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Separation, Neutrality, and Clergy Liability for Sexual Misconduct

*William P. Marshall**

Immediately after a church service, a cleric approaches a woman congregant (whom he knows only through her attendance at church services) and asks her to meet with him in his church office. During that meeting, he raises with her the importance of their faith and religious tradition and tells her that if she were a true believer, she would agree to give him physical comfort in order to provide him the strength necessary to pursue his religious mission.[1] *She agrees to the sexual relationship. Some time later, she develops anxiety and other psychological ills as a result of her guilt and stress surrounding this relationship. Eventually, she sues him in civil court for violating his fiduciary duty to her as her minister. Should the court recognize her claim, or should her action be dismissed as violative of the religion clauses of the First Amendment?*

I. INTRODUCTION

The issues raised by the foregoing hypothetical are as intricate and as troubling as any that exist in the area of law and religion.[2] Whether, or when, clergy and religious institutions should be liable for sexual misconduct[3] is a question as politically charged as it is complex, involving matters as diverse as defining the scope of vicarious corporate liability, mapping the constitutional boundaries in the relations between church and state, and exploring the power

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1. The facts of this hypothetical are loosely based upon some of the events depicted in the fictional motion picture *The Apostle* (Universal Pictures 1997).

2. I use the example of a male cleric and a female congregant in this Article, although the same legal issues could arise if the gender roles were interchanged .

3. The use of the term "misconduct" in this regard may be misleading. "Misconduct" assumes that the actor has engaged in wrongdoing and in that sense appears to anticipate the result of our inquiry: has the cleric done something actionable? The use of "misconduct" in this Article, however, is not intended to convey a legal conclusion but is intended to describe only conduct that is morally or ethically suspect.

imbalances inherent in consensual sexual relations between group leaders and followers. There are no easy ways to balance the many competing interests at stake, and there are no easy answers.

Professors Ira C. Lupu and Robert W. Tuttle, however, take on the considerable challenges posed by the clergy and church sexual misconduct question in their remarkable paper, *Sexual Misconduct and Ecclesiastical Immunity*.[4] It is an outstanding work. Despite the difficulties inherent in their project, Professors Lupu and Tuttle address the numerous issues at stake with exceptional dispassion and rigor, and they do not shy away from making the hard decisions. Their solutions, I am sure, will not fully satisfy any of the competing interests involved.[5] No one, however, will fairly be able to criticize the power and honesty of their arguments.[6]

Nevertheless, one of the matters over which Professors Lupu and Tuttle are likely to generate criticism is their response to the question posed in our introductory hypothetical—should the civil courts recognize a breach of fiduciary duty claim for sexual misconduct against a cleric brought by one of his adult congregants?[7] To Professors Lupu and Tuttle, the answer is no (unless the cleric is acting, in effect, as a secular therapist)[8]—on the basis of what is,

4. Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789.

5. Those pursuing misconduct claims against clergy and religious institutions will likely find the authors' approach too protective of religious interests. *See, e.g.*, Zanita E. Fenton, *Faith in Justice: Fiduciaries, Malpractice and Sexual Abuse by Clergy*, 8 MICH. J. GENDER & L. 45 (2001); Janice D. Villiers, *Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship*, 74 DENV. U. L. REV. 1 (1996). Those defending clergy and religious institutions are likely to believe that the authors' approach will too readily permit liability. *See, e.g.*, Mark E. Chopko, *Stating Claims Against Religious Institutions*, 44 B.C. L. REV. 1089 (2003); Patrick J. Schiltz, *The Impact of Clergy Sexual Misconduct on Religious Liberty*, 44 B.C. L. Rev. 949 (2003).

6. Actually, the fact that Professors Lupu and Tuttle are likely to please no one is only a testament to the integrity of their thinking and the difficulty of their mission. Law and religion issues do not lend themselves to easy answers. Religion clause jurisprudence is beset with inherent contradiction—from its intrinsic tension between the First Amendment's Free Exercise and Establishment clauses to its inherent irony that merely setting forth a constitutional definition of "religion" can run afoul of the first amendment values at stake. One should therefore expect that a balanced assessment of the issues surrounding the liability of church and clergy for sexual misconduct will not lead to one-sided results but would rather reflect the contradictions that pervade religion clause jurisprudence generally.

7. Lupu & Tuttle, *supra* note 4, at 1832.

8. *Id.* While the authors would allow liability in circumstances where the cleric has acted in the capacity of a therapist or counselor, the key to liability for the authors is that "[a]

essentially, a jurisdictional ground. They contend that submitting the clergy-congregant sexual misconduct issue to civil courts violates structural concerns of church-state separation[9] because it requires judges to investigate the religious significance of the clergy-congregant relationship and therefore improperly enmeshes the civil courts in resolving internal church issues such as the meaning of a sect's theology or the nature of its polity.[10] Such matters, according to Professors Lupu and Tuttle, are simply beyond the civil courts' competence.[11]

Professors Lupu and Tuttle's conclusion that clergy should not be liable for sexual misconduct with adult congregants is, of course, controversial in result. Some courts and commentators, for example, have taken precisely the opposite view and have suggested that fiduciary liability may arise from the religious quality of the clergy-congregant relationship.[12] The authors' reasoning, however, is also controversial because it is based on a premise that is the exception in contemporary religion clause jurisprudence.[13] Generally, as Lupu and Tuttle note,[14] First Amendment law posits that religion and nonreligion are indistinct for constitutional purposes (the "neutrality" or "equality" model).[15] Accordingly, the central

fiduciary relationship between clergy and congregant must be grounded in something other than its religious character." *Id*. At 1828.

9. For purposes of brevity, I will refer to this theory as that of "structural-separation."

10. *Id*. at 1820–32.

11. *Id*. at 1825.

12. *See* F.G. v. MacDonnell, 696 A.2d 697 (N.J. 1997) (allowing a sexual misconduct claim against a cleric based upon breach of fiduciary duty); Fenton, *supra* note 5 (arguing that clergy should be liable in such circumstances); Villiers, *supra* note 5 (same).

13. As will be discussed, Professors Lupu and Tuttle's approach is also controversial in its claim that it is based on jurisdictional concerns and therefore absolute in application. *See infra* notes 39–66 and accompanying text.

