Faith Accompli?: Using Nonprofit Law To Protect Social Services when Faith-Based Providers Close

Tad Heuer†

Introduction .................................................................................................................. 178

I. The Parish Reconfiguration Process ...................................................................... 181

II. The Threat to Social Services .............................................................................. 186
   A. The Catholic Church and Social Justice ......................................................... 187
   B. Types of Social Services Provided Through the Catholic Church ............ 189
      1. Bricks and Mortar ................................................................................. 189
      2. Direct Service Provision ...................................................................... 191
      3. Community Stability ........................................................................... 192

III. Unworkable Compromises .................................................................................. 194
   A. Regulatory Approaches ............................................................................. 194
   B. Legislative Approaches ............................................................................ 195
   C. Diplomatic Approaches ............................................................................ 196
   D. The Unworkable Compromises ................................................................... 198

IV. The Procedural Statute Alternative ..................................................................... 199
   A. The Statutory Vehicle ................................................................................ 200
   B. Advantages of a Procedural Statute ............................................................. 202
   C. Executive Authority .................................................................................. 204
   D. Legal Authority and the First Amendment Religion Clauses .................... 206
   E. Summary of the Proposal ........................................................................... 208

V. Potential Criticisms and Concerns ....................................................................... 209
   A. Response to Concerns that This Proposal Is Too Limited ......................... 209
   B. Response to Concerns that This Proposal Is Too Broad ............................ 211

Conclusion .................................................................................................................. 214

† J.D., Yale Law School, 2006; Ph.D., The London School of Economics & Political Science, 2003; A.B./M.A., Brown University, 1999. The author would like to thank Noah Feldman, Adam Gordon, Marin K. Levy, David Lenz, Eduardo Peñalver, Steven E. Sachs, John Simon, and Kenji Yoshino for their suggestions, comments, and support. The author would particularly like to thank Michael Gottesman for his exceptional editorial assistance in bringing this Note to fruition. The author welcomes comments and correspondence via email at Heuer.YLPR.v25@gmail.com.
INTRODUCTION

The Roman Catholic Church in the United States has been buffeted by numerous crises in recent years, yet in few places have these crises combined to such an extent as in the Archdiocese of Boston. From revelations that the church hierarchy in Boston covered up the actions of sexually abusive priests, to the public debate over the politically charged role of the Archdiocese in the wake of the Massachusetts Supreme Judicial Court’s ruling in favor of same-sex marriage, to the controversy over whether parish priests should deny Communion to Catholic presidential nominee John Kerry because of his stance on abortion, the Archdiocese of Boston has acquired an unusually high public profile—even in a state where the Catholic church has historically carried significant political influence because of the 44% of Massachusetts citizens (and 53% of citizens within the geographic boundaries of the Archdiocese) who are at least nominally affiliated with the church. Yet in the midst of these very public crises, a quiet crisis was enveloping the Archdiocese of Boston.

In the span of seven months, from December, 2003, to June, 2004, the Archdiocese of Boston announced, planned, and executed the most broad-reaching closure of parishes ever undertaken in the United States. This closure process—called “reconfiguration” by the Archdiocese—was widely opposed by local parishioners, many of whom faced losing the parish church and community to which they had belonged for decades. Yet beyond the spiritual and emotional impact of the parish closure process, the structure of the closure process created significant problems for both state and local governments. This was largely because parishes provide a wide variety of social services in their communities—from schools to food pantries to immigrant assistance...
Faith Accompli?

services—to both parishioners and non-parishioners alike. For instance, one parish slated for closure operated a day shelter for older homeless people, as well as an outreach program for homeless and abused teenagers; another ran “a food pantry that feeds 3,000 people each month, a 188-student school, and the Little Lambs Baby Program, which provides diapers and baby food to low-income mothers.”

The reconfiguration procedure pursued by the Archdiocese of Boston kept government out of the closure process, thereby creating significant uncertainty and anxiety among both social service recipients (who feared the loss of those services), and government officials (who feared that they would have neither the advance notice nor the resources necessary to fill the gap).

Such a suboptimal outcome need never have arisen. This Note argues that both the Archdiocese and state government could have better handled the reconfiguration process in a way that would have resolved the uncertainty surrounding social services while still respecting the needs of all parties involved. Moreover, while this Note uses Boston as a case study to determine what went wrong in the reconfiguration process, the primary aim of this Note is to identify lessons that can help avoid similar future results in other cities. The archdioceses of New York, Chicago, and Newark, New Jersey have all announced that they may be forced to close or consolidate significant numbers of churches and parishes; indeed, in March, 2006, the Archdiocese of New York announced plans to close thirty-one of its 409 parishes as well as fourteen parochial schools. Moreover, a number of smaller dioceses around the country are also actively considering reconfiguration. As such, the problems that arose in Boston are almost certain to recur in archdioceses around the country, unless all parties involved recognize the potential secular problems that such closings may create and take proactive steps to prevent similar results.

While it may be too late for the Commonwealth of Massachusetts to proactively ensure the protection of its social services in the wake of the current round of parish closings, this Note argues that the lessons of Boston can

7. See infra Section II.B.
9. See Andrew Glazer, Merger Plan Worries Catholics; Some Fear End of Old and Familiar Churches, BERGEN COUNTY REC. (N.J.), May 24, 2004, at L1 (reporting on a plan to close forty-eight parishes in the Archdiocese of Newark); Ana Mendieta, Parishioners Debate Future of W. Side Catholic Churches, CHI. SUN-TIMES, May 18, 2004, at 11 (noting that all ten Catholic churches on Chicago’s West Side were being considered for closure and consolidation); Gary Stem, Archdiocese To Reorganize, J. NEWS (West Nyack, N.Y.), Oct. 25, 2003 (discussing the tentative plans for reconfiguration of the Archdiocese of New York).
11. These dioceses include Buffalo (see Elmer Ploetz, Initial Meeting Held on Reshaping Diocese, BUFFALO NEWS, Aug. 26, 2005, at D1), Syracuse (see Rahkia Nance, Closing Saddens Parishioners, PRESS & SUN-BULLETIN (Binghamton, N.Y.), June 22, 2006, at 1A), and New Hampshire (see Darry Madden, Diocese Pooling Parish Resources, BRATTLEBORO REFORMER (Vt.), June 13, 2006).
certainly inform the growing number of cities and states that will face similar circumstances in the very near future.

