L. Martin Nussbaum, "Scandal and the Constitution,"
First Things (October 2003)

Let us stipulate from the beginning, as we lawyers say, that the Catholic scandal is fueled by a minority of priests who, mostly from the mid-1960s through the early 1990s, egregiously violated their ordination promises; by the bishops who reappointed known perpetrators; and by partisans of the left and the right now seeking to advance their pre-existing agendas for Church reform. As a result of certain bishops' failure to govern their dioceses responsibly, some state officials have stepped in to do so, and not without some cause. Yet this move by the state has grave implications for people of all faiths because it undercuts the long-established constitutional principle of Church Autonomy.

The constitutional principle known as the Doctrine of Church Autonomy is derived from the Religion Clauses of the First Amendment and articulated in over a thousand published precedents, including six United States Supreme Court opinions, which invoke and follow the 1871 Supreme Court decision, *Watson v. Jones*. These cases comprise a body of law in which the Religion Clauses structurally restrain government power over certain subjects--like the church-minister relationship, religious doctrine, and church communications--which are reserved to the church. The Constitution restrains government power when it insists that there are certain things government cannot do. Most citizens readily understand that the Supreme Court cannot impose a tax and that the Governor of Iowa cannot raise and support an army because the Constitution insists that such are the exclusive powers of Congress. The Constitution prevents the Supreme Court and Iowa's Governor from engaging in such activities even when Congress unwisely exercises its taxing or army-raising powers.

The precedents following *Watson* teach that Religion Clauses, and especially the establishment clause, structurally restrain government power over certain ecclesiastical matters in a similar fashion. *Watson* arose from a post-Civil War dispute in the Walnut Street Presbyterian Church in Louisville, Kentucky which had split the congregation over the issue of slavery. One faction followed the then-traditional Presbyterian Church teaching accepting slavery. The other, supported by the Presbyterian hierarchy, rejected slavery. Each faction wanted the church property for itself.

The Supreme Court resolved the case by rejecting England's Lord Eldon's Rule which would have given the church property to the faction following traditional church doctrine. It instead adopted a rule that required civil courts to defer to hierarchical church authority as identified in the church's polity. *Watson* held that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom or law have been decided by [the church hierarchy, the civil] legal tribunals must accept such decisions as final and as binding on them."

The *Watson* Court knew that its holding had "intrinsic importance and far-reaching consequences." It also understood that it had pronounced a rule restraining the power of government and, therefore, a doctrine limiting a civil court's subject matter jurisdiction. "No jurisdiction has been conferred on the [civil] tribunal to try the particular case before it. . . . The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference [and] it has secured religious liberty from the invasion of the civil authority."

Watson's Doctrine of Church Autonomy thereby ensures that when the church and the state are operating within their respective spheres, neither is subjugated to the other. It recognizes six subject matters in which churches, whether they are wise or foolish, determine

their own affairs and are not subject to intervention by the government. These include: 1) church splits and the resulting disputes over church property and ministry assignments, 2) disputes between ministers and churches, 3) disputes concerning the discipline of church members, 4) claims arising from or related to church communications, 5) claims against clergy for malpractice or breach of fiduciary duty, and 6) claims against churches or church officials for negligent hiring, assignment, and supervision of ministers.

In the church-split cases, the United States Supreme Court has recognized that it must defer to the church's own hierarchy even when the hierarchy teaches a gospel of slavery or when communist governments co-opt the patriarchates of Orthodox churches. In church-minister disputes, over two hundred appellate courts have declined jurisdiction even when the defendant churches had breached ministers' contracts, violated their civil rights, and injured them through tortious conduct. Neither may civil courts hear claims of church members alleging that their churches injured them by defamation, invasion of privacy, or intentional infliction of emotional distress in the course of church disciplinary processes.

The clergy malpractice cases are an important example of the application of the Doctrine of Church Autonomy. These cases typically arise when a parishioner is injured by a pastoral counseling relationship as, for example, when a pastor does not refer a suicidal young man to a therapist and the parishioner then kills himself, or when a minister takes sexual advantage of a woman seeking help with her failed marriage. Every court to consider such claims has rejected them because the First Amendment does not permit the government to define the duties of a "reasonably prudent" pastor as is required in professional malpractice cases. Nineteen states have rejected clergy malpractice claims. None have upheld them.

Church Autonomy law recognizes that civil courts also have no jurisdiction over church communications regardless of whether they take the form of preaching, creeds, tracts, congregational meetings, defamatory statements regarding ministers or members, penitential communications, pastoral counseling, statements before or by ecclesiastical tribunals, and church personnel files. The Fifth Circuit, for example, dismissed a suit in which the Equal Employment Opportunity Commission simply sought to force the Southwestern Baptist Theological Seminary to disclose demographic information about its faculty.

