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LOOKING TOWARDS A HIGHER LAW

*Mark E. Chopko**

Among the many contributions Father Charles Whelan has made in his distinguished career, one cannot be underestimated. For decades he served, officially and unofficially, as a consultant—"of counsel"—to the Office of the General Counsel of the Catholic Bishops' Conference. In the half-century since he began his work in this capacity, he has watched the law and the Church change in many different ways. But even in his roles as a lawyer and a subject matter expert in the legal issues confronted by the Church, he has also always been very clearly a priest of the Church. His work has been his ministry, and his ministry has plainly pointed all who enjoyed the benefit of his work towards a higher law—the one written in our hearts and minds by the Hand of God.

A little more than twenty years ago, Father Whelan served the Conference on the search committee looking for a new General Counsel—the position I assumed in January 1987. Around a table of lawyers, the questions ranged from the substance and the procedure of the law to the politics of the Church. When it was his turn to speak, Father Whelan said simply he was going to ask "the priest questions." Although I was familiar with and impressed by his scholarship, I was energized by the conversation we had about faith and what it means to put faith into action. I was immediately impressed that he was a priest first, who happened also to teach and practice law. This integration of lawyer and priest has allowed him to say and do things most of us can only imagine.

I write these brief lines in gratitude for what Father Whelan has been to and done for the Church's legal work, and to share some reflections on his life's work as it has advanced the collective work of his many colleagues who represent Church agencies in the United States. His last time on the dais of the annual meeting of diocesan attorneys was in 1990. Unfortunately his health did not allow him to accept subsequent invitations. But on that occasion he spoke about what he had seen in Church-State work, what he saw in 1990, and what he hoped to see as he looked forward. As I reread his words, and his other talks to the diocesan attorneys and his briefs *amicus curiae* filed for the Church, I am struck, not just by the depth

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and intricacy of his analysis, but also by his prudence, common sense, and good humor. Mostly, I am struck by his powerful profession of faith. It is to those themes I turn.

I. A MAN OF SUBSTANCE

Father Whelan began his service to the Conference's legal office in 1959. In his words, "we had a rather simple set of cases to work with."¹ The early free exercise cases generally involved either Mormons or Jehovah's Witnesses, or property disputes arising in other faith communities. On the other hand, cases under the Establishment Clause involved many more interactions with Catholic institutions, including, for example, busing,² school release time,³ education,⁴ and tax exemption issues.⁵ As he traced the progression of cases, he remarked that what he "learned most from this succession of [U.S.] Supreme Court decisions was that logic and history are not enough in dealing with the Supreme Court. They are, of course, terribly important, but insufficient."⁶ What he did not trace was his own important role as an advocate. A mark of a skilled advocate, in my view, is the ability to anticipate the analytical needs of judges and Justices and to offer them the kinds of arguments they will need to decide a case properly. That is what Father Whelan contributed in some key cases.

For example, the brief signed by Father Whelan in *Board of Education v. Allen*⁷ was submitted for the National Catholic Educational Association, the Lutheran Education Association, the National Union of Christian Schools, and the National Conference of Yeshiva Principals. The case concerned the constitutionality of a law authorizing public school districts to purchase and loan approved secular subject textbooks to students attending nonpublic (including religious) schools. Part of the attack on the statute concerned the nature of the religious schools. The theme of the amicus brief was to decry the "caricature" of religious schools as simply extensions of Sunday Schools, rather than the reality of what they are: complete and comprehensive educational institutions. Religious formation is one purpose of these schools, but another is basic secular education. While the state may be barred from advancing religion, as argued in the brief, it was obligated to assist secular education to make meaningful the rationale of

1. Charles Whelan, *Supreme Court Doctrine and Religious Institutions*, 34 Cath. Law. 1 (1991) [hereinafter Whelan, *Supreme Court Doctrine*].

2. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

3. *E.g.*, *Zorach v. Clauson*, 343 U.S. 306 (1952).

4. *E.g.*, *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968).

5. *E.g.*, *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664 (1970).