14. Lupu & Tuttle, *supra* note 4, at 1802.

15. *Id*. at 1802–03; Ira C. Lupu & Robert W. Tuttle, *The Distinctive Place of Religious Entities in our Constitutional* Order, 47 VILL. L. REV. 37, 78–79 (2002) (noting that neutrality has become the dominant mode of religion clause analysis). Identifying the problems associated with according religion a distinct legal status has also been a major part of my own work. *See* William P. Marshall, *What Is the Matter With Equality? An Assessment of the Equal Treatment of Religion and Non-religion in First Amendment Jurisprudence*, 75 IND. L.J. 193 (2000); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991); *see also* Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994); Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555 (1998); Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341 (1999).

constitutional inquiry is whether religion and nonreligion are being treated equally with respect to the matter at hand.[16] Thus, in the case of the clergy-congregant sexual misconduct issue, the neutrality model would simply inquire whether leaders of nonreligious organizations would be subject to liability for similar conduct with their members. Professors Lupu and Tuttle's structural-separation model, however, is premised on the notion that religion should be considered constitutionally distinct with respect to clergy-congregant sexual misconduct cases. How a neutrality analysis would resolve such cases is therefore irrelevant to their analysis. Rather, it is a competing way to understand the question.

Professors Lupu and Tuttle are on solid ground in noting that in some areas the Court continues to treat religion and nonreligion as constitutionally distinct[17] and that the movement to the religion/nonreligion equality model has been "incomplete."[18] They are also correct in their assertion that matters requiring state mediation of internal religious matters have generally been considered an appropriate exception to the neutrality model.[19] That

16. Thus, in Free Exercise and Free Speech cases, the Court's central inquiry has been whether religion has been singled out for disfavored treatment. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (considering the disfavored treatment of religion under free exercise); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) (considering the disfavored treatment of religion under free speech). Meanwhile, in the Establishment Clause arena the question has been whether religion has been improperly singled out for favored treatment. *See* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1 (1989). Religion/nonreligion neutrality also comes up in the Establishment Clause cases that challenge programs that include religious beneficiaries among their classes of eligible participants. In those cases the Court has tended to uphold such programs on neutrality grounds even though they provide some subsidy to religious endeavors. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

17. Lupu & Tuttle, *supra* note 4, at 1803–04. For example, as the authors point out, the Court has applied a strong, nonneutral separationist approach to cases involving state-sponsored religious activity in public schools. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Lee v. Weisman, 505 U.S. 577 (1992); Engel v. Vitale, 370 U.S. 421 (1962).

18. Lupu & Tuttle, *supra* note 4, at 1803. One need look no further than *Locke v. Davey*, 124 S. Ct. 1307 (2004), decided this past term, holding that a state could constitutionally exclude theology students from a scholarship program for gifted students, to find positive proof of this assertion. As Justice Scalia noted in dissent in that case, the Court, in upholding the program, made "no serious attempt to defend the program's neutrality." *Id.* at 1318, (Scalia, J., dissenting).

19. Lupu & Tuttle, *supra* note 4, at 1803–04. For example, even as the Court was holding that the Free Exercise Clause did not require religious adherents to receive special exemption from neutral rules of general applicability, it favorably cited the cases prohibiting civil courts from taking sides in religious disputes. *See* Employment Div. v. Smith, 494 U.S. 872, 877 (1990) (citing Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian

said, however, there are significant considerations that suggest that the clergy-congregant sexual misconduct issue is not the type of matter that is properly outside of neutrality's ambit.[20]

This Article will discuss whether Professors Lupu and Tuttle are correct in their assertion that clergy should not be subject to liability for misconduct with their adult congregants and whether the authors applied the appropriate construct in reaching this result. It concludes that while the authors reached the correct result, their reliance upon a constitutionally based structural-separation principle is misguided. Rather, the conclusion that clergy should not be subject to liability for misconduct with their adult congregants is more appropriately reached through the application of a neutrality model, which would suggest that sexual misconduct in clergy-congregant relationships is not actionable because current law does not subject secular leaders to similar liability for sexual relations with their followers. As we shall see, more may turn on which approach is used than simply the recognition that there can be multiple ways to achieve a common result.

Part II of the Article introduces the issue by discussing some of the reasons that support holding clergy liable for sexual misconduct with adult congregants in scenarios similar to our opening hypothetical. Part III presents Professors Lupu and Tuttle's thesis that principles of structural-separation prohibit civil courts from entertaining these types of sexual misconduct actions and raises some preliminary concerns about the authors' approach. Part IV first analyzes the sexual misconduct issue under the neutrality model and demonstrates how this approach also leads to the result that clergy should not be found liable to their adult congregants for sexual misconduct. It then raises some of the problems inherent in the neutrality approach. Part V compares the two approaches and argues that the neutrality model offers the better alternative for resolving

Church, 393 U.S. 440, 445–52 (1969); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 95–119 (1952); Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708–25 (1976)); *see also* Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871).

20. The authors themselves offer a nod in this direction when they write: "We have searched diligently and have found no decisions in which courts have deemed leaders of non-religious voluntary associations to stand in fiduciary relationships with adult members of the association. If, as may be the case, the law is treating religious leaders differently, is such a disparity justified?" Lupu & Tuttle, *supra* note 4, at 1826.

clergy-congregant sexual misconduct issues. Part VI offers a brief conclusion.

II. THE CASE FOR CLERGY LIABILITY FOR SEXUAL MISCONDUCT WITH ADULT CONGREGANTS

Although most consensual sexual relationships between adults are not actionable,[21] there are exceptions. Therapists,[22] physicians,[23] and divorce lawyers[24] can be subject to civil liability (as well as professional sanctions) for engaging in sexual relations with their patients or clients.[25] There is, obviously, a common theme with respect to these types of relationships: In all the instances noted above, there is a power imbalance between the two parties to the relationship.[26] One party comes into the relationship because she needs help with a particular matter; the other comes into the relationship because he has the expertise and ability to provide that help. One party provides confidential information about herself; the other party discloses no similarly revealing details. The first party, because of her needs, is vulnerable; the second party, because he is the source of assistance, is in control.

Clergy-congregant relationships can reflect a similar imbalance even when the relationship does not involve one-on-one or small group counseling. People seek religion to find meaning, comfort,

21. Hertel v. Sullivan, 633 N.E.2d 36, 39 (Ill. App. Ct. 1994).

22. *See* David M. Dince, *Malpractice Actions Against Therapists by Patients Alleging Sexual Relations*, N.Y.L.J., Mar. 9, 1994, at 1.

23. The liability of physicians to their patients for their sexual relationship is not categorical and will generally depend upon the degree the relationship involves therapeutic counseling. *See* Atienza v. Taub, 293 Cal. Rptr. 454, 457 (Cal. Ct. App. 1987) (noting that a sexual relationship between physician and patient will provide "a basis for a malpractice action only where the patient has alleged that the physician induced sexual relations as part of the therapy").

24. Doe v. Roe, 681 N.E.2d 640, 650–51 (Ill. App. Ct. 1997) (stating that a claim against an attorney for breach of fiduciary duty by coercing the client into a sexual relationship is an actionable claim).

