

**CANAANITES, CATHOLICS AND THE CONSTITUTION**  
**Developing Church Doctrine, Secular Law and Women Priests\***

**By**

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## INTRODUCTION

### THE CANAANITE WOMAN

[1] One of the most dramatic gospel teachings is delivered to Jesus, not by him. It is found in his terse confrontation with the self-deprecating pagan woman, chronicled in the books of Matthew and Mark. Tired and harassed by the religious authorities, Jesus tries to get away from the crowds and gather himself.<sup>1</sup> A desperate woman searches him out and pleads for his healing powers.<sup>2</sup> She is a mother, seeking a cure for her very ill daughter.<sup>3</sup> The woman is not Jewish. She is foreign, a pagan. She is a Canaanite in Matthew, a Syrophenician in Mark.<sup>4</sup> Jesus first ignores her, then sharply dismisses her.<sup>5</sup> He calls her and her people "house-dogs." It was unjust, he said, to "take the children's food and throw it to the house-dogs," but the foreign woman does not retreat in the face of his insults.<sup>6</sup> "Ah, yes sir," she replies, "but even house-dogs eat the scraps that fall from the Master's table."<sup>7</sup> Matthew and Mark tell us that Jesus cured the foreign woman's daughter in response to the woman's "great faith," faith which moved him to

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<sup>1</sup> *Matthew* 15:21-28 (The Jerusalem Bible); *Mark* 7:24-30 (The Jerusalem Bible).

<sup>2</sup> *Matthew* 15:21-25 (The Jerusalem Bible).

<sup>3</sup> *Id.* at 15:22; *Mark* 7:25 (The Jerusalem Bible).

<sup>4</sup> *Matthew* 15:22 (The Jerusalem Bible); *Mark* 7:26 (The Jerusalem Bible).

<sup>5</sup> *Matthew* 15:23 (The Jerusalem Bible).

<sup>6</sup> *Id.* at 15:26; *Mark* 7:27 (The Jerusalem Bible).

<sup>7</sup> *Matthew* 15:27 (The Jerusalem Bible); *Mark* 7:28 (The Jerusalem Bible).

set aside his aversion to her and to her people.<sup>8</sup> Jesus was moved to respond to those who reached out to him in faith. Even pagans. Even pagan women.

[2] In almost all times and all tribes, secular law and religious doctrine have defined women as inferior.<sup>9</sup> They have been the "house dogs" of history, diminished in almost all cultures. In some societies, many of the customs and laws that discriminated against women have been modified, but such changes have been slow and relatively recent.<sup>10</sup> Institutional change concerning the status of women ricochets between the social forces that seek the stability of tradition on one hand, and the change brought by reform on the other.<sup>11</sup> In the United States,

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<sup>8</sup> Some biblical commentators and translators have attempted to soften Jesus's speech. For example, "Much of the sting is taken out of the [dog] epithet by the fact that Jesus is using a term ["house dogs"] blunted by repeated use; moreover, he adopts its diminutive form (little or pet dogs)." *Matthew* 15:27, comment, note i (The Jerusalem Bible). However, common use of ethnic or racial slurs throughout a culture does not so much dull the injury as institutionalize it and assist in making it a common, cultural truth. As for the diminutive form or "puppy" defense, Raymond E. Brown, one of the foremost modern biblical scholars, rejected the argument observing that "in this period, diminutives . . . are often insignificant variants." RAYMOND E. BROWN, AN INTRODUCTION TO THE NEW TESTAMENT, 137 n.28 (1997).

<sup>9</sup> "Scholars reckon the age of patriarchy by including the two millennia of the common era and the prehistoric period in which it emerged. Thus, they estimate that patriarchy has dominated for at least five millennia and its influence has been strongly felt for an additional five." RICHARD A. SCHOENHERR, GOODBYE FATHER: THE CELIBATE MALE PRIESTHOOD AND THE FUTURE OF THE CATHOLIC CHURCH 198-199 (David Yamane ed., 2002). Patriarchy is "(1) a form of social organization in which the father or eldest male is the head of the family and descent is reckoned through the male line. (2) a system of society in which men hold most or all of the power." OXFORD ONLINE DICTIONARY, available at [http://www.askoxford.com/concise\\_oed/patriarchy?view=uk](http://www.askoxford.com/concise_oed/patriarchy?view=uk) (last visited November 15, 2005). Thomas Aquinas concluded that women were "defective male[s]." See *infra* notes 227-241, and accompanying text.

<sup>10</sup> Western democracies did not allow women to meaningfully participate in government until the 20th century. For example, full suffrage for women was not adopted in Switzerland until 1971. Kuwait adopted women suffrage laws in 2005. Jone Johnson Lewis, *Women's History, International Women Suffrage Timeline*, available at [http://womenshistory.about.com/od/suffrage/a/intl\\_timeline.htm](http://womenshistory.about.com/od/suffrage/a/intl_timeline.htm) (last visited November 15, 2005).

<sup>11</sup> These conflicts involve politics and law, as well as religion. Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CAL.L. REV 755, 839 & n.5 (2004).

religious and secular communities frequently seek to reconcile their conflicting principles and traditions, including those concerning the nature of women.<sup>12</sup> Roman Catholic and United States cultures have traditionally taught that women were by nature inferior to men. In the last century, however, developments in the United States have destabilized the tradition of women's inferiority.<sup>13</sup> Traditional notions of inferiority survive, but without the protection of law.<sup>14</sup> The Roman Catholic church ("Church") has also rejected the doctrine of women's natural inferiority, while strongly defending Church practices that originated in the tradition of women's inferiority, including the Church's traditional male-only priesthood doctrine.<sup>15</sup>

#### AN EQUAL PROTECTION METHODOLOGY

[3] Cultural traditions of racial and gender inferiority in the United States were enshrined in its civil laws until the 20th century, and in some matters, until the late 20th century.<sup>16</sup> As

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<sup>12</sup> See *infra* notes 242-253 and accompanying text.

<sup>13</sup> See *infra* notes 227-241 and accompanying text.

<sup>14</sup> See *infra* notes 292-360 and accompanying text.

<sup>15</sup> This article's reference to "Church" often and obviously refers only to the Roman Catholic Church hierarchy or Church government. One of the great confusions in the Catholic Church is the popular misconception that the Church consists of its hierarchy, and only its hierarchy. Letter from Thomas L. Shaffer, Notre Dame Law School law and religion professor-scholar (April 15, 2005) (on file with the author). Doctrinally, of course, the Church is the "People of God. . . . These faithful [laity, those in holy orders and those in a religious state] are by baptism made on body with Christ and are established among the people of God." VATICAN COUNCIL, *Lumen Gentium*, in THE DOCUMENTS OF VATICAN II ¶ 31, at 57 (Walter M. Abbott & Joseph Gallagher eds. 1966).

<sup>16</sup> Laws that discriminated on the basis of gender or race with regard to voting rights, housing rights, employment rights, education rights, and association rights have held sway in the United States for almost all of its history. See, e.g., U.S. CONST. amend XIX; 42 U.S.C. §1971 (2004); U.S. Dept of Justice, Civil Rights Division, Voting Section, *Introduction to Federal Voting Rights Laws: Before the Voting Rights Act*, available at [http://www.usdoj.gov/crt/voting/intro/intro\\_a.htm](http://www.usdoj.gov/crt/voting/intro/intro_a.htm) (last visited November 15, 2005). Twentieth century changes have resulted from constitutional and statutory enactments, as well as litigation. See, e.g., Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2004); Title VII of the Civil Rights Act of

sustained opposition arose against these traditions, the United States' legal structures developed a rigorous method for testing discriminatory laws and customs, a method that differentiates on the basis of culturally "suspect" classifications like race and gender.<sup>17</sup> Under modern equal protection law, when the state converts a suspect tradition into law, the general presumption of constitutional propriety that is afforded laws is reversed.<sup>18</sup> Today, a civil or criminal statute that adopts the ancient bias against women is presumptively invalid.<sup>19</sup> In contrast, lengthy and broadly practiced church traditions can become near-immutable doctrinal fortresses because of their alleged "always, everyone and everywhere" history. This occurs without regard to the social circumstances, anthropological reasons or theological biases of such traditions, or to their origin in a culture-theology of women's inferiority. This article contends that the equal protection methodology that has developed within secular constitutional law to test male-preferred laws in the United States is helpful in developing a modern response to a theology of ordained priesthood, a theology that has almost always excluded women, almost always because they are from the race of Eve.

[4] Any proposal to link American constitutional doctrine to the development of Church doctrine faces instinctive, pre-emptive opposition. First, there are those who deny that Church

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1964, 42 U.S.C. §§ 2000e-2000e-17 (2004); Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e-2 (2004); The Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (2004); The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of the U.S. Code); Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (2004); Fair Housing Act, 42 U.S.C. §§ 3601-3631 (2004); Exec. Order No. 11,246, 30 Fed. Reg. 12319, 30 Fed. Reg. 12935 (Sep. 24, 1965); *Brown v Bd. Of Education*, 347 U.S. 483 (1954); *Loving v. Virginia*, 367 U.S. 1 (1967); *Perez v Lippold*, 198 P.2d 17 (Cal. 1948).

<sup>17</sup> See *infra* notes 296-318 and accompanying text.

<sup>18</sup> See *infra* note 316 and accompanying text.

<sup>19</sup> See *infra* note 356 and accompanying text.

doctrine can "develop."<sup>20</sup> Second, there are those who define the Church's core mission as one of opposition to the dominant secular culture, especially the United States' secular culture and most especially the United States' legal culture. The Vatican and U.S. bishops frequently refer to the United States' "culture of death."<sup>21</sup> The United States is depicted as a dangerous, if not evil nation, with a hopeless and destructive culture, located somewhere between the no-hopers of Nazareth<sup>22</sup> and the sinners of Sodom.<sup>23</sup> Nonetheless, there is a lengthy, powerful tradition of

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<sup>20</sup> Concerning the question of the development of moral doctrine, John T. Noonan, Jr. states that "One approach of which Bishop Bousset and Orestes Brownson are representative, has been to deny that any real [doctrinal] change has ever occurred; there has only been an improvement in expression." John T. Noonan, *Development in Moral Doctrine*, 54 THEOLOGICAL STUDIES 662, 670 (1993). Cardinal Joseph Ratzinger, now Pope Benedict XVI, has explained that the church generally groups its teachings into three categories: (1) dogmas contained in revelation; (2) definitive doctrines only "linked" to revelation; (3) other teachings that require respect and assent. John Thavis, *Catholic News Service*, THE WITNESS, February 2, 1997 at 3. Cardinal Avery Dulles, the venerable Catholic theologian and a leading American member of the doctrinal stabilizing forces, has divided Church doctrine into two types, dogma and social teachings. Dogma apparently can develop "through the discernment of new truths that are formally implicit in the apostolic deposit." Cardinal Avery Dulles, *Development or Reversal*, 156 FIRST THINGS 53 (October 2005). However, "such truths, once proclaimed by the Church as divinely revealed, are dogmas and must be held by all as matters of divine and Catholic faith." *Id.* Apparently once a dogma is revealed by the Church, development is over. "Social teaching, on the other hand, consists of behavioral norms for social conduct in conformity with the gospel. . . . Development in social teaching is not simply a matter of articulating what was always implicitly taught but a way of applying the teaching to new social situations." *Id.*

<sup>21</sup> See National Conference of Catholic Bishops, *Abortion and the Supreme Court: Advancing the Culture of Death*, available at <http://www.usccb.org/prolife/issues/abortion/culture.htm> (last visited November 30, 2005).

<sup>22</sup> *John* 1:46 (The Jerusalem Bible) ("But Nathanael said to him, 'Can anything good come from Nazareth?'").

<sup>23</sup> Mary Ann Glendon, a respected constitutional law professor and Vatican insider, observes that the United States is a "prosperous nation with a great deal of individual freedom." She then immediately proceeds to report that the United States is also:

[A] nation whose culture is saturated with habits and attitudes that are antithetical to core Christian beliefs. It is a society steeped in materialism, consumerism, secularism, and moral relativism. It is a society where self-reliance slides easily into self-absorption, and liberty into license. It is a society where it is risky to allow oneself to be dependent, a society that is increasingly dangerous for those

doctrinal development in the Church, and much of that development is based upon an ancient and venerable connection between secular law and Church doctrine.<sup>24</sup> This tradition of doctrinal development is replete with unlikely sources, including the Gospels' Canaanite woman and the Constitution of the United States.

## **I. THE DEVELOPMENT OF SECULAR LAW AND CHURCH DOCTRINE**

### **A. THE CONNECTIONS BETWEEN SECULAR LAW AND CHURCH DOCTRINE**

[5] The connections between secular legal thought and Christian doctrine are ancient, sweeping and strong. Tertullian, the third century Father of Western Theology, was a renowned lawyer. His use of Roman legal terms and legal concepts in the work of theology were among his most significant and lasting contributions.<sup>25</sup> His ideas, legalistic and expressed through a Latin vocabulary, were a major influence on Western Christianity.<sup>26</sup> Furthermore, his strident anti-women cultural prejudices also reflected the times and helped shape the future.<sup>27</sup> The

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at the fragile beginnings and endings of life.

Mary Ann Glendon, *The Challenge of "Being Leaven" in a Secular Society*, in *THE CHURCH WOMEN WANT* 112-113 (Elizabeth A. Johnson, ed., 2002). *See also* Mary Ann Glendon, *The Hour of the Laity and the Future of the Church*, Address at John Paul II Center, Denver, Colorado (December 16, 2002) (noting that Vatican humorists refer to U.S. Catholics as "Protestants who go to Mass.").

<sup>24</sup> *See infra* notes 25-160 and accompanying text for an analysis of the connection between Church doctrine and secular law.

<sup>25</sup> *See generally* ROBERT BARR, *MAIN CURRENTS IN EARLY CHRISTIAN THOUGHT* 24-64 (1966) for a discussion of Tertullian's background and his major role in the development of a theology as a discipline in the early Christian community.

<sup>26</sup> *Id.* at 47. ("[A] legalistic approach to broad areas of theology has remained characteristic of the Christian West since Tertullian inaugurated it in broad areas of his own theology in 200.").

<sup>27</sup> "Woman. You are the Devil's doorway. You have led astray one whom the Devil would not dare attack directly. It was your fault that the Son of God had to die, you shall always go in mourning and rags." TERTULLIAN, *ON THE DRESS OF WOMEN IN PATROLOGIA GRAECA*, 70:59, *quoted in* Marie Henry-Kane, Paper Presented to Catholic Theological Society in South Africa (October, 1987). "You (woman) destroyed so easily God's image, man." *The Ordination of Women in*



commingling and interchange of legal and theological terms and concepts has endured from the earliest age through the present. For example, tradition is a central query in Catholic theology, especially around women and ordained priesthood issues. The ecclesiastical term *traditio* was adopted from Roman law.<sup>28</sup>

[6] Furthermore, the governance of the Church, the exercise of authority in the Church, and Church doctrine itself have developed over several centuries along legalistic lines drawn by lawyers.<sup>29</sup> Paul Johnson, the British historian, teaches that, beginning in the second century, the Christian Church gradually moved from a "divine" society to a "legal" society.<sup>30</sup> Johnson notes that "[f]rom the time of Gregory VII onwards, all of the outstanding popes were lawyers; the papal court, or *curia*, became primarily a legal organization, with over a hundred experts employed there by the thirteenth century, plus other lawyers who looked after the interests of kings, princes and leading ecclesiastics."<sup>31</sup> In fact, "[I]n 1199, Pope Innocent III described these canon lawyers as a separate 'ordo' [order], at a time when 'ordo' could be used 'to refer simply to one's state of life,'" and during a period when "neither liturgies, nor popes, nor bishops had a problem referring particularly to deaconesses, abbesses and nuns as persons entering into an ecclesiastical order through ritual ordination."<sup>32</sup>

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the Roman Catholic Church, *Women Priests Internet Library* (quoting Tertullian) available at <http://www.womenpriests.org/traditio/tertul.asp> (last visited October 15, 2005).

<sup>28</sup> YVES CONGAR, TRADITION AND TRADITIONS 244 (Naseby & Ranisborough trans., The MacMillan Co. 1967).

<sup>29</sup> See, e.g., PAUL JOHNSON, THE HISTORY OF CHRISTIANITY 206-215 (Atheneum 1979) (1976) (describing the development of the Church into a complex legal society).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 206.

<sup>32</sup> Indeed, for several hundred years, the official Church applied the presently fixed terms "*ordo, ordinatio, and ordinare*," as well as "*ordines*," with much more inclusiveness than later

[7] Roman legal principles and terms were not only assimilated into Church law, they were also used to forge Western secular constitutions and civil governments.<sup>33</sup> Meanwhile, the Roman Empire's imperial-hierarchical form of laws and legal system dominated the formation, promulgation and enforcement of Church procedural law and church doctrine.<sup>34</sup> As the Roman Catholic Church's legal system developed— with its various offices, laws, customs, decrees, administrative actions, procedural rules, norms, orders and instructions (for example, the courtly *responsum ad dubium*), it systematically set out collected codes that were adaptations of Roman civil law.<sup>35</sup> The various codes of canon law are at least as connected to a legal tradition as they are to a theological tradition. Law and theology are fashioned on the same ancient workbench – institutional religions are actually organized around law. Furthermore, these developments in religious communities predate the Christian era.<sup>36</sup> Two hundred years before officialdom. Yves Congar, *Note sur une valeur des termes ordinare, ordinatio*, REVUE DES SCIENCES RELIGIEUSES 58, at 7-10 (1984), cited in Gary Macy, *The Ordination of Women in the Early Middle Ages*, THEOLOGICAL STUDIES No. 61, at 3 (2000).

<sup>33</sup> John Beal, *Toward a Democratic Church: The Canonical Heritage*, in A DEMOCRATIC CATHOLIC CHURCH: THE RECONSTRUCTION OF ROMAN CATHOLICISM 59 (Eugene Bianchi and Rosemary Reuther eds., 1992) (citing BRYAN TIERNEY, RELIGION, LAW AND THE GROWTH OF CONSTITUTIONAL THOUGHT 1150-1650 (1982)).

<sup>34</sup> The Church adopted its governmental structures "from forms of governance that differ from its own theological self-understanding (e.g., monarchy, the military, the formal bureaucracies of Renaissance states) . . ." John A. Coleman, *Not Democracy but Democratization*, in A DEMOCRATIC CATHOLIC CHURCH, *supra* note 33, at 13-22 (citing John Lynch, *Powers in the Church: An Historico-Critical Survey*, in POWER IN THE CHURCH, Concilium 197 (James Provost & Knut Walf eds., 1988),

<sup>35</sup> "Canon law, it may be said, adopted from Roman law what relates to obligations, contracts, judiciary actions, and to a great extent civil procedure." A. Boudinhon, *Canon Law*, in THE CATHOLIC ENCYCLOPEDIA, available at <http://www.newadvent.org/cathen/09056a.htm> (last updated Oct. 6, 2005).

<sup>36</sup> The difficult interplay between "law" and "doing the right thing" is ancient. Dominican theologian Donald L. Goergen's four volume work on the life of Jesus discusses the historical "quenching of the spirit of prophecy" by legal systems in pre-Christian Judaism, and the fact that "John and Jesus appeared as prophets in an era of the Law." DONALD L. GOERGEN, THE MISSION AND MINISTRY OF JESUS 155 (Liturgical Press 1992) (1986). Thomas L. Shaffer writes frequently and

Christ, "[t]he [Judaic] spirit of prophecy had been replaced by that of the Law . . . . In the post-exilic period, prophecy was judged in terms of whether it was in accord with the Law, not vice-versa."<sup>37</sup>

[8] Throughout their conjoined histories, secular law and Church doctrine have done more than develop common systems of government, they have also formed and informed the other's customs, precepts and doctrines.<sup>38</sup>

## B. THE TRADITIONAL ROLE OF SECULAR LAW IN THE DEVELOPMENT OF CHURCH DOCTRINE

[9] Church doctrine is a living organism. It responds to challenges across time and cultures. Cardinal John Henry Newman saw doctrinal development as being driven by conflict "in which the leading idea will effect the 'throwing off of earlier views now found to be incompatible with the leading idea more fully realized.' The new 'leading idea' is generated by a growth in understanding of the 'reality that is Jesus Christ.'"<sup>39</sup> The modern Church hierarchy has described the male-only priesthood doctrine variously as "infallible," "immutable," "unchangeable," and "definitive" as in "irreformable."<sup>40</sup> Historically, however, several doctrines that have been

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convincingly that the calling of the modern lawyer is to be a counter-cultural witness for the poor, like the Old Testament prophets. Lawyers must withdraw from lives lived as the tools of the powerful and the enemies of the poor—seen as a principal occupation of U.S. lawyers. *See, e.g.,* Thomas L. Shaffer, *The Biblical Prophets as Lawyers for the Poor*, 31 *FORDHAM URB. L.J.* 15 (2003); Thomas L. Shaffer, *Lawyers as Prophets*, 15 *ST. THOMAS L. REV.* 469 (2003); Thomas L. Shaffer, *Lawyers and the Biblical Prophets*, 17 *NOTRE DAME J.L.ETHICS & PUB. POL'Y* 521 (2003).

<sup>37</sup> GOERGEN, *supra* note 36, at 155.

<sup>38</sup> *See infra* notes 39-94 and accompanying text for this analysis.