***

The central question this Note asks is whether the state should have any legal right to be either involved in or informed about the reorganization processes of nonprofit organizations (including religious ones), and if so, what form such involvement should take in order to balance the interests of the state with the needs (and constitutional rights) of the nonprofits. This Note argues that the state does have a compelling interest in reserving a legal right of some level of involvement in the reorganization of nonprofit organizations—in this instance, the Archdiocese of Boston—in order to mitigate the effects such reorganizations have on the provision of governmental social services. This Note then proposes a legislative solution that would empower government to meet its public obligations while ensuring that the First Amendment rights of religious nonprofit organizations to manage their own internal affairs are not infringed. In doing so, this Note not only presents the first scholarly examination of the 2004 Boston parish closings, but also offers a timely and practical policy blueprint for addressing the effects of a church-closing trend that appears likely to spread in the coming years.

Finally, the legislative solution this Note proposes is not limited to addressing the problem faced by governments in relation to Catholic parish closings in particular. Major secular nonprofit social service providers that dominate their respective geographic areas have the potential to create similar levels of uncertainty and upheaval if they were to close or scale back without warning. For instance, New York’s Harlem Children’s Zone runs comprehensive health and education programs that serve over 8600 at-risk inner city children in a twenty-four-block region of central Harlem. In New Jersey, the Community FoodBank delivers twenty-four million pounds of food annually to 1500 local food pantries throughout the state. And in urban Dorchester, Massachusetts, the nonprofit Codman Square Health Center provides a largely low-income community of 42,000 individuals with an innovative combination of comprehensive medical care and social, educational, and community services; its staff records over 120,000 client contacts annually. The solution proposed herein is therefore of significant general applicability, as it provides governments with a tool for managing social

Faith Accompli?

service delivery in any instance in which the reconfiguration or closure of a social service provider (either faith-based or secular) impacts the public in a significant way.

Part I of this Note outlines the background of the Boston parish reconfiguration process, providing a chronology of the events of early 2004 and illustrating the various tensions that arose as the process unfolded. Part II draws attention to one particularly important consequence of the reconfiguration process—the significant adverse effect of church closings on both parish-provided social services and the ability of government to adequately meet its own social welfare obligations. Part III discusses the various governmental solutions that were proposed in an attempt to ensure that reorganization was responsive to both governmental and parishioner needs, and demonstrates why these solutions were ultimately unsuccessful. Part IV then presents the main thesis of this Note, arguing that there is an alternative approach that would meld the legal with the diplomatic in order to allow future reorganizations to be resolved in a more mutually beneficial manner. This Part proposes the use of a "procedural statute," which would require nonprofit organizations to engage in a nonbinding consultation with the state if they took (or proposed to take) steps that would significantly and adversely affect the ability of the state to fulfill its social service obligations. Part V discusses several legitimate concerns that critics could raise regarding the proposed statutory solution, including its validity, its enforceability, its potential unintended effects, and its practical effectiveness. This Part then rebuts each of these arguments in turn. The Conclusion suggests that other states consider enacting similar legislation in order to avoid similar outcomes, if and when other archdioceses—or other secular nonprofit social service providers—find it necessary to engage in large-scale reorganizations.

I. THE PARISH RECONFIGURATION PROCESS

In order to understand the problem that state and local governments faced following the reconfiguration announcement, it is first important to understand how the reconfiguration process unfolded—the underlying context, the actors involved, and the speed with which closure decisions were made.

There was no one factor that triggered the decision of the Archdiocese of Boston to undertake the massive program of parish closures it announced in December, 2003. Declining Mass attendance, a lack of new seminarians to take the place of aging priests, and an increasing number of parishes with


16. Between 1988 and 2004 there was a loss of 341 diocesan priests in the Archdiocese of Boston
spiralng deferred maintenance bills all combined to threaten the number of viable parishes remaining within the Archdiocese. Indeed, demographics in the Archdiocese meant that many churches no longer served the communities for whom they were built. The descendants of those Italian and Irish immigrants who constructed churches in the inner cities at the turn of the twentieth century no longer lived in proximity to those churches. Instead, they had moved out to the suburbs, where many parishes were growing rapidly. This slow, silent decline was staunched for many years by the Cardinal’s Annual Appeal, a fundraising program in which the more affluent parishes of the Archdiocese contribute funds to a central Archdiocesan fund, which is then redistributed to assist these struggling parishes. While these struggling parishes may have had fewer parishioners, frequently they maintained disproportionately important roles in their local communities, supporting programs ranging from Catholic schools and elderly outreach assistance to soup kitchens and literacy programs.

Yet the revelations about the role of the Archdiocese in protecting pedophile priests in 2002 turned this slow decline into a rapid one. Not only did Mass attendance begin to decline, but so too did the local weekly collections upon which almost all churches depend for their immediate financial needs—by 13% between 2002 and 2004. Donations to the Cardinal’s Appeal fell precipitously as well, from a record $17 million in 1999 and a respectable $15.6 million in 2001 to a low of just $8.8 million in 2002, according to the Director of the Annual Appeal for the Archdiocese. Furthermore, the sexual abuse scandal was creating more than financial problems for the Archdiocese; it was creating sustained criticism of the ability of the Archdiocese to manage its own affairs. By early 2002, several high-profile grassroots organizations had formed among lay Catholics, advocating an overhaul of the personnel in the Archdiocese and a financial settlement of the parishes crisis.

(a decline of over 37%). In 2004, the current median age of priests in the Archdiocese was fifty-nine, and there were 132 active priests over the age of seventy. Archdiocese of Boston, Frequently Asked Questions About Reconfiguration, http://www.rcab.org/Parish_Reconfiguration/FAQ.html (last visited Dec. 15, 2006) (on file with author) [hereinafter Frequently Asked Questions].