25. Some states may even impose criminal liability for such action. *See, e.g.*, COLO. REV. STAT. ANN. § 18-3-405.5(1)(a) (West 2003); MINN. STAT. ANN. § 609.345(h)–(j) (West 2003). *See generally* Michael T. Barruso, *Sexual Abuse by Psychotherapists: The Call for a Uniform Criminal Statute*, 17 AM. J.L. & MED. 289 (1991) (noting the extent of civil and, in some states, criminal liability for such transgressions by physicians and calling for greater criminal accountability).

26. *See* D.E.M. v. Allickson, 555 N.W.2d 596, 604 (N.D. 1996); Fenton, *supra* note 5, at 58–67; Villiers, *supra* note 5, at 46–48.

and moral guidance, and clerics are the voices through which the religion advises its adherents on these matters. Moreover, because the existential matters addressed by religion are among the most troubling and consequential components of the human condition,[27] religious adherents often look to clerics to provide some clarity in an otherwise incomprehensible universe.[28] The cleric, accordingly, can touch the deepest needs of his congregants even when speaking to them only from the pulpit. This is not to say that all religious believers are vulnerable and all clerics are seen as all-powerful to their followers, but certainly in most traditions[29] the laity will look up to those holding religious office as having religious insights and understanding that they do not possess. Thus, even though a cleric speaking from the altar or casually talking to a congregant, as in our opening hypothetical, may not have been entrusted by that congregant with the personal knowledge that a patient provides to her therapist, the fact that he will be seen as working in the service of God may nevertheless provide him with an extraordinary influence.

The power imbalance between cleric and congregant, moreover, is not easily overcome. Certainly, congregants, if they choose, can separate the man from the cleric in the way they react to his actions and supplications. But the power of faith, for many, may not always be so easily divisible. The entreaty of the cleric in our opening hypothetical—that he needs the female congregant's physical comfort to help him fulfill their religion's mission—may not be a request that can easily be turned down by someone deeply committed to her church and religion. She will want her religion to succeed. She will not want to believe that her religion is being led by someone who would choose to exploit her. The trust she extends to her cleric, therefore, may not be all that different than the trust extended by the patient to her therapist.

27. *See* RUDOLPH OTTO, THE IDEA OF THE HOLY 59 (John W. Harvey trans., 2d ed. 1950) (describing humanity's existential fear as "the starting-point for the entire religious development in history").

28. *Cf.* PETER L. BERGER, THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION 58 (1969) (noting that humanity's need for meaning may become "even stronger than the need for happiness").

29. Some religions, of course, do not have this sort of hierarchy. The Quakers, for example, subscribe to "a sort of radical equality of relationship among church members." Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391, 405 (2000).

III. CLERGY LIABILITY FOR SEXUAL MISCONDUCT UNDER THE LUPU/TUTTLE STRUCTURAL MODEL

A. The Lupu/Tuttle Position

Professors Lupu and Tuttle do not contest the point that clergy may exercise inordinate power over congregants in certain instances and that clerics may be able to use that power for sexual exploitation. Nevertheless, they conclude that absent any indicia of a counseling or other similar, nonreligiously-based professional relationship, a member of the clergy should not be found liable for any sexual misconduct with one of his adult congregants. Importantly, the authors do not base this claim on ecclesiastical immunity premised on the defendant's role as a religious actor.[30] Rather, Professors Lupu and Tuttle base their conclusion upon the structural principle they perceive as grounded in the Establishment Clause; specifically, that the state may not adjudicate matters involving religious polity or theological judgment.[31] Accordingly, the cleric's defense to the civil claims based on sexual misconduct is jurisdictional. Because some of the elements of these actions require the mediation of internal religious matters, the civil courts have no competence to decide the issues involved.

Working from this premise,[32] the authors are able to explain why their theory would reject a plaintiff/congregant's claim for breach of fiduciary duty.[33] They contend that a fiduciary breach claim could

30. Lupu & Tuttle, *supra* note 4, at 1816–19.

31. *Id*. For a similar view of this restraint, see generally Carl H. Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J.L. & POL'Y 445 (2002).

32. The structural-separation principle also allows Professors Lupu and Tuttle to quickly dismiss the argument that sexual misconduct with parishioners may subject a cleric to an action for clergy malpractice. The problem with such a theory, they explain, is that, like all malpractice claims, it would require inquiry into whether the defendant breached his duty of care. The problem, however, is with how a court is to determine what constitutes reasonable care by a cleric in the pursuit of his calling. Such an inquiry, the authors contend, with strong precedential support, would improperly require the state to make judgments that can only be made from within the religious tradition. Lupu & Tuttle, *supra* note 4, at 1816 (citing Nally v. Grace Cmty. Church, 47 Cal. 3d. 278 (1988)).

33. The authors identify the elements required to establish a fiduciary relationship as follows: "The vulnerability of one party to the other which results in the empowerment of the stronger party by the weaker which empowerment has been solicited or accepted by the stronger party and prevents the weaker party from effectively protecting itself." Lupu & Tuttle,

not be constitutionally applied to the clergy-congregant context for two reasons. First, one element of the action, determining the plaintiff's vulnerability to the cleric, would necessarily require a prohibited inquiry into the extent to which this vulnerability was based on her religious faith.[34] Second, because fiduciary theory requires that both parties must intend to enter into a fiduciary relationship, a court would need to examine the parties' religious understanding of their relationship in order to determine whether there has been the requisite intent.[35] Such an inquiry would again require a forbidden investigation by the civil court into religious meaning.[36]

Professors Lupu and Tuttle do not contend that a cleric should never be found liable to a congregant for sexual misconduct; indeed, they argue that liability is appropriate when the sexual misconduct arises from a counseling relationship between the cleric and congregant that takes on attributes similar to a secular therapist-patient relationship.[37] Thus, liability may be found in circumstances when, for example, the clergyman has undergone training in therapy, held himself out as a qualified therapist, and induced a patient to rely on his expertise.[38] Similarly, it might also be triggered when the cleric has engaged in a regular course of counseling sessions with a congregant, has offered her personal—as opposed to spiritual—advice, and has some knowledge that the congregant may be especially vulnerable to exploitation.[39] The key to the cleric's liability, however, must be based on nonreligious factors. As the authors state, "[a] fiduciary relationship between clergy and congregant must be grounded in something other than its religious character."[40]

supra note 4, at 1826 (quoting Langford v. Roman Catholic Diocese, 677 N.Y.S.2d 436, 438 (N.Y. Sup. Ct. 1998)).

34. *Id*. at 1827–28.

35. *Id*. at 1827.

36. *Id*.; *see also* Richelle v. Roman Catholic Archbishop, 130 Cal. Rptr. 2d 601 (Cal. Ct. App. 2003).