<sup>39</sup> CARDINAL JOHN HENRY NEWMAN, *AN ESSAY ON THE DEVELOPMENT OF CHRISTIAN DOCTRINE* 185-188 (C.P. Harold ed., Longmans, Green, 1949) (1845) *referenced in* John T. Noonan, Jr., *Development in Moral Doctrine*, 54 *THEOLOGICAL STUDIES* 662 (1993).

<sup>40</sup> Ladilas Orsy, *Stability and Development in Canon Law and Definitive Teaching*, 76 *NOTRE DAME L. REV.* 871-879 (2001).

defended with similar certainty have subsequently undergone material development. Examples of such doctrinal developments, and the role played by secular law in those developments, are examined below.

### 1. Newman, Noonan and Doctrinal Developments

[10] While the Roman Catholic Church has never been the slave of doctrinal tradition, it has seldom been comfortable with acknowledging doctrinal change. Indeed, there continues to be significant political and theological resistance in the Church to the proposition that Church doctrine can change.<sup>41</sup> So, if in the past, the Church has denied priestly ordination to women, based on revelation or tradition, how can it now ordain women without changing immutable truths, without admitting error? How does the "One, True Church" explain, as John T. Noonan, Jr. puts it, that "what was [once] forbidden, [is now] lawful . . . what was permissible [is now] unlawful . . . and what was required [is now] forbidden . . . ."<sup>42</sup> While the guardians of infallible doctrine may grimace at the mention of "development," their knives come out when they hear "change." That may be why Noonan quotes Cardinal Newman's conclusion that "True

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<sup>41</sup> John T. Noonan, Jr. has a Masters and a Ph.D. in Theology from Catholic University of America and a Juris Doctorate from Harvard University. After several years on the law faculties of the University of Notre Dame and of the University of California at Berkeley, he was appointed in 1985 to the Ninth Circuit Court of Appeals for the United States, where he presently serves as a Senior Judge. He has written extensively on religion and law issues. Judge Noonan's latest book, *A Church That Can and Cannot Change*, continues his ground-breaking work in this area. See also Orsy, *supra* note 40, at 865-866 (acknowledging Judge Noonan's "monumental service to the Christian community through his work on the development of doctrine and law . . . [and] the great esteem in which he is held by theologians and canon lawyers.").

<sup>42</sup> Noonan, *supra* note 39, at 669 (examining the process by which moral doctrine develops in the Roman Catholic church). See also John T. Noonan, Jr., *On the Development of Doctrine*, AMERICA, April 3, 1999. This is the quandary that gave rise to the ecclesiastical maxim advising that a pope must always introduce any significant new change in the Church with the preface: "In accordance with the teachings of my predecessors . . . ."

[doctrinal] development . . . 'corroborates, not corrects, the body of thought from which it proceeds . . . .'<sup>43</sup>

[11] Church doctrinal "development" occurs with regard to both faith and morals. John T. Noonan, Jr. has observed that a great deal of "literature exists on the development of doctrine, [but] examination reveals that this literature is focused on changes in theological propositions as to the Trinity, the nature of Christ, the Petrine office, or Marian dogma."<sup>44</sup> Noonan has also set forth additional faith-items from Cardinal Newman's text<sup>45</sup> to the list of the Church's dogmatic developments:

[A] canon for the New Testament, of reaching a fixed position on original sin, of instituting infant baptism, of requiring communion in one species, of establishing the consubstantiality of the Father with the Son and the equality of the three persons of the Trinity, of authorizing and encouraging the veneration of the Mother of God and of asserting the supremacy of the Pope- all being so many instances of developments rooted in the revelation but worked out in the course of conflict in the life of the church. Far from being a repetition of a message, these changes made manifest dimensions in the Christian life not immediately grasped by the first Christians.<sup>46</sup>

Various explanations have been tendered for what Noonan describes as these "changes in propositions of faith."<sup>47</sup> Noonan concludes that Newman's discussion on the process of development of Christian doctrine makes the most sense – doctrinal development driven by

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<sup>43</sup> NEWMAN, *supra* note 39, at 186.

<sup>44</sup> Noonan, *supra* note 39, at 669. *See also* RICHARD P. MCBRIEN, CATHOLICISM 1242 (Study edition 1981) (noting that dogmatic theology is the systematic reflection on the Christian faith as that faith has been articulated by the official church); *Id.* at 1250 (stating that moral theology "attends to the individual and social ramifications of the Gospel, and draws normative inferences for the conduct of the Church and its individual members.").

<sup>45</sup> *See* NEWMAN, *supra* note 39, at 186.

<sup>46</sup> Noonan, *On the Development of Doctrine*, AMERICA, *supra* note 42, at 7.

<sup>47</sup> Noonan, *supra* note 39, at 667 & n.22.

conflict, with new ideas building on earlier ideas.<sup>48</sup> In fact, the leading idea is frequently not original, but an idea that has percolated and taken shape over a lengthy period of time, many times through the civil society and its secular laws, e.g. religious freedom.<sup>49</sup> Such an idea can develop a truth that has deep religious significance; an example of doctrine converting to the deeper truth.<sup>50</sup>

[12] Noonan went on to examine the nature of doctrinal development in four matters of moral doctrine or dogma, i.e. usury, marriage, slavery, and religious freedom.<sup>51</sup> His 1999 article in the magazine *America*, added capital punishment to his doctrinal development examples.<sup>52</sup>

a. Usury

[13] Noonan states, for approximately five hundred years, "usury, understood as profit on a loan, was forbidden as contrary to the natural law, as contrary to the law of the Church, and as contrary to the law of the Gospel."<sup>53</sup> Jesus taught that, "[e]ven sinners lend to sinners to get back the same amount. Instead, love your enemies and do good, and lend without any hope of return."<sup>54</sup> This was understood to announce a constant, unchanging, unwavering prohibition against seeking profit on a loan.<sup>55</sup> Violation of the doctrine was a mortal sin, and those that

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<sup>48</sup> Noonan, *supra* note 39, at 671-672.

<sup>49</sup> *See generally*, Noonan, *supra* note 39.

<sup>50</sup> Noonan, *On the Development of Doctrine*, *AMERICA*, *supra* note 42, at 7.

<sup>51</sup> *See generally* Noonan, *supra* note 39.

<sup>52</sup> Noonan, *On the Development of Doctrine*, *AMERICA*, *supra* note 42.

<sup>53</sup> Noonan, *supra* note 39, at 662.

<sup>54</sup> *Luke* 6:33-35 (The Jerusalem Bible).

<sup>55</sup> Noonan, *supra* note 39, at 662-63.

denied its sinfulness were heretics.<sup>56</sup> The entire teaching authority of the Church – popes, three ecumenical councils, bishops and theologians – universally proclaimed and enforced this doctrine.<sup>57</sup> Then, over time, things changed, and the doctrine "developed."

[14] In the 16th century, as the economy of Europe became more commercial and profitable, alternative ways of extending credit were recognized by theologians engaged in a fierce battle with curial conservatives.<sup>58</sup> By the 18th century, the old usury rule was a mere shadow of church doctrine, formally maintained by the papacy, but abandoned in practice.<sup>59</sup> By the 20th century, investments in banks were commonplace for popes, bishops and ordinary Christian folk; what had been prohibited had become lawful.<sup>60</sup>

[15] The commercial world rejected the divinely revealed proscription, as well as medieval scholasticism's natural law basis for the rejection, i.e. "breeding" money violated the natural law.<sup>61</sup> Over time, Western civil law, which had condemned making profit on a loan based on religious grounds, broke away from the church decretals.<sup>62</sup> Of course, the Vatican now accepts the lawfulness of the practice, and has actively participated in such transactions for centuries, but it has never issued a decree rolling back the early doctrinal condemnations of the practice.<sup>63</sup>

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> NOONAN, *supra* note 41, at 127-142.

<sup>59</sup> Noonan, *On the Development of Doctrine*, AMERICA, *supra* note 42, at 8.

<sup>60</sup> NOONAN, *supra* note 41, at 127-142; *See also* Noonan, *On the Development of Doctrine*, AMERICA, *supra* note 42, at 8.

<sup>61</sup> NOONAN, *supra* note 41, at 134-135.

<sup>62</sup> *Id.* at 138-142 (German states, with Jesuit support, formally allowed interest at five percent in the sixteenth century).

<sup>63</sup> A. Vermeersch, *Usury*, THE CATHOLIC ENCYCLOPEDIA, *available at*

b. Marriage and Adultery

[16] Noonan also reminds us that Roman Catholic marriage doctrine, which applies to "fundamental unchanging human nature," has experienced radical change during the history of the church.<sup>64</sup> Jesus' apparently clear and absolute prohibition against divorce and remarriage<sup>65</sup> quickly gave way to the "Pauline privilege,"<sup>66</sup> which permitted a convert to Christianity to divorce a non-baptized person and re-marry a Christian.<sup>67</sup> In the sixteenth century, Pope Gregory XIII expanded the exception to include slave-converts who had been separated from a spouse and sought remarriage with a new person.<sup>68</sup> Noonan documents a twentieth century case in which the papacy dissolved a marriage between a Roman Catholic convert and an Anglican Catholic, in order that the Roman Catholic convert might marry another Roman Catholic.<sup>69</sup>

[17] Church law provides other exceptions to the doctrine set out by Jesus in Matthew's Gospel.<sup>70</sup> Under the "Petrine Privilege," a baptized person who was a Christian when he married a non-baptized person, may have the marriage dissolved for a just cause.<sup>71</sup> There was Hebrew

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<http://www.newadvent.org/cathen/15235c.htm> (last updated Oct. 6, 2005). The papal office admits, practically, the lawfulness of interest on loans, even for ecclesiastical property. However, it has not promulgated any doctrinal decree on the subject.

<sup>64</sup> Noonan, *supra* note 39, at 663.

<sup>65</sup> *Matthew* 19:2-9 (The Jerusalem Bible).

<sup>66</sup> *1 Corinthians* 7:10-16 (The Jerusalem Bible).

<sup>67</sup> NOONAN, *supra* note 41, at 134-135. *See also* MCBRIEN, *supra* note 44, at 795.

<sup>68</sup> Noonan, *supra* note 39, at 663-664.

<sup>69</sup> Noonan, *supra* note 39, at 664.

<sup>70</sup> *Matthew*, *supra* note 65.

<sup>71</sup> MCBRIEN, *supra* note 44, at 795-796.



scriptural precedent for this in Ezra,<sup>72</sup> where Jews were permitted to put away their foreign (pagan) wives:

Regardless of the Law of Moses, many, even the leading Jews and priests, had intermarried with the idolatrous inhabitants of the country. Horror-stricken by the discovery of this abuse -- the extent of which was very likely unknown heretofore to Esdras [Ezra] . . . Sechenias . . . proposed that the Israelites should put away their foreign wives and the children born of them. Esdras seized his opportunity . . . and . . . . A general assembly of the people was called by the princes and the ancients; but the business could not be transacted easily at such a meeting and a special commission, with Esdras at its head, was appointed to take the matter in hand. For three full months this commission held its sessions; at the end of that time the "strange wives" were dismissed.<sup>73</sup>

c. Slavery

[18] Until the middle of the nineteenth century, the Church permitted and participated in the institution of slavery.<sup>74</sup> From Paul through Augustine, through the historical papacy and well into the Church's episcopal history in the United States, enslaving another human being was taught to be morally acceptable under Gospel events and principles, as well as natural law.<sup>75</sup> Bishops, theologians and religious orders were of the slaveholder class.<sup>76</sup> Noonan notes that "[t]he greatest of the reforming popes, Gregory I, accepted a young boy as a slave and gave him as a gift to another bishop."<sup>77</sup> In 1965, Vatican II concluded that slavery was "shameful

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<sup>72</sup> *Ezra* 10:1-14 (The Jerusalem Bible).

<sup>73</sup> Charles Souvray, *Ezra*, THE CATHOLIC ENCYCLOPEDIA (1909), available at <http://www.newadvent.org/cathen/05535a.htm>(last updated Oct. 6, 2005).

<sup>74</sup> NOONAN, *supra* note 41, at 17-126.

<sup>75</sup> NOONAN, *supra* note 41, at 17-126.

<sup>76</sup> NOONAN, *supra* note 41, at 36-39, 79, 87-88, 91-93, 102, 106, 200, 251-252.

<sup>77</sup> Only in the last 150 years has the hierarchy moved toward doctrinally condemning slavery as a great moral evil. Noonan, *supra* note 39, at 665. Church condemnation of slavery didn't occur until Vatican II. NOONAN, *supra* note 41, at 120.

(*pobra*)," along with "prostitution; the trading of women and children, and the treatment of laborers as mere instruments for profit . . . ."78 For most of Christian history, slavery had been defended by various religious references, including the Seventh Commandment's injunction against theft (a slave was property) and St. Paul's command that "Slaves, be obedient to the men who are called your masters in this world . . . ."79 Now, revealing a major doctrinal change, such references are read to condemn slavery.<sup>80</sup> Furthermore, the present teaching of the Church concludes that the institution of slavery is intrinsically evil, that it is always and everywhere evil, without qualification.<sup>81</sup> That can only mean that the earlier teachings, which accepted slavery, were erroneous. In developing this changed moral law position, the Church was the student of secular societies rather than its teacher, a situation relevant to the issue of developing women's roles in the Church.

d. Religious Freedom

[19] The Church was a full partner with the State in the "terror by which the heretics were purged."<sup>82</sup> "For a period of over 1,200 years, during much of which the Catholic Church was dominant in Europe, popes, bishops, theologians regularly and unanimously denied the religious liberty of heretics . . . ."83 In 1965, Vatican II dramatically changed that centuries-old teaching,

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<sup>78</sup> NOONAN, *supra* note 41, at 119-120 (referring to the *Pastoral Constitution of the Church in the World of This Time*, or *Gaudium et Spes*).

<sup>79</sup> *Colossians* 3:22 (The Jerusalem Bible).

<sup>80</sup> CATECHISM OF THE CATHOLIC CHURCH, Part 3, § 2, ch. 2, art. 7, ¶ 2414, *available at* <http://www.vatican.va/archive/catechism/p3s2c2a7.htm> (last visited Oct. 15, 2005).

<sup>81</sup> POPE JOHN PAUL II, *Veritatis Splendor* (1993) *cited in* NOONAN, *supra* note 41, at 122.

<sup>82</sup> Noonan, *supra* note 39, at 667.

<sup>83</sup> *Id.*

concluding that "each human being . . . [is] the possessor of a precious right to believe and to practice in accordance with belief."<sup>84</sup> That which moral doctrine previously required, is now forbidden.

e. Capital Punishment

[20] The death penalty was part of the mechanics of government of the Roman Empire and was not condemned as intrinsically immoral by Christians of the empire. Christian emperors did not hesitate to employ it. Individual bishops sought mercy but only in individual cases. In the 12th century, the church accepted the death penalty as the appropriate penalty for a recalcitrant heretic. During the Counter-Reformation eminent theologians defended the church's role in securing the elimination of heretics in this way. In the 20th century, after World War II, the church began to see matters differently. In 1995, in his encyclical *Evangelium Vitae*, Pope John Paul II found conditions justifying the death penalty as necessary to the defense of society "very rare, if in fact they occur at all." The moral judgment about the death penalty is a very interesting instance of a moral rule in transition. Without justification by social necessity, the implication runs, executions are themselves a form of homicide. Still, the Pope addresses governors to ask for mercy, not to tell them that they are about to become murderers.<sup>85</sup>

[21] The turning against capital punishment in church teaching has caused considerable difficulty for the Church's stabilizing forces. Cardinal Avery Dulles and others deny any development in the Church's teaching under these circumstances, claiming that "there is no conclusive evidence that the bishops [ever] taught the legitimacy of capital punishment as a 'a matter of faith to be definitively held.' "<sup>86</sup> Under Cardinal Dulles' approach, if a teaching of the church has changed, then, ipso facto, the original teaching was not church dogma.<sup>87</sup>

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<sup>84</sup> Noonan, *On the Development of Doctrine*, AMERICA, *supra* note 42, at 8.

<sup>85</sup> *Id.* at 7.

<sup>86</sup> Dulles, *supra* note 20, at 53. See also Cardinal Avery Dulles, *Religious Freedom: Innovation and Development*, 118 FIRST THINGS 35-39 (December 2001). Cardinal Dulles distinguishes between "homogenous" development of doctrine, and a repudiation of prior doctrine. Doctrine that "develops" does not repudiate its prior forms. See also Cardinal Avery Dulles, *Religious Freedom: A Developing Doctrine*, lecture at Fordham University, (March 21, 2002).

<sup>87</sup> See generally Dulles, *Religious Freedom: Innovation and Development*, *supra* note 86.

Conservative Roman Catholic intellectual, U.S. Supreme Court Justice Antonin Scalia rejects *Evangelium Vitae*, because it repudiates biblical teaching and Church tradition.<sup>88</sup> In rejecting the church doctrinal development against capital punishment, Scalia relies upon: (1) the text of Paul's teaching to the Romans regarding the source of the Roman Empire's power, and the Emperor's right to vengefully execute "him who doeth evil,"<sup>89</sup> and (2) two thousand years of church doctrinal tradition, much of which actually involves the Church as a material participant in the practice of capital punishment.<sup>90</sup> "Unlike such other hard Catholic doctrines as the prohibition of birth control and of abortion," Scalia writes, "this [the doctrinal repudiation of capital punishment] is not a moral position that the church has always-or indeed ever before maintained."<sup>91</sup> Therefore, a papally produced doctrinal development is trumped by centuries of tradition which has a biblical basis. Scalia sees capital punishment as the doctrinal legacy of the early tradition, "the legacy of St. Paul and St. Augustine," and he views efforts to abolish capital punishment as the offspring of Napoleon, Hegel, and Freud.<sup>92</sup> Scalia reports that he has been informed by canonical experts that the teaching of *Evangelium Vitae* is not binding because the

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<sup>88</sup> Antonin Scalia, *God's Justice and Ours*, 123 FIRST THINGS, 17-21 (May 2002). Scalia disagrees with Dulles' consistent position on these doctrinal development matters. According to Scalia, Dulles understands *Evangelium Vitae* to be "an affirmation of two millenia of Christian teaching that retribution is a proper purpose . . . of criminal punishment, but merely adding the 'prudential judgment' that in modern circumstances, condign retribution 'rarely if ever,' justifies death." *Id.* at 21 (quoting Cardinal Avery Dulles, *Catholicism & Capital Punishment*, 112 FIRST THINGS 35 (April 2001)).

<sup>89</sup> *Romans* 13:1-5 (The Jerusalem Bible).

<sup>90</sup> Scalia, *supra* note 88, at 20-21.

<sup>91</sup> *Id.* at 19.

<sup>92</sup> *Id.* at 21.

encyclical deviated from previously unbroken church tradition.<sup>93</sup> He stated that had he been bound by the development in the teaching, he would have had to resign from the Supreme Court.<sup>94</sup>

2. Additional Doctrinal Developments from the Early Church and from the Modern Church: Mission to the Gentiles, Birth Control, Abortion and the Male-Only Priesthood

[22] The developing nature of church doctrine is also apparent from the very beginnings of Christianity, and is observable working on other issues in the modern world.

a. The Early Church and the Mission to the Gentiles

[23] During the first century, the Church was faced with a Jewish-Gentile question. Revelation itself was in tension. The Gospel of Matthew has Jesus instructing his twelve disciples to go forth and teach his message, but to stay out of non-Jewish territory, specifically "Do not turn your steps to pagan territory, and do not enter any Samaritan town."<sup>95</sup> He emphasizes that his mission is not to the Gentiles, but exclusively to the "lost sheep of the house of Israel."<sup>96</sup> When Jesus found it necessary to travel through Samaria in order to get from Galilee to Jerusalem, he took the occasion to deliver his message in "schismatic" Samaria.<sup>97</sup> Jesus did not expressly expand the boundaries of his mission beyond the Jewish nation until after his death, when he appeared to disciples on their way to Galilee, telling them to "Go, therefore,

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<sup>93</sup> *Id.*

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

<sup>95</sup> *Matthew* 10:5 (The Jerusalem Bible).

<sup>96</sup> *Matthew* 10:6, 15:24 (The Jerusalem Bible).

<sup>97</sup> *Luke* 9:55, comment I (The Jerusalem Bible); *See also John* 4:1-4 (The Jerusalem Bible). *Also*, BROWN, *supra* note 8, at 83-84 (concluding that "In the Synoptic Gospel memory, [Jesus] has little contact with Gentiles or Pagans, forbids his disciples to go near them, or imitate their ways, [and] betrays Jewish prejudice toward them") (citations omitted).

make disciples of all the nations."<sup>98</sup> This expansion of the original mission was hard for the infant Church to understand, and doctrinal conflict around evangelizing Gentiles bubbled into and through the New Testament's Acts of the Apostles. Peter is compelled in Acts to justify his visits and feasts with pagans, and his acceptance of the uncircumcised Gentile, Cornelius.<sup>99</sup> Later, the Jerusalem church, led by James, the brother of Jesus, sends people to Antioch to challenge Paul's acceptance of Gentiles without circumcision, and Paul and Barnabas return to Jerusalem to contest the teaching.<sup>100</sup> Paul moved the young church to change. That Jerusalem conference may be judged as the most important ever held in the history of Christianity, "for [it] implicitly . . . decided that the following of Jesus would soon move beyond Judaism and become a separate religion reaching to the ends of the earth."<sup>101</sup>

b. The Modern Church: Birth Control, Abortion and Women Priests

[24] Three major contested doctrinal issues in the present-day church – birth control, abortion and the male-only priesthood – engage the Church's understanding of women.<sup>102</sup>

[25] The Church hierarchy has tried almost everything to convince the laity that "artificial contraceptive" birth control is a grave sin, that a "procured" abortion is always a grave sin, and

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<sup>98</sup> *Matthew* 28:19 (The Jerusalem Bible).

