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Developing Church Doctrine, Secular Law and Women Priests

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**CANAANITES, CATHOLICS AND THE CONSTITUTION:
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INTRODUCTION

THE CANAANITE WOMAN

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 Matthew (15:21-28) and Mark (7:24-30). Tired and harassed by the religious authorities, Jesus tries to get away from the crowds and gather himself. A desperate woman searches him out, and pleads for his healing powers. She is a mother, seeking a cure for her very ill daughter. The woman is not Jewish. She is foreign, a pagan. She is a Canaanite in Matthew, a Syrophenician in Mark. Jesus first ignores her, then sharply dismisses her. 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. "Ah, yes sir," she replies, "but even house-dogs eat the scraps that fall from the Master's table." 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 set aside his aversion to her and to her people.^{1/} Jesus was moved to respond to those who reached out to him in faith. Even pagans. Even pagan women.

In almost all times and all tribes, secular law and religious doctrine have defined women as inferior. 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. Institutional change concerning the status of women ricochets between the social forces that seek the stability of tradition on one hand and the change of reform on the other. In the United States, religious and secular communities frequently seek to reconcile their conflicting principles and traditions. One of the areas of conflict concerns the nature of women. 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 U.S.'s tradition of women's inferiority. It survives, but without the protection of law. The Roman Catholic church (hereafter "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. This includes the church's traditional male-only priesthood doctrine.^{2/}

^{1/} Some biblical commentators and translators have attempted to soften Jesus' 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)." *The Jerusalem Bible*, (1966), Matt. 15: 27, fn. i. But 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 "puppy" defense, Raymond Brown, S.S., one of the foremost modern biblical scholars, rejected the same. Brown observed that "in this period, diminutives ... are often insignificant variants." *Introduction to the New Testament*, (Doubleday 1996), p. 137, fn. 2. Biblical citations are to *The Jerusalem Bible* (Doubleday, 1966).

^{2/} 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 church is the popular misconception that the church consists of its hierarchy, and only its hierarchy. April 15, 2005 letter of Thomas L. Shaffer, preeminent Notre Dame Law School law and religion teacher-scholar, as well as legal aid lawyer. Doctrinally, of course, the church is the "People of God," those who are entwined in the "common

AN EQUAL PROTECTION METHODOLOGY

The United States' cultural traditions of racial and gender inferiority were enshrined in its civil laws until the late 20th century. As 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. 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. Today, a civil or criminal statute that reflects the ancient bias against women is presumptively invalid. In contrast, lengthy and broadly practiced church traditions can become near-immutable doctrinal fortresses because of their "always and everywhere" history," without regard to their social circumstances, anthropological reasons and theological biases, without regard to their origin in a culture-theology of women's inferiority. This article contends that the equal protection methodology that has developed to test male-preferred laws in the United States is helpful in developing a modern response to a theology of ordained priesthood that has almost always excluded women, almost always because they are from the race of Eve.

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 doctrine can "develop." 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."^{3/} 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^{4/} and the sinners of Sodom.^{5/} Nonetheless, there is a lengthy, powerful tradition of doctrinal development in the church, and much of that development is based upon an ancient and venerable connection between secular law and church doctrine. This tradition of doctrinal

priesthood of the faithful [laity] and the ministerial or hierarchical priesthood..." *The Documents of Vatican II*, Lumen Gentium, Chap.II, Walter Abbott, S.J., Ed. (Guild Press 1966), pp. 24 et seq.)

^{3/} See, for e.g., statement of National Conference of Catholic Bishops, "Abortion and the Supreme Court: Advancing the Culture of Death," November 15, 2000.

^{4/} But Nathanael said to him, 'Can anything good come from Nazareth?'" John 1: 46.

^{5/} 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 at the fragile beginnings and endings of life.

"Being Leaven' in a Secular Society," *The Church Women Want*, Ed. Elizabeth A. Johnson, (Crossroad Publishing Co., 2002), pp. 112-113.

Indeed, we are told by Glendon that Vatican humorists refer to U.S. Catholics as "Protestants who go to Mass." Address "The Hour of the Laity and the Future of the Church," presented at John Paul II Center, Denver, Colorado December 16, 2002.

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

THE CONNECTIONS BETWEEN SECULAR LAW AND CHURCH DOCTRINE

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. "As the initiator of ecclesiastical Latin, he was instrumental in shaping the vocabulary and thought of Western Christianity for the next 1,000 years."^{6/} His strident anti-women cultural prejudices also reflected the times and helped shape the future.^{7/} The 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; certainly around women and ordained priesthood issues. The ecclesiastical term *traditio* was adopted from Roman law.^{8/}

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, lines drawn by lawyers. 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. Johnson notes that

From 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.^{9/}

In fact, "In 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

^{6/} Tertullian's background and his major role in the development of a theology as a discipline in the early Christian community is discussed in Robert Barr's, *S.J. Main Currents in Early Christian Thought* (Paulist Press 1966).pp. 24-64.

^{7/} "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, cited by Marie Henry-Kane, O.P., paper presented to Catholic Theological Society of South Africa, October, 1987. "You (woman) destroyed so easily God's image, man." *De Cultu Feminarum*, book 1, chap. 1 quoted at *Women's Ordination Catholic Internet Library, Academic Archives, Fathers of the Church*, Tertullian (www.womenpriests.org; John Wijngaards, Website administrator) quoting Robert L. Wilken, *Encyclopedia Britannica*

^{8/} Yves Congar, O.P., *Tradition and Traditions*, (The MacMillan Co. 1967; translated by Naseby & Ranisborough), p.244.

^{9/} Paul Johnson describes the development of the church into a complex legal society in *The History of Christianity* (1976), pp. 208-215.

"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." ^{10/}

Roman legal principles and terms were not only assimilated into church law, they were used to forge Western secular constitutions and civil governments.^{11/} 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. 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 e.g., the courtly *responsum ad dubium*), it systematically set out collected codes that were adaptations of Roman civil law. 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. Two hundred years before Christ, "the [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."^{12/}

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.

THE DEVELOPMENT OF CHURCH DOCTRINE AND THE TRADITIONAL ROLE OF SECULAR LAW

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

^{10/} / 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 officialdom. Gary Macy, *Theological Studies* 61 (2000), p.3, citing Yves Congar, O.P., *Revue des Sciences Religieuses* 58 (1984) pp7-10.

^{11/} / "Toward a Democratic Church: The Canonical Heritage," John Beal, *A Democratic Catholic Church*, editors E. Kennedy and R. Reuther (Crossroads, 1993), p.59, citing B. Tierney, *Religion, Law and Growth of Constitutional Thought, 115-1650*, Cambridge U. Press, 1982.

^{12/} / 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." *The Mission and Ministry of Jesus*, (Michael Glazier-The Liturgical Press 1986), p.155. Thomas L. Shaffer writes frequently and 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 "The Biblical Prophets as Lawyers for the Poor," XXXI *Fordham Urban Law Journal* 15 (No.1) (2003); "Lawyers as Prophets" 15 *St. Thomas L. Rev.* 469 (2003); "Lawyers and the Biblical Prophets" 17 *Notre Dame J.L.Ethics & Public Policy* 521 (2003)

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.'¹³ /

The modern church hierarchy has described the male-only priesthood doctrine variously as "infallible," "immutable," "definitive," and "irreformable."¹⁴ / Historically, however, several doctrines that have been defended with similar certainty have subsequently undergone material development. Some examples of such doctrinal developments, and the role played by secular law in those developments, are examined below.

Newman, Noonan and Doctrinal Developments

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. 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..."?¹⁵ / (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,...") 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 [doctrinal] development... 'corroborates, not corrects, the body of the thought from which it proceeds."¹⁶ /

Church doctrinal "development" occurs with regard to both faith and morals. Noonan's 1993 *Theological Studies* article 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."¹⁷ / Noonan's 1999 *America* article set forth additional faith-items from Newman's *Essay* to the list of church dogmatic developments:

¹³ / John T. Noonan, Jr, "Development in Moral Doctrine," *Theological Studies*, Vol. 54 (1993), p.662, referring to Cardinal Newman's *An Essay on the Development of Christian Doctrine* (1845) ed. C.P. Harrold (NY.:Longmans, Green, 1949)

¹⁴ / Ladilas Orsy, SJ. "Stability and Development in Canon Law and Definitive Teaching," 76 *Notre Dame Law Rev.* 865-866 (2001)

¹⁵ / John T. Noonan, Jr, "Development in Moral Doctrine," *Theological Studies*, Vol. 54 (1993), p.662. This work examines the process by which moral doctrine develops in the Roman Catholic church. Also see Noonan, "On the Development of Doctrine," *America*, April 3, 1999.

¹⁶ / "Development of Moral Doctrine," p.671, quoting Newman, *An Essay on Development of Christian Doctrine*, ed. c.P. Harrold (NY.:Longmans, Green, 1949) p.186

¹⁷ / Id. at p.669. 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." Richard P.

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.^{18/}

Various explanations have been tendered for what Noonan describes as these "changes in propositions of faith." Noonan concludes that Newman's discussion on the process of development of Christian doctrine makes the most sense— doctrinal development driven by conflict, new ideas building on earlier ideas. 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. Such an idea can develop a truth that has deep religious significance. Doctrine converts to the deeper truth.

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.^{19/} His 1999 *America Magazine* article added capital punishment to his doctrinal development examples.