37. Lupu & Tuttle, *supra* note 4, at 1821–24, 1827, 1830–31.

38. *Id*. at 1821–24.

39. *Id*. at 1821–32.

40. *Id*. at 1828.

B. Potential Problems Within the Lupu/Tuttle Approach

Professors Lupu and Tuttle's thesis that clergy should not be liable to congregants for sexual misconduct can be questioned from a number of angles. First, a breach of fiduciary duty claim may not truly fit within their structural theory.[41] Contrary to their assertion, determining whether a fiduciary relationship existed between a cleric and congregant may not require deciding internal church matters of theology or polity.[42] Rather, reviewing whether the particular relationship at issue rose to fiduciary status may only require the court to investigate the subjective religious understandings of the two parties involved.[43] In this respect, consider *Thomas v. Review Board*.[44] *Thomas* involved a Jehovah's Witness who claimed that the Free Exercise Clause prevented the state from denying him unemployment compensation solely because, on account of his religious beliefs, he refused to accept work in an armaments factory.[45] The state contended that his belief was personal and not religious and introduced evidence that the Jehovah's Witnesses' doctrine did not prohibit its adherents from armaments work.[46] To the Court,

41. The structural-separation approach does, however, more comfortably encompass the clergy malpractice action because, as we have seen, the basis of such a suit would depend upon a jury determination of a reasonable cleric within a particular religious tradition.

42. Professors Lupu and Tuttle briefly address this argument by contending that looking at the subjective views of the plaintiff would "effectively—and unconstitutionally—discriminate[ ] against religious defendants by imposing fiduciary obligations on them through the unilateral action of the alleged beneficiary," or alternatively that if "the plaintiff and defendant disagree about the religious meaning of the relationship, the court will need to decide between the rival understandings," an inquiry which the authors allege would require the court to determine the "'true' theological meaning of . . . [the] relationship." *Id.* at 37. The authors do not consider, however, that a court could look solely to the subjective understandings of both parties.

43. *See* Moses v. Diocese of Colo., 863 P.2d 310 (Colo. 1993) (noting that a fiduciary relationship between a cleric and congregant may be determined by reviewing the specific factual circumstances of the case rather than by concluding that fiduciary relationships exist between clerics and congregants as a matter of law).

44. 450 U.S. 707 (1981).

45. *Id.* at 709–13. *Thomas* remains good law even after *Employment Division v. Smith*, 494 U.S. 872 (1990). In holding that the Free Exercise Clause did not require that religious adherents be exempted from neutral laws of general applicability, *Smith* distinguished *Thomas* (and the other unemployment compensation cases that had held that the Free Exercise Clause did mandate constitutionally based religious exemptions) on grounds that unemployment compensation laws were not neutral laws of general applicability because they allowed claimants to be excused from work requirements for nonreligious reasons. *Id.* at 879–83.

46. The lower court had in fact held that the claimant's belief was not religious but was philosophical. *Thomas*, 450 U.S. at 713.

however, the relevant issue was only the subjective belief of the individual Witness and not the sect's official tenets.[47] Whether Witness doctrine prohibited or allowed armaments work was beside the point.[48]

Thomas thus suggests that a court could rule on the nature of the cleric's and congregant's personal religious beliefs regarding the nature of their relationship without ruling on official church doctrine or polity. That is, any fiduciary duty between the parties could be constructed based on the subjective beliefs of the parties rather than on the official doctrine of the church. As such, a clergy-congregant sexual misconduct case based upon breach of fiduciary duty would not implicate structural concerns because no civil court adjudication of an internal church matter would be necessary to reach a decision.[49] To be sure, the inquiry into the nature of the parties' religious beliefs may be constitutionally sensitive in that it will require determining when a belief is religiously based,[50] but this inquiry would be necessary under the structural-separation approach in any case.[51]

Second, the implications of Professors Lupu and Tuttle's assertion that a structural constitutional limitation may prevent civil courts from investigating the nature of religiously based relationships

47. *Id.* at 715–16.

48. *Id.*

49. *Moses*, 863 P.2d at 321.

50. *See* United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring) (noting that evaluating the merits of religious claims raises the risk that "governmental approval of some and disapproval of others will be perceived as favoring one religion over another"); United States v. Ballard, 322 U.S. 78, 86–87 (1944) (holding that a finder of fact may not judge the sincerity of a person's religious beliefs by judging the reasonableness of those beliefs).

51. For example, the authors' conclusion that a cleric may be found liable for sexual misconduct when he provides secular counseling will require constitutionally sensitive line drawing between what constitutes secular and what constitutes religious counseling. Lupu & Tuttle, *supra* note 4, at 1828–32. The authors suggest that lines might be drawn on the basis of factors such as whether the cleric's advice was personal as opposed to spiritual in nature, but the clarity of such distinctions is questionable. *Id.* at 1830–32. To many clerics and congregants, the differences between advice on personal and spiritual matters will be anything but distinct. In such circumstances, how is a court to define when counseling by clerics is religious and when it is not? *See* George C. Freeman, *The Misguided Search for the Constitutional Definition of "Religion*,*"* 71 GEO. L.J. 1519 (1983) (noting the inherent difficulties in defining religion). How is a court to decide whether or not to believe a cleric who states he believes that his counseling was religious in nature? *Cf. Ballard*, 322 U.S. at 92–93 (Jackson, J., dissenting) (noting the inherent difficulties in determining religious sincerity).

may extend further than the authors intend. Specifically, it may throw into doubt the validity of the priest-penitent privilege, which can also require civil courts to determine religious issues. Consider the decision in *In re Murtha*.[52] In that case, a nun refused to testify regarding a statement made to her by a suspect in a homicide case and, as a result, was held in contempt.[53] The critical question posed by the case was whether her position in the Catholic Church entitled her to raise the testimony privilege—a question that required the court to consider such matters as whether she carried on "any of the religious functions of a priest,"[54] what "religious aspect she attached to her relationship with individuals such as [the suspect],"[55] and whether there was "anything in Catholic doctrine or practice that would give [her] the right to claim the priest-penitent privilege."[56] These, of course, are exactly the types of question that Professors Lupu and Tuttle claim cannot be considered by a civil court hearing a sexual misconduct case against a member of the clergy. Yet, if such issues cannot be adjudged by civil courts for liability purposes, why can they be decided in determining whether a clergy-congregant relationship gives rise to a testamentary privilege? Either the prohibition on civil courts deciding religious issues is not complete, or the priest-penitent privilege is constitutionally suspect.[57]

Third, the authors' claim that the structural-separation principle is grounded exclusively in the Establishment Clause and is jurisdictional can be criticized on several grounds.[58] Supreme Court

52. 279 A.2d 889 (N.J. Super. Ct. App. Div. 1971).