6. Whelan, *Supreme Court Doctrine*, *supra* note 1, at 3.

7. Brief for National Catholic Educational Association, Lutheran Education Association et al. as Amici Curiae Supporting Appellees, *Allen*, 392 U.S. 236 (No. 660) [hereinafter *Allen Brief*]. The brief was also signed by William Considine (under Father Charles Whelan's name) who was General Counsel of the Catholic Bishops' Conference, and joined "of counsel" by Francis Gallagher, Alfred Scanlan, and Harmon Burns, each of whom represented various diocesan or other Catholic interests. *Id.*

Pierce v. Society of Sisters,⁸ which had sustained the right to exist for nonpublic schools as educational choices for parents. “The wall of separation is a wall between Church and State, not between the child and the State.”⁹ The brief continued, “The No Establishment Clause does, indeed, forbid all purposeful promotion of religion, but the Free Exercise Clause also forbids denying individuals, because of their religion or lack of it, the right to participate in secular welfare and educational benefits.”¹⁰

The Court, of course, in *Allen* was more circumspect, but the contours of the majority opinion mirrored this analysis. The Court highlighted aspects of the New York law, specifically those providing that the books are furnished on loan to the pupil and that ownership remain in the state.¹¹ The opponents of this assistance highlighted the educational significance of textbooks to the work of religious schools, but the Court rejected this argument. “[T]his Court has long recognized that religious schools pursue two goals, religious instruction and secular education.”¹² The Court noted that a premise of *Pierce*’s “holding was the view that the State’s interest in education would be served sufficiently by reliance on the secular teaching that accompanied religious training in the schools maintained by the Society of Sisters.”¹³ As argued by Father Whelan’s brief, the Court saw this case as a “sensible corollary” of *Pierce*.¹⁴ Specifically, the Court noted that “if the state must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function.”¹⁵ Father Whelan rooted this analysis in notions of academic and personal freedom which he called the “key gradient” between the no aid principle of the Establishment Clause and the no discrimination principle of the Free Exercise Clause. Unfortunately, the Court was unwilling to accept this wise proposition, setting the stage for several decades of doctrinal confusion.¹⁶

The amicus brief, however, was prescient for its time. It argued that any “religious effect” in the schools would occur solely as a result of private choices made by parents as taxpayers and citizens.¹⁷ The Court would come to embrace this notion of private choice more clearly fifteen years

8. 268 U.S. 510 (1925).

9. *Allen* Brief, *supra* note 7, at 3.

10. *Id.* at 10.

11. *Allen*, 392 U.S. at 243-44.

12. *Id.* at 245.

13. *Id.*

14. *Id.* at 247.

15. *Id.* *Pierce* had made clear the ability of the state to reasonably regulate the secular education curriculum of the schools and the qualifications of teachers, among other things. See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925).

16. *Lemon v. Kurtzman*, 403 U.S. 602 (1971), for example, moved away from this principle, trying to distinguish *Allen*.

17. *Allen* Brief, *supra* note 7, at 15-16. Specifically, the brief illustrated this point with an example of a donation to a religious charity by a citizen from her government Social Security check.

later.¹⁸ Moreover, the brief argued that the constitutionality of the program could not practically turn on what choices citizens make under general educational benefits programs, but rather should be measured by the “secular character of the State’s program.”¹⁹ The Court did not truly recognize this principle until many years later. The practical problems of trying to monitor individual citizen choices year by year are daunting. Rather than have the constitutionality turn on shifting facts, the Court wisely adopted program design as the touchstone for constitutionality.²⁰

Two years later in an amicus brief filed in the name of the Catholic Bishops Conference, Father Whelan confronted the constitutionality of the inclusion of religious entities in a program of general real estate tax exemption.²¹ Responding to the charge that New York City’s program was unconstitutional under the Establishment Clause, the amicus brief noted the limits of the then prevailing “purpose and effect” test cobbled together in the 1962 school prayer cases.²² The brief urged a different analysis and rooted its conclusion that the program was constitutional in the long-standing history of the practice of tax exemption for religious institutions under the state’s welfare powers.²³ It also noted that the Supreme Court had never decided that an exemption of a religious body was unconstitutional.²⁴ The brief suggested that it would be far more intrusive were the government to try to sever the religious from the secular than to apportion tax liability within religious institutions. Such a public procedure would require invasive scrutiny (the brief did not use the word “entanglement”).²⁵ In a worse case, the brief noted that depriving religious institutions of tax exemption would require those institutions to channel resources away from public charity. Services to the poor would suffer.