Usury

For approximately five hundred years, Noonan states, "... 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." Jesus taught that "Even sinners lend to sinners to get back the same amount. Instead, love your enemies and do good, and lend without any hope of return." Luke 6:33-35. This was understood to announce a constant, unchanging, unwavering prohibition against seeking profit on a loan. Violation of the doctrine was a mortal sin, and those that denied its sinfulness were heretics. The entire teaching authority of the church— popes, three ecumenical councils, bishops and theologians— universally proclaimed and enforced this doctrine. Then, over time, things changed, and the doctrine "developed."

McBrien, *Catholicism* (Study Ed.) (1981), p. 1250. Dogmatic theology is the systematic reflection on the Christian faith as that faith has been articulated by the official church. *Ibid*, p.1242.

^{18/} Noonan, "On the Development of Doctrine," *America*, April 3, 1999, p.7.

^{19/} "Development in Moral Doctrine," *Theological Studies*, Vol. 54 (1993). John T. Noonan, Jr. has a masters and doctorate degrees in theology from Catholic University of America and a law degree from Harvard University. After several years on the law faculties of the University of Notre Dame and of the University of California (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. Ladilas Orsy, S.J.'s article "Stability and Development in Canon Law and Definitive Teaching," 76 *Notre Dame Law Rev.* 865-866 (2001) cited in ftns. 14, above, and 57, below, acknowledged 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." Judge Noonan's latest book continues his ground-breaking work in this area. *A Church That Can and Cannot Change*, University of Notre Dame Press (2005).

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. By the 18th century the old usury rule was a mere shadow of church doctrine, formally maintained by the papacy, but abandoned in practice. By the 20th century, investments in banks were commonplace for popes, bishops and ordinary Christian folk. What had been prohibited had become lawful.^{20/}

The commercial world rejected the divinely revealed proscription, and medieval scholasticism's natural law basis for the same, i.e. "breeding" money violated the natural law. Over time, Western civil law, which had condemned profit on a loan on religious grounds, broke away from the church decretals. Germany formally allowed interest at five percent in the sixteenth century. Of course, the Vatican now accepts the lawfulness of the practice, has actively participated in such transactions for centuries, but it has never issued a decree rolling back the early doctrinal condemnations of the practice.^{21/}

Marriage and Adultery

Noonan also reminds us that Roman Catholic marriage doctrine, this time doctrine which applies to "fundamental unchanging human nature," has experienced radical change during the history of the church. Jesus' apparently clear and absolute prohibition against divorce and remarriage (Matt. 19:2-9) quickly gave way to the "Pauline privilege" (1 Cor. 7: 10-16), which permitted a convert to Christianity to divorce a non-baptized person and re-marry a Christian.^{22/} 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. 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. Church law provides other exceptions to the doctrine set out by Jesus in Matthew's Gospel. Under the "Petrine Privilege," a baptized person who was a Christian when he marries a non-baptized person may have the marriage dissolved for a just cause.^{23/} There was Hebrew scriptural precedent for this in Ezra 10: 1-14, where Jews were permitted to put away their foreign (pagan) wives.

²⁰ / Noonan, *A Church That Can and Cannot Change*, (U. Notre Dame Press, 2005), pp. 127-144; "On the Development of Doctrine," *America*, April 3, 1999, p. 8.

²¹ / *The Catholic Encyclopedia*, New Advent Website, [<http://www.newadvent.org/cathen/>, Copyright 2003 by K. Knight], "Usury", Byrne, (1912). The papal office admits practically the lawfulness of interest on loans, even for ecclesiastical property, though it has not promulgated any doctrinal decree on the subject.

²² / Richard McBrien, *Catholicism*, (Harper&Row ,1981), p.795. Noonan, *A Church That Can and Cannot Change*, (U. Notre Dame Press, 2005), pp. 161-178.

²³ / *Id.*, pp. 795-796

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] -- he gave utterance to his feelings in a prayer which made such an impression upon the people that Sechenias, in their names, proposed that the Israelites should put away their foreign wives and the children born of them. Esdras seized his opportunity, and exacted from the congregation an oath that they would comply with this proposition. 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.

The Catholic Encyclopedia[<http://www.newadvent.org/cathen/05535a.htm>] Copyright 2003 by K. Knight, "Ezra", Souvay (1909), updated 11/20/04

Slavery

Until the middle of the nineteenth century, the Roman church permitted and participated in the institution of slavery. From Paul through Augustine, through the historical papacy, 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 analysis. Bishops, theologians and religious orders were of the slaveholder class. Noonan notes that "The greatest of the reforming popes, Gregory I, accepted a young boy as a slave and gave him as a gift to another bishop."²⁴ Only in the last 150 years has the hierarchy moved to doctrinally condemn slavery as a great moral evil, and the actual condemnation didn't occur until Vatican II in 1965. In this regard, the hierarchy was the student of secular societies rather than the teacher; a situation relevant to the issue of developing women's roles in the church.

Religious Freedom

"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;..." Indeed, the church was a full partner with the State in the "terror by which the heretics were purged." In 1965, Vatican II dramatically changed that centuries-old teaching, concluding that " ... each human being... [is] the possessor of a precious right to believe and to practice in accordance with belief." "On the Development of Doctrine," *America*, April 3, 1999, p.8. That which moral doctrine previously required is now forbidden.

Capital Punishment

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

²⁴ / Noonan, "Development in Moral Doctrine," *Theological Studies*, Vol. 54 (1993), p. 665. For extensive development of doctrine-slavery issues, see Noonan, *A Church That Can and Cannot Change*, (U. Notre Dame Press, 2005), pp. 17-119. Actual church condemnation of slavery didn't occur until Vatican II. **Id at** _____

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.

Noonan, "On the Development of Doctrine," *America*, April 3, 1999, p.7.

The turn against capital punishment in church teaching has caused considerable difficulty for the church's stabilizing forces. Cardinal 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.'"^{25/} Under Cardinal Dulles' approach, if a teaching of the church has changed, then, ipso facto, the original teaching was not church doctrine. Conservative intellectual and devout Catholic^{26/}, U.S. Supreme Court Justice Antonin Scalia rejects *Evangelium Vitae*, concluding that it repudiates biblical teaching and tradition. 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," (Romans 13: 1-5), and (2) two thousand years of church doctrinal tradition, much of which actually involves the church as a participant in the practice of capital punishment. "Unlike such other hard Catholic doctrines as the prohibition of birth control and of abortion," he writes, "this [the doctrinal repudiation of capital punishment] is not a moral position that the church has always-or indeed ever before maintained."^{27/} Tradition apparently trumps all, including any "developments" in the hierarchy's or the faithful's understanding of a tradition. Long-standing moral teachings of the church are seen as immutable. Scalia reports that he has been informed by canonical experts that the teaching of *Evangelium Vitae* is not binding because the encyclical deviated from previously unbroken church tradition. He stated that had he been bound by the development in the teaching, he would have had to resign from the Supreme Court.^{28/}

^{25/} Cardinal Avery Dulles, the venerable theologian and leading American member of the stabilizing forces, distinguishes between "homogenous" development of doctrine, and a repudiation of prior doctrine. Doctrine that "develops" does not repudiate its prior forms. "Religious Freedom: Innovation and Development," *First Things* 118 (December 2001): 35-39. "Religious Freedom: A Developing Doctrine," McGinley Lectures, Fordham University, March 21, 2002

^{26/} A May 21, 2004 Google search ("scalia devout catholic") generated 813 "hits." A review of the first thirty articles and stories cited from different sectarian and religious newspapers, magazines and internet publications show each referring to Justice Scalia as a "devout Catholic."

^{27/} Scalia, "God's Justice and Ours," *First Things*, May, 2002, pp. 17-21. Scalia disagrees with Dulles' consistent position on these doctrinal development-change matters. 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." Scalia citing Dulles from "Catholicism & Capital Punishment," *First Things*, April, 2001

^{28/} Id.

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

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

The Early Church and the Mission to the Gentiles

In the first century church, there was the 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 to enter any Samaritan town." (Matt. 10:5) He underlines that his mission is not to the Gentiles, but exclusively to the "lost sheep of the house of Israel." (Matt. 10:6 and 15:24) 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.^{29/} 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, make disciples of all the nations." (Matt. 28:19) 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 11 to justify his visiting and eating with pagans, and his acceptance of the uncircumcised Gentile, Cornelius. 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. (Acts 15: 1-3) 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." Raymond E. Brown, S.S., *Introduction to the New Testament*, (Doubleday, 1997) p.306.

The Modern Church: Birth Control, Abortion and Women Priests

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. ^{30/}

^{29/} / Luke 9:55, fn. 1 [Jerusalem Bible (1966)]; John 4:1-4. Brown concludes that "In the Synoptic Gospel memory, [Jesus] has little contact with Gentiles or Pagans, forbids his disciples to go near them [citation omitted], or imitate their ways [citation omitted], [and] betrays Jewish prejudice toward them [citations omitted]." *Introduction to the New Testament*, (Doubleday, 1997), pp. 83-84.

^{30/} / Especially the U.S. church. "Since 1960 the most controversial topics confronting American Catholics have been the church's teaching on sex and on women." Peter Steinfels, *A People Adrift, The Crisis of the Roman Catholic Church in America* (Simon & Schuster 2003), p.253.