17. Archbishop O’Malley noted that fifty of the 357 parishes in the Archdiocese were unable to pay their bills, and that the Archdiocese, which had avoided bankruptcy by borrowing $135 million in 2002, would face a $104 million bill just to repair its buildings within the City of Boston. See Paulson, supra note 5.

18. Frequently Asked Questions, supra note 16 (discussing the demographic shifts in the Archdiocese over the past century).


Faith Accompli?

abuse claims being made by the alleged victims.\textsuperscript{22}

As the head of the Archdiocese, Cardinal Bernard Law admitted to having acquiesced in reassigning priests who had been accused of child abuse, rather than reporting those priests to the police.\textsuperscript{23} However, Cardinal Law believed that by agreeing to a comprehensive audit of the priest assignment system—and by agreeing to implement “zero tolerance” safeguards that would prevent future such abuses—the lay community would be placated.\textsuperscript{24} He was wrong.\textsuperscript{25}

Eventually bowing to the growing revolt within the lay community, Cardinal Law submitted his resignation to the Vatican on December 13, 2002.\textsuperscript{26} On July 1, 2003, the Vatican announced that in his place, Pope John Paul II had appointed Bishop Sean O’Malley, the former bishop of Fall River, Massachusetts and the then-bishop of West Palm Beach, Florida.\textsuperscript{27} O’Malley’s experience in Fall River made him an attractive candidate for the Boston position because of his understanding of the Massachusetts Catholic community.\textsuperscript{28} But O’Malley brought extremely valuable specialist credentials as well: the very reason O’Malley had been dispatched to West Palm Beach only nine months earlier was because of his proven ability to negotiate the resolution of priest sexual abuse scandals. Such skills were certainly in demand in Boston, and the Vatican recognized the need to bring O’Malley back to Massachusetts to triage the rapidly deteriorating situation within the Archdiocese.\textsuperscript{29}

Upon his installation as Archbishop on July 30, O’Malley’s first priority was to settle the civil sexual abuse lawsuits of at least 500 alleged victims, who were suing the Archdiocese for a total of over $100 million.\textsuperscript{30} In addition to the

\textsuperscript{22} The main group, Voice of the Faithful, was organized in January, 2002, by twenty-five parishioners of St. John the Evangelist church in Wellesley. Although initially formed in response to what these parishioners viewed as the systemic problems within the hierarchy of the Archdiocese of Boston, the group quickly grew into a significant lay force in the Archdiocese. See, e.g., Thomas Farragher, Lay Group Votes To Seek Cardinal’s Ouster, BOSTON GLOBE, Dec. 12, 2002, at A1; Michael Paulson, Law Seeks To Curb Organizing by Laity, BOSTON GLOBE, Apr. 27, 2002, at A1; Michael Paulson, Push is On To Quell Voice of Faithful, BOSTON GLOBE, Aug. 17, 2002, at A1.


\textsuperscript{25} Eric Convey, Church Adopts Abuse Policy, BOSTON HERALD, June 15, 2002, at 1.


\textsuperscript{28} Steve Eder, Past Flock Has Warm Memories of Tenure, BOSTON GLOBE, July 2, 2003, at A25.

\textsuperscript{29} Kevin Cullen, Selection Seems Driven First by Local Needs, BOSTON GLOBE, July 2, 2003, at A25.

\textsuperscript{30} See, e.g., Michael Rezendes & Walter V. Robinson, Lennon Picks Sites for Sale, Eyes Court Test in Abuse Cases, BOSTON GLOBE, Dec. 23, 2002, at A1. These claims were in addition to the $40
legal and moral ramifications of the lawsuits, these suits were also threatening to put the already financially struggling Archdiocese into bankruptcy. 31 Vowing that no money from local parish collections or Catholic Charities would be used to settle the lawsuits, O'Malley promised that the settlements would be paid for through a combination of Archdiocesan assets, insurance, and the sale of Archdiocesan property (as opposed to parish property). 32 On September 9, 2003, after protracted and sometimes tense negotiations, O'Malley announced a settlement proposal of $85 million, 33 which was accepted by the requisite number of victims on October 20. 34 Because of questions surrounding whether the Archdiocese's insurance companies would cover a portion of the settlement, O'Malley announced that he would be selling the grandiose archbishop's residence and grounds, assessed in 2002 at $13.7 million. 35 For a few fleeting days, it appeared that Archbishop O'Malley had successfully navigated the Archdiocese through its most grueling crisis, while acknowledging the need to rebuild the trust and confidence of parishioners in the years ahead. Instead, this was the calm before the storm.

On December 16, 2003, O'Malley announced that by June 1, 2004, a massive number of parishes were going to be either merged or closed in an attempt to refocus the resources of the Archdiocese—a process that the Archbishop referred to as reconfiguration. Emphasizing that the need for reconfiguration arose “quite independent of the sex abuse scandal,” O'Malley portrayed the process as essential in order to do what was best “for the entire faith community, not just what seems to be best for a single parish.” 36 Indeed, O'Malley carefully timed the announcement of the restructuring proposal to

---


32. The Archbishop’s spokesman, Rev. Christopher Coyne, further noted that the settlement would be paid in part through the sale of up to fifteen church properties, while also acknowledging that the Archdiocese’s insurance carriers had not (as of then) agreed to contribute funds to the settlement. Boston Church Settles with Abuse Victims, FACTS ON FILE WORLD NEWS DIG., Sept. 18, 2003, at 732G2.

33. Kevin Cullen & Stephen Kurkjian, Church in an $85 Million Accord: Tentative Record Pact with 532 over Abuse, BOSTON GLOBE, Sept. 10, 2003, at A1. As of April, 2006, the Archdiocese had agreed to pay a total of $84.1 million to 541 victims as a part of the global settlement. Financial Disclosure, supra note 30.


come after the announced sale of Archdiocesan property, in order to demonstrate that the Archdiocese’s obligations under the sexual abuse settlement were being met with preexisting resources (rather than with the resources that would be saved by closing heavily subsidized parishes). Initial reaction from the parish priests to this announcement was cautiously optimistic, as they applauded what appeared to be the refreshing openness and honesty of the new Archdiocesan administration.\footnote{Paulson, \textit{supra} note 5.} However, this silver lining was of little consolation to the lay community. Only days after having resolved the largest crisis ever faced by the Archdiocese, Catholics were again faced with the prospect of another widespread upheaval—this time in the form of an extremely rapid process that would pit neighboring churches and parishioners against one another.