18. *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481 (1986). *Witters* provides an example of a government employee who donates most or all of his salary to religion as a “private choice[.]” of funds whose source was the government. *Id.* at 486-87.

19. *Allen* Brief, *supra* note 7, at 16.

20. *Mueller v. Allen*, 463 U.S. 388, 399, 401-02 (1983) (noting that courts “loath” to adopt a rule making the constitutionality of a neutral benefits law turn on its use by different classes of citizens). This rationale is the cornerstone of the U.S. Supreme Court’s affirmation of vouchers. *Zelman v. Simmons-Harris*, 536 U.S. 639, 650-51 (2002). The principle of design over implementation makes enormous sense unless courts are expected to engage in all sorts of after-the-fact determinations. Mark E. Chopko, *Vouchers Can Be Constitutional*, 31 Conn. L. Rev. 945, 957-58 (1999).

21. See generally Brief of United States Catholic Conference as Amicus Curiae Supporting Appellant, *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664 (1970) (No. 135) [hereinafter *Walz* Brief].

22. *Id.* at 63, 70-74; see also *Sch. Dist. v. Schempp*, 374 U.S. 203, 222 (1963) (“[T]here must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.”). Although the *Walz* Brief argues that the case for exemption can satisfy the test, it questions the need to apply this single test when relevant precedent was not so limited.

23. *Walz* Brief, *supra* note 21, at 27. The text was captioned “America’s Undeviating Historical Policy and Practice of Exempting Religious Property from Taxation.” *Id.*

24. *Id.* at 54.

25. *Id.* at 83-85.

Likewise churches that were less well-off would also suffer much more than wealthier churches.²⁶

In *Walz v. Tax Commission of New York*,²⁷ the Court upheld the validity of the grant of an exemption to church property. In doing so, the Court recognized the analytical problems created by the “purpose and effect” test and wrote a new variation—the requirement to avoid “excessive entanglement.”²⁸ In applying this test, the Court recognized the history and pervasive nature of property tax exemptions for religious bodies as part of the state’s general program to promote religious, educational, and charitable works in the community.²⁹ Equally important, the Court recognized that “[e]limination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes.”³⁰ In other words, more entanglement would result.

Not all of Father Whelan’s wisdom was accepted by the Court. In briefs for the cases that became *Lemon v. Kurtzman*,³¹ he unsuccessfully tried to extend the rationale of his *Allen* child benefit and academic freedom argument. In Father Whelan’s view, promoting the educational choices of parents and children increased the number of educational providers and strengthened the nation’s commitment to a well-formed citizenry. He also attempted to limit the use of excessive entanglement analysis.³² The Court did not agree, holding Pennsylvania’s and Rhode Island’s programs of subsidy for teacher salaries and other assistance to religious schools to be unconstitutional, on grounds of “excessive entanglement.”³³

These are two of the many contributions that Father Whelan made to the development of constitutional law as the Supreme Court described the boundaries and working relationships between church and state. But his contributions to the development of the law also extended to the areas of taxation and tax exemption of churches, especially his creative work on the

26. *Id.* at 91-94.

27. 397 U.S. 664 (1970).

28. *Id.* at 670.

29. *Id.* at 676-77.

30. *Id.* at 674.

31. 403 U.S. 602 (1971).

32. Brief for the National Catholic Educational Association et al. as Amici Curiae Supporting Appellees, *Lemon*, 403 U.S. 602 (No. 89) [hereinafter *Lemon* Brief] (stating “a school is a school, not a church”); see also *id.* at 30 (arguing that *Walz* did not abandon the purpose-and-effect test). The same parties for whom he appeared in *Allen* authorized the amicus brief filed in *Lemon* and its companion case *Earley v. DiCenso*, 401 U.S. 931 (1971). The Brief of National Catholic Educational Association et al. in *Earley* was also signed by Dean Jesse H. Choper of the University of California Law School at Berkeley. Brief of National Catholic Educational Association et al. as Amici Curiae Supporting Appellants, *Earley*, 401 U.S. 931 (No. 569).

33. *Lemon*, 403 U.S. at 614.