Courts in twelve states recognize that the First Amendment bars civil courts from determining standards for "reasonably prudent" bishops, district superintendents, or others with authority over clergy and ministers. These courts recognize that they may not hear claims arising from the discipline, oversight, or appointment of a minister, including the claim that a denomination or diocese negligently hired, assigned, and supervised a minister. The 1995 Wisconsin Supreme Court, for instance, reasoned that the First Amendment prevents the courts "from determining what makes one competent to serve as a Catholic priest since such a determination would require interpretation of church canons and internal church policies and practices."

Even though the Catholic scandal has placed the greatest pressure on whether Church Autonomy law precludes judicial oversight over how a church oversees, supervises, and disciplines its clergy, Washington and Massachusetts appellate courts reaffirmed the viability the autonomy doctrine even after the unprecedented adverse press coverage of 2002. In August 2002, the Massachusetts Supreme Judicial Court held, in *Hiles v. Episcopal Diocese of Massachusetts,* that the First Amendment deprived the civil courts of jurisdiction "to probe into a religious organization's discipline of its clergy." In its September 2002 decision, *S.H.C. v. Lu*,

the Washington Court of Appeals likewise dismissed on First Amendment grounds, a claim that a Buddhist Temple negligently retained and supervised a grandmaster who convinced a follower that he could "save her life" and cure her headaches through a "Twin Body Blessing" which required her to have intercourse with him. Even though there was evidence that the monastery had notice of the manipulative conduct, the court reasoned, "we can see no way that a civil court could avoid interpreting the above religious doctrine in determining whether the Temple was liable for negligent supervision and retention."

The Catholic scandal has unfortunately provoked an alarming aggression by some government officials to use state power in ways that trample these constitutional principles. It is an old story. From 1855 to 1890, thirty-seven states, fearful of the "Catholic menace," passed "Blaine Amendments" to their state constitutions which sought to ensure that only public schools, then dominated by the Protestant culture and religion, would benefit from government funding. The 1922 Oregon legislature and statehouse controlled by Klansmen and Scottish Rite Masons all but forbade private schools in Oregon, so that the common schools might "Americanize the mongrel hordes." Today, prosecutors, legislators, and even a few judges are ignoring *Watson* and its progeny through the use of grand juries auditing diocesan administrations, legislatures regulating pastoral communications, and courts determining professional standards of care for bishops and other church officials.

For example, since January 2002, state and local prosecutors have convened over eighteen grand juries for the purpose of investigating Catholic dioceses including Manchester, Rockville Centre, Los Angeles, Boston, St. Louis, Louisville, Phoenix, Cincinnati, and Philadelphia. While grand juries are invested with extraordinary power including the ability to subpoena witnesses and documents, they are not above the Constitution and the First

Amendment's limitation on government power. Many of these grand juries have, nevertheless, issued scores of subpoenas, reviewed thousands of confidential internal church documents, and acquired sworn testimony from hundreds of church representatives including bishops, vicars general, and even the secretaries who served them.

Earlier this year, the Suffolk County Grand Jury issued an 181-page report on its investigation of the Diocese of Rockville Centre in New York. This grand jury boasted that it had issued fifty-one subpoenas, "heard testimony from ninety-seven witnesses," and thereby acquired "unprecedented access to thousands of pages of records, memos, notes, and other confidential documents." The documents it reviewed included the personnel files and canonically confidential archives for forty-three priests as well as privileged correspondence and reports from diocesan attorneys and mental health professionals.

Even though a New York grand jury's function is limited to investigating crimes and giving reports regarding misconduct of "public servants," the Suffolk County Grand Jury described and criticized the diocese's practices regarding the quality of its seminary formation process, its internal communications, its ministry to victims, and its defense and settlement of civil cases. It even published the amount of money that the diocese had accumulated to settle future cases. The grand jury admitted that its criticisms had nothing to do with criminal violations by the diocese when it issued no indictments and concluded "that the conduct of certain diocesan officials would have warranted criminal prosecution but for the fact that existing statutes are inadequate." The translation for this circumlocution is simply that the diocese and its officials violated no criminal statutes.

Absent violations of law, the grand jury then issued a series of moral and religious indictments of the diocese: "The history of the Diocese . . . demonstrates that as an institution [it

is] incapable of properly handling issues relating to the sexual abuse of children by priests"; the "response of . . . the diocesan hierarchy . . . was not pastoral"; "victims were betrayed by the diocesan hierarchy"; and the diocese's interpretation of the child abuse reporting statute was "callous in view of a priest's responsibility to minister to the people." Whether these criticisms are apt is not the point. The point is that respect for constitutional principle precludes a government body from pronouncing on whether a church wisely supervised its clergy, from declaring that the church is immoral and unpastoral, and from, as the Suffolk County Grand Jury did, making twenty-one legislative proposals to regulate churches. Having crossed the boundary between church and state, it is a particular concern that this grand jury, like the New Hampshire grand jury that investigated the Diocese of Manchester, proposed a mechanism by which it might repeat such church audits in the future.