Indeed, as details of the process emerged, it became clear that the involvement of the lay community in the restructuring would be both limited and adversarial. The initial leveling test was how each parish scored on the “sacramental index”—a weighted composite of the number of baptisms, weddings, and funerals in the parish over the past year.\footnote{Anne E. Kornblut, \textit{Parishes Calculate Their Future: “Sacrament Index” Part of Decision on Closings}, \textit{BOSTON GLOBE}, Mar. 9, 1998, at B1. Although this index had existed for many years as a tool for allocating priests, the Archdiocese decided to expand the use of the index to help determine candidates for parish closure.} Parishes with low scores would be presumed to be targets for closing unless a compelling case could be made otherwise, and vice versa for parishes with high scores. Armed with these index scores, the Archdiocese then grouped parishes into “clusters” of three to eight, and required that the parishes in each cluster designate one of their number for closure—effectively creating, as one \textit{Boston Globe} columnist aptly put it, an ecclesiastical version of the reality TV show \textit{Survivor}.\footnote{Bella English, \textit{Keeping the Faith}, \textit{BOSTON GLOBE}, June 22, 2004, at E1.} While individual parishes would be permitted to offer reasons to the Archdiocese to demonstrate why their parish should remain open, the final decision about closings would be made by the Archbishop, and could be appealed only to the Vatican, and then only on procedural (rather than substantive) grounds.\footnote{Gregory L. Tracy, \textit{Parish Appeals Unlikely To Succeed, Says Canon Law Expert}, \textit{PILOT} (Boston), June 4, 2004, \textit{available at} http://www.rcab.org/Pilot/2004/ps040604/Parish_appeals.html.} These decisions were also to be made quickly. On January 12, 2004, the Archbishop set an eight-week deadline—March 8—for parishes to recommend the candidate for closure in their cluster.\footnote{Michael Paulson, \textit{O’Malley Seeks Advice on Closings}, \textit{BOSTON GLOBE}, Jan. 13, 2004, at A1.} In the span of only six months, the Archdiocese moved quickly through the reconfiguration process, arguing that a rapid consolidation would be less painful than a long and drawn-out one.\footnote{Kevin Joy & Stephen Kurkjian, \textit{Diocese To Speed Parish Closings}, \textit{BOSTON GLOBE}, Mar. 3, 2004, at A1.} Indeed, the Archdiocese noted that
parishes needed to know whether they should invest in maintenance projects, that parish schools needed to know (prior to their fall opening dates) whether their parent parish would still exist, and that engaged couples needed to know whether the church in which they intended to get married would be open on the date of the wedding.\footnote{See id.; Michael Paulson, Closings Spur Church To Warn of Weddings, BOSTON GLOBE, Apr. 27, 2004, at B1.} An additional factor driving the accelerated closing schedule was money—as the Archbishop noted, the Archdiocese was on the brink of financial collapse, and the sale value of property of the parishes that were eventually designated for closure was estimated at a total of over $400 million.\footnote{Stephen Kurkjian, Parish Properties Seen Worth $400m, BOSTON GLOBE, May 27, 2004, at A1.}

Yet the speed and efficiency with which the Archdiocese proceeded with the restructuring was a shock to many parishes and parishioners, particularly those who were at risk of closure.\footnote{Noonan & Mahoney, supra note 4.} Under canon law, parishes are owned by and operated subject to the approval of the Bishop, which means that the Archdiocese is free to reorganize itself and its “temporal goods” in any way it wishes in order to further its religious purpose.\footnote{Temporal Goods and Their Administration, 1983 CODE c.634-40.} While the decision of the Archdiocese to close parishes was unquestionably resented by numerous lay parishioners because of the cursory nature of the consultation, the prospective dispersal of cohesive parish communities, and the intention of the Archdiocese to deconsecrate and then sell numerous churches, there was little dispute that the Archdiocese was within its legal rights to engage in these changes. On May 25, 2004, the Archbishop announced his decision to close or merge sixty-five of the 357 parishes in the Archdiocese.\footnote{Sean O’Malley, Archbishop of Boston, Remarks on Parish Reconfiguration (May 25, 2004), available at http://www.rcab.org/Parish_Reconfiguration/statement040525.html. Seventeen more parishes were eventually affected in the older industrial cities of Lawrence and Lowell, bringing the total to eighty-two.}

II. The Threat to Social Services

While the primary impact of the Archdiocese’s decision to reorganize was upon the Catholic spiritual community, the reconfiguration had a second major impact upon the general public. This impact was closely tied to the reason many of the churches that scored poorly on the “sacramental index” had remained open and operating for many years under the subsidy of the Archdiocese: their social service outreach ministries. With the prospective loss of parishes, both state and local governments faced the loss of social services that they had traditionally relied upon to augment their own social welfare obligations. This Part illustrates the historical commitment of the Catholic Church to social justice and outlines the three main categories of social services
Faith Accompli?

in which the Church has traditionally engaged—social services that were suddenly threatened by the Boston reconfiguration.

A. The Catholic Church and Social Justice

The commitment to social justice through action has always been a centerpiece of Roman Catholic doctrine. Catholic parishes have traditionally operated as more than mere worship communities; indeed, arguably one of the most significant splits between the Roman Catholics and Martin Luther's Protestant reformation was Luther's dissent from the Catholic belief that faith alone, in the absence of good works, was insufficient to ensure entry into the Kingdom of God. This commitment to social service was reaffirmed in 1965 by the Second Vatican Council in the papal encyclical Gaudium et Spes. In this encyclical, Pope Paul VI reminded Catholics that

[a]ll must consider it their sacred duty to count social obligations among their chief duties today and observe them as such. For the more closely the world comes together, the more widely do people's obligations transcend particular groups and extend to the whole world. This will be realized only if individuals and groups practise moral and social virtues and foster them in social living.