<sup>99</sup> *Acts* 11:4-18 (The Jerusalem Bible).

<sup>100</sup> *Acts* 15:1-3 (The Jerusalem Bible).

<sup>101</sup> BROWN, *supra* note 8, at 306.

<sup>102</sup> This particularly applies to the U.S. Church. See PETER STEINFELS, *A PEOPLE ADRIFT, THE CRISIS OF THE ROMAN CATHOLIC CHURCH IN AMERICA* 253 (2003) ("Since 1960 the most controversial topics confronting American Catholics have been the church's teaching on sex and on women.").

that the ordination of women to the priesthood is a metaphysical impossibility, and attempts to do so result in grave sin.<sup>103</sup>

i. *Birth Control*

[26] A 1968 encyclical from Pope Paul VI, *Humanae Vitae*, rejected the overwhelming recommendation of a papal commission, and renewed the condemnation of contraceptive practices.<sup>104</sup> In response, the laity has overwhelmingly rejected the encyclical's teaching, and the tradition that it taught.<sup>105</sup> One of the arguments used by the doctrine's supporters is the "immutability" doctrine. "For if this [birth control] doctrine is not substantially true, the magisterium itself will seem to be empty and useless in any moral matter."<sup>106</sup> An anecdote around that argument comes out of the meetings of the aforesaid papal commission.

Conservative elements argued that it was impossible for the church to change its birth control teaching in justice to the millions of people who had died and were consigned to hell as a result

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<sup>103</sup> See, e.g., Archbishop Charles Chaput, A Misunderstood Papal Convention, in 28 ORIGINS, No. 14, Sep. 17, 1999, available at <http://www.usccb.org/laity/marriage/statements.shtml> (last visited Dec. 4, 2005) (discussion birth control); CATECHISM OF CATHOLIC CHURCH, Part 3, § 2, ch. 2, art. 5, ¶¶ 2270-2275, available at [http://www.vatican.va/archive/ccc\\_css/archive/catechism/p3s2c2a5.htm - 2270](http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a5.htm - 2270) (last visited October 15, 2005) (concerning abortion); *Catholic Women Unofficially Ordained*, CBC NEWS (July 25, 2005), available at <http://www.cbc.ca/story/canada/national/2005/07/25/womenpriests0725.html> (last updated July 26, 2005).

<sup>104</sup> Pope John Paul VI, *Human Vitae*, July 25, 1986, available at [http://www.vatican.va/holy\\_father/paul\\_vi/encyclicals/documents/hf\\_p-vi\\_enc\\_25071968\\_humanae-vitae\\_en.html](http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html) (last visited October 15, 2005).

<sup>105</sup> In a 2005 survey, researchers William V. D'Antonio, Dean Hoge, James Davidson and Mary Gautier performed a survey of U.S. Catholic attitudes. 75% of U.S. Catholics believe they can be a "good Catholic...without obeying the church's hierarchy teaching on birth control." NATIONAL CATHOLIC REPORTER, September 30, 2005, at 11.

<sup>106</sup> Papal Commission for the Study of Population, Family and Birth, *Minority Report* (1966), quoted in MCBRIEN, *supra* note 44, at 1019.

of violating the existing teaching. Patty Crowley, a Chicago laywoman on the Papal Birth Control Commission and a force in the U.S Church, had little patience with this position. When a Spanish priest, also a member of the Commission, asked, “‘What then with the millions we have sent to hell,’ . . . Patty immediately responded in what became perhaps her most memorable quote. ‘Fr. Zalba,’ she said, ‘do you really believe God has carried out all your orders?’”<sup>107</sup>

[27] Contraceptive birth control is a grave sin in the eyes and words of the hierarchy; but the teaching is not believed by the laity.<sup>108</sup> *Humanae Vitae* seems to have gone the way of those biblical and hierarchical proscriptions that for over a thousand years condemned interest on a loan.<sup>109</sup> The teaching has been massively rejected. It provides evidence that the laity has a considerable role in the development of doctrine, simply through the powerful witness of their daily lives.

[28] The hierarchy's recent efforts to impose its reproduction theology has been more political than doctrinal. The Vatican has been criticized for making political alliances with nations and communities that are notoriously anti-feminist – for example, Sudan, Libya, and certain Latin American countries – to thwart the distribution of birth control medications and devices to third world women.<sup>110</sup>

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<sup>107</sup> Robert J. McClory, *Patty Crowley, giant of Catholic laity, dies at 92*, NATIONAL CATHOLIC REPORTER, Dec. 9, 2005, at 14. Marquette University theologian, Dr. Daniel Maguire tells a similar story. Several priests piled into a Roman taxi the day *In Humanae Vitae* was published. The taxi driver listened to their conversation, and then asked one priest "what happened?" A priest replied solemnly: "The pope came out today and condemned the pill." The cab driver shook his head disconsolately and finally said: "Why did they tell him about it?" Dr. Daniel Maguire, Address, Our Lady of Lourdes Church in Milwaukee, Wisconsin (2003) (on file with the author).

<sup>108</sup> NATIONAL CATHOLIC REPORTER, *supra* note 105.

<sup>109</sup> See *supra* notes 53-63 and accompanying text for a discussion about interest-bearing loans.

<sup>110</sup> See, e.g., *As Bad as the Inquisition: The Vatican Perpetuates a Grave Wrong*, THE GUARDIAN, June 30, 1999, available at <http://www.guardian.co.uk/leaders/story/0,,289298,00.html> (last



It is the central paradox of the papacy of John Paul II that while he has championed the cause of the developing world on frequent occasions, lambasting the arms trade and global economic inequality, as soon as the agenda switches to anything to do with sex, a rigid doctrinaire fundamentalism sets in. A reminder of what is at stake here: the health and well-being of a huge generation. One in five of the world's population is under 24, and every day 7,000 of them are infected with HIV; around half of all sexual assault is against adolescents aged 15 and younger; the biggest cause of death for girls aged 15-19 are complications around pregnancy and childbirth.<sup>111</sup>

ii. *Abortion*

[29] For the most part, the Church has retreated from the birth control field, and drawn battle lines around its abortion doctrine, at least in the United States. While Catholic theologians have historically come to different conclusions about the commencement of human life –

"ensoulment," embryonic development, and personhood – the present church teaching states that human life begins at conception, and that each and every conceptus "must be protected absolutely from the moment of conception. Direct abortion, willed either as an end or as a means, is gravely contrary to the moral law. . . . Formal cooperation in an abortion constitutes a grave offense . . . ."<sup>112</sup> Procurers and formal cooperators in an abortion are automatically excommunicated.<sup>113</sup>

[30] While most democratic nations, including Italy, France, England, Germany, and even Poland, have legislated a woman's conditional right to procure an abortion, and while those laws operate without meaningful church opposition, the U.S. experience is proving different. The  

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visited November 30, 2005).

<sup>111</sup> *Id.* For an analysis of the doctrinal debate and fallout since *Humanae Vitae*, see STEINFELS, *supra* note 102, at 255-306.

<sup>112</sup> CATECHISM OF CATHOLIC CHURCH, Part 3, § 2, ch. 2, art. 5, ¶¶ 2270-2272, available at [http://www.vatican.va/archive/ccc\\_css/archive/catechism/p3s2c2a5.htm#2270](http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a5.htm#2270) (last visited October 15, 2005).

<sup>113</sup> *Id.*

European laws consider a variety of factors in conditioning abortion rights, such as viability of the fetus, exceptional hardships on the woman, likelihood of serious defect or illness of the fetus, or conceptions by rape or incest.<sup>114</sup>

[31] In the late 20th century development of abortion rights laws in Europe came through the compromising and consensus-building world of secular legislation in democratic parliaments.<sup>115</sup>

In contrast, abortion rights in the United States were recognized by the judiciary as rights grounded in the Constitution.<sup>116</sup> A woman's conditional right to an abortion was found to be part of her individual liberty right under the Due Process Clause of the Fourteenth Amendment, and therefore majority-willed legislation could not absolutely restrict that individual right.<sup>117</sup> Like the Vatican's coalition with similar-minded countries to resist the distribution of birth control devices, some U.S. bishops have formed a de facto coalition with conservative evangelical and political groups to attack and seek to defeat any political candidate who supports *Roe v. Wade* and the body of law that emanates from that constitutional decision.<sup>118</sup> These bishops claim that

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<sup>114</sup> MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* app. A at 144-150 (Harvard U. Press 1987). In Poland, abortion is permitted if the unborn child is so severely physically deformed as to not be able to survive outside the womb, if the mother's life is threatened or in cases of rape or incest. Stephen Ertelt, *Poland Defeats Legislation to Overturn Pro-Life Laws on Abortion*, LIFE NEWS.COM (February 15, 2005), available at <http://www.lifenews.com/nat1198.html>.

<sup>115</sup> GLENDON, *supra* note 114.

<sup>116</sup> *See generally* *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>117</sup> *Id.* at 153-154.

<sup>118</sup> A major Christian evangelical figure Dr. James Dobson, whose Focus on the Family enterprise is based in Colorado Springs, Colorado, Catholic Bishop Michael Sheridan of Colorado Springs and Archbishop Charles Chaput of Denver, Colorado received national attention in 2004 for attacking state and national political candidates on the basis of their failures to campaign for the reversal of *Roe*.

Archbishop Chaput, who has never explicitly endorsed a candidate, is part of a group of bishops intent on throwing the weight of the church into the [2004]

abortion is always murder; the woman who procures an abortion is always a murderer.<sup>119</sup> The elected official who does not seek to criminalize abortions is a formal cooperator in multiple murders – as are the people who vote for such officials.<sup>120</sup> The majority of U.S. Catholics do not believe these teachings.<sup>121</sup> There are at least two reasons for this difference. First, the political arm of the present Church doctrine lacks moral nuance. Spermatozoon unites with ovum, the conceptus occurs within the host woman's body, and attaches to the uterus.<sup>122</sup> The circumstances

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elections. Galvanized by battles against same-sex marriage and stem cell research and alarmed at the prospect of a President Kerry – who is Catholic but supports abortion rights – these bishops [the article also identifies Bishop Sheridan] and like-minded Catholic groups are blanketing churches with guides identifying abortion, gay marriage and the stem cell debate as among a handful of ‘non-negotiable issues.’

David D. Kirkpatrick & Laurie Goodstein, *Group of Bishops Using Influence to Oppose Kerry*, NEW YORK TIMES, October 12, 2004, available at <http://www.nytimes.com/2004/10/12/politics/campaign/12catholics.html?ex=1134277200&en=a5503148efc6255d&ei=5070> (last visited Dec. 9, 2005). For additional discussion of political enterprise of Catholic and protestant political evangelicals, including Dobson and Chaput, see Now with Bill Moyers (PBS television broadcast, Nov. 12, 2004), manuscript available at [http://www.pbs.org/now/transcript/transcript346\\_full.html](http://www.pbs.org/now/transcript/transcript346_full.html) (last visited, Dec. 9, 2005).

<sup>119</sup> CATECHISM OF THE CATHOLIC CHURCH, Part 3, § 2, ch. 2, art. 5, 2270-2278. In the Catechism, abortion is treated under the Fifth Commandment: "Thou Shall Not Kill." *Exodus* 20:13.

<sup>120</sup> See *supra* note 118.

<sup>121</sup> See, e.g., Belden, Russonello & Stewart, *The View From Mainstream America: The Catholic Voter in Summer 2004* (July 2004), available at [http://www.brspoll.com/Reports/Catholic\\_Voters\\_2004.pdf](http://www.brspoll.com/Reports/Catholic_Voters_2004.pdf) (last visited October 16, 2005).

<sup>122</sup> "Human development is a continuous process that begins when an oocyte (ovum) from a female is fertilized by a sperm (or spermatozoon) from a male." This union or fusion produces a single cell, normally with 46 chromosomes, called a zygote. KEITH L. MOORE & T.V.N. PERSAUD, *THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY* 2, 37 & nn. 40, 43 (6<sup>th</sup> ed. 1998) (1975); Dianne N. Irving, *The Woman and the Physician Facing Abortion: The Role of Correct Science in the Formation of Conscience and the Moral Decision Making Process*, Paper Presented Before the Scientific Congress, Mexico City, Mexico (Oct. 28, 1999) available at <http://www.uffl.org/irving/irvmexico.htm> (last visited December 9, 2005)

under which the sperm was placed in the host's vaginal canal, and whether or not the zygote attaches to the uterus, is of no consequence in Church doctrine.

[32] Within the last few years, there has been politicized rape-impregnating campaigns by the Janjaweed against African women and girls in the Sudan,<sup>123</sup> and military rape camps in Bosnia where young girls were kept imprisoned for the sexual use of Serbian soldiers, whose political goal was to impregnate the girls with their foreign seed.<sup>124</sup> In 2003, a nine year old Nicaraguan girl was impregnated, and her parents had the pregnancy aborted.<sup>125</sup> The parents and the doctors who performed the abortion were threatened with formal excommunication by the Cardinal Archbishop of Managua, and with prosecution by civil authorities for murder.<sup>126</sup> Any church doctrine that teaches that the circumstances around the conception act, no matter how horrific, are irrelevant to the rights and obligations involved in sustaining fetal life, will have opposition in the U.S. public square. That doctrine has already been defeated in the plazas, piazzas, and platzs of Europe.<sup>127</sup> Such a doctrine will have to develop moral distinctions, or go the way of the anti-usury doctrine.<sup>128</sup>

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<sup>123</sup> *Rape of Sudanese Women by Arabs Produce Living Proof on Ethnic War*, ROCKY MOUNTAIN NEWS, February 11, 2005, at 39A. See also AMNESTY INTERNATIONAL, SUDAN: SURVIVING RAPE IN DARFUR (August 8, 2004), available at <http://www.amnestyusa.org/countries/sudan/document.do?id=1413C75E4E935C2980256EEB00631B11> (last visited October 15, 2005).

<sup>124</sup> *War Crimes Tribunal Convicts Bosnian Serbs*, THE GUARDIAN (February 22, 2001), available at <http://www.guardian.co.uk/yugo/article/0,,441559,00.html> (last visited October 2005).

<sup>125</sup> Giles Tremlett & Rupert Widdicombe, *Rebellion forces Vatican u-turn in child rape case*, THE GUARDIAN (March 7, 2003), available at <http://www.guardian.co.uk/international/story/0,,909061,00.html> (last visited October 15, 2005).

<sup>126</sup> *Id.*

<sup>127</sup> See GLENDON, *supra* note 114, app. A at 144-150.

<sup>128</sup> *Dear Senator Kerry* . . . , COMMONWEAL No. 14, August 13, 2004, at 5; . . . *Dear Bishops*, COMMONWEAL No. 14, August 13, 2004, at 6 (both articles noting additional moral nuances around

[33] Furthermore, the exclusive “maleness” and “bachelor maleness” of the doctrine formulators, makes their promulgations concerning women suspect. In the U.S., Church bishops are not educated in, experienced in, sensitive to, or appreciative of the crucial importance of the development of individual constitutional rights within their nation's history, especially the development of the rights of women. U.S. bishops have become bishops within an anti-democratic system, thus they are particularly disoriented in a democracy that provides contrarian political rights to individual women.

iii. *Women Priests*

[34] A final example of doctrine under development is this question of women and holy orders. The hierarchy has attempted to shelter its male-only priesthood doctrine, and halt development of an opposition, with declarations that its male-only doctrine is "infallible," "irreformable," "definitive," and a "Constant Tradition," along with instructions that the issue must not be discussed, and even denying ordination to men who believe that women may be "fit" for ordination.<sup>129</sup> Nonetheless, the heirarchical teaching has not been widely accepted by the large segments of the faithful nor by theologians, and the hierarchy has felt the need to defend its teaching, in large part through legal argument, as well as theological argument. These facts are heavy evidence that the male-only doctrine is in motion.<sup>130</sup>

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abortion and public law are identified as addressed to Presidential Candidate John Kerry and U.S. bishops).

<sup>129</sup> See Orsy, *supra* note 40. See also Tim Unsworth, *After One Year in the Windy City: He Learns Fast*, NATIONAL CATHOLIC REPORTER (May 22, 1998), available at [http://natcath.org/NCR\\_Online/archives2/1998b/052298/052298a.htm](http://natcath.org/NCR_Online/archives2/1998b/052298/052298a.htm) (last visited October 15, 2005) (noting that the Chicago Archdiocese does not retain seminarians who do not subscribe to the immutability of the present male-only priesthood teaching).

<sup>130</sup> See, e.g., John E. Theil, *Tradition and Reasoning: A Non-foundationalist Perspective*, THEOLOGICAL STUDIES, December 1995, at 627-655.

### 3. Secular Law's Role in Doctrinal Development

[35] Moral doctrinal developments are commonly first expressed in secular contexts, often through the instrument of civil law. Usury's religious elements became secularized in the Middle Ages. Ultimately, secular legal doctrine replaced the Church doctrine, even governing commercial transactions to which the church itself was a party.<sup>131</sup> In addition, marriage and marriage laws have been in the domain of both church and state, although not always concurrently. In twelfth century Europe, the Church's marriage laws "eclipsed secular jurisprudence on all matters relating to marriage."<sup>132</sup> However, the church laws were not immutable. The church's extreme seventh-degree prohibition on the consanguinity of married parties was vigorously and relentlessly resisted by nobility and peasants.<sup>133</sup> It was the Fourth Lateran Council in 1215 that "reduced the forbidden degree from the seventh back to the fourth, putting an end to one of the oddest chapters in the long history of the incest taboo."<sup>134</sup>

[36] In 2003, Massachusetts' highest State court determined that there is a constitutional due process and equal protection right to civil-marriage status between members of the same sex.<sup>135</sup> The court acknowledged that "our decision marks a change in the history of our marriage law. Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral."<sup>136</sup> At

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<sup>131</sup> *See supra* notes 53-63 and accompanying text.

<sup>132</sup> FRANCES & JOSEPH GIES, *MARRIAGE AND THE FAMILY IN THE MIDDLE AGES* 134 (1987).

<sup>133</sup> *Id.* at 140.

<sup>134</sup> *Id.*.

<sup>135</sup> *Goodridge v. Dept of Pub. Health*, 798 N.E. 2d 941 (Mass. 2003).

<sup>136</sup> *Id.* at 948.

least one Catholic organization filed an amicus brief with the Supreme Court of Massachusetts opposing the homosexuals' constitutional claims, and voices from the Vatican and the U.S. church hierarchy condemned the high court's opinion as violating God's law, as expressed through traditional church doctrine.<sup>137</sup>

[37] The developments in Church doctrine and church practice concerning slavery, racism and religious freedom are more settled and more instructive.<sup>138</sup> The Church's mid-19th century informal rejection of slavery finally boiled over due to various philosophies, religions, and politics – a product of various secular and religious societies, and civil and religious laws.<sup>139</sup> The Church was more of a follower than a leader in the development of its current anti-slavery doctrine. Many political communities and sister churches asserted this truth before the authoritative propounders of Roman Catholic Church doctrine did so.<sup>140</sup>

[38] Like secular societies, the Church's convicted action against racism is of much more recent vintage than its development of an anti-slavery doctrine. Indeed, while not being papally proclaimed or declared by Church councils, the denial of the ordained priesthood to Africans,

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<sup>137</sup> See, e.g., Amicus Curiae Brief of the Catholic Action League of Massachusetts in Support of Defendants-Appellees, *Goodridge v. Dept. of Pub. Health*, 2002 WL 32364759 (Mass., Dec. 20, 2002).

<sup>138</sup> Unlike slavery and religious intolerance, racism in the Church was taught almost exclusively by practice. Church teaching [*doctrina*] can be done "by example as well as by word . . . ." NOONAN, *supra* note 41, at 8. Church teaching is sometimes developed by what the Church actually does. NOONAN, *supra* note 41, at 10.

<sup>139</sup> NOONAN, *supra* note 41, at 17-123 (tracing the gradual rejection of slavery in the United States and other nations).

<sup>140</sup> *Id.* "1829's Congregationalists, Quakers, Mennonites, Methodists and Unitarians organized the 'underground railway' to help slaves escape northward towards Canada and southward into Spanish held territories" Ontario Consultants on Religious Tolerance, *Christianity and Slavery, The Final Abolition of Slavery in Christian Lands*, available at [http://www.religioustolerance.org/chr\\_slav2.htm](http://www.religioustolerance.org/chr_slav2.htm) (last visited December 5, 2005).

including African-American descendants of slaves, was part of Church practice and Church tradition until the mid-twentieth century's socio-political gains of African-Americans.<sup>141</sup> These gains were generated by the United States' civil rights movement. This was a movement led by African-American Protestant churches and secular organizations, a movement which combined to advocate civil laws that attacked institutional racism and its effects, and to prosecute legal claims through the court system. It was a response to generations of race-based violence and oppression, imposed in the secular world, and in the Church. One church historian, writing about the Church and its treatment of its African-American community, is very direct:

The exclusion of all but a handful of Black men from the Roman Catholic priesthood in the United States until well into the twentieth century both symbolized and helped to perpetuate the second class status of Blacks within the Catholic Church. Despised by a majority of White Catholics and deprived of their own priestly spokesmen in the hierarchical clerical-dominated Catholic Church, Black Catholics, for most of their history, found themselves powerless and persecuted within the Church. The absence of Black priests deprived Black Catholics of symbols of their own dignity and worth and reinforced feelings of inferiority. The paucity of Black priests, moreover, belied the Catholic Church's claims of universality and hindered its efforts to win converts.<sup>142</sup>

[39] The ancient interplay between secular and Church racist traditions has worked many ironies, such as racially segregated seating arrangements and order of communion receptions by race in Catholic churches and religious orders, as well as segregation in Catholic schools and universities.<sup>143</sup> One of the more bizarre examples involved the papacy during World War II.