In the final paragraph of its report, the grand jury stated that it was "mindful of the constitutional principle of the separation of church and state." If this grand jury was mindful of the constitutional principle, it certainly did not observe it. The author of the grand jury report understood that, because the diocesan officials had not violated any criminal statutes, the report was primarily a moral condemnation of diocesan practices. The opening sentence makes this clear. It quotes canon law as its true indictment: a "diocese is a portion of the people of God which is entrusted for pastoral care to a bishop." But the grand jury has no authority to enforce church law. The grand jury's message from this opening sentence to the end of its report was that the bishop of the Diocese of Rockville Centre and those who assisted him were bad pastors and religious hypocrites. Its mindfulness of the constitutional principle did not slow its exercise of government power over the church-minister relationship, confidential priest personnel files,

and the professional duties of a bishop as regards his priests--subject matters which the First Amendment places beyond the government's jurisdiction.

Similar lines have been crossed by the legislative branch of government. A number of state legislatures--including those in Iowa, Colorado, Virginia, Kansas, Massachusetts, and New York--have considered making their child abuse reporting statutes more comprehensive by identifying clergy as mandatory reporters, by making the duty to report trump the penitential communications privilege, or by requiring reports even when the victim is no longer a child.

Even though the bishops committed in the Dallas Charter of 2002 to report every instance in which a priest is suspected of sexually abusing a minor, legislative imposition upon clergy of child abuse reporting obligations creates a constitutional problem almost never considered by legislators.

Reporting statutes generally require certain professionals to report instances of reasonably suspected "child abuse or neglect." Yet "child abuse or neglect" includes far more than the physical or sexual abuse of a minor. Many law enforcement officials interpret this language as also including the failure to provide medical care, or the failure to provide adequate supervision, as well as the causing of emotional distress. Because of their positions of trust and confidence, pastors know the troubled families in their congregations. They know of drinking problems, illnesses, financial difficulties, and emotional stresses. They learn of such circumstances through a variety of church communications including prayer requests, requests for pastoral counsel, penitential communications, and even church gossip. They know of parents who have wounded their children with harsh words and parents who have left their children unattended for short periods of time. One pastor told me that he served a poor Hispanic congregation, many of whose members were illegal immigrants who never sought medical care for their children for fear of

deportation. Many pastors, youth ministers, elders, and parishioners effectively intervene to help such troubled families. The constitutional problem arises when the government defines a pastor's obligations as requiring him to disclose pastoral communications. As the pastor who serves the Hispanic congregation stated, "I cannot minister to my flock if they know me as a government snitch."

Then there is the issue of defining bishop malpractice. Early in 2002, the Attorney General of Massachusetts announced that the cardinal archbishop of Boston should consult with him before the archbishop made any future priestly assignments. While he eventually retreated from this statement, most of the civil lawsuits being filed against Catholic dioceses contain similar contentions in the form of claims that a diocese should be liable for the negligent hiring, assignment, supervision, and retention of priests who sexually abused minors. Both the statement of the Massachusetts Attorney General and the claims made by the victims' attorneys seek government oversight over the church-minister relationship. Courts in Colorado, Louisiana, Maine, Minnesota, Missouri, New York, Texas, Washington, Wisconsin, and Wyoming have (properly) rejected such claims on First Amendment grounds. Other courts, however, have made findings that have the effect of handing to government the final say over who shall preside at worship, preach the Gospel, and inculcate the faith.

When this constitutional boundary is breached, a judge or a jury effectively don the miter and decide which prior failings are disqualifiers for future ministry. Some say prior sexual abuse of a minor is one such failing, but it is just the beginning. As early as 1993 the Colorado Supreme Court held in *Moses v. Diocese of Colorado* that a seminarian with low self-esteem and a history of depression should have been disqualified from serving as an Episcopal priest, even though he had never engaged in any prior sexual misconduct. One wonders if a church burdened

by such oversight would have been permitted to hire such sinners (and future saints) as St. Peter, St. Paul, and St. Augustine.

Some public officials, in trying to fix what they incorrectly perceive as an ongoing problem, have given inadequate reflection as to whether the Constitution permits the government to audit pastoral assignments, regulate pastoral communications, or define a bishop's duties toward his priests. When the media's fixation on the Catholic scandal subsides, we can be confident that the Church will still be standing. Let us hope that the First Amendment will be as well.

L. Martin Nussbaum is an attorney in Colorado Springs who advocates on behalf of a variety of churches and denominations.