In this spirit, the Catholic Church has historically and voluntarily engaged in numerous social undertakings that have eased the welfare burden of government. Indeed, while the state may be obliged by law to provide many of these social welfare services to all residents who qualify, it has long been recognized that the state frequently relies upon the provision of services by nonprofit, charitable, and religious organizations in order to augment its own limited resources.

The Archdiocese of Boston and its parishes have historically embraced the Catholic doctrine of social justice wholeheartedly, providing a vast array of social services in Greater Boston communities ranging from parochial schools to food pantries. At the Archdiocesan level, social services are provided by Boston Catholic Charities, a tax-exempt 501(c)(3) church-related corporation that receives its funding from government agencies, religious sources, and a variety of foundations. Boston Catholic Charities is the largest single private

49. PAUL VI, GAUDIUM ET SPES: PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD ¶ 30 (1965).
50. For example, Catholic schools have frequently been liberal toward non-Catholics in their admission policies, and many of the major hospitals in the United States today were founded (and often continue to be run) by the Roman Catholic Church and its subsidiaries.
51. Archdiocese of Boston, Social and Health Care Ministries (Nov. 2, 2004), cached version available at http://web.archive.org/web/20041102094226/http://www.rcab.org/Finance/ministriesSocialHealth.html ("Programs include community health care and emergency assistance, such as shelters, transitional housing and food pantries; adoption and foster care; mental-health counseling; substance abuse treatment and educational and vocational training.").
52. CATHOLIC CHARITIES (ARCHDIOCESE OF BOSTON), ANNUAL REPORT 2005, at 15, available at
social service provider in the Commonwealth, in the fiscal year ending June 30, 2003, Boston Catholic Charities spent $30,468,923 on social service programs, assisting over 213,000 individuals. While the operations of Catholic Charities were not directly impacted by the parish closings, these figures illustrate the extent to which the Catholic Church has assumed a leadership role in social service provision in the Archdiocese. Moreover, although impressive in their own right, these figures also illustrate by omission the critical importance of local parishes in local-level social service provision. These figures do not include the social services provided solely at the parish level, nor do these figures entirely reflect the significant amount of volunteer or parish-subsidized labor that contributes to the social justice mission of the Archdiocese at the local level. Catholic parishes have always played a significant role in their communities, ministering to the poor, hungry, unemployed, and dispossessed, Catholic and non-Catholic alike. Indeed, it is in local service delivery that parish churches have historically played such an integral role, given that it is at the “street level” where the success of social service provision is almost always determined.

The decision of the Archdiocese to close numerous parishes therefore struck a significant blow not only to worship communities, but also to the provision of local social services. It is worth noting that the Archdiocese claimed that it would consider social service provision when making its closure decisions, asking clusters to make a “careful review of all [such] activities accomplished in the cluster.” Furthermore, Archbishop O’Malley stated prior to the initiation of the closure process that he wanted to avoid placing the sole burden of any parish closings on the poor or the immigrant communities in the Archdiocese. Yet while the Archdiocese permitted (limited) input from parishes in reaching its decisions about closings, the Archdiocese did not

54. CATHOLIC CHARITIES (ARCHDIOCESE OF BOSTON), ANNUAL REPORT 2003, at 7 (on file with author). Note that this figure is for social services alone, and does not include additional administrative costs. These social service programs include emergency food and clothing assistance, immigration counseling and information, parental training classes, adoption services, AIDS care and education, substance abuse treatment, day care services, home health visitation, and GED preparation. Id. at 8.
56. See MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY (1980).
57. These activities included the “presence of an ethnic apostolate, number and population of parish schools, outreach to the hungry and homeless, programs for the elderly and homebound, nursing home coverage, youth groups, number of children in religious education, adult education programs, RCIA [Rite of Christian Initiation for Adults] meetings hosted by parishes, and a number of other activities sponsored by parishes.” Frequently Asked Questions, supra note 16.
59. See, e.g., Paulson, supra note 41.
solicit input from those outside the Catholic community regarding how the parish closings would affect the wider public communities in which they were situated. Furthermore, attempts by state and local government to convince the Archdiocese to consult more widely met with swift rejection, as the Archdiocese declined to engage in any systematic consultation with state or local governments regarding the impact that the closures would have on non-Catholics. Indeed, despite the pleas of numerous governmental leaders to delay the closing process to mitigate the effect on broader neighborhood stability, Archbishop O’Malley declined, noting simply that he “consider[ed] these moves necessary to save the church and strengthen the parishes.” While the City of Boston eventually resorted to convening an ad hoc task force to independently assess the extent and necessity of the social services offered at each of the parishes designated for closure, smaller communities were often left to their own devices in seeking information.

B. Types of Social Services Provided Through the Catholic Church

In order to fully understand both the government’s attempts to mitigate the consequences of the reconfiguration and the alternative solution that this Note proposes, it is essential to understand the impact of the reconfiguration process upon the three general types of social services that parishes traditionally provide—“bricks and mortar,” “direct service,” and “community stability.” Unfortunately, the structure of the reconfiguration process not only eliminated these types of social services from areas in which they were desperately needed, but also severely hampered the ability of government to ensure the continuity of these services through alternative means.

1. Bricks and Mortar

This category consists mostly of schools, because education relies heavily on fixed physical resources in terms of buildings and physical plant. The Archdiocese of Boston operates an extensive and comprehensive educational system, with 168 elementary and high schools educating over 53,000 children in 2003-04. In Boston alone in 2004, the Archdiocese ran thirty-eight schools,
educating nearly 11,000 of the 82,000 school-aged children in the city. Most Catholic schools are directly associated with a specific parish, from which the majority of students are usually drawn and which provides a certain amount of local funding. Because of subsidies from the Archdiocese, tuition is often significantly less than at private schools, averaging $2570 for elementary school and $6544 for secondary school in 2002-03. Although the Archdiocesan schools teach a Catholic curriculum and are maintained by subsidized tuition, most are open to non-Catholic students, and in many urban areas Catholic schools comprise a significant minority of the overall number of classroom seats in the school district. It is also important to note that although parents may decide to send their children to Catholic schools, Massachusetts law still provides that every child in the Commonwealth is entitled to a place in a Massachusetts public school. Accordingly, the closure of a Catholic or other private school has the real potential to increase the burden upon the local public school, through a rapid influx in the number of former Catholic school pupils who must be accommodated in the public system.