<sup>141</sup> See *infra* notes 319-342 and accompanying text.

<sup>142</sup> Stephen L. Ochs, *The Ordeal of the Black Priest*, 5 U.S. CATHOLIC HISTORIAN 45, 46 (1986).

<sup>143</sup> Albert J. Raboteau, *Black Catholics and Afro-American Religious History: Autobiographic Reflections*, 5 U.S. CATHOLIC HISTORIAN 119, 124 (1986).

For some reason, we had missed Sunday Mass at the Black church and went instead to the white church. Inside we were crowded by the ushers into a half pew in the back with the only other Black worshipers in the church . . . Directly in front of us sat two white men with a pew all to themselves . . . The message was obvious: they belonged we didn't . . . Since we were seated in the back, we were at the rear of the line to the altar rail, when it came time to go to



From shortly after the Civil War until 1948, the United States maintained a tradition of racially segregating its African-American military forces from its white troops.<sup>144</sup> As the Germans retreated from Rome in the middle of World War II, this racist practice made it possible for Pope Pius XII to request that the U.S. military leaders in Italy not use African-American troops to re-occupy Rome.<sup>145</sup> Pius XII is alleged to have been motivated by Germany's accusations about the conduct of French-African colonial troops in Germany at the end of World War I, and other allegations against the conduct of African-American troops as the Allies came north through Italy.<sup>146</sup> Neither Pius XII's request nor the granting of the request raised an eyebrow. Racial equality as an element of justice was not a developed religious concept in the Church in 1940, nor in the secular society in general. This was at a time when the beliefs of Western societies concerning interracial relationships was phobic, a time when the United States routinely forbade

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Communion. But as we knelt there were still some white communicants waiting their turn to receive the Host. To my amazement, the priest passed me by, not once, but twice, until he had distributed communion to all the whites. The he returned to me. I still recall my mixed feelings of surprise, embarrassment, and anger. I was eight years old.

*Id.*

<sup>144</sup> MORRIS J. MACGREGOR, JR., *INTEGRATION OF THE ARMED FORCES, 1940-1965* 3 (Defense Studies Series, Center of Military History, United States Army, Washington, D.C. 1985), available at <http://www.army.mil/cmh/books/integration/IAF-01.htm>. “On 26 July 1948 President Harry S. Truman signed Executive Order 9981, calling on the armed forces to provide equal treatment and opportunity for black servicemen.” *Id.* at 292.

<sup>145</sup> JOHN CORNWELL, *HITLER'S POPE: THE SECRET HISTORY OF PIUS XII* 319-322 (1999). Although Cornwell's book about the place of Pius XII in the Holocaust story has been attacked by many as an unbalanced treatment of the religious and cultural complexities of the time, no one has denied the evidence that establishes Pius XII's request that the transfer in Rome's occupying armed forces from German to Allied sought to maintain the Caucasian nature of the occupying forces.

<sup>146</sup> *Id.* (noting that the "biographer" of Pius XII's beautification proceedings, Fr. Peter Gumpel, acknowledged the event, and is the source of Pius XII's reported motivation).

interracial education and made interracial marriage a crime, a time when United States' Catholic universities routinely denied admission to African-Americans.<sup>147</sup>

[40] Capital punishment traditions and laws also reveal a developmental history. The Church, Catholic and Reformed, has almost always been an active partner in governmental use of capital punishment in response to sins, real or perceived, against the Church or the state.<sup>148</sup> When Pope John Paul II's 1995 encyclical, *Evangelium Vitae*, dramatically rejected capital punishment, it went far beyond any prior church teaching.<sup>149</sup> This change developed well-after the rejection of capital punishment laws by most democratic nations, although not the United States.<sup>150</sup>

[41] The Church's recognition of individual religious freedom, and its rejection of the ancient doctrine denying the rights of "heretics," most closely presents a connection between doctrinal change and modern secular law. Religious freedom as a personal right was not accepted as

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<sup>147</sup> See generally PHILIP GLEASON, *CONTENDING WITH MODERNITY: CATHOLIC HIGHER EDUCATION IN THE 20TH CENTURY* (1995). Prior to World War II, U.S. Catholic colleges and universities generally refused admission to African-Americans. In fact, while Catholic University of America had earlier admitted some African-Americans, it rescinded that policy during World War I. *Id.* at 155. Protracted efforts to enroll an African-American at the University of Notre Dame failed until 1944 when a U.S. Navy wartime training program that was conducted at Notre Dame enrolled an African-American trainee. *Id.* at 161. Admission of African-American students at Missouri's Catholic colleges was resisted fiercely, and the leadership for the resistance came from St. Louis's Cardinal-Archbishop Glennon, a staunch segregationist. Admission of an African-American at St. Louis University, a Jesuit university, did not occur until the mid-1940s. It should also be understood that admission of African-American students to Catholic colleges and universities did not come with the "social integration of these students." *Id.* at 214

<sup>148</sup> Noonan, *supra* note 42, at 7.

<sup>149</sup> MARVIN L. KRIER MICH, *CATHOLIC SOCIAL TEACHING AND MOVEMENTS* 228-229 (1998).

<sup>150</sup> A partial list of nations that abolished capital punishment prior to 1986 includes: Argentina, Australia, Austria, Bolivia, Brazil, Canada, Colombia, Costa Rica, Denmark, Ecuador, Federal Republic of Germany, France, Honduras, Mexico, Netherlands, Nicaragua, Norway, Panama, Peru, Portugal, Spain, Sweden, Uruguay, Venezuela. AUSTRALIAN INSTITUTE OF CRIMINOLOGY, *TRENDS AND ISSUES IN CRIME AND CRIMINAL JUSTICE* 2 & n.4 (February, 1987), available at <http://www.aic.gov.au/publications/tandi/ti03.pdf>.

Church doctrine until 1965 at Vatican II, the last ecumenical council.<sup>151</sup> The leading proponents of religious freedom at the Council were Americans, especially John Courtney Murray, a Jesuit who had earlier been silenced by Vatican and Jesuit authorities for his writings that promoted this cornerstone of United States' constitutional law as a desirable doctrinal expression of the church:

[T]he Council proclaimed that the Church learned from human experience. In Murray's words, the Church here adopted "a principle accepted by the common consciousness of men and civilized nations." . . . The learning had been largely from the United States: from its Constitution of such extraordinary importance . . . and from the Virginian Declaration . . . from its bishops who kept the issue alive as "the American issue" in the Council . . . the declaration of Freedom would not have come into existence without the American contribution and the experiment that began with Madison.<sup>152</sup>

[42] Murray and the American bishops, acculturated in their secular nation's democratic experience of religious freedom, made the experience of a United States' constitutional doctrine the major source of a significant, modern development in Roman Catholic Church doctrine.<sup>153</sup> Interestingly, opposition to the position taken by Murray and the American bishops did not galvanize around the issue of individual religious freedom, or the "rights" to be accorded error, but to defend the principles of doctrinal immutability and certainty-stabilizing characteristics. Indeed, Murray saw the development of doctrine issue "is *the* issue underlying all of the issues at the Council"<sup>154</sup> Opposition at Vatican II to doctrinal change was not driven by the nature of the change as much as it was opposed to the idea that doctrinal change could occur.

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<sup>151</sup> See *supra* notes 82-84 and accompanying text.

<sup>152</sup> JOHN T. NOONAN, JR., *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM* 353 (1998).

<sup>153</sup> *Id.*

<sup>154</sup> John Courtney Murray, *This Matter of Religious Freedom*, *AMERICA* 40-43 (January 1965), quoted in NOONAN, *supra* note 152, at 346 (emphasis in original).

[43] The use of secular legal thought to shape Church doctrine is itself one of the Church's more lengthy traditions, although such developments are almost always highly resisted, and frequently denied. A vital component of the stability of the Church is its long-standing tradition of doctrinal development. As presented earlier, secular law and Church moral doctrine have not developed independently from the other, each has used and relied on the developments of the other.

#### 4. Use of Secular Legal Concepts to Defend and Oppose Male-Only Doctrine

[44] It is also telling that those seeking to stabilize the religious male-only priesthood doctrine cite secular legal concepts and principles in support of their position, as do those who seek to reform the doctrine. For example, some stabilizers claim that women do not have the requisite "standing" to oppose the male-only priesthood doctrine, because they suffer no injury from the doctrine.<sup>155</sup> According to this reasoning, women are not injured by the doctrine any more than they are injured by not being able to be fathers or uncles – it's not about "equality," it is about gender-based differences in "functions and services."<sup>156</sup> Civil law has effectively developed "standing" doctrines to preclude those who are not injured by conduct from legally challenging the conduct.<sup>157</sup> There are also assertions from those seeking to stabilize the male-only doctrine that no viable claim exists in relation to the exclusion of women from the priesthood because the

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<sup>155</sup> Mary Rousseau, *Dignity and Vocation of Women*, COMMUNIO, Summer, 1989, at 212, 230.

<sup>156</sup> *Id.*

<sup>157</sup> "In other words, when standing is placed in issue in a case, the question is whether the person who brings the claim is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968). The doctrine cuts across federal and state jurisprudence. *See e.g.*, *Pomerantz v. Microsoft Corp.*, 50 P.3d 929, 932 (Colo. Ct. App. 2002) ("Resolution of the standing issue involves two considerations: (1) whether the party seeking judicial relief has suffered an injury in fact, and (2) whether the injury is to a legally protected interest as contemplated by statutory or constitutional provisions").

priesthood is neither a "fundamental right," nor a "human right."<sup>158</sup> Both "standing" and "rights" are secular law concepts, aspects of which have been adopted into the present Code of Canon Law.<sup>159</sup> Representatives of the stabilizing forces have also made "burden of proof" arguments, another secular legal principle, in support of the male-only priesthood doctrine. "As a final consideration favoring the pope and the CDF [and their restatement of laws forbidding women priests], one must consider where the burden of proof must lie. To me it seems clear that the presumption must be on the side of tradition."<sup>160</sup> So efforts to stabilize the male-only doctrine have engaged secular legal principles in support of the tradition. It would be odd to exclude

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<sup>158</sup> See Joseph Ratzinger, *The Male Priesthood: A Violation of Women's Rights?*, DIE SENDUNG DE FRAU IN DE CERCI (date unknown), at 79, quoted in Barbara Albrecht, *On Women Priests*, THE CHURCH AND WOMEN, A COMPENDIUM (Helmut Moll ed. 1988), at 196-197 ("The priesthood in the Church is neither a fundamental right, rooted in God's creative order nor is it a 'human right' determined by men. 'It has nothing whatsoever to do with any supernatural equality of opportunity vis-a-vis our ultimate purpose'"). See also Cardinal Avery Dulles, *Rome's Word on Women's Ordination*, NATIONAL CATHOLIC REGISTER, January 6, 1995, at 1, 10 ("Whereas slavery is a denial of a natural right, there is no natural right to ordination."). However, secular equal treatment protection around gender issues is not restricted to fundamental rights. In addition, United States' constitutional jurisprudence some time ago "fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights." *Bd. of Regents v. Roth*, 408 U.S. 564, 571 (1972).

<sup>159</sup> With regard to "standing," the *Code's* section dealing with procedures for "Contentious Trials" provides that a *libellus*, the petition introducing a legal action, can be rejected if "if without doubt it is evident that the petitioner lacks legitimate personal standing in the trial." Code of Canon Law, Book VII, Part II, Title I, ch. 1, 1505 § 2, no. 1, available at [http://www.Vatican.va/archive/ENG1104/\\_\\_\\_P5Q.HTM](http://www.Vatican.va/archive/ENG1104/___P5Q.HTM) (last visited October 15, 2005). Both standing and "justiciable rights" seem to be addressed in the following language: "The Christian faithful can legitimately vindicate and defend the rights which they possess in the Church in the competent ecclesiastical court according to the norm of law." CODE OF CANON LAW, Book II, Part I, Title I, 221, § I, available at [http://www.vatican.va/archive/ENG1104/\\_\\_\\_PU.HTM](http://www.vatican.va/archive/ENG1104/___PU.HTM) (last visited October 15, 2005). Finally, proof-burdens at trials under the *Code* are imposed upon "the person who makes the allegations," but proof is not required for "matters presumed by the law itself . . . ." CODE OF CANON LAW, Book VII, Part II, § 1, Title IV, 1526, §§1, 2, no. 1.

<sup>160</sup> Cardinal Avery Dulles, *Infallible: Rome's Word on Women's Ordination*, NATIONAL CATHOLIC REGISTER, January 7, 1996, at 1, 10.

consideration of other secular legal principles and processes, such as the Equal Protection Clause and its implementing procedures, that lead toward the reformation of the male-only doctrine.

## **II. TRADITION AND TENSION IN THE MALE-ONLY PRIESTHOOD DOCTRINE**

### **A. THE SOCIAL FORCES OF STABILITY AND DEVELOPMENT**

[45] In healthy human communities, there is a constant tension between the need for stability and the need for reform, between the need to preserve what has been held as truth, and the need for new responses to truths better understood:

[The] demand for stability and the imperative of development are vital forces in any living community; they operate in nations and churches. The question, therefore, is not how the one could be eliminated and the other kept. Nor could it be which of the two should prevail. Both are needed.<sup>161</sup>

[46] This conflict between stability and development works through every democratic society's laws and every organized religion's doctrine. For example, the tension around tradition and development is a major theme in U.S. constitutional jurisprudence. U.S. Supreme Court Justice Antonin Scalia speaks often and passionately about the necessity of interpreting the U.S. Constitution by determining the original understanding of the constitutional text.<sup>162</sup> For Scalia, the Constitution is a document of fixed-meaning, determined by the use of the words at the time they were written, passed and ratified. "The goal of constitutional interpretation, Scalia says, is to

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<sup>161</sup> Orsy, *supra* note 40, at 865-866. This neo-Hegelian tension in the church was also addressed by John Cardinal Newman in the nineteenth century, and more recently, of course, by Judge Noonan.

<sup>162</sup> See, e.g., Antonin Scalia, Address for the McClure Lecture Series at University of Mississippi (April 11, 2003), *as reported by* Laura Houston, *Scalia defends legal views*, DAILY MISSISSIPPIAN, April 11, 2003, *available at* [http://www.thedmonline.com/vnews/display.v/ART/2003/04/11/3e966c48d4d45?in\\_archive=1](http://www.thedmonline.com/vnews/display.v/ART/2003/04/11/3e966c48d4d45?in_archive=1) (last visited Dec. 8, 2005).

determine 'the original meaning of the text' . . . ."<sup>163</sup> Scalia's understanding of church doctrinal interpretation is similar to his understanding of constitutional interpretation. Since the Constitution's plain language has always acknowledged a death penalty, original textualists like Scalia, conclude that the Constitution's Eighth Amendment's prohibition against "cruel and unusual punishment" cannot effectively be applied against the constitutionality of capital punishment.<sup>164</sup> In rejecting the development of Church teaching concerning capital punishment and attacks on the constitutionality of capital punishment, Scalia relies on his understanding of the text of the Bible and the Constitution, as defined by the earliest understandings of their writers and readers, evidenced by the resulting traditional practices of the community.<sup>165</sup> Scalia

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<sup>163</sup> William N. Eskridge, Jr., *Should the Supreme Court Read the Federalist but not Statutory Legislative History*, 66 GEO. WASH. L. REV. 1301, 1304 (1998). Scalia makes a sharp distinction between "original textualism" and "original intent" approaches to constitutional interpretation. ("I am a textualist," he said, "I am an originalist. I am not a nut." NEW YORK TIMES, May 2, 2004, at 34.) This intended distinction has been criticized. "Because received meaning (the original understanding, which in Justice Scalia's view is appropriate) is hard to distinguish in practice from intended meaning (intent, which Justice Scalia views as inappropriate), this distinction is not practically useful." Eskridge, *supra* at 1302.

<sup>164</sup> U.S. Supreme Court Justice Antonin Scalia, Address at Thomas Aquinas College (Jan. 24, 1997). However, at least one constitutional scholar confronts Scalia's logic by distinguishing between what the language of the Eighth Amendment originally meant, and the context of that original meaning – what those who wrote or adopted the text understood as absolutes.

For instance, it has been suggested that the death penalty could not . . . ever be deemed . . . violative of the Eighth Amendment, inasmuch as . . . other constitutional provisions clearly envision that the penalty of death will always be available. In truth, of course, nothing beyond the *expectation* that death will be an available punishment can be alleged, and that expectation no more negates the possible invalidity of capital punishment under some other constitutional clause than does the expectation that the hacking off of limbs will be available punishment . . . .

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 55 (3d ed. 2000) (emphasis in original) (citation omitted).

<sup>165</sup> Scalia, *supra* note 162 and *infra* note 166.

rejects both constitutional and doctrinal "developments" because they move away from traditions.<sup>166</sup> If specific conduct is not expressly valued in the Constitution, and if "the longstanding traditions of American society have permitted [the conduct] to be legally prescribed," the conduct is not a constitutionally protected right.<sup>167</sup>

[47] This tension between textual-traditionalism and developmental-reform has become a major political battleground in United States law, with political "good guys" ( otherwise known as strict constructionists) and political "bad guys" (judicial activists). Those who see the Constitution as a living organism, open to development, often cite the following opinion of the second Justice Harlan in *Poe v. Ullman*.<sup>168</sup> *Poe* concerned a Connecticut criminal statute which made it a crime for married persons to use contraceptive devices, and for others to give medical

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<sup>166</sup> See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (Scalia, J., dissenting). The Court's majority held that Virginia's refusal to admit women students to Virginia Military Institute was unconstitutional. Scalia wrote:

Much of the Court's opinion is devoted to deprecating the closed mindedness of our forebears with regard to women's education, and even with regard to the treatment of women in areas that have nothing to do with education . . . . The same cannot be said of this most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the counter majoritarian preferences of the society's law trained elite) into our Basic Law. . . . For that reason it is my view that, whatever abstract tests we may choose to devise, they cannot supersede--and indeed ought to be crafted so as to reflect--those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts. More specifically, it is my view that when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down.

*Id.* at 566-568.

<sup>167</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., concurring and dissenting) (citations omitted).

<sup>168</sup> 367 U.S. 497 (1961).



advice concerning the use of such devices.<sup>169</sup> A very conservative Justice Harlan found the laws to be unconstitutional, although the Constitution mentioned nothing about birth control.<sup>170</sup> He wrote:

If the supplying of content to this Constitutional concept [Due Process Clause's reference to the individual's right to liberty] has, of necessity, been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.<sup>171</sup>

Constitutional democratic societies work politically and legally within the tension of development and reform. So do healthy churches.

#### B. TENSION IN THE MALE-ONLY PRIESTHOOD DOCTRINE

[48] The Church's male-only priesthood doctrine is in tension. The Church's maintenance of that doctrine is consistent with the several thousand year-old social paradigm of patriarchy – an ingrained belief in female inferiority and male superiority.<sup>172</sup> Over the last one hundred years, the strength of this paradigm as a doctrinal source has eroded. What was once the universal, uncontested understanding of the basis for the male-only priesthood, female inferiority, has disappeared into a doctrinal “witness protection program.” In its place, traditionalist forces in the Church advance surrogate bases, including the use of biblical references and biblical omissions to infer an “attitude of Jesus” against women priests, as well as the ancient church

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 582.

<sup>171</sup> *Id.* at 543 (1961).

<sup>172</sup> *See supra* note 9 and accompanying text.

tradition of a male-only priesthood, and symbolic male "iconic" constructs interpreted against women priests.<sup>173</sup>

[49] These surrogate bases contend against mature doctrinal developments that assert the full humanity of women, and the resulting conclusion that women are therefore "fit matter" to serve the church by teaching, governing and presiding as priest at worship.<sup>174</sup> The traditionalist, stabilizing forces claim that the priestly roles are "functions and services" that are gender-limited to men, analogous to the limitation of childbirth to women.<sup>175</sup> So the Church is in tension, with conflict between those who seek to replace the discredited inferiority bases with new justifications, and those who seek to open the ordained priesthood to women. The ancient, creative tension continues between stability and reform.<sup>176</sup>

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<sup>173</sup> See, e.g., *Ordinatio Sacerdotalis*, Apostolic Letter from Pope John Paul II (May 22, 1994), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/apost\\_letters/documents/hf\\_jp-ii\\_apl\\_22051994\\_ordinatio-sacerdotalis\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/apost_letters/documents/hf_jp-ii_apl_22051994_ordinatio-sacerdotalis_en.html) (last visited Oct. 15, 2005); *Inter Insignores*, Declaration of the Sacred Congregation for the Doctrine of the Faith, on the Question of the Admission of Women to the Ministerial Priesthood (October 15, 1976) (hereinafter *Declaration*); Augustine DiNoia, Briefing Questions on the CDF Responsum ad Dubium Concerning the Authentic Interpretation of *Ordinatio Sacerdotalis*, U.S. National Conference of Catholic Bishops, Secretariat for Doctrine and Pastoral Practices (1995).