“vow of poverty” and his seminal article on the definition of “Church” in the Internal Revenue Code.³⁴

Thirty years ago, the Internal Revenue Service (IRS) issued Revenue Ruling 77-290, which defines when compensation received by a member of a religious order will be treated as individual income and when it will be treated as income of his or her order (and thus not be taxable because the religious order is a tax-exempt organization).³⁵ In the early 1980s, organizations representing religious orders, including the General Counsel’s Office at the Bishops’ Conference and Father Whelan, worked to clarify the meaning of the 1977 ruling, specifically by attempting to expand its scope to include compensation received by a member of a religious order working for a non-Church charitable organization, such as a state university, the Red Cross, a county hospital, etc.³⁶ Father Whelan’s contributions added substance to the legal discussion and an understanding of the works of charity which surpassed that of others in the conversation.³⁷ They were essential to the effort, even if it was ultimately unsuccessful.

Father Whelan’s comprehensive article entitled, “*Church*” in the *Internal Revenue Code: The Definitional Problems*,³⁸ was published in the *Fordham Law Review* thirty years ago, at a time when there were no law school courses in exempt organizations, let alone on the Byzantine exemptions in the Internal Revenue Code relating to church and religious tax-exempt organizations. He proffered a definition that would allow the government to distinguish between exempt and nonexempt religious activity, so as to render the myriad of religious charitable activities within the protection of the Constitution.³⁹ His article broke new ground and paved the way for those who have followed in his footsteps for these last thirty years, including members of the Conference’s legal team. What is most remarkable is that many of the definitional problems, and the issues flowing from them, which Father Whelan identified in 1977 continue to plague the religious community today.⁴⁰ This is a theme to which I will return later.

34. See Charles M. Whelan, “*Church*” in the *Internal Revenue Code: The Definitional Problems*, 45 *Fordham L. Rev.* 885 (1977).

35. Rev. Rul. 77-290, 1977-2 C.B. 26.

36. See Charles M. Whelan, *Critical Developments in the Vow of Poverty Area and Update on Unrelated Business*, 25 *Cath. Law.* 340 (1980) [hereinafter Whelan, *Critical Developments*]; Charles M. Whelan, S.J., *Vow of Poverty Rulings and Update on Unrelated Business*, 23 *Cath. Law.* 201 (1977) [hereinafter Whelan, *Vow of Poverty*].

37. See generally Whelan, *Critical Developments*, *supra* note 36; Whelan, *Vow of Poverty*, *supra* note 36.

38. Whelan, *supra* note 34.

39. Father Whelan added to this literature in a 1979 article published by the *Annals of the American Academy of Political & Social Science* called *The Uneasy Boundary: Church and State*.

40. This is one of the points of contention between religious institutions and the government today. See *Catholic Charities of Sacramento v. Superior Court*, 85 P.3d 67 (Cal. 2004) (rejecting a classification argument that placed a Catholic charities agency outside the scope of a “religious employer” exemption).

Finally, Father Whelan had a remarkable ability to look beyond the horizon. He accurately predicted a series of trends in the adjudication of the Church's properties a full quarter century before they were manifested. In 1980, he predicted a shift in church-related litigation toward cases designed to test the limits of the Church's rights and exemptions in property, liability, and accountability. He read the Supreme Court's decision in *Jones v. Wolf*⁴¹ as inviting lawyers to write Church documents dealing with property clearly as to questions of ownership and connectedness to the faith community.⁴² He could not have foreseen—or could he?—the need for such clarity that would arise as the Church unexpectedly confronted the bankruptcies of dioceses in recent years.⁴³ Likewise, Father Whelan remarked on the trends of litigants seeking deeper pockets for liabilities⁴⁴ and governments seeking more penetrating accountability.⁴⁵ Gazing ahead, he offered suggestions on how to separate legitimate governmental inquiries from the entangling ones.⁴⁶ His concerns and suggestions, valuable then, are a source of enduring insight into the behavior of courts when they encounter religious institutions.

41. 443 U.S. 595 (1979).

42. See Charles M. Whelan, S.J., *Current Attitudes of the Courts Towards Church Properties and Liabilities*, 26 Cath. Law. 219 (1981) [hereinafter Whelan, *Current Attitudes*].