As the reconfiguration itself unfolded, this very concern was paramount among state and local education officials, given that there was almost no information forthcoming from the Archdiocese regarding how parishes with parochial schools would be treated during the reconfiguration. Eventually, it was revealed that of the eighty-two parishes slated for closure, three would be closing their schools, two schools would merge, and another six schools would close elsewhere in the Archdiocese (a move unrelated to the parish reconfiguration). However, although the number of schools actually closed was relatively small, the initial March 2004 list of potential closure candidates included seventeen parishes with schools. This large list created significant uncertainty within numerous local communities, which were legitimately concerned that the lack of advance communication—combined with the late-May timing of the closure announcement—would provide neither parents nor local public school boards with enough time to plan adequately for the arrival of displaced pupils. By announcing a decision at the end of May, the

68. See, e.g., Editorial, Church-City Teamwork, BOSTON GLOBE, Mar. 11, 2004, at A18 (noting that Archdiocesan officials refused to participate in a public hearing regarding the impact of the parish closures on public education).
70. Paulson, supra note 65.
Faith Accompli?

Archdiocese almost guaranteed that parents would miss many of the deadlines for arranging alternative places at other private schools. Furthermore, with most local education budgets having been set several months earlier by city councils or at town meetings, and with the fiscal year ending on June 30, there was little time for many communities to arrange for a reallocation of resources in order to address any enrollment increase that might have arisen as a result of school consolidations or closures. While some communities may have been able to absorb the new students without difficulties, there existed the real possibility that a sudden influx of students would create the need for more classrooms, teachers, supplies, buses, and myriad other fiscal expenditures.

2. Direct Service Provision

This category covers the vast range of services that parishes provide to both their own parishioners and to their broader local communities. Across the Archdiocese, these services include health ministries, elderly visitation and "meals on wheels", substance abuse rehabilitation programs, food pantries, soup kitchens, immigration assistance services, teaching English as a Second Language, youth sports leagues, and low-income child care. Moreover, many of these services have been designed specifically to meet the unique needs and demographics of the parish and community, and as such are highly geographically dependent. It is somewhat axiomatic that that a Vietnamese youth program run out of a parish in a Vietnamese immigrant community in inner city Dorchester would be of little value if the program were retained yet

72. Although the Archdiocese promised that any displaced pupil would be assured a place at another parochial school, there are obviously significant geographic limitations regarding the extent to which many families would find this option feasible. See Margery Eagan, *Children Get Lost in the Shuffle*, BOSTON HERALD, May 27, 2004, at 8.

73. As Dracut School Superintendent Elaine Espindle told the *Boston Globe*, "there are 464 students from Dracut attending Catholic school in Lowell," a city where two schools were associated with parishes recommended for closure. Espindle's concern was "that some of these students will enroll in local schools. This would have a big impact on the district's spending in 2005, since the enrollment numbers used to determine the budget do not include any increases from parochial school closings." Alexander Reid, *Crunching the Numbers: School Budget Planning Hampered by Uncertainties*, BOSTON GLOBE NORTHWEST WKLY., Mar. 18, 2004, at 1.

74. To document these services parish-by-parish is well beyond the capacity of this Note. However, an illustrative sense of the scope of these parish-level programs can be found by quickly perusing local parish websites. See, e.g., The Paulist Center Boston, Paulist Center Groups, http://www.paulist.org/boston/groups/index.htm (last visited Dec. 16, 2006) (food pantry, soup kitchen, Interfaith Partnership against Domestic Violence); St. Blaise Catholic Church (Bellingham), Special Sections, http://www.saintblaise.org/SpecialSections/tabid/61/Default.aspx (last visited Dec. 16, 2006) (community harvest, food pantry); St. Joseph Parish (Salem), Ministries (Aug. 9, 2002), cached version available at http://web.archive.org/web/20020809140435/http://www.stjoseph-church.com/ministries.html (Hispanic community group, food pantry, youth programs); St. William's Parish (Dorchester), Ministries/Opportunities, http://www.technobridge.com/stwil/parish.html (last visited Dec. 16, 2006) (St. Vincent dePaul Society (assistance to poor families), English as a Second Language, Legion of Mary (visitation of the sick), soup kitchen, visitation to homeless mothers and children, youth sports league).
moved to a parish in suburban Wellesley. However, although the Archdiocese promised to consider the implications of social service provision during the reconfiguration process, the lack of transparency in the reconfiguration process made it impossible to determine whether these implications were weighted appropriately (or even at all). Indeed, an anecdotal review of the parishes slated for closure revealed that many of these parishes offered a robust range of social service programs, all of which were therefore in danger of either being eliminated or being moved out of the local community. Notably, the proposed closings also disproportionately affected churches in urban areas—precisely the areas in which parish-based social service provision is often the most crucial.

This failure of the reconfiguration process to adequately explain or redress the consequences of reconfiguration on parish-level social service provision is significant for two main reasons. First, the parishes in which many of these services are most needed are often those parishes that have the least money. There is obviously much less need for many of these social services in the wealthier, self-sustaining parishes—parishes which were generally spared during reconfiguration. Second, because the direct services are usually provided by the parish without significant regard for the religious affiliation of the recipients, many of those who had the potential to be most affected by the elimination of parish-provided direct services were not Catholic. These individuals were thus not even provided with any meaningful opportunity to voice their concerns about the impact the reconfiguration process would have on their lives.