<sup>174</sup> CATECHISM OF THE CATHOLIC CHURCH, Part 2, § 2, ch. 2, art. 6, 1592. "The ministerial priesthood differs in essence from the common priesthood of the faithful because it confers a sacred power for the service of the faithful. The ordained ministers exercise their service for the People of God by teaching (*munus docendi*), divine worship (*munus liturgicum*) and pastoral governance (*munus regendi*)." *Id.*

<sup>175</sup> See *supra* note 158 and accompanying text.

<sup>176</sup> Church birth control doctrine and its male-only priesthood doctrine have both been identified as "doctrines currently in a state of dramatic development," in other words, "doctrine that is developing in such a way that its current authority as the authentic teaching of the magisterium will be lost at some later moment in the life of the Church, and that exhibits signs in the present moment that this final loss has begun to take place." John E. Theil, *Tradition and Reasoning: A Non-foundationalist Perspective*, THEOLOGICAL STUDIES, December 1995, at 627-655.

### III. ORDAINING WOMEN TO THE PRIESTHOOD: DEVELOPMENT THROUGH CONFLICT

[50] Canon 1024 of the Roman Catholic Church's 1983 Code of Canon Law states, "A baptized male alone receives sacred ordination validly."<sup>177</sup> It is the legal articulation of a traditional Church doctrine, the teaching that only males have the metaphysical capacity to be ordained priests. Canon 1024 and the underlying doctrine is the offspring of the ancient doctrine of female inferiority. However, modern political and social developments have overwhelmed this inferiority basis, and it no longer serves as a ground for religious truth. In response, the papacy and its instruments are advancing alternative bases for the doctrine, trying to strengthen the connection between the doctrine and church orthodoxy. In examining these developments, it is relevant to note the nature of the ordained priesthood itself, which is explained as a developing Church doctrine, the corrupting depth and breadth of the ancient female inferiority doctrine on Church doctrinal matters, and the nature of the arguments that the Church now promotes to support its male-only priesthood teaching.

#### A. THE ORDAINED PRIESTHOOD: ANOTHER DEVELOPING DOCTRINAL TRADITION

[51] The theology of the priesthood has developed, and continues to develop, over the life of the church. While neither *Ordinatio Sacerdotalis*,<sup>178</sup> nor the 1976 CDF *Declaration*<sup>179</sup> claims that Jesus instituted the ordained priesthood, some theologians assert that Jesus conferred the ministerial priesthood on his apostles at his last Seder. Dulles describes such a position as the

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<sup>177</sup> CODE OF CANON LAW, Book VI, pt. I, tit. VI, ch. II, 1024, available at [http://www.vatican.va/archive/ENG1104/\\_\\_\\_P3P.HTM](http://www.vatican.va/archive/ENG1104/___P3P.HTM) (last visited Oct. 15, 2005).

<sup>178</sup> See *supra* note 173 and accompanying text.

<sup>179</sup> See *supra* note 173 and accompanying text.

product of "the authoritative teaching" of the church.<sup>180</sup> However, Vatican II teaches that Christ sent the apostles, and that the bishops are successors to those apostles, each having a "ministerial role [that] has been handed down to priests in a limited degree."<sup>181</sup> In reducing the alternatives to "the apostles or . . . the Church," it makes no reference to any claim that Jesus personally instituted the ordained priesthood.<sup>182</sup> Moreover, there are scholars like Elizabeth Johnson, former president of the Catholic Theological Society of America, who explains:

[L]et it be stated as plainly as possible that Jesus never ordained twelve men, thus setting up an all male priesthood. Such an interpretation is an anachronism projected backward onto the Gospels in the light of later development. In truth, biblical scholarship demonstrates that Jesus never ordained anyone; that a distinction must be made between the Twelve (who had no long term successors), the apostles, and the disciples; and that women were among the most faithful and active of the apostles and disciples.<sup>183</sup>

We also know that the New Testament refers frequently to pagan priests and Jewish priests, but it never identifies a Christian priest:<sup>184</sup>

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<sup>180</sup> Tracy Early, *Father Avery Dulles . . . Female Priest Issue Not New*, THE WITNESS, April 21, 1996, at 10.

<sup>181</sup> VATICAN COUNCIL, *Decree on the Ministry and Life of Priests*, in THE DOCUMENTS OF VATICAN II, *supra* note 15, at 534 cmt. 16. The comment expressly acknowledges the absence of any official church position on whether or not the ordained priesthood was instituted by Jesus. It is an open question whether or not the ordained priesthood "was instituted by the apostles or by the Church, which the [Council's] Decree [On the Ministry and Life of Priests ] did not wish to solve." *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> Elizabeth Johnson, *Responses to Rome*, COMMONWEAL, January 26, 1996, at 11. *See also* GARRY WILLS, *PAPAL SIN* 112 (2000) (citing RAYMOND BROWN, *BIBLICAL REFLECTIONS ON CRISES FACING THE CHURCH* 53-54 (1975), and concluding that "[f]rom the New Testament it appears that the clear conceptualization of the Christian priesthood came only after the destruction of the Jerusalem Temple in AD 70.").

<sup>184</sup> Paul Philibert, *Issues for a Theology of Priesthood*, in THE THEOLOGY OF PRIESTHOOD 11 (Goergen & Garrido eds, 2000) (citing RAYMOND E. BROWN, *PRIEST AND BISHOP: BIBLICAL REFLECTIONS* 13 (1970)).

[The New Testament] never uses the technical term hierus [priest] for the Christian ministry . . . it never places hierus in relationship with the eucharist. The New Testament says very little on the subject of the ministry of the eucharist. . . . The pastoral epistles which give us the most detailed picture of the leaders of the local community (episkopos and presbyterio), never attribute to them an eucharistic function.<sup>185</sup>

[52] It was not until the end of the second century that four church roles – disciple, apostle, presbyter-bishop and the eucharistic celebrant – were merged, generating a Christian ordained priesthood.<sup>186</sup> Between the fourth and tenth centuries, a monastic form of the priesthood developed through organized religious communities, alongside a presbyter-bishop priesthood.<sup>187</sup> The first official declaration that priestly ordination was a condition to presiding at the eucharistic celebration did not occur until 1208 A.D.<sup>188</sup> By the Middle Ages, the priesthood was defined primarily in terms of the power of eucharistic consecration.<sup>189</sup> When the Protestant reformers moved to restore church power to the laity, the Council of Trent responded by further centralizing and ordering both sacred and temporal church power in a hierarchical manner.<sup>190</sup> From the sixteenth century until Vatican II, the “ministry . . . was done by parish priests, very much located within sacraments and sacramentals . . . it was an activist ministry strengthened by a theology of actual graces brought by sacraments and by personal prayer.”<sup>191</sup>

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<sup>185</sup> VATICAN COUNCIL, *Dogmatic Constitution on Divine Revelation*, in THE DOCUMENTS OF VATICAN II, *supra* note 15, at 534 cmt. 16.

<sup>186</sup> Philibert, *supra* note 184, at 14-15.

<sup>187</sup> Philibert, *supra* note 184, at 16-17.

<sup>188</sup> MCBRIEN, *supra* note 44, at 803.

<sup>189</sup> Philibert, *supra* note 184, at 18.

<sup>190</sup> Philibert, *supra* note 184, at 19-21.

<sup>191</sup> Thomas. F. O'Meara, *The Ministry of Presbyters and the Many Ministries in the Church*, in THE THEOLOGY OF THE PRIESTHOOD 75 (Goergen & Garrido eds, 2000).

[53] While tensions around various eligibility conditions for the ordained priesthood have been frequent and prolonged, and the nature and roles of the priesthood have developed over time, the gender condition that barred women has been stable. For thousands of years, the constant barrier to women priests in the Christian priesthood and its Judaic predecessor, has been the conviction of the fundamental inferiority of women. In history, eligibility conditions for the priesthood involved physical appearance and disease issues.<sup>192</sup> In the Hebrew Bible, the temple priesthood of Leviticus denied membership to those Jewish men who had an infirmity such as blindness or lameness, disfigurement or deformity, an injured foot or arm, if he was a hunchback or a dwarf, disease of the eyes or of the skin, running sores, or if he was a eunuch.<sup>193</sup>

[54] The 1917 Roman Catholic Code of Canon Law barred from the priesthood hunchbacks, midgets, those who had no nose, no lips, an ugly cancer on their face, or were without ears – unless the earless candidates could hide their deformity with hair.<sup>194</sup> The next codification of Church law, the 1983 Code of Canon Law deleted the inventory of disqualifying infirmities, but discreetly requires the priest candidate to "possess . . . physical . . . qualities in keeping with the order to be received."<sup>195</sup>

[55] In the aftermath of the Church sex scandal that exploded in the United States, some U.S. bishops and some Vatican officials concluded that homosexuals should not be ordained or

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<sup>192</sup> *Leviticus* 21:14-21 (The Jerusalem Bible).

<sup>193</sup> *Id.*

<sup>194</sup> *1917 Code of Canon Law, Canon 984, in CANON LAW TEXT AND COMMENTARIES* (Bouscaren ed., 4th ed. 1963). Many of these same canonically disabling conditions were thought to result from conception while the mother was menstruating. UTA RANKE-HEINEMANN, *EUNUCHS FOR THE KINGDOM OF HEAVEN: WOMEN, SEXUALITY, AND THE CATHOLIC CHURCH* 152 (Peter Heinegg trans, 1990).

<sup>195</sup> CODE OF CANON LAW, book VII, pt. I, tit. VI, ch. II, art. I, § 1029, *available at* [http://www.vatican.va/archive/ENG1104/\\_\\_\\_P3Q.HTM](http://www.vatican.va/archive/ENG1104/___P3Q.HTM) (last visited October 15, 2005).

admitted to church seminaries."<sup>196</sup> In May 2002, a high ranking Vatican official responded to a query by advising that the ordination "of homosexual persons or those with a homosexual tendency is absolutely inadvisable and imprudent. A person who is homosexual or has homosexual tendencies is not, therefore, suitable to receive the sacrament of holy orders."<sup>197</sup> After the Vatican floated several positions over a three year period, the media reported in late November 2005 that a reliable source, an Italian news agency had posted a document that Pope Benedict XVI had already signed.<sup>198</sup> The document bars men from admission to seminaries if the men "practice homosexuality, present deeply seated homosexual tendencies, or support the so-called gay culture."<sup>199</sup> The "deeply seated homosexual tendencies" – as distinguished from "transitory" tendencies – must clearly have been "overcome for at least three years before ordination as a deacon."<sup>200</sup> So sexually disordered or sexually deformed men – homosexuals – who are already ordained may remain priests. The new Leviticus condition is prospective. Meanwhile, the Vatican has yet to formally respond to questions regarding women as deacons, which it has faced for more than twenty years. However, the Vatican has circulated a draft document that would continue the prohibition against women deacons, "The unstated fear

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<sup>196</sup> John L. Allen, Jr., *Ban on gays subject to seminary practice*, NATIONAL CATHOLIC REPORTER, Dec. 9, 2005, at 5.

<sup>197</sup> Archbishop T. Bertone, the Secretary of the CDF was quoted as saying that "persons with a homosexual inclination should not be admitted to the priesthood." Papal spokesman, Navarro-Valls, has claimed that "people with these inclinations just cannot be ordained." AMERICA, Dec. 16, 2002, at 4; *See also* Jon Fuller, *On 'Straightening Out' Catholic Seminaries*, AMERICA, Dec. 16, 2002, at 8.

<sup>198</sup> *Vatican document puts up new barriers to gays in priesthood*, THE DENVER POST, Nov. 23, 2005, at 1A, 6A.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

evident in the document is the specter of women priests: If you can ordain a woman a deacon, you can ordain a woman a priest."<sup>201</sup>

[56] Tensions around the sacrament of holy orders and the nature of the ordained priest have been a common part of the development of the Church's teachings about the ordained priesthood. The Church continues to seek the full meaning of its ordained priesthood.

#### B. INFERIORITY: THE DOCTRINAL BASIS FOR DENYING ORDINATION TO WOMEN

[57] The Church's male-only priesthood doctrine has been shaped by the historical understanding of men, women and the ordained priesthood. The priesthood of the Hebrew scripture was steeped in the understanding of the fundamental inferiority of women before God and men.<sup>202</sup> The ordained priesthood of the Church has developed in post-biblical cultures that maintained the same perception of women as inferior. The development of Church doctrine around an ordained priesthood required the imbuing of priests with superior characteristics, and the compulsory denial of that office to those who were inferior by nature, such as all women and deformed men.<sup>203</sup>

[58] The Church's ordained priesthood has almost always been seen as a male-only office. Throughout history, the proclaimed basis for the male-only doctrine was the God-ordained, nature-based reality of female inferiority. When early Church teachers addressed the order of the

<sup>201</sup> Phyllis Zagano, *Catholic Women Deacons?*, AMERICA, February 17, 2003, at 9.

<sup>202</sup> "Simply stated, the clear conclusion from the analysis of the foregoing evidence is that in the formative period of Judaism the status of women was not one of equality with men, but rather, severe inferiority, and that even intense misogyny was not infrequently present. Since the sacred and secular spheres of that society were so intertwined, this inferiority and subordination of women was consequently present in both the religious and civil areas of Jewish life." LEONARD SWIDLER, *WOMEN IN JUDAISM: THE STATUS OF WOMEN IN FORMATIVE JUDAISM* (1976), available at <http://global-dialogue.com/swidlerbooks/womenjudaism.htm> (last visited Nov. 22, 2005).

<sup>203</sup> See *supra* note 194 and accompanying text.



universe, their common working assumption was the "subordination" of woman to man.<sup>204</sup> A 4th century commentary on Paul's Epistles to Timothy and Corinthians I, refers to the "manifestly inferior" nature of women and strikes out at heretics who provide church offices to women, complaining that "though he [Paul] orders the woman to keep silent in church, they on the contrary try to vindicate the authority of her ministry."<sup>205</sup> The commentator further observed:

How can anyone maintain that woman is the likeness of God when she is demonstrably subject to the dominion of man and has no kind of authority? For she can neither teach nor be a witness in a court nor exercise citizenship nor be a judge – then certainly she can not exercise dominion.<sup>206</sup>

St. John Chrysostom, the 4th century bishop of Constantinople, preached vehemently on the limitations placed on women by these epistles, concluding that the restrictions were required because "the woman is in some sort a weaker being and easily carried away and light minded."<sup>207</sup>

[59] The inferior condition is frequently linked to Eve, the first woman, through whom sin was brought into the world.<sup>208</sup> If a woman was in a priestly role in a community, it was seen as

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<sup>204</sup> See, e.g., MICH, *supra* note 149, at 373-374; WILLS *supra* note 183, at 107-119; Elizabeth A. Johnson, *Imaging God, Embodying Christ: Women as a Sign of the Times*, in WHAT CHURCH WOMAN WANT, CATHOLIC WOMEN IN DIALOGUE 49-50 (Elizabeth A. Johnson ed., 2002). For further evidence of the wide spectrum of misogynistic teachings of Catholic Theologians such as Tertullian, Ambrosiaster, St. Irenaeus, Firmilian, St. Clement, St. John Chrysostom, Epiphanius, and St. Thomas Aquinas, see *The Ordination of Women in the Roman Catholic Church*, WOMEN PRIESTS INTERNET LIBRARY, available at <http://www.womenpriests.org/> (last visited Oct. 15, 2005).

<sup>205</sup> St. John Chrysostom, *Homily 37*, reprinted in WOMEN PRIESTS INTERNET LIBRARY, available at <http://www.womenpriests.org/traditio/chrysos.asp - weaker> (last visited Oct. 15, 2005) (citing *Genesis* 3:16). The author, originally believed to be St. Ambrose, of the oldest known commentary on St. Paul's letters, referred to as "Ambrosiaster."

<sup>206</sup> Ambrosiaster, *4<sup>th</sup> century commentator on Letters of St. Paul (1 Corinthians 14, 34)*, WOMEN PRIESTS INTERNET LIBRARY, available at <http://www.womenpriests.org/traditio/brosiast.asp> (last visited Dec. 6, 2005).

<sup>207</sup> St. John Chrysostom, *supra* note 205.

<sup>208</sup> St. John Chrysostom, *Homily 9*, reprinted in WOMEN PRIESTS INTERNET LIBRARY, available at <http://www.womenpriests.org/traditio/chrysos.asp - weaker> (last visited Oct. 15, 2005).

evidence of the devil and heresy.<sup>209</sup> Firmilian, another third century North African bishop, describes a prophetess who baptized, performed the Eucharist, and did astonishing feats, but all under the sway of the demons.<sup>210</sup> Women priests were found among patristic and medieval Montanist, Valentinian, Gnostic, Collyridian, Waldensian and Cathari "heresies."<sup>211</sup> Apparently the appearance of women priests led a fourth century Cyprian bishop, Epiphanius, to issue this rallying cry:

Courage, servants of God, let us invest ourselves with all the qualities of men and put to flight this feminine madness. These women repeat Eve's weakness and take appearance for reality. But let us get to the heart of the subject. . . . Never, anywhere, has any woman acted as priest for God, not even Eve; even after her fall she was never so audacious as to put her hand to an undertaking so impious as this; nor did any of her daughters after her ever do so . . . . Many men in the Old Testament offered sacrifices, but nowhere has a woman exercised the priesthood.<sup>212</sup>

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The woman [Eve] taught once, and ruined all. On this account therefore he saith, let her not teach. But what is it to other women, that she suffered this? It certainly concerns them; for the sex is weak and fickle, and he is speaking of the sex collectively. For he says not Eve, but "the woman," which is the common name of the whole sex, not her proper name.

*Id.* See also TERTULLIAN, DE CULTU FEMINARUM, book 1, chap 1 reprinted in Woman Priests Internet Library, available at <http://www.womenpriests.org/traditio/tertul.asp - curse> (last visited Oct. 15, 2005) ("Do you not realize that you [women] are each an Eve. This curse of God on the female sex lives on even in our times."); Genesis 3:6-7 (The Jerusalem Bible).

<sup>209</sup> Firmilian of Caesarea, *Letter of Firmilian, Bishop of Caesarea, to Cyprian, Bishop of Carthage*, 200- 258 AD., reprinted in WOMEN PRIESTS INTERNET LIBRARY, available at <http://www.womenpriests.org/traditio/firmil> (last visited Oct.15, 2005).

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

<sup>211</sup> Dulles, *supra* note 158, at 1,10.

<sup>212</sup> Epiphanes, *Panarion* 79, § 2, reprinted in WOMEN PRIESTS INTERNET LIBRARY, available at <http://www.womenpriests.org/traditio/epiphan.asp> (last visited Oct. 15, 2005).

Epiphanius taught that "women are a feeble race, untrustworthy and of mediocre intelligence."<sup>213</sup>

St. Augustine, the great fifth century bishop of Hippo, concluded:

It is the natural order among people that women serve their husbands and children their parents, because the justice of this lies in (the principle that) the lesser serves the greater . . . This is the natural justice that the weaker brain serve the stronger. This therefore is the evident justice in the relationships between slaves and their masters, that they who excel in reason, excel in power.<sup>214</sup>

Elsewhere he observed, "Nor can it be doubted, that it is more consonant with the order of nature that men should bear rule over women, than women over men."<sup>215</sup>

[60] These dominant and little contested beliefs reflected and spawned church laws discouraging women from singing in church, forbidding them from approaching the altar during services, from distributing the eucharist, from performing baptisms, from preaching, as well as segregating them from the men at services, requiring them to cover their heads in church, and ultimately eliminating the early church offices of deaconess and widow.<sup>216</sup>

[61] Twentieth century procedures under the 1917 Code of Canon Law even developed distinctions between the weight of testimony by male and female physicians in marriage tribunal cases. While a woman physician's testimony was permitted in cases usually having to do with

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<sup>213</sup> Epiphanius, *Panarion* 79, § 1, *supra* note 213.

<sup>214</sup> St. Augustine of Hippo, *On Concupiscence*, Book I, chap. 10., reprinted in WOMEN PRIESTS INTERNET LIBRARY, available at <http://www.womenpriests.org/traditio/august.asp - natural> (last visited Nov. 22, 2005).

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

<sup>216</sup> *Declaration*, *supra* note 173, at § 6 (citing Pope Paul VI, *Acta Apostolicae Sedis* § 68 (1963), while acknowledging that "in the writings of the Fathers one will find the undeniable influence of prejudices unfavourable to women . . ." This acknowledgment was then discounted by the judgment that "these prejudices had hardly any influence on their pastoral activity, and still less on their spiritual direction.")

the consummation of marriages and annulments, it had to be corroborated by a male physician.<sup>217</sup>

And, of course, women were not fit for the ordained ministry, the office of deacon, priest or bishop, the ontologically superior, and pre-eminent personages of the Church.

[62] The inferior-by-nature belief has been a constant in the social and religious organization of the Christian community. The doctrine was proclaimed by church Fathers, papally pronounced and published by church councils, originating in and/or reinforced by secular societies.<sup>218</sup> Indeed, over several hundred years, arguments were made that these female deficiencies actually made women less than human. The inferiority assumption clearly ruled in medieval theology.<sup>219</sup> Wives remained subordinate to their husbands throughout the middle ages, a period during which canonists restricted female rights to burial ground choices, marital partner choices, and the right to demand sexual relations with a spouse.<sup>220</sup> St. Thomas Aquinas, first among the Western Catholic philosophers and theologians, saw women's inferiority as biological, social, and devolving from God's creative plan.<sup>221</sup> She is a "defective male," providing a passive womb to the active male seed, having rational abilities that were inferior to the male's, and she was created after man, with a less God-like image than man.<sup>222</sup> Her status,

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<sup>217</sup> Clara Marie Henning, *Canon Law and the Battle of the Sexes*, in RELIGION AND SEXISM: IMAGES OF WOMAN IN THE JEWISH AND CHRISTIAN TRADITIONS 267-282 (Rosemary Radford Ruether ed., 1974).