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

Birth Control

A 1968 encyclical from Pope Paul VI, *In Humanae Vitae*, rejected the overwhelming recommendation of a papal commission, and renewed the condemnation of contraceptive practices. In response, the laity has overwhelmingly rejected the encyclical's teaching, and the tradition that it taught. 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."^{31/} An anecdote around that argument comes out of the meetings of the aforesaid papal commission. Conservative church hierarchs argued that it was impossible for the church to change its birth control teaching in justice to the thousands and thousands of people who had died and been consigned to hell as a result of violating the existing teaching. A Commission member, Patricia Crowley, a Chicago woman who was a force in the U.S. church, responded that she was under the impression that consigning souls to hell was the work of God, and not the work of some Vatican agency.^{32/}

Contraceptive birth control is a grave sin in the eyes and words of the hierarchy; but the teaching is not believed by the laity. *In 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. 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.

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 e.g., Sudan, Libya, certain Latin American countries— to thwart the distribution of birth control medications and devices to third world women.

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

^{31/} / *Papal Commission for the Study of Population, Family and Birth, Minority Report* (1966), quoted in McBrien, *Catholicism*, (Harper & Row ,1981), p. 1019

^{32/} / Marquette University theologian, Dr. Daniel McGuire 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 cabby shook his head disconsolately and finally said: "Why did they tell him about it?"

adolescents aged 15 and younger; the biggest cause of death for girls aged 15-19 are complications around pregnancy and childbirth.^{33/}

Abortion

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..." Procurers and formal cooperators in an abortion are automatically excommunicated.^{34/}

While most democratic nations, including Italy, France, England, Germany (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. First, the 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.^{35/}

Second, the late 20th century development of abortion rights laws in Europe came through the compromise, consensus world of secular legislation in democratic parliaments. In contrast, abortion rights in the United States were recognized by the judiciary as rights grounded in the Nation's Constitution. A woman's conditional right to an abortion was found to be part of her individual liberty right under the Fourteenth Amendment's Due Process Clause, and therefore majority-willed legislation could not absolutely restrict that individual right. Like the Vatican's coalition with similar-minded countries to resist the distribution of birth control devices, some U.S. bishops have formed a coalition with conservative evangelical and political groups to attack and seek to defeat any political candidate who upholds *Roe v. Wade* and the body of law that emanates from that constitutional decision. These bishops claim that abortion is always murder; the woman who procures an abortion is always a murderer; and the elected official who does not seek to criminalize abortions is always a formal cooperator in multiple murders—as are the people who vote for such officials. The majority of U.S. Catholics do not believe these

^{33/} For e.g., "As Bad as the Inquisition; The Vatican Perpetuates a Grave Wrong," *The Guardian* editorial, June 30, 1999. For an analysis of the doctrinal debate and fallout since *Humanae Vitae* read Peter Steinfels chapter, "Sex and the Female Church" in, *A People Adrift, The Crisis of the Roman Catholic Church in America* (Simon & Schuster 2003), pp. 255-306

^{34/} *Catechism of Catholic Church*, §§2270-2272

^{35/} Mary Ann Glendon, *Abortion and Divorce in Western Law*, Harvard U. Press (1987) App. A, pp. 145-150. 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, *LifeNews.com*, February 15, 2005.

teachings.^{36/} There are at least two reasons. First, the political arm of the present church doctrine lacks moral nuance. Spermatozoon enters ovum, the conceptus occurs within the host woman's body, and attaches to the host. How the sperm was placed in the host's vaginal canal is of no consequence to the church's doctrine. Within the last few years, we have seen politicalized rape-impregnating campaigns by the Janjaweed against African women and girls in the Sudan^{37/}, 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.^{38/} In 2003, a nine year old Nicaraguan girl was impregnated, and her parents had the pregnancy aborted. 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.^{39/} Any church doctrine that teaches that the circumstances around the conception act— no matter how horrific— are irrelevant to the rights involved in sustaining fetal life, will have opposition in the U.S. public square. That doctrine has already been defeated in the plazas and piazzas of Europe. Such a doctrine will have to develop moral distinctions, or go the way of the anti-usury doctrine.^{40/}

Furthermore, the exclusive maleness and bachelor maleness of the doctrine formulators makes their promulgations concerning women suspect. In the U.S., the church's 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. They are particularly disoriented in a democracy that provides contrarian political rights to individual women.

Women Priests

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— to kill 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

^{36/} See for example Belden, Russonello and Stewart Poll, June 2004 at <http://www.freerepublic.com/focus/f-news/1164566/posts>

^{37/} "Rape of Sudanese women by Arabs produce living proof on ethnic war," (*NYTimes*) *Rocky Mtn. News*, February 11, 2005, p.39A; Amnesty International Release "Surviving Rape in Sudan," August 20,2004 at <http://www.amnestyusa.org/news/document.do?id=1413C75E4E935C2980256EEB00631B11>

^{38/} "War Crimes Tribunal Convicts Bosnian Serbs," *The Guardian*, February 22,2001 at <http://www.guardian.co.uk/print/0%2C3858%2C4140586-103645%2COO.html>

^{39/} "Rebellion forces Vatican u-turn in child rape case," *The Guardian/AP* March 7,2003 at <http://www.guardian.co.uk/international/story/0%2C3604%2C909061%2COO.html>

^{40/} Additional moral nuances around abortion and public law are identified in a *Commonweal* editorial addressed to Presidential Candidate John Kerry and U.S. bishops, August 13,2005, pp. 5-6

ordination.^{41/} Nonetheless, its 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.^{42/}

Secular Law's Role in Doctrinal Development

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. 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."^{43/} 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. 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."^{44/} 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. 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."^{45/} At least one Catholic organization filed an amicus brief with the Supreme Judicial 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.

The developments in church doctrine and church practice concerning slavery, racism and religious freedom are more settled and more instructive.^{46/} The church's mid-19th century [condemnation-informal rejection](#) of slavery boiled up, finally, out of various philosophies, many religions, and much politics—a product of various secular and religious societies, and civil and

^{41/} See fn. 14, above. The Chicago Archdiocese does not retain seminarians who do not subscribe to the immutability of the present male-only priesthood teaching. Unsworth, *National Catholic Reporter*, • Friday, 28 March 2003, (http://natcath.org/NCR_Online/archives2/1998b/052298/052298a.htm)

^{42/} John E. Theil, "Tradition and Reasoning: A Non-foundationalist Perspective," *Theological Studies*, December, 1995 (pp. 627-655).

^{43/} Frances & Joseph Gies, *Marriage and the Family in the Middle Ages*, Harper & Row (1987), p.134

^{44/} *Id.* at p.140

^{45/} *Goodridge, et al. v. Dept of Public Health, et al.*, 798 N.E. 2d 941,948 (Mass. 2003).

^{46/} 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, *The Church That Can and Cannot Change*, (U. Notre Dame Press, 2005), p.8; Church teaching is sometimes developed by what the church actually does. *Id.*, p.10

religious laws. The church was more follower than leader in the development of its present anti-slavery doctrine. Many political communities and sister churches asserted this truth before the authoritative propounders of Roman Catholic church doctrine did so.

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 a declaration of church councils, denying the ordained priesthood to Africans, 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. 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 legislate civil laws that attacked institutional racism and its effects, and to prosecute legal claims through the court system. It responded 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.^{47/}

The ancient interplay between secular and church racist traditions has~~ve~~ worked many ironies, such as racially segregated Catholic churches, religious orders, the seating arrangements and even the order of communion reception within church congregations, and segregated Catholic schools and universities. One of the more bizarre examples involved the papacy during WW II. 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. 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.^{48/} 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.^{49/} Neither Pius XII's request nor the granting of the request raised an eyebrow. Racial equality as an

^{47/} / Stephen L. Ochs, "The Ordeal of the Black Priest," Vol 5. *U.S Catholic Historian*, pp. 45 at 46 (1986).

^{48/} / John Cornwell, *Hitler's Pope: The Secret History of Pius XII*, (Viking Penguin 1999) pp. 319-321. 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. However, 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.

^{49/} / Id. The "biographer" of Pius XII's beautification proceedings, Fr. Peter Gumpel, SJ, acknowledged the event, and is the source of Pius XII's reported motivation.

element of justice was not a developed religious concept in the church of 1940, nor in the secular society generally. This was at a time when the tradition of Western societies concerning interracial relationships was phobic, a time when the United States routinely forbade interracial education and made interracial marriage a crime, a time when United States' Catholic universities routinely denied admission to Negroes.

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. When Pope John Paul II's 1995 encyclical, *Evangelium Vitae*, dramatically rejected capital punishment, it went far beyond any prior church teaching.^{50/} This change developed well-after the rejection of capital punishment laws by most democratic nations, although not the United States.

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 church doctrine until 1965 at Vatican II, the last ecumenical council. 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.

...the Council proclaimed that 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. "

John T. Noonan, Jr. *The Lustre of Our Country (The American Experience of Religious Freedom)*, (U. of California Press, Berkeley 1998), p.353.

So, 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. Interestingly, opposition to Murray's and the American bishops' position did not galvanize around the issue of individual religious freedom, or the "rights" to be accorded error. The opposition galvanized 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" ^{51/}

^{50/} / Krier Mich, "Catholic Social Teaching and Movements," (Twenty-Third Publications, 1998), pp. 228-289

^{51/} / Noonan, *The Lustre of Our Country, (The American Experience of Religious Freedom)*, (U. of California Press, Berkeley 1998), p.346, quoting from an *America* article by Murray, (January 1965) pp 40-43.