3. Community Stability

The third category, community stability, is the least visible of the social services provided by parishes, but is no less vital. Institutions—be they
churches, schools, general stores, or others—are extremely important to the stability of communities because they provide disparate components of a community with a sense of common connection. As the *Boston Globe* noted, "the loss of a respected central institution such as a church or community center can quickly lead to disinvestment and neighborhood destabilization." For example, former Boston Mayor Ray Flynn observed that the churches of South Boston had played a crucial role in quietly addressing that area's youth drug problem, and voiced concern that the reconfiguration process would not fully account for these kinds of contributions. "The government is getting out of the business of helping people," said Flynn. "People need somewhere to go for family stability." Parishes and other institutional actors have often spent years working to acquire the trust of their communities, through the slow process of building the intangible personal networks that are so essential for successful local-level social service provision. Yet the sudden elimination of parishes (and the influence that those parishes hold in their local communities) creates significant problems for governmental entities, which were given only a few months to attempt to replace social services whose prior success may have relied heavily upon mutual trust that took years to accumulate.

For example, during the 1990s, the Boston Police Department engaged in a unique community collaboration, forming partnerships with local church leaders in order to reform the community perception of the police force. Studies showed that between 1990 and 1999, homicide rates in Boston fell by 80%, while complaints against police declined by 60%—declines that these studies attribute partially to the effectiveness of these community partnerships. Other services such as immigration services rely heavily upon institutional trust networks as well, because immigrants—often unfamiliar with local laws, language or customs—must place significant trust in those to whom they turn for help. Despite the fact that Boston had sixty-seven parishes with ethnic communities large enough to support a separate ethnic-language Mass—i.e., parishes in which immigration assistance and other similar social services might be in high demand—eighteen of these parishes were designated for closure. Although the impact of reconfiguration on community stability may

---

not be as immediately apparent as the impact of reconfiguration on direct service provision, the consequences of reconfiguration are likely to be equally adverse in both contexts. The police collaboration studies suggest that without the assistance of local nongovernmental institutions, government agencies will often have more difficulty building the trust necessary to accomplish their own social service missions. In closing churches and removing important social institutions from neighborhoods without engaging in consultation with state and local governments, the Archdiocese failed to address the potential destabilizing effects of its actions, particularly in poorer urban communities in which there are fewer institutional anchors.

III. UNWORKABLE COMPROMISES

As the Archdiocese moved ahead with its reconfiguration plans, state and local governments scrambled to find ways to mitigate the impact that the parish closures would have upon the governmental provision of social services. From this concern emerged three different approaches, which can roughly be categorized as regulatory, legislative, and diplomatic. Although each had its strengths, none was ultimately successful, for the reasons set forth below.

A. Regulatory Approaches

The initial regulatory approach came from Massachusetts Secretary of State William Galvin. Throughout early 2004, Galvin explored various legal avenues that would have provided the Commonwealth with a measure of influence over the parish closings. In one instance, Galvin sought to determine whether his position as the chairman of the Massachusetts Historical Commission provided him with authority to protect or landmark individual church buildings that had been deemed historically significant—either through law or by being allowed to provide financial assistance that would permit essential maintenance to be conducted on the structures themselves.\(^8\) Although in 1990 the Jesuits won a significant preservation case against the historic designation of the interior of Immaculate Conception church in Boston’s South End,\(^8\) Galvin argued that in that case, the religious order opposed the designation. Galvin believed that here, many churches would welcome the designation (and the assistance that the designation would bring). This innovative approach failed to gain any significant traction, however, largely because the Archdiocese argued that it both owned the parish properties and opposed any such designation.\(^8\)

---


\(^8\) Several churches slated for closure did seek to challenge their closure on historic preservation list (last visited Dec. 15, 2006).
Faith Accompli?

Galvin then sought to determine whether his authority (and/or that of the Attorney General, Tom Reilly) over nonprofit and charitable organizations could be employed to block the reallocation of gifts that had been given to specific parishes. Parishioners in some parishes argued that their financial and in-kind donations to the parish had been for the use of the parish alone, and could not therefore be transferred (either to other parishes or to other Archdiocesan uses) without the express consent of the donors. While this approach did meet with some notable initial success after the actual closings were announced, the effectiveness of this approach in leveraging significant influence over the prospective closing decisions of the Archdiocese was minimal to nonexistent.

In a somewhat analogous regulatory maneuver, several local governments attempted to use their zoning authority to thwart or delay the closure of local parishes once the closures were announced. Yet this regulatory gambit likewise had little or no effect upon the closure decisions and did little to help local governments prepare for the social and community consequences of those closures.

B. Legislative Approaches

Despite Secretary Galvin’s efforts to find some legal angle through which to have the views of state government recognized in the reconfiguration process, the Archdiocese ultimately proceeded on its own schedule and announced the closings on May 25, 2004. In the days immediately following

grounds, including one church (St. Jeremiah’s in Framingham) which argued that its bells—donated in memory of Challenger astronaut and former parishioner Christa McAuliffe—were sufficient to merit special consideration of the church itself as a historic landmark. See Michael Paulson, 10 of 82 Parishes Fight Archdiocese on Closure Plans, BOSTON GLOBE, Aug. 12, 2004, at A1.

88. In August, 2004, the Archdiocese announced that the Attorney General would be exercising his authority over the use of charitable funds to regulate the “disposition of millions of dollars in money and gifts” that may have been legally restricted when they were initially donated to the eighty-two parishes slated for closure. Michael Paulson, AG Gains Oversight of Assets at Parishes, BOSTON GLOBE, Aug. 19, 2004, at A1. This decision expanded an ad hoc approach begun in June, 2004, when parishioners from one parish were successfully able to petition the Archdiocese to refrain from spending or reallocating a school fund that, they argued, was set up solely for the use of their local parish school. Jonathan Salzman & Suzanne Sataline, Church Seeks AG’s Opinion on School Fund, BOSTON GLOBE, June 5, 2004, at A1.