<sup>218</sup> See *infra* notes 219-226 and accompanying text

<sup>219</sup> See, e.g., Gary R. Macy, *The Church's Legacy of Mysogyny*, NATIONAL CATHOLIC REPORTER, April 25, 2003, at 17 (analyzing the work of Dr. Ida Raming, the German theologian who was one of the seven women ordained in 2002, and then excommunicated).

<sup>220</sup> Charles L. Reid, Jr., *Rights and Equality of Men and Women in Twelfth and Thirteenth Century Canon Law*, 35 LOY. L.A. L. REV. 471, 477 (2002).

<sup>221</sup> THOMAS F. O'MEARA, THOMAS AQUINAS: THEOLOGIAN, 233-234 (1997).

<sup>222</sup> *Id.*

her nature, her appearance was incompatible with the pre-eminence required of a 53Eucharistic consecrator.<sup>223</sup>

[63] In some geo-historical settings, women legally disappeared into their marriage. In eighteenth century England, it was well established in English common law that when a woman married a man, and two became one under the gospel teaching, the one who survived in law was the man.<sup>224</sup> These were the social and religious principles and conditions under which women entered modern times. Periodically, reasons other than female inferiority have been offered in support of the male-only priesthood doctrine.<sup>225</sup> However, the “tradition” of restricting ordination to men is clearly a subsidiary historical principle, the offspring of the sociological-biblical principle of women being subject to men.<sup>226</sup> The male-only doctrine was maintained by a historical tradition that taught that women were in the fundamental state of subjection to men.

### C. DEVELOPMENTS IN THE SOCIAL AND RELIGIOUS STATUS OF WOMAN

[64] Women have made remarkable progress in the past century, forging a public role as well as a legal presence for themselves, and for their sisters and daughters. Politically, women entered the twentieth century akin to children and slaves. They did not vote in democracies, their

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<sup>223</sup> *Id.*

<sup>224</sup> *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 442, (1765), *quoted in* DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW 124 (1941) (“[B]y marriage, the husband and wife are one person in law; that is, the very being of legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband.”).

<sup>225</sup> *See, e.g., infra* note 259 and accompanying text, concerning claims that the male-only doctrine is established by inferences made from conduct in which Jesus did not engage (Jesus and a New Testament Church that did not call a woman to be among the Twelve; and did not ordain his mother, Mary), and a lengthy tradition of denying ordination to women.

<sup>226</sup> William H. Shannon, *Tradition and the Ordination of Women*, AMERICA, February 17, 1996, at 8.

educations were limited under every system of governance, and they were, throughout most of the world, the chattels of fathers and husbands. In the West, women's legal, social and religious disabilities reflected the developed state of Christian doctrine, both Catholic and Reform.

[65] The evolution of women as political persons has been a major part of the evolution of democracy. While the United States' break-through constitutional documents in 1788 permitted women to stand for election, they were not permitted to vote in federal elections until 1920.<sup>227</sup> Italian and French women did not secure the right to vote until the mid-1940s.<sup>228</sup> The Swiss elected a woman mayor of Geneva in 1968, but she was not allowed to vote in Swiss federal elections until 1971.<sup>229</sup> The continuing struggle of women to fully acquire human rights and status is one of the great legal and religious stories in history.

[66] First, the secular stereotypes, the assumptions concerning the natural characteristics, ways and needs of each sex, have come undone. Certainly, men and women are different, and some of the differences can be described as complementary or even functional. But differences expressed in the master-servant, authority-lack of authority, active-passive terms are rejected. During the last generation, women have become deeply embedded in the public fabric of every Western nation, especially the United States.<sup>230</sup> The venerable secular gender segregation around

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<sup>227</sup> U.S. CONST. amend. XIX.

<sup>228</sup> See Jone Johnson Lewis, *supra* note 10.

<sup>229</sup> Presence Switzerland, Swiss Confederation, The Right to Vote, *available at* <http://www.swissworld.org/eng/swissworld.html?siteSect=910&sid=4039230&rubricId=17135> (last visited Nov. 22, 2005) (“In 1968 Geneva, then the country's third largest city, had a woman mayor - but she still couldn't vote in federal elections . . . on February 7th 1971 Swiss males, by a two thirds majority, finally gave their female compatriots their full federal voting rights.”).

<sup>230</sup> Sara Terry Gabrels, *The Changing Face Of Feminism*, THE CHRISTIAN SCIENCE MONITOR, July 20, 1998, *available at* <http://www.womenshistory.about.com/library> (last visited Dec. 8, 2005).

occupations and work has been dismantled. During that process, the gender-boxes formerly used for ascribing such human traits as rationality, leadership, objectiveness, nurturing, intuitiveness, and aggressiveness have become mixed in the real-world marketplace.<sup>231</sup> The shared humanity of male and female overwhelm the separateness of the sexes.<sup>232</sup>

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Still, the gains of the past 30 years are undeniable. Women's studies programs are now a fact of academic life at universities across the country; legal decisions have forced the walls of all-male bastions, such as clubs and schools, to come tumbling down; federal funding of girls' sports programs has changed the face of athletics on playgrounds across the country; and workplaces have been forced open by women workers entering virtually every profession, from politics and law to construction and the nation's space program.

*Id.*

<sup>231</sup> In defense of the male-only priesthood doctrine, the church hierarchy circulates articles such as Barbara Albrecht's *On Women Priests*, *supra* note 158, which sets forth in relevant part:

To be 'head' is an image which nevertheless (without making any evaluation) attempts to express something characteristic of man: his power to guide and rule, to engage in purposeful reflection, to plan a project rationally and objectively; his aptitude for looking ahead and translating a plan into action, his being an 'arrow', his ability to define ideas, the ability to abstract and speculate.

'Being body', on the other hand, is an image that describes the woman as virgin, spouse, and mother, her closeness to giving and receiving life, her closeness to nature, to 'mother' earth . . . .

'Helpermate' refers to the fact that it is characteristic for women to help . . . . In it is reflected the entire wealth of her psychological sensibility, the power of her thinking as related to persons, her planning, her acting, her intuitive gifts, the ability to understand people and situations sympathetically, her sense of the concrete.

*Id.* (citing JOSEF KENTENICH, *MARIAN EDUCATION* 200f (1971)).

<sup>232</sup> *See, e.g.*, *United States v. Virginia*, 518 U.S. at 533-534:

'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications may be used to compensate women 'for particular economic disabilities [they have] suffered,' *Califano v. Webster*, 430 U.S. 313, 320 (1977) *per curiam* to 'promote equal employment opportunity,' see *California Federal Sav. & Loan*

[67] Second, the ecclesiastical stereotypes have likewise eroded. Nineteenth and 20th century Catholic social teaching seldom separately mentioned women, including them only within the terms "man" and "family."<sup>233</sup> When they were identified, women were seen as dependent, child-like, and naturally "bound" to the home.<sup>234</sup> Pius XII taught that "men and women are equal in dignity and worth in the eyes of God. 'But they are not equal in every respect.'"<sup>235</sup> Pope John XXIII acknowledged women's growing role in the Western secular world, and their claims "to the rights and duties that befit a human person," while accepting the necessity of women's subordination to male authority.<sup>236</sup> In the early 1960s, the organization and opening of liturgies of Vatican II publicly revealed the hierarchy's mind-set toward women in that no women were included as participants, observers or consultors.<sup>237</sup> Sister Mary Luke Tobin, an American Sister of Loretto, tells the story about her presence at the 1964 session as an official observer, one of a handful of women so designated for the first time.<sup>238</sup> At the first meeting, Sister Luke and some

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*Assn. v. Guerra*, 479 U.S. 272, 289 (1987), to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, *see Goesaert*, 335 U. S., at 467, to create or perpetuate the legal, social, and economic inferiority of women.

*Id.*

<sup>233</sup> See MICH, *supra* note 149, at 347-370.

<sup>234</sup> Mich believes that the church's continuing denial of the equality of the sexes into the 20th century was in part a reaction to "socialists and communists who promoted the equality of women and men." MICH, *supra* note 149, at 349.

<sup>235</sup> Pope Pius XII, *Address to Girls of Catholic Action*, (April 24, 1943)) *cited in* MICH, *supra* note 149, at 349.

<sup>236</sup> *Pacem in Terris*, encyclical by Pope John XXIII (1963), at ¶ 41 (1963) *cited in* MICH, *supra* note 149, at 350.

<sup>237</sup> See Margaret Murphy, *Creativity and Hope: Sister Mary Luke Tobin at Vatican II*, AMERICA, Oct. 28, 1995.

<sup>238</sup> *Id.* at 9-10.



other women observers were invited to the bishops' coffee bar during the mid-morning break, giving them a chance to meet some of the bishops informally.<sup>239</sup> On the third day of the session, however, while on their way to the coffee bar, the handful of women were intercepted by Vatican functionaries, who directed them to an alcove at the rear of St. Peter's.<sup>240</sup> A curtain had been drawn across the alcove, and behind it was a table with cookies and coffee. "(T)he women were invited to enjoy a coffee break--in their place."<sup>241</sup>

[68] Beginning with the documents of Vatican II, there is evidence of Church movement toward more ambiguous positions about the rights of women. *Gaudium et Spes* teaches that "with regard to the fundamental rights of the person, every type of discrimination, whether social or cultural, whether based on sex, race, color, social condition, language, or religion, is to be overcome and eradicated as contrary to God's intent."<sup>242</sup> However, much of Church authority has subsequently focused on limiting the breadth of the teaching by minimizing the bundle of "fundamental rights" available to women.<sup>243</sup>

[69] There have been advances by women in the church since Vatican II. One development generated by the Council was an inclusion of all women in the church laity.<sup>244</sup> The laity's rising

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<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup>

*Id.*

<sup>242</sup> VATICAN COUNCIL, *Gaudium et Spes*, in THE DOCUMENTS OF VATICAN II, *supra* note 15, at ¶ 29, at 227-228..

<sup>243</sup> See Dulles, *supra* note 158, Cardinal Dulles asserts that no viable rights claim exists in relation to the exclusion of women from the priesthood because the priesthood is neither a "fundamental right," nor a "human right."

<sup>244</sup> VATICAN COUNCIL, *Gaudium et Spes*, in THE DOCUMENTS OF VATICAN II, *supra* note 15, at 37-65. *Gaudium et Spes* divides the Church between the hierarchy (bishops, priests and deacons) and the laity (everyone else).

tide also lifts the boats of its women members. Pope John Paul II explained gender differences through a "theory of complementarity," wherein both men and women are fully human in nature, but a human nature that "is possessed differently" by men than it is by women.<sup>245</sup>

[70] However, the hierarchy's ambivalence toward and confusion about how women are human, remains intact and dominant. Cardinal Dulles has been reported as saying that "it remains to be shown how women's talents can be utilized if they are not eligible for the priesthood."<sup>246</sup> He is unclear whether or not women "can hold jurisdiction [i.e. governing authority in the church], and if so, under what conditions."<sup>247</sup> Canon law provides, "In accord with the prescriptions of law, those who have received sacred orders are capable of the power of governance . . . which is also called the power of jurisdiction."<sup>248</sup> The power of jurisdiction includes "legislative, executive and judicial powers."<sup>249</sup> Cardinal Dulles' uncertainty reflects the

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<sup>245</sup> Sister Sara Butler, *Embodiment: Women and Men, Equal and Complementary?*, in THE CHURCH WOMAN WANT, CATHOLIC WOMEN IN DIALOGUE 38 (Elizabeth A. Johnson ed., 2002).

<sup>246</sup> See Early, *supra* note 180, at 10 (quoting Cardinal Avery Dulles). A tea-leaf development around this odd discussion took place on April 24, 2004 when Pope John Paul II named an Italian nun as undersecretary to a Vatican Congregation. Congregational positions have not previously been open to lay people, i.e. any woman. Canon 129 of the 1983 Code holds that "lay people may only 'cooperate' [in the exercise of governing power], and hence cannot exercise jurisdiction themselves." John L. Allen, *Sister Named to High-Level Post*, NATIONAL CATHOLIC REPORTER, May 7, 2004, at 9 (noting that if the new undersecretary is actually assigned tasks that required the exercise of "jurisdiction," it would seem that Cardinal Dulles' question is answered).

<sup>247</sup> Early, *supra* note 180, at 10 (quoting Cardinal Avery Dulles).

<sup>248</sup> CATHOLIC CODE OF CANON LAW, book I, tit. VIII, 129, § 1, available at [http://www.vatican.va/archive/ENG1104/\\_\\_\\_PF.htm](http://www.vatican.va/archive/ENG1104/___PF.htm) (last visited October 15, 2005).

<sup>249</sup> CATHOLIC CODE OF CANON LAW, book I, tit. VIII, 135, § 1, available at [http://www.vatican.va/archive/ENG1104/\\_\\_\\_PF.htm](http://www.vatican.va/archive/ENG1104/___PF.htm) (last visited October 15, 2005). See also ANNE MUNLEY, IHM ET AL., WOMEN AND JURISDICTION: AN UNFOLDING REALITY 2-5, 22-35 (2002) ("The 1917 Code of Canon Law . . . understood the power of jurisdiction to be inextricably linked to the power of orders." Efforts to reform that understanding are on-going. Post-Vatican II practices in the U.S. reveal women serving as diocesan chancellors, judges on diocesan tribunals, vicars for religious, directors of Catholic Charities, and parish "pastoral directors.").

hierarchy's uncertainty with and church law's proscriptions against the propriety of women holding authority in the church. In May 2004, the Congregation for the Doctrine of the Faith issued a letter to Church bishops extolling a type of "collaboration" between the men and women, in the Church and in the world.<sup>250</sup> Women were to have major responsibility in their families, their work and in their world, with access to responsible positions that "allow them to inspire the policies of nations and to promote innovative solutions to economic and social problems."<sup>251</sup> They do not have that responsibility in the Church. While women are a great "sign" for the church, they are a marianized sign, "with [Mary's] dispositions of listening, welcoming, humility, faithfulness, praise and waiting."<sup>252</sup> One of the things women will be waiting for is access to ordination with its decision-making authority in their church:

In this perspective one understands how the reservation of priestly ordination solely to men does not hamper in any way women's access to the heart of Christian life. Women are called to be unique examples and witnesses for all Christians of how the Bride is to respond in love to the love of the Bridegroom.<sup>253</sup>

[71] While there has been broad movement on the margins, especially in the past century, the authority and mystery of ordination is still denied women. The church doctrine of female inferiority has been hidden in a closet – it has not died.

#### D. THE CHURCH'S PRESENT TEACHING: A MALE-ONLY PRIESTHOOD

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<sup>250</sup> Apostolic Letter prepared by Congregation for the Doctrine of the Faith and approved by Pope John Paul II to the Bishops of the Catholic Church on the Collaboration of Men and Women in the Church and in the World (May 31, 2004), *available at* [http://www.Vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20040731\\_collaboration\\_en.html](http://www.Vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20040731_collaboration_en.html) (last visited Sep. 26, 2005).

<sup>251</sup> *Id.* at § 13, para. 4.

<sup>252</sup> *Id.* at § 16, para 2.

<sup>253</sup> *Id.* at § 16, para. 3.

[72] The Vatican has been the major force seeking to stabilize the male-only priesthood doctrine. In October 1976, the CDF issued its *Declaration on the Question of the Admission of Women to the Ministerial Priesthood* (hereinafter, “*Declaration*”), concluding that women could not be ordained to the priesthood.<sup>254</sup> In May 1994, Pope John Paul II issued an apostolic letter affirming the *Declaration*.<sup>255</sup> In contrast to its celibacy rule, the Vatican doctrinal agency and the Pope presented the male-only priesthood doctrine as the immutable law of God.<sup>256</sup> Almost completely ignoring its traditional doctrinal basis of female inferiority, they proposed substitute grounds for the doctrine.<sup>257</sup>

1. The Example of Jesus and the Apostles: New Testament Practices

[73] “Stabilizers” insist upon a biblical base for a male-only priesthood.<sup>258</sup> Unable to identify express references, they propose that the doctrine is established by inferences made from conduct in which Jesus did *not* engage. They rely upon Jesus and a New Testament Church that did not call a woman to be among the Twelve or among the other apostles, and did not ordain female priests, including Mary.<sup>259</sup> Jesus is said to not have shared his culture's "Jewish mentality, which

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<sup>254</sup> *Declaration*, *supra* note 173 at ¶ 3.

<sup>255</sup> *Ordinatio Sacerdotalis*, *supra* note 173.

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

<sup>257</sup> In U.S. constitutional litigation concerning laws that adversely affect women, newly adopted justifications, generated in response to litigation attacks, for such laws are highly suspect. "The [discriminatory] justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *United States v. Virginia*, 518 U.S. at 533 (1996) (citations omitted).

<sup>258</sup> *Ordinatio Sacerdotalis*, *supra* note 173, at § 2.

<sup>259</sup> *Declaration*, *supra* note 173, at ¶¶ 10-13.

did not accord great value to the testimony of women," and it is claimed that his readiness to "depart from the Mosaic Law in order to affirm the equality of the rights and duties of men and women with regard to the marriage bond," establishes the absence of cultural bases for Jesus' preferential male-only conduct.<sup>260</sup> Pope John Paul II's encyclical, *Ordinatio Sacerdotalis*, encourages the *Declaration's* teaching, remarking that the "document also shows clearly that Christ's way of acting did not proceed from sociological or cultural motives peculiar to the time."<sup>261</sup>

## 2. Tradition

[74] The *Declaration* also presented the male-only doctrine as reflecting the church's "Constant Tradition."<sup>262</sup> The *Declaration* noted that the tradition developed in the early church and continues through the present.<sup>263</sup> During much of church history, it had been accepted without objection. "Since that period [medieval times] and up to our own time, it can be said that the question [of ordaining women] has not been raised again, for the practice has enjoyed peaceful and universal acceptance."<sup>264</sup> "Stabilizers" also argue that the breadth and length of the male-only priesthood tradition in the Church establishes the practice as immutable doctrine. While acknowledging that "in the writing of the [Church] Fathers one will find the undeniable influence of prejudices unfavourable to women," the *Declaration* observes that "it should be

noted that these prejudices had hardly any influences on their pastoral activity, and still less on

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<sup>260</sup> The male-only doctrine was said to reflect the very "Attitude of Christ." *Declaration, supra* note 173, at ¶¶ 11-12.

<sup>261</sup> *Ordinatio Sacerdotalis, supra* note 173, at § 2, para. 1.

<sup>262</sup> *Declaration, supra* note 173.

<sup>263</sup> *Declaration, supra* note 173.

<sup>264</sup> *Declaration, supra* note 173, at ¶ 7.

their spiritual direction."<sup>265</sup> The bases, the accuracy and the authority of those conclusions are in contention.

### 3. The Male Icon Theory

[75] Finally, the *Declaration* adopts a gender-icon analogy to support its position, "Christ is a man . . . [and] actions . . . in which Christ himself is represented [for example, the Eucharist] . . . must be taken by a man."<sup>266</sup> Pope John Paul II and others have more recently sought to defend the male-only priesthood doctrine through an anthropology of gender-complementarity.<sup>267</sup> Using trinitarian language, this approach proposes that men and women have an "identical nature" that each "possesses differently."<sup>268</sup> The male-priest and the female-mother exemplify ways in which this identical nature is possessed differently. Peter Steinfels believes that "complex theological reasoning about biblical imagery or *in persona Christi* is doomed to read like elaborate rationalizations for the status quo . . . ." <sup>269</sup>

[76] Even the forces of stabilization acknowledge that the justifications now advanced by the hierarchy – implied attitude of Jesus, tradition, and a male-iconic priesthood analogy – present "an extraordinarily modest [case], from a theological perspective."<sup>270</sup> First, the "attitude of

<sup>265</sup> *Declaration, supra* note 173, at ¶ 6 (citing *Acta Apostolicae Sedis* 68 (1976), at 599-600).

<sup>266</sup> *Declaration, supra* note 173, at ¶ 30.

<sup>267</sup> Apostolic Letter prepared by Congregation for the Doctrine of the Faith and approved by Pope John Paul II, *supra* note 250, at § 8.

<sup>268</sup> Butler, *supra* note 245, at 38.

<sup>269</sup> STEINFELS, *supra* note 102, at 298.