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. And a vital component of the stability of the church is its long-standing tradition of doctrinal development. Secular law and church moral doctrine have not developed independently from the other. Each has used and relied on the developments of the other.

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

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. 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^{52/} (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.") Civil law has effectively developed "standing" doctrines to preclude those who are not injured by conduct from legally challenging the conduct.^{53/} 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 priesthood is neither a "fundamental right," nor a "human right."^{54/} Both "standing" and "rights" are secular law concepts, aspects of which have been adopted into the present Code of Canon Law.^{55/} Representatives of the stabilizing forces have also made "burden of proof" arguments, another

^{52/} / Mary Rousseau, "Dignity and Vocation of Women", *Communio* (Summer, 1989), pp. 212, 230.

^{53/} / "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, (1968). The doctrine cuts across federal and state jurisprudence. See, for example, *Pomerantz v. Microsoft Corp.*, 50 P.3d 929, 932 (Colo.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."

^{54/} / "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." Ratzinger, "The Male Priesthood- A Violation of Women's Rights ?", *Die Sending de Frau in de Cerci*, p.79, [date unknown] quoted by Barbara Albrecht, [translated by Maria Shady]; "On Women Priests," *The Church and Women: A Compendium*, [date unknown] at 196-197. Dulles also makes a similar argument. "Whereas slavery is a denial of a natural right, there is no natural right to ordination." *National Catholic Register*, January 6, 1995. 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." *Ed. of Regents v. Roth*, 408 U.S. 564, 571 (1972)

^{55/} / 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 "it is undoubtedly clear that the petitioner lacks a legitimate personal standing in court;" Can. 1505-§2, 1°. Both standing and "justiciable rights" seem to be addressed in the following: "The Christian faithful can legitimately

secular legal principle, in support of the male-only priesthood doctrine.^{56/} So efforts to stabilize the male-only doctrine have engaged secular legal principles in support of the tradition. It would be odd to exclude 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

THE SOCIAL FORCES OF STABILITY AND DEVELOPMENT

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.^{57/}

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.^{58/} "The goal of constitutional interpretation, Scalia says, is to determine 'the original meaning of the text'..."^{59/}

vindicate and defend the rights which they enjoy in the Church before a competent ecclesiastical court in accord with the norm of law." Can.221-§I, from Book Four of the *Code* which sets out legal "Processes" or procedures, analogous to civil law codes of civil procedure. Finally, proof-burdens at trials under the *Code* are imposed upon "the person who makes the allegations," but proof is not required for "matters which are presumed by the law itself;" Can. 1526-§1 and §2, 1 0.

^{56/} Dulles, *National Catholic Register*, "Infallible: Rome's Word on Women's Ordination," Jan. 7, 1996. "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" Dulles, Jan.7, 1996.

^{57/} Ladilas Orsy, SJ. "Stability and Development in Canon Law and Definitive Teaching," *76 Notre Dame Law Rev.* 865-866 (2001) 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.

^{58/} For e.g., address at McClure Lecture Series at University of Mississippi, April 11, 2003, (<http://www.olemiss.edu/cgi-bin/news2000/display.pl?id=3128&mode=full>)

^{59/} William N. Eskridge, Jr., "Should the Supreme Court Read the Federalist but not Statutory Legislative History," *66 Geo. Washington Law 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, p.34.) This intended distinction has been criticized. "Because received meaning (the original understanding, which in

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. 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 governmental death penalty, original textualists conclude that the Constitution's Eighth Amendment's prohibition against "cruel and unusual punishment" cannot be effectively applied against the constitutionality of capital punishment.^{60/} In rejecting the development of church teaching concerning capital punishment, and in rejecting attacks on the constitutionality of capital punishment, Scalia relies on his understanding of the text of the Bible, as well as the text of the Constitution, as defined by their writers' and readers' earliest understandings, evidenced by the resulting traditional practices of the community. Scalia rejects both constitutional and doctrinal "developments" because they move away from traditions.^{61/} If specific conduct is not expressly valued in the Constitution, and if "the longstanding traditions of American society have permitted it [the conduct] to be legally prescribed," the conduct is not a constitutionally protected right.^{62/}

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 at 1302

^{60/} U.S. Supreme Court Associate Justice Antonin Scalia, Remarks at Thomas Aquinas College, Jan.. 24,1997. See "Cult of Scalia," web site, <http://members.aol.com/schwenkler/scalia/> However, at least one formidable constitutional scholar confronts Scalia's logic by distinguishing between what the language of the Eighth Amendment originally meant, and what those who wrote or adopted the text presumably expected.

"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. [Scalia, *A Matter of Interpretation* pp.46, 145-146 (1997)] 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 possibility invalidity of capital punishment under some other constitutional clause than does the expectation that the hacking off of limbs will be available punishment. (citation omitted)."

Laurence H. Tribe, *American Constitutional Law*, Foundation Press (3rd Ed.2000), p.55.

^{61/} For e.g., see Scalia's dissenting opinion in *U.S. v. Virginia*, the case in which the Court's majority held Virginia's refusal to admit women students to Virginia Military Institute to be unconstitutional. "Much of the Court's opinion," wrote Scalia, "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 [at 566]*** 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. [at 567] *** 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. [at 568] 518 U.S. 515 (1996, Scalia, dissenting)

^{62/} *Planned Parenthood of S.E. Pa. v Casey*, 505 U.S. 833 at 980 (1992), (Scalia, J. concurring and dissenting).

This tension between textual-traditionalism and developmental-reform has become a major political battleground in United States law, with political good guys ("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*. *Poe* concerned a Connecticut criminal statute making it a crime for married persons to use contraceptive devices, and for others to give medical advice concerning the use of such devices. A very conservative Justice Harlan found the laws to be unconstitutional, although the Constitution mentioned nothing about birth control.

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.^{63/}

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

TENSION IN THE MALE-ONLY PRIESTHOOD DOCTRINE

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.^{64/} 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. They include the use of biblical references and biblical omissions to infer an "attitude of Jesus" against women priests, as well as the ancient church tradition of a male-only priesthood, and symbolic male "iconic" constructs interpreted against women priests.^{65/}

^{63/} / 367 U.S. 497 at 543 (1961).

^{64/} / "Scholars reckon the age of patriarchy by including two millenia of the common era and the prehistoric era in which it emerged. Thus they estimate that patriarchy has dominated for at least five millenia and its influence has been strongly felt for an additional five." Richard A. Schoenherr, *Goodbye Father*, (Oxford 2002) pp. 198-199.

^{65/} / *Ordinatio Sacerdotalis*, Pope John Paul II's Apostolic Letter, May 22, 1994; *Inter Insigniores* (On the Question of the Admission of Women to the Ministerial Priesthood), Declaration of the Sacred Congregation for the Doctrine of the Faith, October 15, 1976; *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

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.^{66/} The traditionalist, stabilizing forces claim the priestly roles are "functions and services" that are gender-limited to men, analogous to the limitation of childbirth to women. 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.^{67/}

^{66/} *Catechism of the Catholic Church*, §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*). "

^{67/} Church birth control doctrine and its male-only priesthood doctrine have both been identified as "doctrines currently in a state of dramatic development," meaning "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 (pp. 627-655).

III. ORDAINING WOMEN TO THE PRIESTHOOD: DEVELOPMENT THROUGH CONFLICT

Canon 1024 of the Roman Catholic church's 1983 Code of Canon Law states, "Only a baptized male validly receives sacred ordination." It is the legal articulation of a traditional church doctrine, the teaching that only males have the metaphysical capacity to be ordained priests. The canon 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 muscle up the connection between the doctrine and church orthodoxy. In examining these developments, it is relevant to note that the nature of the ordained priesthood itself has always been experienced 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.

THE ORDAINED PRIESTHOOD: ANOTHER DEVELOPING DOCTRINAL TRADITION

The theology of the priesthood has developed, and continues to develop, over the life of the church. While neither *Ordinatio Sacerdotalis*, nor the 1976 CDF *Declaration* 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 product of "the authoritative teaching" of the church.⁶⁸ 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." The footnote to this text in Walter M. Abbott, S.J.'s 1966 *The Documents of Vatican II* expressly acknowledges that 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 resolve."⁶⁹ In reducing the alternatives to "the apostles or...the Church," it makes no reference to any claim that Jesus personally instituted the ordained priesthood. There are those, like Elizabeth Johnson, C.S.J., former president of the Catholic Theological Society of America, whose close on this issue follows:

⁶⁸ / *The Witness*, Dubuque, Iowa, April 21, 1996, p.10 (Tracy Early, Catholic News Service)

⁶⁹ / Ftn. 16 to "Decree on the Ministry and Life of Priests," *The Documents of Vatican II*, edited by Walter Abbott, S.J.(Guild Press 1966), p.534 discusses the absence of any official position that the ordained priesthood was instituted by Jesus.

"... let 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." ^{70/}

The New Testament refers frequently to pagan priests and Jewish priests, but it never identifies a Christian priest. ^{71/} 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."

"Dogmatic Constitution on Divine Revelation", *The Documents of Vatican II*, W.M.Abbott, Ed., (Guild Press 1966), p.120.