43. In 1980, Father Whelan used the bankruptcy of a Jesuit school in Houston to illustrate his point about ownership. The bankruptcy trustee sued the directors of the school and the regional Jesuit Province for mismanagement. One issue was whether the Province even had the authority to represent the Society of Jesus. *Id.* at 224. Twenty-five years later, in the cases of diocesan bankruptcies, the courts highlighted the opportunity that lawyers had to clarify the structural relationships between a diocese and its parishes. *E.g.*, *Tort Claimants Comm. v. Roman Catholic*, 335 B.R. 842 (Bankr. D. Or. 2005). The court also noted that the canon law did not preclude some other arrangement, such as a separate corporation or express trust that could be documented in accord with the civil law. *Id.* at 861-62. The court cited the Archdiocese of Portland's own canonical experts against it, noting that canon law experts have long stressed the importance of conforming the civil structures to the canon law. *Id.* at 865-66; see also *id.* at 857 & n.15.

44. Specifically he used the then recent decision of a California court which applied internal church documents to hold that the United Methodist Church was a single unincorporated association for liability purposes. *Barr v. United Methodist Church*, 153 Cal. Rptr. 322 (Ct. App. 1979); see also Whelan, *Current Attitudes*, *supra* note 42, at 223-24. Virtually all commentators regard the case as an unconstitutional excess.

45. At the time of his speech, the California Attorney General had appointed a receiver for the Worldwide Church of God, which was organized as a California corporation, to respond to allegations of fraud in the church. Father Whelan accurately described the case as a "real nightmare." Whelan, *Current Attitudes*, *supra* note 42, at 225. The outcry against the actions of the Attorney General resulted in amendments to the California Corporation Code narrowing his oversight of religious entities and an opinion of a California court suggesting the receiver was unconstitutional. *People ex rel Deukmejian v. Worldwide Church of God*, 178 Cal. Rptr. 913, 915 (Ct. App. 1981) ("How the State, whether acting through the Attorney General or the courts, can control church property and the receipt and expenditure of church funds without necessarily becoming involved in the ecclesiastical functions of the church is difficult to conceive.").

46. Whelan, *Current Attitudes*, *supra* note 42, at 226-27.

II. A MAN OF PRUDENCE, COMMON SENSE, AND GOOD HUMOR

In a 1969 talk to the diocesan attorneys of the United States, Father Whelan explained the precarious nature of the victory in *Allen*.⁴⁷ The majority opinion in *Allen* was based on the record which showed that not all teaching at the schools was religious, not every subject for activity in the school was intertwined with religion and that secular textbooks were not used to teach religion.⁴⁸ From the decided cases, he lifted a set of principles: Religious schools have a right to exist; they have a right to be different than public schools; and the state may assist secular education in those schools. But he also offered a predictive principle: It should be enough, he argued, for the validity of a program to be tested by its secular purpose and secular effect. If there is a secularity of means and public control over public funds, that should be sufficient.⁴⁹ The state does not have to invade the religious schools in order to be sure that those funds are properly spent.⁵⁰

"We have to be much more than right in our arguments. We have to be persuasive . . ." ⁵¹ His remarks were not based merely on what he thought right or just, but rather on what he thought would be persuasive to the Justices then sitting on the United States Supreme Court.⁵² In a line of cases from 1971 to 1985, the Supreme Court was unreceptive to these arguments.⁵³ How much worse would this situation have been if one had given in to the temptation to demand complete and unlimited funding for religious schools in response to the then-prevailing doctrinal trends? Knowing when, how, and how much to argue marks Father Whelan as a skilled and prudent advocate.⁵⁴

47. Charles M. Whelan, *Religious Permeation of Secular Subjects—Educational and Constitutional Considerations*, in Proceedings: National Meeting of Diocesan Attorneys 79 (1969).

48. *Id.* at 80; see also *Bd. of Educ. v. Allen*, 392 U.S. 236, 248 (1968).

49. *Religious Permeation*, *supra* note 47, at 81.

50. *Id.* It is possible to read *Lemon* to agree with that premise—and more. It eschewed the legitimacy of any invasion of religious schools by the state. There, the Court found that the surveillance required to be sure that no state aid was spent to advance religion would be excessively entangling.

51. *Id.* at 79.