<sup>270</sup> Augustine DiNoia, O.P., *When events outrun theological consensus*, NATIONAL CATHOLIC REPORTER, December 1, 1995, at 8. DiNoia was then executive director of the U.S. National Conference of Catholic Bishops Secretariat for Doctrine and Pastoral Practices, at the time this article was published. He presently is an official of the Vatican's Congregation for the Doctrine of the Faith. DiNoia states that the *Declaration* was rushed into place in response to the "Episcopal church's decision to ordain women . . . [and that] a fully elaborated theological

Jesus" justification was rejected by the Pontifical Biblical Commission twenty-five years ago, and effectively resisted before and after that rejection.<sup>271</sup> Second, traditions, by their very nature, are developed within time. Third, the male-icon analogy has always been presented as a basis that is subordinate to tradition and to the intent or attitude of Jesus arguments.<sup>272</sup> The justifications of the hierarchy are expressly recognized by the CDF, "not [as] a demonstrative argument, but . . . [a clarification] . . . by the analogy of faith."<sup>273</sup> Furthermore, the Incarnation – the core teaching that Jesus Christ is God and became human – is not a basis for classifying human beings according to gender; its significance has never been taught as a gender-event.<sup>274</sup>

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argument for the traditional practice was not yet in place . . . ." *Id.* Cardinal Dulles has also remarked that "The so-called 'iconic' or symbolic argument . . . may be in need of refinement in order to increase its persuasive force." Early, *supra* note 180.

<sup>271</sup> See generally Johnson, *supra* note 183 (concerning Jesus, the apostles and the history of the priesthood); WOMEN PRIESTS, A CATHOLIC COMMENTARY ON THE VATICAN DECLARATION (Arlene Swidler & Leonard Swidler eds., 1977).

<sup>272</sup> DiNoia's *Responsum's* briefing paper for the American hierarchy acknowledges that the nuptialized icon reasoning "has figured in recent magisterial documents dealing with this issue . . . [although] [s]uch considerations are always subordinate to the main reasons given for the Church's practice, i.e. the example of Christ and the constant witness of the tradition." DiNoia, *supra* note 173, at 8. Cardinal Dulles has stated that the nuptial analogy shows great promise as an answer to the "why" question, "although it may be in need of refinement in order to increase its persuasive force." Early, *supra* note 180, at 10. See also DiNoia, *supra* note 270.

<sup>273</sup> *Declaration*, *supra* note 173, at ¶ 25.

<sup>274</sup> See, e.g., Walter Drum (Transcribed by Mary Ann Grelinger), "Incarnation," THE CATHOLIC ENCYCLOPEDIA, available at <http://www.newadvent.org/cathen/07706b.htm> (last updated December 6, 2005) (stating the "miracle" of the Incarnation is the union "of the Divine [nature] with the human nature in one and the same Person."). See also CATECHISM OF THE CATHOLIC CHURCH, Part 1, § 2, ch. 2, art. 3, para. 1, ¶ 2414, available at <http://www.vatican.va/archive/catechism/p3s2c2a7.htm> (last visited Oct. 15, 2005) ("Taking up St. John's expression, 'The Word became flesh', the Church calls 'Incarnation' the fact that the Son of God assumed a human nature in order to accomplish our salvation in it. . . . Have this mind among yourselves, which is yours in Christ Jesus, who, though he was in the form of God, did not count equality with God a thing to be grasped, but emptied himself, taking the form of a servant, being born in the likeness of men. And being found in human form he humbled himself and became obedient unto death, even death on a cross."). The core of the Incarnation doctrine is God adopting a human nature.

## E. STASIS AND MOVEMENT

[77] Consistent with Cardinal Newman's theorem, conflict around the male-only doctrine continues, throwing off new stabilizing-preservation ideas and new development-reform ideas.<sup>275</sup> The hierarchy attempts to prohibit dialogue around the doctrinal conflict.<sup>276</sup> In the meantime, women are ordained, women hold priest-less eucharistic celebrations, and women and men present their developmental ideas in opposition.<sup>277</sup> We have the hierarchy stating that the male-only priesthood is the fruit of infallible doctrine, definitively taught in the voice of those who cannot commit error in such matters.<sup>278</sup> Then we have the reformers, some of whom are

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<sup>275</sup> See *supra* notes 39-52 and accompanying text for a discussion on Cardinal Newman's theorem.

<sup>276</sup> Angela Bonavoglia, *The Church's Tug of War*, THE NATION (Aug. 19, 2002), available at <http://www.thenation.com/doc/20020819/bonavoglia>.

A fiery orator and prolific author, this 66-year-old Benedictine nun [Sister Joan Chittister] made international news last year when she refused to obey a Vatican order forbidding her to speak at an international conference in Dublin on the ordination of women. Chittister made her decision in the face of Vatican threats of 'grave penalties,' which could have ranged from excommunication to expulsion from her monastery in Erie, Pennsylvania. 'The Church that preaches the equality of women but does nothing to demonstrate it within its own structures...is...dangerously close to repeating the theological errors that underlay centuries of Church-sanctioned slavery,' she told the emboldened crowd at the gathering.

<sup>277</sup> See MIRIAM WINTER, *OUT OF THE DEPTHS* (2001). Winter describes the story of Ludmilla Jarahova, a Czech woman who, along with other women, was ordained a priest by her Vatican-appointed "underground" bishop during the Communist persecution of churches in Eastern Europe. In addition, there have been periodic ordinations of women to the Catholic priesthood in Europe and North America. See, e.g., Julian Pettifer, *Catholic Woman in Secret Ordination*, BBC NEWS WORLD EDITION, (June 22 2005), available at [http://news.bbc.co.uk/2/hi/programmes/crossing\\_continents/4119254.stm](http://news.bbc.co.uk/2/hi/programmes/crossing_continents/4119254.stm). See also, JAY P. DOLAN, *IN SEARCH OF AMERICAN CATHOLICISM* 235 (2002) ("Numbers of women, both religious and lay, began to gather in informal groups to celebrate the Eucharist without including a priest as their celebrant.").

<sup>278</sup> "This teaching requires definitive assent, since, founded on the written Word of God, and from the beginning constantly preserved and applied in the Tradition of the Church, it has been set



convinced that compulsory celibacy will fall first, then women – just as inevitably – will be ordained.<sup>279</sup> Things will happen in that order, it is said, because patriarchy is more deeply embedded, more widely embedded, less debated and less opposed than compulsory celibacy.<sup>280</sup>

[78] The stabilizers say there is no remaining issue. "For those who see with the eyes of faith, the matter is resolved."<sup>281</sup> But the reformers are like the Canaanite woman, they are not going to be driven away by insults or exile.<sup>282</sup> They are not going anywhere until their daughters are acknowledged and healed.<sup>283</sup>

#### **IV. DEVELOPING CHURCH DOCTRINE: THE MALE-ONLY PRIESTHOOD AND THE SPECIAL SCRUTINY OF EQUAL PROTECTION LAW**

[79] Church doctrine develops, including doctrine concerning the ordained priesthood. Furthermore, church doctrinal developments are entwined with secular society's development of law. The meaning of the political equality of man and women is frequently taken up by the United States' judicial system, a system that developed in response to a monarchy that viewed itself as God's instrument of governance. The Founding Fathers believed that the King's religion

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forth infallibly by the ordinary and universal Magisterium (cf. Second Vatican Council, Dogmatic Constitution on the Church, *Lumen Gentium* 25, 2)." *Responsum ad dubium*, (Concerning the Teaching Contained in *Ordinatio Sacerdotalis*), Congregation of the Doctrine of the Faith (Oct. 28, 1995).

<sup>279</sup> See generally SCHOENHERR, *supra* note 9, at 198-216

<sup>280</sup> *Id.*

<sup>281</sup> Cardinal J. Francis. Stafford, Statement on the CDF Responsum Regarding Ordination of Women, November 17, 1995 (further stating "The teaching is definitive and has been set forth infallibly by formal declaration. It will not change and it cannot change. Therefore, for those who see with the eyes of faith, the matter is resolved.").

<sup>282</sup> See *supra* notes 2-8 and accompanying text.

<sup>283</sup> See *supra* note 7-8 and accompanying text.

could not be imposed on the people of the kingdom, that speech and press could freely speak against the King, that weapons could not be the exclusive property of the King, that the King's soldiers could not commandeer your home, nor could the King's men unreasonably search your home and seize things therein, nor could criminal proceedings be brought by the King without heavy protections for the accused.<sup>284</sup> Indeed, it is a system that limits the King to the status of a citizen rather than a demi-god. Despite their age difference, the United States' legal system has wrestled with gender discrimination issues far more than the Church's doctrinal systems have done so.

[80] It can hardly be said that the United States Constitution and its Bill of Rights set out to forge a political or personal egalitarianism between the sexes. The doctrine of female inferiority was fully entrenched in the eighteenth century colonial and revolutionary states, and the removal of the laws and customs that maintained that inferior status has been incremental. What has come to be seen as a fundamental democratic right – the right to vote – was first achieved by women in various colonial states before the Revolutionary War, then lost to women in those states after the Revolutionary War.<sup>285</sup> Ultimately, the United States Constitution was amended in 1920 to include the Nineteenth Amendment, which gave women the right to vote.<sup>286</sup> But just as

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<sup>284</sup> See U.S. CONST. amend I (relating to religion and speech); U.S. CONST. amend. IV (relating to search and seizure and quartering troops); and U.S. CONST. amend.V (relating to criminal procedural protections of individual).

<sup>285</sup> Women's rights to vote were revoked in New York (1777), Massachusetts (1780), New Hampshire (1784) and New Jersey (1807). The 1787 U.S. Constitutional Convention placed voting qualifications in the hands of the states, and women in those states that held voting rights saw them revoked. The Women's History Project of Lexington Area National Organization for Women, Timeline for Women's Suffrage in the United States, *available at* <http://dpsinfo.com/women/history/timeline.html> (last updated May 17, 2005).

<sup>286</sup> U.S. CONST. amend XIX.

the constitutional extension of the right to vote to African-American men in 1870 did not make African-Americans equal citizens, the constitutional extension of the right to vote to women did not make them the political equals of men. The legal rights of women in the secular United States have only gradually grown to include the right to own property, the right to convey property, the right to conduct a business, the right to enter into contracts, the right to sue, the right to receive equal pay and equal consideration for employment, the right to terminate her pregnancy by abortion and the right to equal access to public education.<sup>287</sup> Today, the development of women's rights remains a legal trench war. Except in the case of abortion, the Church has not been a moral leader in the fight to secure or deny any of these rights. In the United States in particular, the Church has characterized the "right" to an abortion as societally condoned murder, the exercise of which is a grave sin.<sup>288</sup>

[81] A principle vehicle for the development of women's rights in the United States has been the Fourteenth Amendment's simply stated Equal Protection Clause, which states "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>289</sup> The

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<sup>287</sup> Most of these rights were acquired in the mid-19<sup>th</sup> century through the passage of Married Women's Property Acts by the various states. *See, e.g.*, Colorado Revised Statutes §§ 14-2-201, *et seq* (2004). Several of these laws gave married women rights that unmarried women already held. Under common law, the wife was absolutely under the control of her husband, and without his consent, she could neither act nor contract. *See, e.g.* Daniels v. Benedict, 97 F. 367 (8th Cir. 1899).

<sup>288</sup> "Child-murder; the killing of an infant before or after birth. According to the French Criminal Code the word is limited to the murder of the new-born infant. In English it has been used for the deprivation of life from the moment of conception up to the age of two or three years." James J. Walsh, *Infanticide*, THE CATHOLIC ENCYCLOPEDIA, *available at* <http://www.newadvent.org/cathen/08001b.htm> (last updated Oct. 5, 2005)

<sup>289</sup> U.S. CONST. amend XIV, § 1. Abortion rights were established under the Fourteenth Amendment's Due Process Clause. The constitutional right of a woman to have an abortion, under circumstances that are much broader than the one condition that the Church teaches is permissible (to save the life of the mother), has been traced to "the Fourteenth Amendment's [Due Process Clause's] concept of personal liberty and restrictions upon state action . . . [which] is broad enough to encompass a woman's decision whether or not to

Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike."<sup>290</sup> It has been in place since 1868, but women were denied its protections until twentieth-century developments in constitutional interpretation brought them within its shelter. Those developments in the understanding of the Equal Protection Clause have been substantive, such as race, religion, gender, sexual orientation, disability, as well as procedural, like the development of multi-leveled "scrutiny" tests, applied proportionately to the right or discrimination involved.

#### A. EQUAL PROTECTION'S PURPOSE

[82] United States jurisprudence uses two major doctrines to test the conflict between societal traditions and fundamental personal rights and protections. The Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment are used to test laws and traditional governmental practices against constitutional principles. As developed,

[T]he Equal Protection clause is tradition-correcting, whereas the Due Process Clause is generally tradition-protecting. The Equal Protection clause sets out a normative ideal that operates as a critique of existing practices [ traditions]; the Due Process Clause safeguards rights related to those long-established [traditions] in Anglo-American law.<sup>291</sup>

Equal protection law developed out of legislative commitment to end slavery and its accouterments.<sup>292</sup> It subsequently was expanded to other areas of discrimination, based upon  
\_\_\_\_\_ terminate her pregnancy." *Roe v. Wade*, 410 U.S. 113, 154 (1973).

<sup>290</sup> *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

<sup>291</sup> Cass R. Sunstein, *Leaving Things Undecided*, 22 HARV. L. REV. 6, 101 n.306 (1996) (citing three U.S. Supreme Court equal protection cases, *U.S. v Virginia*, *City of Cleburne v. Cleburne Living Cntr., Inc.* and *Brown v. Bd. of Educ.*, and commenting that "interestingly, Justice Scalia contends in his dissenting opinion in *U.S. v. Virginia* that the Equal Protection Clause should be understood by reference to tradition").

<sup>292</sup> Gerard N. Magliocca, *The Cherokee Removal And The Fourteenth Amendment*, 53 DUKE L.J. 875, 965 n.3 (December, 2003) (citing AKHIL REED AMAR, *THE BILL OF RIGHTS* 162 (1998)).

social developments that resulted in the identification of other forms of government-aided discrimination as being pernicious.

[The Equal Protection Clause was] self-consciously designed to eliminate practices that existed at the time of ratification and that were expected to endure. The purpose of this clause is to protect socially subordinated groups against discrimination by the majority. Thus it is not only not driven by traditional values, it often functions directly in opposition to tradition. This understanding of equal protection explains sex discrimination doctrine, which holds that a state may not justify treating women differently than men by resting on a traditional vision of their respective roles, capacities, or characteristics.<sup>293</sup>

[83] In the Roman Catholic tradition, some "Traditions" reflect the religious truth, such as expressions "of the Scriptures, the essential doctrines of the Church, the major writings and teachings of the Fathers, the liturgical life of the church, and the living and lived faith of the whole Church down through the centuries."<sup>294</sup> But not all such expressions are religious truth. "It is not to be confused with tradition (lower case), which includes customs, institutions, practices which are simply usual ways of thinking about, and giving expression to, the Christian faith."<sup>295</sup>

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(postulating that Congress drafted the Fourteenth Amendment to prevent a restoration of the South's racial caste system during Reconstruction); KENNETH M. STAMPP, *THE ERA OF RECONSTRUCTION 1865-77*, at 138 (1965) (recognizing that the Fourteenth Amendment was enacted as a de jure race equalizer in the face of the Black Codes); Michael C. Dorf, *Equal Protection Incorporation*, 88 Va. L. Rev. 951, 958 (2002) ('There is general agreement that the central, original purpose of the Equal Protection Clause, indeed of the entire Fourteenth Amendment, was to protect African-Americans against the Black Codes.').

<sup>293</sup> Barbara J. Flagg, *"Animus" and Moral Disapproval: A Comment on Romer v. Evans*, 82 MINN. L. REV. 833, 848-849 (1998) (citing Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1174 (1998)).

<sup>294</sup> MCBRIEN, *supra* note 44, at 1258.

<sup>295</sup> MCBRIEN, *supra* note 44, at 1258.

[84] The United States is a young nation, but it is an elder among modern democracies. Like all national cultures, it has embraced and developed traditions, many of which have been adopted into law. Distinct from the Church's practice, however, is the United States' constitutional tradition by which customs, long-standing practices and laws are tested against the principles provided under the Constitution. The First Amendment sought to assure religious liberty among the people of this new country. Over the course of one hundred-seventy years, that one-time radical political doctrine became a major source of a development in the Church's moral doctrine. The Fourteenth Amendment's Equal Protection Clause has also developed a meaning broader than originally intended. At first, it was meant to address the moral evil of slavery. It later developed to challenge the moral evil of other government-enforced castes. The nature and type of distinctions drawn between persons by the Church and the state are issues of moral theology and constitutional law. The principles and experience of the Equal Protection Clause may also address the Church, just as the First Amendment freedom of religion principles and experiences address the Church.

#### 1. Text and Original Meaning of Equal Protection Clause

[85] In 1868, shortly after the end of the Civil War, a Fourteenth Amendment was added to the United States Constitution. The Equal Protection Clause of that Amendment was aimed at the evil of race discrimination, "The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden."<sup>296</sup> As we have seen, the Clause is short and "delphic" in character.<sup>297</sup> This brevity greatly assisted its adoption.

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<sup>296</sup> *The Slaughter-House Cases*, 83 U.S. 36, 81 (1873).

<sup>297</sup> "To declare that no state shall 'deny to any person within its jurisdiction the equal protection of the laws' is more to proclaim a delphic edict than to state an intelligible rule of decision." TRIBE, *supra* note 164, at 1514.

There was broad agreement that government must treat people equally, but there was much diversity about the meaning of equal treatment.<sup>298</sup> Some saw equality as requiring people and governments to behave consistent with a “natural law.”<sup>299</sup> It was also seen as the recognition that African-Americans had the same natural rights as whites.<sup>300</sup> Some promoters of the Fourteenth Amendment also relied upon Locke's social contract theory as a basis for the Equal Protection Clause, arguing that there is a social contract between the members of a community to obey community laws, and such a contract was based upon the equality of the members.<sup>301</sup> Some saw it as a vehicle for resolving the unseemly variety in the way the States created castes with their laws, an opportunity to bring the order that could only come from federalism.<sup>302</sup> Various motivations, intentions and understandings abounded, and one would be hard put to capture a

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<sup>298</sup> Mark G. Yudof, *Equal Protection, Class Legislation and Sex Discrimination*. 88 MICH. L. REV. 1366, 1366-1367 (1990).

<sup>299</sup> "The most obvious manifestation of natural law theory is the 1866 Civil Rights Act, providing that blacks have the same rights as whites to enter into contracts, to own property, to sue, and to testify -- in other words to invoke the protections of the legal system with regard to their civil or natural rights." *Id.* at 1368-1369 (citations omitted)

<sup>300</sup> *Id.*

<sup>301</sup> WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 80 (1988) ("Americans of 1866, like Americans of today, could all agree upon the rightfulness of equality only because they did not agree on its meaning, and their political leaders, unlike the managers of the modern bureaucratic state, were content to enact the general principle rather than its specific applications into law.") (citation omitted), *cited in* Yudof, *supra* note 298, at 1378. *See also* Yudof, *supra* note 298, at 1368-1370.

<sup>302</sup> "However ironic it may appear more than one hundred years later, the framers of the fourteenth amendment also were concerned with "federalism as a bulwark of liberty". Opponents of the amendment routinely invoked the specter of domination by the federal government and the diminution of state power." Yudof, *supra* note 298, at 1370.

four-cornered Equal Protection "original meaning." What was legislated was a broad principle that continues to be developed within the nation's history.<sup>303</sup>

## 2. Historical Development: Classes and Scrutiny

[86] Implementation of an equal protection law is a process. The very nature of law requires that different acts have different legal consequences. U.S. culture and its political institutions continue to develop an understanding of the meaning of different treatment between persons by organizing rules that determine when different treatment is legally permitted, and when it is not permitted.<sup>304</sup> The process has not been limited to an "original meaning" or "original purpose" of the Equal Protection Clause.<sup>305</sup> We know it came out of a Congress, where statutory purposes may be vast in number, inconsistent and even, incoherent. We know the protections afforded by the Clause have gone far beyond any original, expressed purpose, or understanding.<sup>306</sup>

[87] The Scalia method, utilizing the constitutional text and its original meaning as the answer to constitutional issues, has become a popular methodology, but it has not become the

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<sup>303</sup> Yudof, *supra* note 298, at 1369 ("Whatever the natural law background of the fourteenth amendment, there is universal recognition that a fundamental purpose of the framers was to address racial discrimination in the post-Civil War period.").

<sup>304</sup> *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, (1996) (addressing state treatment of homosexuals as a distinct and separate class, and the unconstitutional placing of material burdens on that status).

<sup>305</sup> *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (Discrimination against ethnic Chinese); *Skinner v. State of Oklahoma*, 316 U.S. 535 (1942) (Law re sterilization of criminals void); *Carrington v. Rash*, 380 U.S. 89 (1965) (Texas Constitution. denied the vote to servicemen stationed in Texas); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (poll tax payment condition to voting); *Rinaldi v. Yeager*, 384 U.S. 305 (1966) (only those confined in institutions required to pay for trial transcripts); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (denial of welfare benefits to those residing in state less than a year).

<sup>306</sup> *Id.*



controlling judicial interpretive method.<sup>307</sup> Judge Noonan rejects the strict original meaning test. "The main problem with written text [original text methodology] is fundamentalism – taking certain words and treating them as decisive," akin to fundamentalist biblical interpretation.<sup>308</sup> So while "original meaning" is a starting point for constitutional interpretation, the work doesn't end there.

[88] The hard work of interpretation also requires an understanding of other approaches to the text. Professor Tribe describes the "constitutional structure" approach in which diction, word repetitions and documentary organizing forms such as the division of the text into articles, or the separate status of the preamble and the amendments, all contribute to a sense of what the Constitution is about.<sup>309</sup> They are as "constitutional" as the Constitution's exact words.<sup>310</sup> Tribe also states that when interpreting the Constitution, there is an obligation to raise and consider the

<sup>307</sup> Supporters of the "original meaning" have been politically defined as "strict constructionists," and everyone else is being portrayed as "judicial activists." Tribe claims that whatever the labels, the practices are not clear cut.