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.^{72/} Between the fourth and tenth centuries, a monastic form of the priesthood developed through organized religious communities, alongside a presbyter-bishop priesthood. The first official declaration that priestly ordination was a condition to presiding at the eucharistic celebration did not occur until 1208.^{73/} By the middle ages, the priesthood was defined primarily in terms of the power of eucharistic consecration. 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. From the sixteenth century until Vatican II,

^{70/} / "Responses to Rome", *Commonweal*, January 26, 1996, p. 11. Raymond Brown concluded that "From the New Testament it appears that the clear conceptualization of the Christian priesthood came only after the destruction of the Jerusalem Temple in A.D. 70." "Bible reflection on Crises Facing the Church," (Paulist Press 1975), p.54, cited in Garry Wills, *Papal Sin*, (Doubleday 2000), p.112

^{71/} / Paul Philibert, O.P., "Issues for a Theology of Priesthood," *The Theology of Priesthood*, Ed. Goergen and Garrido (Liturgical Press, 2000), p.11, citing Raymond E. Brown, *Priest and Bishop: Biblical Reflections*, Paulist Press, 1970), p.13.

^{72/} / Id. at 14-15, citing Brown at pp. 21 and 41.

^{73/} / Richard P. McBrien, *Catholicism*, Study Edition (Harper&Row ,1981), p.803

"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."^{74/}

While tensions around various eligibility conditions for the ordained priesthood have been frequent and prolonged, and while 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 grappled with physical appearance and disease issues. In the Hebrew bible, the temple priesthood of Leviticus denied access to those Jewish men who had an infirmity such as blindness or lameness, or if he was disfigured or deformed, if he had an injured foot or arm, if he was a hunchback or a dwarf, if he had a disease of the eyes or of the skin, if he had a running sore, or if he was a eunuch. (Leviticus 21: 14-21)

The 1917 Roman Catholic Code of Canon Law barred from the priesthood hunchbacks, midgits, those who had no nose, no lips, had an ugly cancer on their face, or were without ears—unless the earless candidates could hide their deformity with hair.^{75/} The 1983 Code of Canon Law deleted the inventory of disqualifying infirmities, but discreetly requires the priest candidate to "possess... the physical... qualities that are appropriate to the orders to be received." Canon § 1029.

In 2002, the Vatican reported that it was working on a document reconsidering the fitness of homosexuals for ordination. In the aftermath of the priest-on-children sex scandal in the United States that exploded earlier in 2002, some U.S. bishops and some Vatican officials have concluded that "since the church considers homosexual orientation as 'objectively disordered' such people should not be admitted to the seminary or ordained."^{76/} 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

^{74/} / Thos. F. O'Meara, O.P. "The Ministry of Presbyters and the Many Ministries in the Church," *The Theology of the Priesthood*, (Liturgical Press, 2000) p. 75.

^{75/} / 1917 Code of Canon Law, Canon 984; *Canon Law Text and Commentaries*, Bouscaren et al, 4th Ed. (1963). Many of these same canonically disabling conditions were taught to result from conception while the mother was menstruating. Uta Ranke-Heinemann, *Eunuchs for the Kingdom of Heaven*, (Doubleday,1990, tr. Peter Heinegg)

^{76/} / Catholic News Service, *The Witness* (Dubuque, Ia., Nov. 10, 2002) p.1

sacrament of holy orders."^{77/} This developing Vatican position may conclude that the ordinations of homosexuals in the past were invalid, were in fact impossible, just like past ordinations of women. (Then again, the immense ramifications of such new doctrine may be enough to still this movement.) Into 2005, the Vatican has yet to respond to a question that has been before it for more than twenty years regarding the ordination of women as deacons. It has circulated a draft document that would continue the prohibition against women deacons. "The unstated fear 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."^{78/}

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.

INFERIORITY: THE DOCTRINAL BASIS FOR DENYING ORDINATION TO WOMEN

The church's male-only priesthood doctrine has been shaped by the church's 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. The church's ordained priesthood developed in post-biblical cultures that maintained that same perception of women as inferior. The development of the church's doctrine around an ordained priesthood required the imbuing of its priests with superior characteristics, and the compulsory denial of that office to those who were inferior by nature- such as all women, as well as deformed men, for e.g. midgets, hunchbacks and those afflicted with a cleft palate.^{79/}

Into the twenty-first century, the church's ordained priesthood has almost always been seen as a male-only office. And throughout this 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 universe, their common working assumption was the "subordination" of woman to man.^{80/} A fourth century commentary on Paul's Epistles to

^{77/} / Archbishop T. Bertone, the Secretary of the CDF has been quoted as saying that "persons with a homosexual inclination should not be admitted to the priesthood," and the papal spokesman, Navarro-Valls, has claimed that "people with these inclinations just cannot be ordained." *America*, December 16, 2002, p.4, and Fuller, "On 'Straightening Out Catholic Seminaries,'" p.8.

^{78/} / Phyllis Zagano, "Catholic Women Deacons?" *America*, February 17, 2003, pp. 9 at 11

^{79/} / 1917 Code of Canon Law, Canon 984; *Canon Law Text and Commentaries*, Bouscaren et al, 4th Ed. (1963).

^{80/} / The quoted texts concerning the Patristics below are from excerpts set out In the *Women's Ordination Network Internet Library*; "*Fathers of the Church*" and "*Medieval Theologians*", www.womenpriests.org. The subordination of woman to man quotation is attributed to Tertullian. The site is also source of material concerning Ambrosiaster, St. Irenaeus, Firmilian, St. Clement, St. John

Timothy and Corinthians I refers to the "manifestly inferior" nature of women, the commentator striking 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." 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.^{81/}

St. John Chrysostom, the fourth 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."

The inferior condition is frequently linked to Eve, the first woman, through whom sin was brought into the world. (For e.g., Tertullian- "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." Also St. Iraeneus, an early church bishop in Gaul.) If a woman was in a priestly role in a community, it was seen as evidence of the devil and heresy. 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. Women priests were found among patristic and medieval Montanist, Valentinian, Gnostic, Collyridian, Waldensian and Cathari" heresies."^{82/} Apparently the appearance of such 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

Chrysostom, Epiphanius, and St. Thomas Aquinas. Biblical sources, church fathers and other saints provide a wide spectrum of misogynist teachings expounded over the history of the church. See, for e.g. Uta Ranke-Heinemann, *Eunuchs for the Kingdom of Heaven*, (tr. Peter Heinegg) (Doubleday, 1990-English edition); Marvin L. Krier Mich, *Catholic Social Teaching and Movements*, (Twenty-Third Publications, 1998), pp.373-374; Garry Wills, *Papal Sin*, (Doubleday 2000), p.107-119; Elizabeth A. Johnson, "Imaging God; Embodying Christ," *What Church Woman Want, Catholic Women in Dialogue*, Ed. Elizabeth A. Johnson (Crossroads Publishing 2002), pp.49-50.

^{81/} Author, originally believed to be St Ambrose, of the oldest known commentary on St. Paul's letters, referred to as "Ambrosiaster."

^{82/} Avery Dulles, "Infallible: Rome's Word on Women's Ordination," *National Catholic Register* (Jan. 6, 1995).

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.

Panarion 79, §§ 2.

Epiphanius taught that "women are a feeble race, untrustworthy and of mediocre intelligence." *Panarion* 79, §§ 1. St. Augustine, the great fifth century bishop of Hippo, concluded that

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.

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. "

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, physically segregating their presence at services, requiring women to cover their heads in church, forbidding women from distributing the eucharist, from performing baptisms and from preaching, and ultimately eliminating the early church offices of deaconess and widow.^{83/}

Twentieth century regulations to 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 such cases- usually having to do with the consummation of marriages and annulments- it had to be corroborated by a male physician.^{84/} And, of course, women were not fit matter for the ordained ministry- the office of deacon, priest or bishop, the ontologically superior, pre-eminent personages of the church.

^{83/} In its 1976 *Declaration* rejecting the ordination of women, the Congregation for the Doctrine of the Faith acknowledged 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." § 6, citing Pope Paul VI's encyclical, *Acta Apostolicae Sedis* § 68 (1963).

^{84/} Most of the references to canon law's historical treatment of women are from Henning, "Canon Law and the Battle of the Sexes", *Religion and Sexism* _____ including the material about dispensing communion, treatment of deaconesses in early church, and special rules governing women doctors' testimony in marriage cases, at pp. 267-282

The inferior-by-nature belief has been a constant in the social and religious organization of the Christian community. The doctrine was proclaimed by the church Fathers, papally pronounced and published by church councils, originating in and/or reinforced by secular societies. 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.^{85/} Wives remained subordinate to their husbands throughout the middle ages, a period during which canonists hacked out restricted female rights around burial ground choices, marital partner choices and the right to demand sexual relations with a spouse.^{86/} St. Thomas Aquinas, first among the unequals of Western Catholic philosophers and theologians, saw women's inferiority as biological, social and devolving from God's creative plan. 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. Her status, her nature, her appearance was incompatible with the pre-eminence required of a eucharistic consecrator.^{87/}

In some geo-historical settings, women legally disappeared into their marriage. By the time of Blackstone's eighteenth century England, it was well established in English common law that when a woman married, and two became one under the gospel teaching, the one who survived in law was the man.^{88/} These were the social and religious principles and conditions under which women entered modern times. Periodically, reasons other than female inferiority were also offered in support of the male-only priesthood doctrine. 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.^{89/} The male-only doctrine was maintained by a historical tradition that taught that women were in the fundamental state of subjection to men.