52. *Id.* ("I have made a very strong effort to be attentive to what I think to be the framework of the intellectual discourse of the nine men currently on the Supreme Court of the United States. I would insist on the absolute necessity of this attention to the way *they* think and to the arguments that may be persuasive to *them*.")

53. *Aguilar v. Felton*, 473 U.S. 402 (1985); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

54. Father Whelan may have been the only priest to have argued a case before the United States Supreme Court. In late 1971, he squared off against Leo Pfeffer, from Americans United for the Separation of Church and State and the American Civil Liberties Union, in a case involving the legitimacy of the exemption of a parking lot owned by a Baptist Church. On weekends the parking lot supplied the space needed for worshippers; during the week it made money for the Church. The Church had prevailed in the Florida Supreme Court and in the three-judge district court. No one will know how this case might have come out on the merits, because after the district court opinion, the Florida legislature amended the statute under which exemption was granted to narrow the exemption to

Several years later, he echoed this argument in the midst of a legislative battle over the tax on unrelated business income. "We should never challenge the authority of Congress to tax commercial activities, whether those activities are religiously motivated or not. The temptation to take extreme positions should be resisted."⁵⁵ As authority for this argument, he cited Scripture. He noted one should render unto Caesar what is Caesar's, to God what is God's, and not to confuse the two.⁵⁶

Father Whelan cited a particular example of doctrinal confusion ten years after the 1968 victory in *Allen*, won "by emphasizing substantial public and secular functions of our schools."⁵⁷ In 1979, he said, "we find ourselves now insisting that the schools are too religious to be required to file annual financial reports or to be subjected to the jurisdiction of the National Labor Relations Board."⁵⁸ Although he noted "no necessary contradiction in this change of emphasis," he pointedly admitted that the church was "indeed in dangerous waters and that we must chart our course with extreme care."⁵⁹ His solution was to go back to basics:

to reexamine the criteria that Church lawyers should use in accepting or opposing governmental regulations of Church affairs. Only by such reexamination can we hope to avoid foundering on the fallacies of the moment. Surely we ought to think twice before picking up weapons . . . that the Supreme Court has used to clobber us.⁶⁰

Given the difficulties that the Church continues to confront in its daily encounters with the regulatory state, Father Whelan's words continue to offer a stirring and practical challenge. His reexamination of basic principles led him to three types of arguments. First, he outlined a Church objection which he said should be the rarest of all objections. It was not written in the civil law but rather in the precepts of Scripture. He quoted *Acts* 5:29, "Obedience to God comes before obedience to men." He continued, "The Church can never accept laws that make it impossible for the Church to preach the Gospel or administer the sacraments," and the Church must be willing to accept "legal punishment" that might follow disobedience to such laws.⁶¹ Although regulatory laws that promote legitimate governmental interests might

indirectly render the Church's work more complicated or more expensive . . . the only law to which the Church objects precisely as the Church is a law that denies the Church the basic right to preach the Gospel and

property used "predominantly" for religious purposes, mooting out the appeal. *Diffenderfer v. Cent. Baptist Church*, 404 U.S. 412 (1972).

55. Charles M. Whelan, *Churches and the Tax on Unrelated Business Income*, 20 *Cath. Law* 357 (1974).

56. *Id.*; see also *Matthew* 22:20-22; *Mark* 12:17.

57. Charles M. Whelan, *Origin & Impact of Government Regulations*, 24 *Cath. Law* 228, 228 (1979) [hereinafter Whelan, *Government Regulations*].

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 229.

administer the sacraments. The Church proclaims that its members are citizens of two worlds, bound by the laws of both.⁶²

And then in words that must have elicited a gasp from his audience, Father Whelan wryly noted, "Christ came to save us, not to exempt us."⁶³

In his second and third arguments, Father Whelan moved to consider constitutional and public policy objections. In making these arguments, however, he counseled against arguments which he considered to be based on shallow doctrine. Rather, he urged Church lawyers to be "reasonably sure that the principles [on which we base our arguments] will serve us well over the long run."⁶⁴ "I sometimes suspect that we would make more progress if we relied less on the Constitution and more on common sense and widely held conceptions of the general welfare."⁶⁵ In these arguments, he counseled advocates for the Church not to rely exclusively on the courts, but to continue to press their cases in the legislatures and with executives.⁶⁶