53. *Id.* at 890–91.

54. *Id.* at 892.

55. *Id.*

56. *Id.* at 893.

57. Indeed, because Professors Lupu and Tuttle's approach is absolute in application, it would not allow the priest-penitent privilege to be sustained even as a permissible accommodation. *Cf.* Corp. of Presiding Bishop v. Amos, 483 U.S. 327 (1987) (upholding a religion-specific statutory exemption from Title VII as a permissible legislative exemption).

58. This issue is not purely academic. There are significant implications depending upon which constitutional provision the Court relies. The current Establishment Clause test does not allow purported infringements to be overcome by the presence of a compelling state interest. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (holding that, to pass Establishment Clause muster, a law must (1) have a secular purpose, (2) neither promote nor inhibit religion, and (3) avoid excessive entanglement in religious matters). The state, however, can impinge an individual's free exercise rights if its action is supported by a compelling state interest. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533–34 (1993).

precedent, for example, does not support this contention. In the intrachurch property dispute cases relied upon by Professors Lupu and Tuttle in developing their structural-separation theory, the Court has never held that the prohibition on civil courts resolving such disputes on the basis of their interpretations of church doctrine depends upon the Establishment Clause alone.[59] Rather, in its first decision holding that the rule was constitutionally based,[60] the Court relied only on the Free Exercise Clause.[61] More recently, it reached this result by resting on the First Amendment generally.[62] This is not to say that there are no reasons that support the authors' contention that the prohibition against civil court resolution of religious issues is based on antiestablishment concerns. For the state to delve into the meaning of church doctrine could be seen as violating the principle of nonentanglement in Establishment Clause jurisprudence,[63] and to hold that one side in an intrareligion dispute represents the "correct" religious position could also be seen as "establishing" that position.[64] But the reasons suggesting this prohibition stems from the Free Exercise Clause are also substantial. The limitation on civil courts mediating internal religious issues serves both to insulate existing religious beliefs from government interference and to protect the further development of those beliefs,[65] and in that sense protects the 'free exercise' of those beliefs. Moreover, as I have argued

59. *See* Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219, 223–25 (2000); *see also* Patty Gerstenblith, *Civil Court Resolution of Property Disputes Among Religious Organizations*, 39 AM. U. L. REV. 513 (1990).

60. Prior to holding that civil courts are prohibited, on constitutional grounds, from resolving religious disputes, the Court reached a similar understanding under the common law. *See* Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871).

61. Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94 (1952).

62. Jones v. Wolf, 443 U.S. 595 (1979); *see also* Arlin Adams, Jones v. Wolf*: Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291 (1980).

63. *See* Agostini v. Felton, 521 U.S. 203 (1997).

64. Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1382 (1981).

65. As Douglas Laycock has explained, "[w]hen the state interferes with the autonomy of a church, and particularly when it interferes with the allocation of authority and influence within a church, it interferes with the very process of forming the religion as it will exist in the future." *Id.* at 1391; *see also* Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of* Smith, 2004 BYU L. REV. 1633 (arguing that the rights of religious institutions to develop and maintain their autonomy over matters of belief and polity are based in the Free Exercise Clause).

elsewhere,[66] the Establishment Clause seems a peculiar reed to serve as a foundation for constitutional defenses to enforcement actions taken against the church or religious leaders. To 'establish' normally connotes support, endorsement, or aid—not regulation.[67]

More problematic than its Establishment Clause label, however, is the characterization of the structural-separation principle as jurisdictional. The effect of the conclusion that the rule is jurisdictional is absolute: civil courts are completely forbidden from resolving all internal religious matters. No Supreme Court decision has gone this far, nor could it, if civil courts were to retain any role in resolving intrachurch disputes. The avoidance of religiously laden issues by civil courts in intrachurch property disputes is simply impossible. For example, even under the approach in intrachurch property disputes that is most designed to keep the civil courts out of internal religious matters—the rule requiring virtually complete deference to the decisions of hierarchical churches announced first in *Watson v. Jones*[68] and later in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*[69]—the civil court must still first decide an issue of internal religious polity—namely, whether the church in question is, in fact, hierarchical.[70] There is no way out. Certainly, limiting the ability of civil courts to mediate internal religious matters is supported by strong constitutional considerations, but characterizing the limitation as jurisdictional is unrealistic.[71] It may also, as in the priest-penitent example noted above, foreclose a more balanced analysis of the competing interests at stake.

Despite these concerns, however, the Lupu/Tuttle position that a cleric should not be liable to a congregant for sexual misconduct may, in the end, be correct—at least in result. The reason, however, may have less to do with the authors' explanation that an exceptional religiously based structural constitutional constraint applies in this

66. William P. Marshall & Douglas C. Blomgren, *Regulating Religious Organizations Under the Establishment Clause*, 47 OHIO ST. L.J. 293 (1986).

67. *Id.*

68. 80 U.S. (13 Wall.) 679 (1871).

69. 393 U.S. 440, 445–52 (1969).

70. Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1877 (1998).

71. Kent Greenawalt, for example, describes the constitutional effort of keeping civil courts out of religious affairs not as an absolute rule but rather as a "sound aspiration." *Id.* at 1846.

area than it does with a more simple explanation—that such a result is mandated by the model of religion/nonreligion neutrality that permeates First Amendment jurisprudence. It is to this possibility we now turn.

III. CLERGY LIABILITY FOR SEXUAL MISCONDUCT UNDER A NEUTRALITY MODEL

A. The Policies Underlying Neutrality

As noted previously, the central premise of the neutrality approach is that religion and nonreligion are indistinct for constitutional purposes.[72] The policy reasons underlying this approach are straightforward. In a modern, pluralistic world in which religion is but one type of ideology among many, there can be no categorical claim that religion holds a special place in the minds of its believers.[73] As Professors Christopher Eisgruber and Lawrence Sager argue, "religious conscience is just one of many strong motivations in human life, and there is no particular reason to suppose that it is likely to matter more in the run of religious lives generally than will other very powerful forces in the lives of both the nonreligious and religious."[74] Professor Frederick Gedicks, in turn, in addressing whether special constitutional exemptions for religious exercise

72. *See supra* note 16 and accompanying text.

73. *See generally* Eisgruber & Sager, *supra* note 15, at 1291–1301 (1994) (noting the centrality of secular belief); Fredrick M. Gedicks, *The Religious, the Secular, and the Antithetical*, 20 CAP. U. L. REV. 113 (1991). *But see* Stephen D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV 149 (1991) (arguing religion is qualitatively different from other ideologies); John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 275, 278 (1996) (same).