Certainly Justices like Stevens, who pay at least as much attention to the overall theme and structure of the Constitution as to the text when protecting individuals from government, should not be dismissive when their colleagues, like Justice Scalia, do the same when protecting states from the nation. And this is a knife that cuts both ways: Justices like Scalia and Chief Justice Rehnquist, for whom the overall structure and logic of the document matter at least as much as its words when the rights of states are concerned, should not be so ready to trash similar forms of arguments on behalf of individuals.

TRIBE, *supra* note 164, at A5 (citation omitted).

<sup>308</sup> John T. Noonan, Reading the Constitution, 2004 Thurlow Gordon Lecture, Dartmouth College, quoted in AnnMary Mathew, *Appeals Judge Urges Liberal Interpretation of the Constitution*, THE DARTMOUTH ONLINE (April 27, 2004), available at <http://www.thedartmouth.com/article.php?aid=2004042701030&sheadline=&sauthor=&stext=noonan>.

<sup>309</sup> TRIBE, *supra* note 164, at 41.

<sup>310</sup> TRIBE, *supra* note 164, at 41.

Nation's values and ideals and commitments.<sup>311</sup> Next, Tribe recognizes the need to interpret the Constitution in the context of the history of past Supreme Court opinions, and be accepting of the inconsistency of some of that history, inconsistency that itself illuminates the process in harmony with the stabilizing concept of *stare decisis*.<sup>312</sup> In his analysis, Tribe specifically references Philip Bobbitt's shorthand "modalities" of constitutional interpretation, "history, text, structure, doctrine, ethos and prudence."<sup>313</sup>

[89] In working through constitutional interpretation, it is also notable "how little of the Constitution [is] found in constitutional opinions, which tend to be filled with the elaboration and application of various doctrinal 'tests' extracted from prior judicial decisions."<sup>314</sup> An important example of the same is set out in the Supreme Court's development of varying tests or rules imposed on statutes or state-honored traditions to determine their validity under the Equal Protection Clause:

The general rule is that legislation is presumed to be valid and will be sustained [against an equal protection challenge] if the classification drawn by the statute is rationally-related to a legitimate state interest. When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.<sup>315</sup>

[89] However, a different role has developed for the Clause in certain areas. First, if a statute appears to impinge on rights guaranteed under the Constitution, or if a statute exhibits prejudice

<sup>311</sup> TRIBE, *supra* note 164, at 70-78.

<sup>312</sup> TRIBE, *supra* note 164, at 78-85.

<sup>313</sup> TRIBE, *supra* note 164, at 87 (citing PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 26-27 (1991); PHILIP BOBBITT, *CONSTITUTIONAL FATE* 93-167 (1982)).

<sup>314</sup> TRIBE, *supra* note 164, at 84 (citing ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 32 (1995)).

<sup>315</sup> *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

against "discrete and insular minorities" whose situation in the democracy limits their ability to achieve protection within the political process, a higher level of scrutiny is invoked.<sup>316</sup> When "strict scrutiny" is invoked, such laws "will be sustained only if they are suitably tailored to serve a compelling state interest."<sup>317</sup>

[90] And then there is gender, which is afforded a slightly more relaxed standard of review.

Legislative classifications based on gender also call for a heightened standard of review. That factor generally provides no sensible ground for differential treatment. "[W]hat differentiates sex from such non-suspect statuses as intelligence or physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion). Rather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women. A gender classification fails unless it is substantially related to a sufficiently important governmental interest. *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982); *Craig v. Boren*, 429 U.S. 190 (1976).<sup>318</sup>

## B. EQUAL PROTECTION AND RACE

[91] Cardinal Newman understood doctrinal development as being driven by a conflict of ideas. New ideas, new truths are recognized as being incompatible with prior understandings of earlier truths. The new idea is generated by a growth in understanding of the "reality that is Jesus Christ."<sup>319</sup> Because of its history, the United States brings a special insight to the church concerning the individual's right to religious freedom, an insight developed through an early amendment to the Constitution.<sup>320</sup> Similarly, the rejection by the American laity of the male-only

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<sup>316</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

<sup>317</sup> *City of Cleburne*, 473 U.S. at 440.

<sup>318</sup> *Id.* at 440-441.

<sup>319</sup> NEWMAN, *supra* note 39, at 186.

<sup>320</sup> U.S. CONST. amend. I.

priesthood doctrine coincides with their experience and understanding of their country's history of unjust, legalized discrimination through the adoption and enforcement of race-based, ethnic-based, gender-based caste systems. This experience permeated both church and state. It included formalized, state-enforced, church-supported racial discrimination, and a Civil War in which over 600,000 people died.<sup>321</sup> Out of the Civil War came Constitutional amendments addressing individual rights, specifically, the prohibition of slavery,<sup>322</sup> the prohibition of state actions denying any person the equal protection of the laws,<sup>323</sup> and the prohibition of state denial of the right to vote "on account of race, color, or previous condition of servitude."<sup>324</sup>

[92] For almost one hundred years, the Fourteenth Amendment was developed in a manner that denied its original culture-busting purpose. First, "private" segregation of colored persons, negroes, and mulattos, which included housing, hotels, hospitals, restaurants, theaters, trains and buses was permissible, since such conduct did not involve the governmental "state action" prohibited by the Equal Protection Clause.<sup>325</sup> Second, soon after race-slavery ended, the "separate but equal" doctrine was employed to restore slavery's social, political and economic rules of race.

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<sup>321</sup> "The human cost of the [Civil War] war far exceeded what anyone had imagined in 1861 . . . . Total deaths thus exceeded 600,000, and the dead and wounded combined totaled about 1.1 million. More Americans were killed in the Civil War than in all other American wars combined from the colonial period through the war in Afghanistan in 2001." *Civil War, American*, MSN ENCARTA ENCYCLOPEDIA, available at [http://encarta.msn.com/encyclopedia\\_761567354/Civil\\_War.html](http://encarta.msn.com/encyclopedia_761567354/Civil_War.html) (last visited Dec. 9, 2005).

<sup>322</sup> U.S. CONST. amend. XIII.

<sup>323</sup> U.S. CONST. amend. XIV, § 1.

<sup>324</sup> U.S. CONST. amend. XV.

<sup>325</sup> *Civil Rights Cases*, 109 U.S. 3 (1893)

[93] The "separate but equal" treatment of the races received its constitutional blessing from the United States Supreme Court in 1896 in *Plessy v. Ferguson*.<sup>326</sup> In 1890, Louisiana, far and away the most Catholic of the slave states, passed legislation requiring separate railway carriages for whites and "coloreds."<sup>327</sup> Two years later, Homer Plessy boarded a train in New Orleans and took his seat in the first class section according to the terms of his ticket.<sup>328</sup> Mr. Plessy had an African ancestor, and because of that, Mr. Plessy was arrested and imprisoned for violating state law.<sup>329</sup>

[94] Homer Plessy claimed that such treatment violated his right to equal protection under the law, a right guaranteed to him under the Fourteenth Amendment to the United States' Constitution.<sup>330</sup> His case ultimately came before the United States Supreme Court, which upheld the right of Louisiana to criminally prosecute Plessy for violation of its laws segregating whites from coloreds in public transportation.<sup>331</sup> These laws of distinction between the races – articulated as a natural law distinction by the majority of the Supreme Court justices, "[have] no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude," according to the majority opinion.<sup>332</sup> While acknowledging the equality of all persons

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<sup>326</sup> 163 U.S. 537 (1896).

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> *Id.* at 539.

<sup>331</sup> *Id.* at 552.

<sup>332</sup> *Plessy*, 163 U.S. at 543.

under the Constitution "without distinction of age or sex, birth or color, origin or condition," the *Plessy* opinion noted:

[W]hen this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion that men and women are legally clothed with the same civil and political powers and that children and adults are legally to have the same functions and be subject to the same treatment . . . .<sup>333</sup>

[95] In rejecting Mr. Plessy's claim that the enforced separation of the "two races stamps the colored race with a badge of inferiority," the Supreme Court concluded that, "If this be so, it is not because of anything found in the [legislation] but solely because the colored race chooses to put that construction upon it."<sup>334</sup> Certainly, in 1896, it was self-evident, it was part of God's natural law, it was civil theology that women and colored men would not have the political powers, the human standing that were the natural right of white men.<sup>335</sup> The parallels between the race history of the United States and the gender history of the Roman Catholic Church confirm that a community's deep, cultural biases inevitably are enshrined in the community's laws and church traditions.<sup>336</sup> Furthermore, when the "natural inferiority" basis for laws discriminating against non-European races and women is exposed, the community's stabilizing forces tend to develop substitute theories to justify its biased laws and traditions.<sup>337</sup> Finally, that

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<sup>333</sup> *Id.* at 544.

<sup>334</sup> *Id.* at 551. A colored person's perception that race-discrimination laws stigmatized colored people was portrayed as a self-inflicted wound. It is a conclusion similarly espoused by many of those who defend the male-only priesthood. *See, e.g.*, BENEDICT ASHLEY, *JUSTICE AND THE CHURCH: GENDER AND PARTICIPATION IX-X* (1996). In the foreword, Father Ashley states that he "would have dedicated this book to my sisters in the Order of Preachers if I had been sure that they would have felt honored by it." *Id.*

<sup>335</sup> *Plessy*, 163 U.S. 544.

<sup>336</sup> *See supra* note 16 (identifying legislation and court decisions voiding long standing culturally biased laws); *See also supra* notes 138-147 (referring to lengthy history of church's acceptance of slavery and racism).

<sup>337</sup> *See supra* note 173 and accompanying text.

substitute theory will claim that the different treatment afforded by the law based upon sex or race is not inferiority-centered, but simply comes from the nature of things, the law of God.<sup>338</sup> It is common for the stabilizing forces, who seek to maintain the male-only priesthood doctrine, to adopt the *Plessy* Court's attitude.<sup>339</sup> If women elect to experience the male-only priesthood teaching as a badge of inferiority, that is their unfortunate choice.

[96] The "separate but equal" race-treatment doctrine survived until the middle of the twentieth century, when the Supreme Court reviewed the longstanding cultural traditions of race-separation and the fundamental rights that are core to each person under the Constitution, and concluded in a series of cases around *Brown v. Bd of Education* that race-based "separate but equal" treatment is a constitutional oxymoron.<sup>340</sup> In reflecting upon that decision approximately forty years later – a decision that broke with deep, ancient cultural beliefs and a lengthy legal tradition – Justice Sandra Day O'Connor reviewed circumstances under which constitutional law decisions have changed, developed, or been overrun by events.<sup>341</sup> A change in constitutional common law occurs, she wrote, when "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine" and often times "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant

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<sup>338</sup> The denial of ordination "does not stem from any personal superiority of [men over women] in the order of values, but only from a difference in fact on the level of functions and service." *Declaration, supra* note 175, at ¶ 30. It's not about inferiority anymore; it's now about fact differences around differing gender "functions and services." *Id.*

<sup>339</sup> *See supra* note 335.

<sup>340</sup> *See Sweatt v Painter*, 339 U.S. 629 (1950); *Brown v. Bd. of Education*, 347 U.S. 483 (1954).

<sup>341</sup> *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

application or justification," and in some instances, "a prior judicial ruling should come to be seen so clearly as error that its enforcement was, for that very reason, doomed."<sup>342</sup>

[97] Under this view of the Constitution, it is believed that Equal Protection clause is open to development with the times. It is a viewpoint that is antithetical to the strict "original meaning" approach, under which constitutional law can become a subdivision of linguistic archeology. And, of course, it is a viewpoint that opposes an immutable body of moral doctrine, but is open to moral doctrine that develops in and with salvation history.

### C. EQUAL PROTECTION AND GENDER

[98] The experience of the Church in the United States provides special insight into the Church's overall conflict around the ordination of women priests. In the United States, the official doctrine of dark-race inferiority has been legally abolished.<sup>343</sup> Now, after thousands of years of secular laws and church laws and social customs proclaiming the inferiority of women, American culture and laws are effectively challenging that inferiority assumption.<sup>344</sup>

Confronting racial discrimination provided a ready model for those who seek to challenge sexual discrimination, in the secular world and in the Church.

[99] The fundamental law of this society has come to reject the tradition of women's inferiority.<sup>345</sup> It now asserts the equality of man and woman before the law.<sup>346</sup> Secular laws which make gender distinctions adverse to women are now presumed to be illegal, and will be

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<sup>342</sup> *Id.* at 854-855. Justice O'Connor refers to such a ruling as "a mere survivor of obsolete constitutional thinking." *Id.* at 857.

<sup>343</sup> *See supra* notes 319-342 and accompanying text.

<sup>344</sup> *United States v. Virginia*, 518 U.S. at 531-534.

<sup>345</sup> *Id.*

<sup>346</sup> *Id.*



subjected to a high degree of scrutiny to determine whether or not such laws will be upheld.<sup>347</sup> In those special circumstances, the presumption that tradition is connected to legality is turned upside-down. Discrimination because of gender, is presumed to be "against" women, and not simply "about" women.

[100] Justice Ruth Bader Ginsburg traced the story of women under law and custom in her majority opinion in *United States v. Virginia*.<sup>348</sup> She pointed out that the present-day law concerning the treatment of women has a past, a tradition.<sup>349</sup> The "skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history."<sup>350</sup>

[101] The particular case involved a refusal by the State of Virginia to admit women to its state-operated, venerable and prestigious military school, the Virginia Military Institute (hereinafter "VMI").<sup>351</sup> The state sought to justify its discrimination on two grounds, claiming VMI's male-only population requirement added to educational diversity, and that VMI's unique military training program would have to be modified if women were admitted.<sup>352</sup> The Supreme Court rejected both rationales, stating that "Neither recent nor distant history" supported Virginia's claim that it was motivated by considerations of diversity.<sup>353</sup> Instead, Virginia's history teaches that the segregation policy was motivated by a lengthy tradition of discrimination

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<sup>347</sup> *Id.* at 534.

<sup>348</sup> 518 U.S. 515 (1996).

<sup>349</sup> *Id.* at 532.

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> *Id.* at 534-535.

<sup>353</sup> *Id.* at 536.

against women in education, as well as other elements of public life – all based upon gender-class assumptions.<sup>354</sup>

[102] As to the claim that essential differences between men and women rendered VMI's educational program impossible to extend to both sexes, Ginsburg's opinion drew on the lengthy history of government action denying women access to law schools, medical schools, and other educational and professional institutions.<sup>355</sup> The Equal Protection Clause forbids the exclusion of qualified individuals based upon "fixed notions concerning the roles and abilities of males and females."<sup>356</sup> The Court again rejected Virginia's use of "'overbroad' generalizations to make judgments about people that are likely to . . . perpetuate historical patterns of discrimination," citing another recent sex-discrimination case striking down laws that prohibited women from serving as jurors, *J.E.B. v. Alabama ex rel. TB*.<sup>357</sup> The evidence of gender discrimination shifted the heavy burden of proof to the State to meet a standard of "exceedingly persuasive" justification.<sup>358</sup>

[103] Until the early twentieth century, these same complementary principles of "fixed notions" about gender differences had been used to uphold laws denying women access to secular professions. In 1872, the United States Supreme Court upheld Illinois' refusal to admit women to the practice of law.<sup>359</sup> The present Vatican complementarity of the sexes position echoes the

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<sup>354</sup> *United States v. Virginia*, 518 U.S. at 536.

<sup>355</sup> *Id.* at 531-564.

<sup>356</sup> *Id.* at 541 (citing *Mississippi University for Women*, 458 U.S. at 725).

<sup>357</sup> 511 U.S. 127, 140 n.11 (1994).

<sup>358</sup> *United States v. Virginia*, 518 U.S. at 533.

<sup>359</sup> *Bradwell v. State*, 83 U.S. 130 (1872).

holding of this one hundred twenty-five year old Supreme Court case that today stands for archetypal, unconstitutional patriarchy. In denying women the right to practice law, Justice Bradley in his nineteenth century concurrence stated:

The civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and women. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfill the noble and benign office of wife and mother. This is the law of the Creator.<sup>360</sup>

The *Bradwell* Court set forth a classic medieval Christian natural law description of the limited realities of all women, their spheres, destinies, missions, functions and services.

## CONCLUSION

[104] The application of the special scrutiny methodology to Church laws that distinguish against women provides a very different lens than Dulles's burden of proof placement.<sup>361</sup>

A special scrutiny examination places the burden on the hierarchy to show that the truth that is conveyed by the exclusion of women from the ordained priesthood is based upon evidence and argument that provides an "exceedingly persuasive justification" for the exclusion doctrine.<sup>362</sup> It

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<sup>360</sup> *Id.* at 141 (Bradley, J. concurring). With regard to historical prohibitions against women entering other professions, *see* *United States v. Virginia*, 518 U.S. at 531-564

<sup>361</sup> *See, e.g.*, KARL RAHNER, CONCERN FOR THE CHURCH 40-43 (1981). A principal twentieth century Catholic theologian, Karl Rahner, concluded that the burden of proof shouldn't automatically be placed upon the proponents of the ordination of women, because of the real possibility that the source of the doctrine was cultural. Also, religious interpretive principles, such as the "hermeneutics of suspicion," have been used in attempts to do similar work. The analysis in use in those efforts include an understanding of the gender ideological overlay at work in the culture of and around Jesus, as well as the original writers and transcribers of the biblical texts, as well as those who have historically interpreted such texts. The text can only be faithfully interpreted in its context of gender superiority-inferiority that influences it.

<sup>362</sup> In fact, this special scrutiny procedural doctrine has been advanced in theology, specifically the feminist theology of Elisabeth Schüssler Fiorenza, as the "hermeneutics of suspicion." *See generally* ELISABETH SCHÜSSLER FIORENZA, IN MEMORY OF HER: A FEMINIST THEOLOGICAL RECONSTRUCTION OF CHRISTIAN ORIGINS (Crossroads Publishing, 1992) (1983).

is an impossible burden to meet. Even the forces of stabilization acknowledge that the substitute justifications now advanced by the hierarchy, such as tradition, the attitude of Jesus, and a male-iconic priesthood nuptial analogy, present "an extraordinarily modest [ case], from a theological perspective."<sup>363</sup> A strict-scrutiny analysis based on a suspect classification, would turn the tradition justification upside-down, as the argument is grounded in a cosmic belief in women's natural inferiority. Instead of providing irrefutable protection for the male-only doctrine, the tradition-justification's origins become a basis for rejecting the doctrine. Furthermore, neither the "attitude of Jesus" justification, nor the male-icon analogy survives a strict scrutiny analysis. Indeed, establishing a "dual anthropology" which teaches that women do not "share in the same human nature as men," that the humanity of women is "essentially a different mode of being human"<sup>364</sup> may be the most dangerous to the Church of any of its options.

[105] The Church's adaptation to and adoption of secular thought has been a significant part of its doctrinal history. The application of the secular equal protection doctrine to the Church's male-only priesthood doctrine is consistent with that tradition. In democracies, the denial of holy orders to women can only marginally symbolize Jesus Christ. It will, for the most part, continue to symbolize the origin of the practice – the determined belief in the inferiority of women.

[106] The Church does not appear to presently have that combination of influential theologians, American bishops and an ecumenical council that gave birth to Vatican II's *Declaration on Religious Freedom*. As a result, the erosion of the male-only priesthood will most likely continue from the bottom up, with resistance from the top-down. The formal excommunication

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<sup>363</sup> See DiNoia, *supra* note 173.

<sup>364</sup> Marie Vianney Bilgrein, *The Voice of Women in Moral Theology*, AMERICA, December 16, 1995, at 15.

of the seven women who were ordained in Europe in 2002 is procedurally complete, and all appeals have been rejected by the Vatican agencies.<sup>365</sup> The agency directive of then-Cardinal Ratzinger, now Pope Benedict XVI, to a U.S. Catholic publisher to destroy 1,300 copies of a book supporting the ordination of women has been carried out.<sup>366</sup>

[107] However, it seems unlikely that there will be enough excommunications and book burnings to save the de-stabilized tradition. The Canaanite woman suffered the "house dog" epithet to save her daughter, but she didn't leave Jesus alone until her faith was recognized, her daughter was recognized, and all three were healed.

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<sup>365</sup> This includes Uta Ranke-Heinemann, the German theologian whose book, *Eunuchs for the Kingdom of Heaven: Women, Sexuality, and the Catholic Church*, is cited *supra* at note 194.

<sup>366</sup> "Liturgical Press of Collegeville, Minnesota has destroyed 1,300 copies of a book [*Women at the Altar* by Sister Lavinia Byrne] that promotes ordaining women as Catholic priests. The publisher was acting on a request by Bishop John F. Kenney, Bishop of St. Cloud, who in turn was acting on a directive from the Congregation of the Doctrine of Faith." NATIONAL CATHOLIC REPORTER, July 31, 1998, *available at* [http://natcath.org/NCR\\_Online/archives2/1998c/073198/073198d.htm](http://natcath.org/NCR_Online/archives2/1998c/073198/073198d.htm). John L. Allen advises in his biography, *The Rise of Pope Benedict XVI*, that the books were not actually destroyed, but were removed from circulation. JOHN L. ALLEN, *THE RISE OF POPE BENEDICT XVI* 187 (2005). The author suspects that the 1,300 books were in fact gifted to the estate of Jimmy Hoffa. Neither the books nor Mr. Hoffa have been found.