In making his cases, Father Whelan did not neglect the court of public opinion. Writing on the pages of *America* magazine, he often engaged, in clear and common sense terms, the broader questions of Church navigating a complicated society: "Watch what you wish for!" One could hear him thinking these words as he wrote about the 1990 Supreme Court opinion immunizing flag burning under the First Amendment as an act of public protest.⁶⁷ While noting that the First Amendment "protects the most virulent forms of spoken or printed" offensive messages, he cautioned that "[e]xtending the doctrine to nonverbal actions, however, is quite another matter."⁶⁸ Conduct is always subject to greater regulation than mere speech. Or in Father Whelan's words, "Your lips, not your teeth, are protected."⁶⁹ He warned that if flags and other symbols of the body politic could be trashed in the name of public protest, could places of worship be far behind?⁷⁰

And, approaching the most current set of confrontations between religious institutions in the government, the accountability for misconduct and clergy abuse of minors, Father Whelan brought the bright beam of common sense to this difficult topic.⁷¹ He warned that the scandal of clergy abuse and the actions of some religious leaders should not be an excuse to trample the legitimate and constitutionally expected separation between government and religion. "It would be just as wrong for the churches to

62. *Id.*

63. *Id.*

64. *Id.* at 230.

65. *Id.* at 231.

66. *Id.*

67. Charles M. Whelan, *Not Flagburners But the Court*, *America*, July 7, 1990, at 4 (discussing *United States v. Eichman*, 496 U.S. 310 (1990)).

68. *Id.*

69. *Id.*

70. *Id.* In the 1994 Freedom of Access to Clinic Entrances Act, Congress made some attacks on churches criminal offenses. 18 U.S.C. § 248(a)(2) (2000).

71. Charles M. Whelan, *Church, Government and Media*, *America*, May 27, 2002, at 21.

expect the federal and state governments to solve the problem of sexual abuse of children as it would be for the government to expect the religious denominations to solve the problem.”⁷² Why? “The problem is not religious. The problem is worldwide, age-old and—in the current state of physical and mental medical knowledge—ineradicable.”⁷³ But his focus was on collaboration, not confrontation, in dealing with a problem that pervades society, to embrace the good works of all “for the health and future of the children.”⁷⁴

In late 1987, as a novice General Counsel, I participated in a meeting of the Religious Liberty Committee of the National Council of Churches organized by the late Reverend Dean Kelley. Father Whelan had been an original member of the Committee, which continues to serve as a forum for civil conversation about hotly debated issues involving the proper relationship between church and state, and other important topics. As a new member, I did not know quite what to expect when I was asked to talk about the grant of certiorari in *Bowen v. Kendrick*⁷⁵ involving the constitutionality of the Adolescent Family Life Act. I thought there would be a quiet discussion. Instead I went toe-to-toe with the legal advisor for the Baptist Joint Committee. Back and forth we and the other Committee members struggled, advancing arguments great and small for how the Court should rule. As we exhausted ourselves and the topic, Reverend Kelley asked Father Whelan, “Charles, what do *you* think?” And the reply—“I think we weren’t able to settle these disputes then, and we weren’t able to do so today.”⁷⁶

Indeed.

III. A MAN OF THE CHURCH

As he once pondered the implications of expanded taxpayer standing to challenge governmental actions under the Establishment Clause,⁷⁷ Father Whelan remarked that he had read that someone had challenged the issuance of religious-themed Christmas stamps by the Postal Service and that the challenge would extend to the Apollo 8 stamp. The flight of Apollo 8 orbited the Moon in late December 1968. On Christmas Eve the flight commander read from *Genesis*.⁷⁸ The stamp contained the first photo of the Earth from the Moon taken by the astronauts and the words “In the

72. *Id.*

73. *Id.*

74. *Id.*

75. 487 U.S. 589 (1988).

76. See also Charles M. Whelan, *The Enduring Problems of Religious Liberty*, America, Nov. 30, 1985, at 368 (“[T]he problems of religious liberty rank among the most serious in the world.”) [hereinafter Whelan, *Religious Liberty*].

77. See *Flast v. Cohen*, 392 U.S. 83 (1968); Charles M. Whelan, *Constitutional Implications and Considerations: Flast v. Cohen*, in *Proceedings: National Meeting of Diocesan Attorneys*, *supra* note 47, at 19.