74. Eisgruber & Sager, *supra* note 15, at 1263. Neutrality has had its most dramatic impact in Free Exercise cases. At one point, the constitutional rule concerning free exercise was decidedly nonneutral. According to the Court in *Sherbert v. Verner*, 373 U.S. 398 (1963), burdens on an individual's religious exercise could only be upheld if supported by the presence of a compelling state interest. *Id.* at 406. If the government failed to meet that burden the result was that the religious adherent would receive a constitutionally mandated exemption from the law at issue. *Id.* at 408–10. But this test raised an important question. Why should religious belief alone justify special accommodation? Gedicks, *supra* note 15, at 560; *see also* William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 373–87 (1990). Eventually, the Court in *Employment Division v. Smith*, 494 U.S. 872, 878–80 (1990), abandoned the compelling interest inquiry in favor of a test that reflected religion/nonreligion neutrality. Henceforth, free exercise claims would not be recognized when they challenged neutral laws of general applicability that incidentally burdened religious beliefs or practices. *Id.*

should be required under the Free Exercise Clause, reaches a similar conclusion based upon basic notions of equality.[75] Professor Gedicks poses the following hypothetical:

> A church and a secular nonprofit organization both want to operate a homeless shelter in violation of local zoning regulations. What would be the justification for granting the church an exemption from the regulations, but not the secular nonprofit? A Sabbatarian refuses to work on Saturday for religious reasons. An agnostic refuses to work on Saturday because he is a noncustodial parent, and Saturday is the only day his children are available to visit him. What would be the justification for constitutionally excusing the Sabbatarian from the obligation to make herself available for work as a condition to receiving unemployment benefits, but not the noncustodial parent?[76]

To Professor Gedicks, no justification supports such disparate treatment. As he states, "[t]here no longer exists a plausible explanation of why religious believers—and *only* believers—are constitutionally entitled to be excused from complying with otherwise legitimate laws that burden practices motivated by moral belief."[77]

B. The Neutrality Model and Clergy Liability for Sexual Misconduct

Accepting, then, that the neutrality model is supported by strong policy considerations, how should the clergy-congregant sexual misconduct issue be decided under this approach? The answer is not complicated. If leaders of secular organizations are not liable for having sexual relations with members of their organizations then clerics should not be held liable for having sexual relations with their congregants.[78]

Like the structural-separation model, however, the neutrality approach can be subject to serious objection. First, and most obviously, applying a neutrality model to the sexual misconduct issue might be criticized for ignoring that there is something unique in

75. *See* Gedicks, *supra* note 15, at 566–68.

76. *Id.* at 555–56.

77. *Id.* at 574. Similar arguments have been made with respect to the inequality of singling out religion for special disfavored treatment under the Establishment Clause. *See* Volokh, *supra* note 15, at 365–-73.

78. Lupu & Tuttle, *supra* note 4, at 1821.

the cleric-congregant relationship that differs from its secular counterparts. As discussed previously, clerics may be seen as more powerful in relation to their congregants because they are potentially viewed as directly in the service of God, or congregants may be seen as more vulnerable because people often seek religion for comfort and solace.[79] Certainly clerics can hold enormous sway over members of their congregations. To many, the religious leader is seen, in the popular vernacular, as a "man of God;" and even if he is not considered a direct representative of deity—as in some religions—a religious leader may be the key individual congregants trust to convey religious messages. Saying "no" to a person to whom one looks for comfort, meaning, and the keys to salvation may not be the same as saying "no" to the local chapter leader of the Sierra Club. Being asked to provide strength to a person to help in his saving of souls may be harder to turn down than being asked to help persons save endangered species.[80]

Perhaps so, in *some* cases, but this is precisely where the contemporary turn to rejecting any inherent distinctiveness of religion comes into play. In a world in which nonreligious beliefs and affiliations are as central to some individuals as religious beliefs and affiliations are to others, neither the power of the religious leader nor the vulnerability of the congregant can be viewed as presenting categorically different considerations than that which occurs in parallel secular relations.[81] True, some congregants may see their religious leaders as especially powerful, but some members of secular organizations may view their leaders as having similar majesty. True, some believers may seek religion because of their own personal vulnerabilities, but others may seek involvement in secular movements for the same or similar reasons. To return to the environmental leader/follower example, the fact is that for some individuals the belief in the sanctity of the environment is equivalent

79. *See supra* notes 26–28 and accompanying text.

80. The reluctance to turn down a member of the clergy may be heightened in this context because the personal qualities of religious leaders can strengthen and solidify the beliefs of their followers to the point where the follower sees her faith as inextricably tied to her congregation's leader. *See, e.g.*, Gayle White & Don O'Briant, *Atlanta Archdiocese Details Sex Abuse Policy*, ATLANTA J.-CONST., Aug. 6, 2003, at 1A (quoting the policy of the Roman Catholic Archdiocese of Atlanta, which states: "[Sexual abuse by Priests] is even more tragic when its consequence is a loss of the faith that the Catholic Church has a sacred duty to foster.").

81. *See supra* note 74 and authorities cited therein.

in depth and commitment to the belief that other individuals have in religious matters. The clergy-congregant and secular leader-follower relationships, in short, cannot be categorically distinguished.

Second, a more nuanced version of this objection might be to suggest that the claim to distinctiveness between religion and nonreligion presented by the clergy sexual misconduct example is not based upon a notion of distinctiveness between religious and nonreligious belief; rather, it is based on a claim that the power of religion vests in religious leaders a greater influence over others than does the power of secular beliefs. Certainly, there are many instances (some quite unfortunate) that suggest that religious leaders hold unique power over their followers.[82] But contemporary experience also suggests that religious leaders are not alone in commanding inordinate power over their followers.[83] And, to draw a parallel to our opening hypothetical, a charismatic environmental rights leader, for example, who tells one of his wide-eyed followers that he needs her physical comfort in order to have the strength to pursue his world-saving mission may exert as much power over her as our cleric did over his congregant.

Third, one may object that in comparing the clergy-congregant relationship with that of a secular leader-member relationship, we have drawn the wrong parallel. The corresponding secular relationship to clergy-congregant should not be the leader-member but, rather, the therapist-patient relationship that is actionable under the civil law. That is, clergy should be seen as comparable to therapists in all circumstances and not only when they are offering secular-type therapeutic services such as individual counseling.[84] After all, as discussed in Part I, the power imbalance present in the clergy-congregant relationship can be even greater than that found in the therapist-patient context, even when the clergy-congregant relationship does not involve personal counseling or therapy. Accordingly, if secular therapists can be sued for sexual misconduct,

82. *See, e.g.*, Anna Borzello, *A Party, Prayers, Then Mass Suicide*, GUARDIAN (London), Mar. 20, 2000, at 3 (noting the devastating affect of the power David Koresh and Jim Jones held over their followers).