^{85/} / See, for e.g., Gary R. Macy's article "The Church's Legacy of Mysogyny," *National Catholic Reporter*, April 25, 2003, p.17, analyzing the work of Dr. Ida Raming, the German theologian who was one of the seven women ordained in 2002, and then excommunicated.

^{86/} / Charles L. Reid, Jr., "Rights and Equality of Men and Women in Twelfth and Thirteenth Century Canon Law," *35 Loyola of Los Angeles Law Review* 471, (2002).

^{87/} / Thomas F. O'Meara, *Thomas Aquinas: Theologian*, (U. Notre Dame Press 1997) pp. 233-234.

^{88/} / For e.g., "[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 incorporated and consolidated into that of the husband." Blackstone, *Commentaries on the Laws of England*, Vol 1,442, (1765) as quoted in Boorstin, *The Mysterious Science of the Law*, p. 124 (Beacon Press, 1941) Blackstone was the great chronicler of the English common law.

^{89/} / William H. Shannon, "Tradition and the Ordination of Women", *America*, February 17, 1996, p.8

DEVELOPMENTS IN THE SOCIAL AND RELIGIOUS STATUS OF WOMAN

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 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.

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. Italian and French women did not secure the right to vote until the mid-1940s. The Swiss elected a woman mayor of Geneva in 1968, but she was not allowed to vote in Swiss federal elections until 1971. The continuing struggle of women to fully acquire human rights and status is one of the great legal and religious stories in history.

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 jargon are rejected. During the last generation, women have become deeply embedded in the public fabric of every Western nation, especially the United States. The venerable secular gender segregation around occupations and work has been mugged and rolled. In the course of that mugging, the gender-boxes formerly used for ascribing the human traits of rationality, leadership, objectiveness, nurturing, intuitiveness, aggressiveness-- they have all become mixed in the real-world marketplace. The shared humanity of male and female overwhelm the separateness of the sexes.^{90/}

Second, the ecclesiastical stereotypes have eroded. 19th and 20th century Catholic social teaching seldom separately mentioned women, including them only within the terms "man" and

^{90/} / "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 Assn. v. Guerra*, 479 U.S. 272, 289 (1987), to advance full development of the talent and capacities of our Nation's people. [n.7] 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." *U.S. v. Virginia*, 518 U.S. 515, 533-534 (1996)

"family." When they were identified, women were seen as dependent, child-like, and naturally "bound" to the home.^{91/} 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.'"^{92/} 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.^{93/} In the early 1960s, Vatican II's organization and liturgies publicly revealed the hierarchy's mind-set toward women. No women were included as participants, observers or consultants. During an early session, a reporter was actually denied communion at an early Council liturgy because she was a woman. 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. At mid-morning of her first meeting, Sister Luke and some 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. 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. 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."^{94/}

Vatican II documents and subsequent documents have moved the church 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." § 29 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.

There have been advances by women in the church since Vatican II. One development generated by the Council was an upgrading of the laity, which in the church includes all of the women. A rising tide lifts all boats. Pope John Paul II explains gender differences through a "theory of complementarity," both men and women are fully human in nature, but a human nature that "is possessed differently" by men than it is by women.^{95/} However, the hierarchy's

^{91/} / Krier Mich, *Catholic Social Teaching & Movements*, (Twenty-Third Publications, 1998), pp. 347-370. Krier 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." At p.349.

^{92/} / Id. at 349, citing an "Address to Girls of Catholic Action," April 24, 1943

^{93/} / Id. at p.350, referring to the encyclical *Pacem in Terris*, par. 41 (1963)

^{94/} / Murphy, "Creativity and Hope: Sister Mary Luke Tobin at Vatican II", *America*, Oct. 28, 1995, pp. 9, 10.

^{95/} / Sister Sara Butler, M.S.B.T. "Embodiment: Women and Men, Equal and Complementary,"

ambivalence toward and confusion about how women are human remains intact, and dominant. 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," and he is unclear whether or not women "can hold jurisdiction [i.e. governing authority in the church], and if so, under what conditions."^{96/} 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." Canon 129 § 1. The power of jurisdiction includes "legislative, executive and judicial powers." Canon 135 § 1.^{97/} Dulles' uncertainty reflects the 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. 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." That's the world. While women are a great "sign" for the church, they are a marianized sign, "with her [Mary's] dispositions of listening, welcoming, humility, faithfulness, praise and waiting." One of the things women will be waiting for is access to ordination and 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.^{98/}

What Church Women Want, Catholic Women in Dialogue, Ed. Elizabeth A. Johnson (Crossroads Publishing 2002), p.38

^{96/} / "[I]t remains to be shown" how their talents can be utilized if they are not eligible for the priesthood. "Further study may be needed to determine whether women can hold jurisdiction, and if so, under what conditions." *The Witness*, Dubuque, Iowa April 21, 1996, p.10. (Catholic News Service, Tracy Early) A tea-leaf development around this odd discussion took place on April 24, 2004 when Pope 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. If the new undersecretary is actually assigned tasks that required the exercise of "jurisdiction," it would seem that Cardinal Dulles' question is answered.

^{97/} / "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." Munley, Smith, Garvey, MacGillray & Milligan, *Women and Jurisdiction*, (LCWR Study, 2001)pp. 2-5; 22-35.

^{98/} / *Letter to the Bishops of the Catholic Church on the Collaboration of Men and Women in the Church and in the World*, May 31, 2004, citing John Paul II, Apostolic Letter *Ordinatio*

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, the "dog" doctrine, has been hidden in a closet— it has not died.

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

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 (Inter Insignores)*, concluding that women could not be ordained to the priesthood.^{99/} In May, 1994 Pope John Paul II issued an apostolic letter affirming the *Declaration*. 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. Almost completely ignoring its traditional doctrinal basis of female inferiority, they proposed substitute grounds for the doctrine.^{100/}

The Example of Jesus and the Apostles: New Testament Practices

Stabilizers insist upon a biblical base for a male-only priesthood. 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 apostles, and did not ordain female priests, even Mary.^{101/} Jesus is said to not have shared his culture's "Jewish mentality, which 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.^{102/} *Ordinatio Sacerdotalis* encourages the *Declaration's*

sacerdotalis (May 22, 1994): AAS 86 (1994), 545-548; Congregation for the Doctrine of the Faith, *Responsum ad dubium* regarding the doctrine of the Apostolic Letter *Ordinatio sacerdotalis* (October 28, 1995): AAS 87 (1995), 1114.

^{99/} / CDF's *Declaration on the Question of the Admission of Women to the Ministerial Priesthood*, (1976). It is often referred to as *Inter Insignores*, which is its first phrase, translated from the Latin as "Among the characteristics."

^{100/} / In U.S. constitutional litigation concerning laws that adversely affect women, replacement 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." *U.S. v. Virginia*, 518 U.S. 515, 533 (1996) (citations omitted).

^{101/} / *Declaration* §§10-13.

^{102/} / The male-only doctrine was said to reflect the very "Attitude of Christ." *Declaration* §§11-12.

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."¹⁰³/ The male-only doctrine was said to reflect the very "Attitude of Christ,"¹⁰⁴/ and the stabilizing forces represent that "[T]his [male-only ordination] was wanted directly by Jesus."¹⁰⁵/

Tradition

The CDF's *Declaration* also presented the male-only doctrine as reflecting the church's "Constant Tradition."¹⁰⁶/ The *Declaration* noted that the tradition developed in the early church and continues through the present. 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."¹⁰⁷/ 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 their spiritual direction."¹⁰⁸/ The bases, the accuracy and the authority of those conclusions are in contention.

The Male Icon Theory

Finally, the CDF's *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."¹⁰⁹/ Pope John Paul II and others have more recently sought to defend the male-only priesthood doctrine through an anthropology of gender-complementarity. Using trinitarian language, this approach proposes that men and women have

¹⁰³ / *Ordinatio Sacerdotalis*, § 2.

¹⁰⁴ / *Declaration*. It is the heading of *Part 2*.

¹⁰⁵ / *Rocky Mountain News*, Denver, Colorado, February 9, 1997, quoting Bishop Angelo Scola, then-head of the Vatican's Lateran University at a Vatican press conference

¹⁰⁶ / *Declaration*. It is the heading of *Part 1*.

¹⁰⁷ / *Declaration*, §7

¹⁰⁸ / *Declaration*, §6, citing *Acta Apostolicae Sedis* 68 (1976), pp.599-600; cf. *ibid.* pp.600-601.

¹⁰⁹ / *Declaration*, § 30.

an "identical nature" that each "possesses differently"^{110/} The male-priest and the female-mother exemplify ways in which this identical nature is possessed differently. Peter Steinfelds believes that "...complex theological reasoning about biblical imagery or *in persona Christi* is doomed to read like elaborate rationalizations for the status quo..."^{111/}

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."^{112/} First, the "attitude of Jesus" justification was rejected by the Pontifical Biblical Commission twenty-five years ago, and effectively resisted before and after that rejection.^{113/} Second, traditions, by their very nature, are developed. 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.^{114/} It was expressly recognized by the CDF "not [as] a demonstrative argument, but... [a clarification] ... by the analogy of faith." §25. Furthermore, the Incarnation is not a basis for classifying human beings according to gender; it's significance has never been taught as a gender-event.