78. *The Apollo 8 Christmas Eve Broadcast* (television broadcast Dec. 24, 1968), available at http://nssdc.gsfc.nasa.gov/planetary/lunar/apollo8_xmas.html.

beginning God . . .”⁷⁹ Father Whelan remarked to his diocesan attorney colleagues in 1969, “I don’t know if they are going to put three dots in it,⁸⁰ but if they put a question mark, I think we ought to sue.”⁸¹ History does not record the placement of a question, and therefore the filing of litigation by Father Whelan was unnecessary. But no one could ever mistake that Father Whelan has been a priest first, last, and always.⁸²

Using his sound approach to problems, he sought solutions consonant with the teaching of the Church. He is practical and engaging, challenging and reflective. He wrote much about the doctrine of “higher law” as found in United States law.

The Declaration of Independence speaks of the laws of nature, and of nature’s God; the Constitution speaks of due process. In both documents we find written into the American tradition the concept of an order normative for purely positive laws, an order not dependent for its existence or justification on the will of any human legislator.⁸³

In remarking about this higher law, he challenges us still to lift up our eyes towards the source of our hope. “As citizens of two worlds, we have a duty to both God and Caesar to use our intelligence, our energy, and our talents to improve the temporal and spiritual well-being of the Church and of all our fellow men.”⁸⁴

In his 1990 remarks to the diocesan attorneys, Father Whelan ended by offering some reflections on what he hoped to see. First, he hoped that there would be a broad endorsement of the religious heritage of the country by the Court.⁸⁵ We still await that day.⁸⁶ His specific example was the Thanksgiving holiday, an insight into the priest, giving thanks.

Second, he hoped for an end to religious conflict and a reopening of the places in the world then inside the Iron Curtain closed to religious

79. The stamp itself can be seen at <http://www.skyimagelab.com/apollo8stamp.html>.

80. In the *New American Bible*, *Genesis* begins “In the beginning when God created the heavens and the earth . . .” Thus a stamp might have stated, “In the beginning . . . God.” The King James version reads, “In the beginning God created the heaven and the earth.” *Genesis* 1:1.

81. Whelan, *supra* note 77, at 24.

82. Father Whelan speaks movingly of his own faith journey in “The Enduring Problems of Religious Liberty,” a reflection on his friend and mentor Father John Courtney Murray. Whelan, *Religious Liberty*, *supra* note 76, at 372.

83. Charles M. Whelan, *The “Higher Law” Doctrine in Bracton and St. Thomas*, 8 *Cath. Law* 218 (1962).

84. Whelan, *Government Regulations*, *supra* note 57, at 231.

85. Whelan, *Supreme Court Doctrine*, *supra* note 1, at 14.

86. The Supreme Court in *Elk Grove Unified School District v. Newdow* flirted with the constitutionality of the reference “under God” in the Pledge of Allegiance, but the case was resolved on nonconstitutional grounds. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (concluding that the respondent lacked standing to commence litigation on behalf of his daughter). Father Whelan noted, “Government may represent the supreme religious truth of God’s existence and sovereignty. When it comes, however, to distinctively sectarian beliefs, government must represent the truth of society as it actually is. The truth is that American society is religiously pluralist.” Whelan, *Religious Liberty*, *supra* note 76, at 371.

celebrations.⁸⁷ We have seen no end to conflict and continued challenges to the recognition of the human right of religious freedom as the base on which other rights are built. But we have seen progress.

And he concluded his remarks with a prayer that we Catholic lawyers would not forget our ethical and God-given responsibility for the preservation of both church and state contributing in their own ways to build up the common good. He recalled his own work and said that he found that he was passing from “a very energetic Martha to what I hope is a more contemplative Mary.”⁸⁸ Yet his prayer—one of his many gifts—remains with us as today I offer one for him. In a special way, we Catholic lawyers owe him an enormous debt of gratitude for his counsel, companionship, and priestly service. We promise we will remember his elegant words that are both uplifting and humbling: “The salvation of souls, not the exemption of churches, is the pearl of great price.” Amen.

87. Whelan, *Supreme Court Doctrine*, *supra* note 1, at 15.

88. *Id.*

Notes & Observations