83. *See, e.g.*, Tracey Tyler, *Charles Manson Parole Hearing to be Telecast Live*, TORONTO STAR, Apr. 21, 1992, at C15 (discussing the "hypnotic hold" Charles Manson had on members of his so-called "family").

84. As discussed earlier, Professors Lupu and Tuttle raise no religion clause objection to clerics being held liable for sexual misconduct when they act, in effect, as secular therapists. *See supra* notes 7–9 and accompanying text.

clergy should be subject to suit as well, even if their only relationship with the congregant is from the pulpit.

The problem with drawing this parallel, however, is that it again simply restates the claim of religious distinctiveness. The reason the therapist-patient relationship is accorded legal significance is that the power of the attachment between the two parties is recognized as *categorically* exceptional and not the norm among secular relationships.[85] Thus, the clergy-congregant relationship could be considered parallel to the therapist-patient relationship only if it is also considered categorically exceptional. By definition, however, the neutrality model rejects the premise that there is something inherently different between religion and nonreligion because, even if there are times when religion and religious belief can be said to exert a special influence over its adherents, there will also be times when nonreligious belief can have similarly extraordinary influence and/or times when religion will have no such power at all. Under the neutrality model then, the cleric sermonizing from the pulpit is seen as exerting no greater power over the members of his congregation than the environmentalist preaching in front of the polluter has over his crowd of followers. Unless all leader-follower relationships are said to raise heightened obligations, the comparison of the clergy-congregant to the therapist-patient relationship is inapposite. Only if the cleric was, in fact, acting as a secular therapist or counselor would the neutrality model allow liability to attach.[86]

Finally, it could be argued that the neutrality model should be rejected as the appropriate tool for analyzing clergy-congregant sexual misconduct because the power of religious leaders to manipulate their followers should be seen as raising special concern. Thus, under this approach, the cleric might be subject to liability for

85. *See, e.g.*, Ronald J. Maurer, *Ohio Psychotherapist Civil Liability for Sexual Relations with Former Patients*, 26 U. TOL. L. REV. 547, 548–53 (1995) (describing the relationship as one in which the therapist is acutely aware of the patient's vulnerability).

86. Because it would allow liability in such circumstances, the neutrality model raises concerns similar to the structural-separation model in its implementation. In determining whether a particular cleric has acted in the capacity of a secular therapist in his relationship with his congregant, the same sort of constitutionally problematic investigation that exists under the structural-separation model will be necessary to determine liability. Did the cleric act as a secular therapist or as a religious counselor? As discussed previously, this may require drawing difficult lines in determining the difference between religious and therapeutic counseling and a constitutionally sensitive inquiry into the nature and sincerity of the religious claims at issue. *See supra* notes 7–9 and accompanying text.

misconduct with his congregant even if a secular leader could not be subject to liability for sexual misconduct with one of his followers. There is precedent for permitting some disfavored treatment of religion under the Constitution. The Establishment Clause prohibits government endorsement of religion but not other ideologies[87] and part of the justification in support of this special treatment, as I have argued elsewhere, is based on concerns relating to the special power that religion may exert over its followers.[88]

Nevertheless, it is one thing to claim that religion may be subject to special disability in its relation to government and quite another that it should be subject to disfavored treatment in tort. The former, after all, raises broad societal concerns of (1) limiting the divisiveness that might occur along religious lines if the power and imprimatur of government was seen as a prize that could be captured by sectarian mobilization and/or (2) the fear that religious persecution might result if the enforcement powers of government were tied to the agenda of one religion.[89] The latter, on the other hand, pertains only to the manner in which the individual intersects with her religion and in that sense more closely parallels the claim for special treatment of religion that has been rejected in the free exercise context.[90] To return to Professor Gedicks's example from free exercise jurisprudence to illustrate this point, the claim that a congregant, because of her religious convictions, is more vulnerable to her cleric than a passionate environmentalist is to her secular leader holds no more resonance than the claim that a Sabbatarian who is forced to work on Sunday suffers greater pain or anxiety than the noncustodial parent, who if forced to work on Saturday, loses visitation with his children.[91] In short, if the claim that religion has special power over its adherents is accepted in the clergy-congregant sexual misconduct context, it would suggest that the neutrality approach should be abandoned in all areas, including those such as free exercise, in which its application is well settled.[92] It is not an argument for special treatment of religion only in sexual misconduct cases.

87. William P. Marshall, *The Inequality of Anti-Establishment*, 1993 BYU L. REV. 63.

88. William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L.J. 843 (1993).

89. *Id*.

90. *See supra* notes 73–77 and accompanying text.

91. *See supra* note 76 and accompanying text.

92. Employment Div. v. Smith, 494 U.S. 872, 877 (1990).

IV. STRUCTURAL-SEPARATION OR NEUTRALITY?

Although, as we have seen, both the structural-separation and neutrality analyses support the conclusion that there should be no liability for clerics who engage in sexual misconduct with their adult congregants, they do so based on opposing justifications. These reasons may be worth a brief review. First, the two models diverge on whether religion should be seen as distinct from nonreligion for constitutional purposes. Under the structural-separation model, clergy are protected from liability because the religious nature of the clergy-congregant relationship places special constraints upon civil courts resolving disputes that arise out of that relationship.[93] Under the neutrality model, on the other hand, clergy are protected because the religious nature of the clergy-congregant relationship is deemed to have no special legal significance.[94]

Second, the structural-separation model is jurisdictional. It contends that civil courts do not have the competence to decide the internal religious matters that may be necessary to resolve the breach of fiduciary duty claim. The neutrality approach, on the other hand, is based on the merits. It concludes that claims of breach of fiduciary duty against clerics should be dismissed because the law does not recognize parallel claims brought by followers of secular organizations against their leaders.

Third, because the structural-separation model is jurisdictional, its effects are absolute. The structural-separation model extends beyond clergy-congregant sexual misconduct claims and applies to all other matters that require civil court mediation of religious issues. As such, it casts into doubt whether legal provisions such as the priest-penitent privilege can be constitutionally recognized because that issue too requires the resolution of internal religious issues, and it even suggests that the current limitations on civil court review of internal church property disputes do not go far enough because they

93. *See supra* notes 31–36 and accompanying text.