STASIS AND MOVEMENT

Consistent with Cardinal Newman's theorem, conflict around the male-only doctrine continues, throwing off new stabilizing-preservation ideas and new development-reform ideas. The hierarchy attempts to prohibit dialogue around the doctrinal conflict. In the meantime, women are ordained, lay-persons hold priest-less eucharistic celebrations, and many present their

¹¹⁰ / Sarah Butler, M.S.B.T. "Embodiment: Women and Men, Equal and Complementary," *What Church Women Want, Catholic Women in Dialogue*, Ed. Elizabeth A. Johnson (Crossroads Publishing 2002), p. A2

¹¹¹ / *A People Adrift, The Crisis of the Roman Catholic Church in America* (Simon & Schuster 2003), p.298.

¹¹² / Augustine DiNoia, O.P., then-executive director of the U.S. bishops' doctrinal office, *National Catholic Reporter*, December 1, 1995, p.8. Dulles has said that "The so-called 'iconic' or symbolic argument.. .may be in need of refinement in order to increase its persuasive force." *The Witness*, Dubuque, Iowa, April 10, 1996, p.10, (Tracy Early, Catholic News Service)

¹¹³ / See, for e.g., Elizabeth Johnson, text to ftn.70 above, concerning Jesus, the apostles and the history of the priesthood; also the anthology *Women Priests, A Catholic Commentary on the Vatican Declaration*, edited by Leonard Swidler and Arlene Swidler, (Paulist Press, 1977).

¹¹⁴ / 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." *National Catholic Register*, January 6, 1996. Di Noia'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] Such 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."

developmental ideas in opposition. We have the hierarchy stating that the male-only priesthood is an irreformable doctrine, definitively taught in the voice of those who cannot commit error in such matters. Then we have the reformers, some of whom are convinced that compulsory celibacy will fall first, then women- just as inevitably- will be ordained.. 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.^{115/}

The stabilizers say there is no remaining issue. The case is closed. "For those who see with the eyes of faith, the matter is resolved."^{116/} But the reformers are like the Canaanite woman. They are not going to be driven away by insults or exile. They are not going anywhere until their daughters are acknowledged, and healed.

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

Church doctrine develops, including doctrine concerning the ordained priesthood. Furthermore, church doctrinal development is 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' legal system. It is a system that developed in response to a monarchy which viewed itself as God's instrument of governance. It is a system that said the King's religion 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— indeed, it is a system that said that the King is more of a citizen 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.

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 inferiority has been incremental. What has come to seen as a fundamental democratic right— the right to vote— was first achieved by women in various states before the Revolutionary War, then lost in several of those states after the Revolutionary War. Finally, in 1920, the Constitution of the United States was amended to

¹¹⁵ / Richard A. Schoenherr, *Goodbye Father*, (Oxford 2002) pp. 198-216

¹¹⁶ / Cardinal J. Francis. Stafford, *Statement on the CDF Responsum Regarding Ordination of Women*, November 17, 1995..(then Archbishop of Denver, Colorado).

include the Nineteenth Amendment, which gave women the right to vote. But just as the constitutional extension of the right to vote to African-Americans 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.^{117/} 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. Especially in the United States, the church has characterized the "right" to an abortion as societally condoned murder, the exercise of which is a grave sin.

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.^{118/}

No state shall...; ... deny to any person within its jurisdiction the equal protection of the laws.

The Clause is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985), citing *Plyler v. Doe*, 457 U.S. 202,216 (1982). 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 both substantive (for e.g., race, religion, gender, sexual orientation, disability) and procedural (for e.g., the development of multi-leveled "scrutiny" tests, applied proportionately to the right or discrimination involved).

^{117/} Most of these rights were acquired in the mid-19th century through the passage of Married Women's Property Acts by the various states, for e.g. Colorado Revised Statutes §§ 14-2-201,et seq. Several of these rights 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 or contract. *Daniels v. Benedict*, 97 F. 367 (8th Cir. 1899)

^{118/} 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 ~~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 terminate her pregnancy." *Roe v. Wade*, 410 U.S. 113, 154 (1973).

DEVELOPMENTS IN EQUAL PROTECTION ANALYSIS

Equal Protection's Purpose

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

..., the 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.^{119/}

Equal protection law developed out of legislative commitment to end slavery and its accouterments. It subsequently was expanded to other areas of discrimination, based upon 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.^{120/}

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.

¹¹⁹ / "Leaving Things Undecided," 110 Harv. L. Rev. 4, 67 (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 Education.*, 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." Ftn. 306

¹²⁰ / "Animus and Moral Disapproval," 82 *Minn.LRev* 833, 849 (1998), citing Sunstein, "Sexual Orientation and the Constitution," 55 *U. Chi.L Rev.* 1161, 1174 (1998) *Reed v. Reed*, 404 U.S. 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Schlesinger v. Ballard*, 419 U.S. 498, 507-508 (1975)

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.

Richard P. McBrien, *Catholicism Study Edition* (Harper & Row, 1981), p .1258

The United States is a young nation, but 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 Nation's 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 onetime 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 more broad than originally entertained. 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 principles and experiences address the church.

Text and Original Meaning of Equal Protection Clause

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.

The Slaughter-House Cases, 83 U.S. (16 Wall.) 36,81 (1873)

As we have seen, the Clause is short and "delphic" in character.^{121/} This brevity greatly assisted its adoption. There was broad agreement that government must treat people equally, but there was much diversity about the meaning of equal treatment.^{122/} Some saw equality as requiring

^{121/} "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." Laurence H. Tribe, *American Constitutional Law* (Foundation Press 2d ed. 1988), p.1514

^{122/} Mark G. Yudof, "Equal Protection, Class Legislation and Sex Discrimination." 88 *Mich.L.Rev.* 1366 at 1366-1367 (1990).

people and governments to behave consistent with a natural law that applied to people and governments. It was also seen as the recognition that African-Americans had the same natural rights as whites. Fourteenth Amendment promoters also relied upon Locke's social contract theory as a basis for the Equal Protection Clause, i.e. there is a social contract between the members of a community to obey community laws, based upon the equality of the members.^{123/} 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. Various motivations, intentions and understandings abounded, and one would be hard put to capture a four-cornered Equal Protection "original meaning." What was legislated was a broad principle that was thereafter developed within the Nation's history. "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."^{124/}

Historical Development of Equal Protection: Classes and Scrutiny

Implementation of an equal protection law is a process. The very nature of law requires that different acts have different consequences under the law. The U.S. culture and its political bodies continue to develop an understanding of the meaning of different treatment between persons, organizing rules that determine when different treatment is constitutionally permitted, and when it is not permitted. The process has not been limited by an "original meaning" or "original purpose" of the Equal Protection Clause. We know it came out of a Congress, where statutory purposes are multiple and often inconsistent, even incoherent. We know the protections afforded by the Clause have gone far beyond any original, expressed purpose, or understanding. The Scalia method—the constitutional text is the thing, and the original meaning of the text is the answer—has become a popular methodology, but it has not become the controlling judicial interpretive method.^{125/} Judge Noonan rejects the strict original meaning

¹²³ / Id. 1378. "Americans of 1866, like Americans of today, could 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." Citing William E. Nelson's, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (, 19_) p. 80; Also see Yudof at 1368-1370.

¹²⁴ / Id. Yudof at 1369

¹²⁵ / The "original meaning" school members 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.

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.^{126/} So while "original meaning" is the starting point for constitutional interpretation, the work doesn't end there. The hard work of interpretation also requires an understanding of other approaches to the text, the first of which is described by Professor Tribe as "constitutional structure," diction, word repetitions and documentary organizing forms (e.g., the division of the text into articles, or the separate status of the preamble and the amendments), for example, all contribute to a sense of what the Constitution is about. They are as "constitutional" as the Constitution's exact words.^{127/} Second, when interpreting the Constitution, Tribe identifies a disciplined obligation to raise and consider the Nation's values and ideals and commitments.^{128/} Third, Tribe recognizes the need to interpret 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*.^{129/} Tribe references Philip Bobbitt's shorthand "modalities" of constitutional interpretation, "history, text, structure, doctrine, ethos and prudence."^{130/}

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."^{131/} 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

Laurence H. Tribe, *American Constitutional Law*, Foundation Press (3rd Ed.2000), Vol. 1, p. **A5** (citation omitted).

^{126/} / "Reading the Constitution," 2004 Thurlow Gordon Lecture, Dartmouth College, as reported in *The Dartmouth Online*, April 27, 2004.

^{127/} / Tribe, above at p. 41.

^{128/} / *Id.* pp. 70-78.

^{129/} / *Id.* pp. 78-85.

^{130/} / *Id.* p. 87 citing Bobbitt, *Constitutional Interpretation* 26-27 (1991); *Constitutional Fate*, 93-167 (1982).

^{131/} / *Id.* p. 84, citing Robert C. Post, *Constitutional Domains: Democracy, Community, Management* (1995) at 32

that even improvident decisions will eventually be rectified by the democratic processes."^{132/}

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 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.^{133/} When "strict scrutiny" is invoked, such laws "will be sustained only if they are suitably tailored to serve a compelling state interest."^{134/}

And then there is gender.

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 US. 718 (1982); *Craig v. Boren*, 429 US. 190 (1976).

City of Cleburne v Cleburne Living Center, 473 US. 432, 440-441 (1985)

THE EQUAL PROTECTION CLAUSE AND RACE

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."^{135/} Because of its history, the United States brings a special insight to the church concerning the individual person's right to religious freedom, an insight developed through an early Amendment (1791) to its constitution. Similarly, the United States' laity's rejection of the male-only priesthood doctrine coincides with their experience and understanding of the United States' history of unjust, legalized discrimination- the adoption and enforcement of race-based,

^{132/} / *City of Cleburne v Cleburne Living Center*, 473 U.S. 432, 440 (1985)

^{133/} / *U.S. v. Carolene Products Co.*, 304 U.S. 144, 153 fn.4 (1938)

^{134/} / *City of Cleburne v Cleburne Living Center*, 473 U.S. 432, 440 (1985)

^{135/} / Noonan "Development of Moral Doctrine," *Theological Studies*, p.671, quoting Newman, *An Essay on Development of Christian Doctrine*, ed. C.P. Harrold (NY.:Longmans, Green, 1949) p.186.

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 620,000 people died. Out of that Civil War came Constitutional amendments, specifically a Thirteenth Amendment (1865) prohibiting slavery, a Fourteenth Amendment (1868), which set out an Equal Protection Clause prohibiting state action that denied any person the equal protection of the laws, and a Fifteenth Amendment that forbade the denial of the vote "on account of race, color, or previous condition of servitude."

In the wake of the race cases, the Equal Protection Clause has developed as a primary tool with which to test discrimination in other areas of human conduct, including discrimination against women. First, the fundamental law of this society has come to reject the tradition of women's inferiority. It now asserts the equality of man and woman before the law. Second, secular laws which make gender distinctions adverse to women are presumed to be illegal, and will be subjected to a high degree of scrutiny to determine whether or not such laws will be upheld. In those special circumstances, the presumption that tradition is connected to legality is turned upside-down. Discrimination— different treatment because of gender— is presumed to be "against" women, and not simply "about" women.

For almost one hundred years, the Fourteenth Amendment was developed in a manner that denied its original purpose. First, "private" segregation- which included housing, hotels, hospitals, restaurants, theaters, trains and buses- of colored persons, Negroes, mulattos was permissible, since such conduct did not involve the governmental "state action" prohibited by the Equal Protection Clause. Second, soon after race-slavery ended, a substitute cultural doctrine was employed to replace and restore slavery's social, political and economic rules of race. The "separate but equal" treatment of the races received its constitutional blessing from the United States Supreme Court in 1896 in *Plessy v. Ferguson*.^{136/} In 1890, Louisiana, far and away the most Catholic of the slave states, passed legislation requiring separate railway carriages for whites and "coloreds." 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. Mr. Plessy had an African ancestor, and Mr. Plessy was arrested and imprisoned.

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. 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. These laws of distinction between the races-- articulated as a natural law distinction by the majority of the Supreme Court justices-- "has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude," according to the majority opinion. While acknowledging the equality of all persons under the Constitution "without distinction of age or sex, birth or color, origin or condition," the *Plessy* opinion noted that

^{136/} 163 U.S. 537 (1896).

... when 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;
163 U.S. 537 at 544 (1896).

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."^{137/} Certainly, in 1896, it was self-evident, it was part of God's natural law- that women and colored men would not have the political powers, the human standing that were the natural right of white men. 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. 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. Finally, that 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 . It is common for the stabilizing forces, who seek to maintain the male-only priesthood doctrine, to adopt the *Plessy* Court's attitude. If women elect to experience the male-only priesthood teaching as a badge of inferiority, that's their unfortunate choice.^{138/}

The United States' "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, reviewed the fundamental rights that are core to each person under the United States' 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.^{139/} In reflecting upon

^{137/} 163 U.S. 537 (1896). 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, for e.g., Benedict Ashley, O.P., *Justice and the Church: Gender and Participation*, (Catholic U. Press, 1996). In the foreword, Father Ashley states that he "would have dedicated this book to my sisters in the Order of Preachers if I would have been sure that they would have felt honored by it." P. x.

^{138/} 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." CDF *Declaration*, (1976), § 30. It's not about inferiority anymore; it's now about fact differences around differing gender "functions and services." Cardinal Dulles would say that it never was about inferiority.

^{139/} See *Sweatt v Painter*, 339 U.S. 629 (1950); *Brown v. Bd. of Education*, 347 U.S. 483 (1954)

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. Sometimes "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine;" sometimes "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant 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." *Planned Parenthood v Casey*, 505 U.S. 833, 854-855 (1992).^{140/} Under this view of the Constitution, one of its characteristics is an openness, within history, to development. It is a viewpoint that is antithetical to the strict "original meaning" approach, under which constitutional law can become a subdivision of 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.

THE EQUAL PROTECTION CLAUSE AND GENDER

The experience of the U.S. church provides special insight into the universal church's conflict around the ordination of women priests. In the United States, the official doctrine of dark-race inferiority has been legally abolished. Now, after thousands of years of secular laws, church laws and social customs that proclaimed the inferiority of women, the culture and its laws are effectively challenging that inferiority assumption. Confronting racial discrimination provided a ready model for those who seek to challenge sexual discrimination, in the secular world and in the church.

Justice Ruth Bader Ginsburg traced the story of women under law and custom in her majority opinion in *U.S. v. Virginia*, 518 U.S. 515 (1996). She pointed out that the present-day law concerning the treatment of women has a past, a tradition. We know, she wrote, that the "skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history."^{141/}

The particular case involved the State of Virginia's refusal to admit women to its state-operated, venerable and prestigious military school, Virginia Military Institute. Virginia 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. The Court rejected both rationales. "Neither recent nor distant history" supported Virginia's claim that it was motivated by considerations of diversity.^{142/} Instead, Virginia's history teaches that her policy was motivated by a lengthy

^{140/} Justice O'Connor refers to such a ruling as "a mere survivor of obsolete constitutional thinking." *Planned Parenthood* at 857.

^{141/} At 532.

^{142/} At 536

tradition of discrimination against women in education, as well as other elements of public life—all based upon gender-class assumptions.

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, to medical schools and to other educational and professional opportunities. The Equal Protection Clause forbids the exclusion of qualified individuals based upon "fixed notions concerning the roles and abilities of males and females." [*U.S. v. Virginia* at 541, citing *Mississippi University for Women*, 458 U.S. at 725 in which a male had been denied access to a state-operated women-only nursing school.] 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.*¹⁴³ The gender discrimination facts shifted the burden of proof to the State, and made that burden a very heavy one— one requiring the State to meet a standard of "exceedingly persuasive" justification. *U.S. v. Virginia* at 533.

Until the early twentieth century, these same complementary principles of "fixed notions" about gender differences had been used to uphold U.S. 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. The present Vatican complementarity of the sexes position echoes this one hundred twenty-five year old United States Supreme Court case that today stands for archetypal, unconstitutional patriarchy. In denying women the right to practice law, this nineteenth century Supreme Court opinion 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. "

Bradwell v. State, 83 U.S. 130, 141 (1872), (Bradley, J. concurring)

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

The application of the special scrutiny methodology to church laws that distinguish against women provides a very different lens than Dulles' burden of proof placement.¹⁴⁴ /

¹⁴³ / *J.E.B. v. Alabama ex Rel. TB.* 511 U.S. 127 (1994).

¹⁴⁴ / A principal twentieth century Catholic theologian, Karl Rahner, S.J. concluded that the burden of

A special scrutiny examination ¹⁴⁵/ 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. It is an impossible burden to meet. Even the forces of stabilization acknowledge that the substitute justifications now advanced by the hierarchy— tradition, attitude of Jesus and a male-iconic priesthood nuptial analogy— present "an extraordinarily modest [case], from a theological perspective."¹⁴⁶/ A suspect-class, strict-scrutiny analysis would turn the tradition justification upside-down, as the tradition 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 women's humanity is "essentially a different mode of being human"¹⁴⁷/ — that retreat to the historical comfort of the inferiority basis may be the most dangerous to the church of any of its options.

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 inferiority of women.

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*

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. *Concern for the Church*, (Crossroads, 1981), pp. 40-43. 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.

¹⁴⁵ / In fact, this special scrutiny procedural doctrine has been advanced in theology, specifically the feminist theology of Elizabeth Schussler Fiorenza, as the "hermeneutics of suspicion." *See In Memory of Her* (Crossroads Publishing 1992; copyright 1983.)

¹⁴⁶ / Augustine DiNoia, O.P., then-executive director of the U.S. bishops' doctrinal office, *National Catholic Reporter*, December 1, 1995, p.8. Dulles has said that "The so-called 'iconic' or symbolic argument.. may be in need of refinement in order to increase its persuasive force." *The Witness*, Dubuque, Iowa, April 10, 1996, p.10, (Tracy Early, Catholic News Service)

¹⁴⁷ / Marie Vianney Bilgrein, "The Voice of Women in Moral Theology," *America*, December 16, 1995, p.15

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 of the seven women who were ordained in Europe in 2002 is procedurally complete, and all appeals have been rejected by the Vatican agencies.¹⁴⁸ / The 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.¹⁴⁹ / 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.

¹⁴⁸ / This includes Uta Ranke-Heinemann, the German theologian whose book, *Eunuchs for the Kingdom of Heaven: Women, Sexuality, and the Catholic Church*, is cited herein at ftn. 75.

¹⁴⁹ / / "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 via *NCR On Line Archives*.