94. There is, of course, considerable irony in this approach. Religion is protected from liability because of its legal insignificance rather than its significance. This irony, however, reflects the pattern in First Amendment jurisprudence generally. For example, when the Court held in *Widmar v. Vincent*, 454 U.S. 263 (1981), that the state could not prohibit prayer groups from using college classrooms otherwise open to secular organizations, it had to conclude that from a free speech perspective there was nothing especially significant about prayer. Prayer was no different than any other kind of speech, be it about morality, philosophy, or the fortunes of the school's football team.

allow for some court adjudication of internal church matters. The neutrality model, on the other hand, is more flexible and would thus, for example, not categorically invalidate legal provisions such as the priest-penitent privilege on grounds that the prohibition of mediating religious issues is absolute[95] and would continue to allow some civil court intervention into internal church disputes.

With these differences in mind, then, it may be possible to determine whether structural-separation or neutrality offers a better approach to the clergy-congregant sexual misconduct issue.[96] In making this comparison, let us assume, for the moment, that the civil law would allow actions to be brought by the followers of secular groups against their leaders for sexual exploitation. Thus, to return to an earlier example, when the environmental leader tells his female follower that he needs her physical comfort to help him succeed in his mission, we can assume the law now provides that he is opening himself up to potential liability based upon a newly constructed leader-follower fiduciary duty.[97] Should the civil law now recognize a claim by a congregant against a cleric who has behaved in a similar manner?

Presumably, if the civil law were to change in this manner, the response of both the neutrality and structural-separation approaches in the case of clergy-congregant sexual misconduct would be clear. The neutrality model would suggest that clerics should also be held liable. The structural-separation approach, on the other hand, would continue to preclude liability because the courts would not be free to inquire into the religious nature of the relationship.[98]

95. The priest-penitent privilege itself could be challenged under a neutrality theory because, as a religiously based measure, it is not neutral in the sense that there are no parallel privileges recognized for nonreligious organizations. The neutrality approach, however, is not rigid and allows legislative accommodation for religion in some circumstances. *See* Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 335 (1987) (upholding the constitutionality of a religion-specific legislative scheme); *see also* Greenawalt, *supra* note 70, at 1906 (noting that the neutrality approach in free exercise law does not prohibit granting religion legislative exemptions).

96. Of course, in reaching any conclusion, we should keep in mind Kent Greenawalt's observation in his work on the related issue of civil court mediation of intrachurch property disputes that no approach is likely to be fully satisfactory. Greenawalt, *supra* note 70, at 1905.

97. *See supra* note 84 and accompanying text.

98. This assumes that the parties' beliefs about the nature of the relationship continue to play a role in determining whether a fiduciary duty exists. If our new leader-follower fiduciary duty depends solely on the status of the parties and not their beliefs regarding the significance of the relationship, then the type of inquiry forbidden by the structural-separation model

Which is the better result? The answer, I believe, is neutrality. Not only because it is more flexible in application, but, more importantly, because it is supported by central notions of equality and fairness.[99] To reverse Professors Lupu and Tuttle's earlier rhetorical question: If the leaders of nonreligious voluntary associations *are* deemed to stand in fiduciary relationships with adult members of their associations, why should the law treat religious leaders differently?[100]

The answer is that it should not. Special exemptions for religion should not come in through the back door. Professors Lupu and Tuttle, of course, would respond that special exemptions are not the issue—the only reason that civil courts cannot hear the sexual misconduct claims is jurisdictional and has nothing to do with whether religion is entitled to constitutionally compelled favored treatment. As we have seen, however, the jurisdictional argument is not compelling. The fact that civil courts address internal religious matters is unavoidable.[101] Alternatively, the authors might argue that the policies prohibiting civil court mediation of internal religious matters are sufficient to require that clergy-congregant misconduct issues not be analyzed under a neutrality approach—an argument that again is not based on favoritism. But even this argument should not be successful. As Professors Lupu and Tuttle themselves point out, the general rule in religion clause cases is neutrality, and anyone seeking to deviate from the neutrality approach bears the burden of showing the variation to be warranted.[102] In the case of the clergy-congregant sexual misconduct issue, the burden has not been met.[103]

would not be required and the action presumably could continue. Even then, however, there might remain sensitive religious issues about who is a leader and who is a follower.

99. *See* Gedicks, supra note 15, at 568–72.

100. Lupu & Tuttle, *supra* note 4, at 1821–22.

101. *See supra* notes 43–56 and accompanying text.

102. *See* Lupu & Tuttle, *supra* note 4, at 1802–04.

103. Neutrality would presumably also not recognize civil actions based upon claims of clergy malpractice because clergy malpractice is a religion-specific action and is therefore not neutral. A more difficult problem might occur if the civil law recognized a "leader malpractice" tort applicable to leaders of nonreligious organizations. Could such an action also be applied to religious leaders? Admittedly, the hypothetical is a stretch. It is hard to imagine how a claim of "leader malpractice" would be stylized. Nevertheless, if such a tort were fashioned (and one should never underestimate the ability of the civil law to generate new torts) then presumably, under the equality approach, similar claims of malpractice could be brought against religious leaders. The constitutional question would then be to what extent such an action requires a determination of the "reasonable religious leader" standard.

The structural-separation policy is counterbalanced by the equality interests at stake. Sexual misconduct by religious leaders with their congregants should lead to no more, and no less, liability than sexual misconduct by nonreligious leaders with their followers.

V. CONCLUSION

Sexual Misconduct and Ecclesiastical Immunity, by Professors Ira C. Lupu and Robert W. Tuttle, sets forth an important and comprehensive theory of clergy and religious institution liability for sexual misconduct. Relying upon a theory of structural-separation, the authors contend that civil court review of such disputes must be limited in order to avoid enmeshing the courts in matters of internal church doctrine and polity. Thus, they conclude in an important example that civil courts should not recognize a breach of fiduciary duty claim for sexual misconduct against a cleric brought by one of his adult congregants because to do so would require civil courts to determine the religious nature of the underlying relationship.

Although the authors may be correct in result, their approach can be questioned. In contemporary religion clause jurisprudence, the dominant mode of analysis has been neutrality and the essential question whether religion and nonreligion are being treated equally with respect to the matter at issue. In the case of clergy-congregant sexual misconduct, the neutrality approach would also lead to the conclusion of no liability,[104] but despite the common result, the choice of method is significant. If one were to take Professors Lupu and Tuttle's structural-separation principle to its logical conclusion, it would mean that civil courts do not have the power to recognize matters such as the priest-penitent privilege or to engage in any resolution of internal church property disputes. The law does not, and should not, go that far. More importantly, the Lupu and Tuttle approach would also transgress the basic sense of equality and fairness between religion and nonreligion that underlies the neutrality principle; it would continue to immunize clergy from liability if the law were to change and allow secular leaders to be subject to actions for sexual misconduct. Religious and nonreligious leaders, however, should not be treated differently when they engage in sexual relations with their followers.

104. This is because secular leaders are not subject to liability for similar conduct with members of their associations. *See supra* note 20 and accompanying text.