89. Local governments in communities including Revere, West Newton, Gloucester, and Milton pursued variants of this zoning authority approach. This tactic generally consisted of attempting to “downzone” the land on which the church sat. The goal of such actions was to effectively prohibit the high-density development opportunities that would make the properties attractive to large-scale commercial developers. There are, however, legal questions concerning whether these changes constitute illegal “spot zoning” or violate the federal Religious Land Use and Institutionalized Persons Act (RLUIPA). See, e.g., Kathy McCabe, Revere Wants Say on New Use for Church, BOSTON GLOBE, June 6, 2004, at North 1; Sara Perkings, Parish, Town Raise Concern Over Closing of St. Pius X: Greater Communication by Diocesan Officials Requested, PATRIOT LEDGER (Quincy, Mass.), June 21, 2004, at 13; Matt Viser & Erica Noonan, Church Says Zoning Change Won’t Stop Parish Closing, BOSTON GLOBE, July 15, 2004, at West 1.
the closure announcement, Galvin then switched gears, turning his attention from regulatory solutions to legislative ones. On May 28, Galvin stated that he would file legislation in the Massachusetts Legislature that would require religious organizations to report to the state details of large-scale financial transactions.\textsuperscript{90} "I don't do this lightly as I know it will be considered treading on the separation of church and state, but it's absolutely not that," said Galvin.\textsuperscript{91} "It is an attempt to force some transparency on an institution that is making decisions on millions of dollars of property that affect thousands of people throughout Greater Boston."\textsuperscript{92} Under Galvin's bill, religious organizations would retain their traditional exemption from filing annual reports except in years when the organization had completed sales of real estate or other assets in excess of $2 million.\textsuperscript{93} While this legislation eventually found a sponsor,\textsuperscript{94} it was soundly defeated in a lopsided 147-3 vote in the Massachusetts House in January 2006, under criticisms that it infringed too heavily upon the separation of church and state.\textsuperscript{95} Aside from this single legislative threat, it does not appear that any other political actors attempted to fashion a legislative solution that would cushion the blow that the parish closures would deliver to government and communities.

C. Diplomatic Approaches

The corollary to the legislative approach is the diplomatic approach. Numerous civic leaders attempted to engage the Archdiocese in some form of consultation during the first six months of 2004, but the Archdiocese repeatedly declined these overtures during the reconfiguration process. For example, in March, the director of the Boston Redevelopment Authority—the city's chief planning agency—urged the Archdiocese to work with the city on a master plan to lessen the impact of the parish closures.\textsuperscript{96} Yet according to a Boston

\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} Paulson, \textit{supra} note 87 (reporting that State Senator Marian Walsh had circulated draft legislation that would "require religious organizations to file annual financial reports like those now filed by nonreligious charitable organizations and that would require charitable organizations, including churches, to report their real estate holdings.").
\textsuperscript{95} See Scott Helman, \textit{House Rejects Disclosure of Religious Funds}, \textit{BOSTON GLOBE}, Jan. 26, 2006, at A1. In April, 2006, the Archdiocese did voluntarily disclose audited financial reports for FY 2004 and FY 2005, as Archbishop O'Malley stated that his reason for making the public disclosures was to rebuild trust between the Archdiocese and the community. Michael Paulson, \textit{Church Tackles $46M Gap; Financial Disclosures Win Praise}, \textit{BOSTON GLOBE}, Apr. 20, 2006, at A1. Notably, this disclosure came after significant public pressure, and nearly two years after the first parishes were designated for closure under the reconfiguration proposal. For the complete Archdiocesan financial disclosure documents, see Archdiocese of Boston, Financial Transparency, http://rcab.org/Finance/HomePage.html (last visited Dec. 15, 2006).
Faith Accompli?

Redevelopment Authority spokeswoman, "the [A]rchdiocese has shown little interest in such a process . . .". Similarly, the Archdiocese refused to send a representative to a March hearing held by the Boston City Council regarding the effect that the closures would have on the public school system, despite the legitimate concerns of the city ranging from school transportation to teacher assignment schedules. This continued reticence from the Archdiocese, particularly as the date for the closure announcement approached, prompted a mixture of resentment and helplessness among government officials.

Finally, on May 29, 2004, the Archdiocese and Mayor of Boston Thomas Menino announced that the Archdiocese and the City of Boston had agreed to work together in order to find new homes for the social services that would be displaced because of the closings. Boston was the municipality that was hit hardest by the closings, both in terms of the absolute number of parishes to be closed (twelve) and the neediness of the communities in which those parishes were located. A relieved Mayor Menino emphasized the importance of this agreement, noting that "these churches are more than places of worship. They are community services centers for many of these neighborhoods." This agreement was significant in that it was the first major acknowledgment by the Archdiocese that the secular community would be adversely affected by the parish closings.

The value of this agreement should not be overstated, however, for a number of reasons. First, it was in no way preordained that such a compromise would occur, and without the insistence of the powerful Boston political establishment, such a compromise might not have ever been reached. It is worth observing that the Boston agreement came over six months after the announcement that the parish closing process would commence, and four days after the specific closing announcements. Second, it is crucial to note that diplomatic solutions are often ad hoc and nonuniform; indeed, in the situation outlined above, it is not entirely clear why the Archdiocese eventually decided to collaborate with the City of Boston in the manner in which it did. Moreover, there is no evidence that similar compromises were reached between the Archdiocese and the governmental leaders in smaller Massachusetts communities—precisely the communities in which the secular services provided by churches are proportionally the most important. To the contrary, in June 2004, town leaders in Milton were still pleading for greater Archdiocesan communication, in July, selectmen in Arlington were still seeking more

97. Id.
98. Church-City Teamwork, supra note 68.
100. Id.
101. Perkings, supra note 89.
details of Archdiocesan plans for two churches slated for closure, and in August, the Mayor of Salem was still seeking the cooperation of the Archdiocese in addressing the loss of crucial social services. As the Mayor of Salem wrote to the Archbishop, “Saint Joseph’s parishioners are struggling with the loss of their church as well as the loss of important community services that the church provides. We need time to identify those services and to study the opportunities that the site presents.”

Ironically, on August 5, an archdiocesan spokesman noted approvingly that the Archdiocese had “started a conversation with the communities,” without noting the fact that such conversations were only being instigated nearly eight months after the closure process was begun. In short, it was almost inevitable that a solution based purely on negotiation would lead to suboptimal results, particularly when one player held all of the cards—and knew it.

D. The Unworkable Compromises

The three main approaches taken by state and local government during the reconfiguration process failed for several reasons. First, the approaches taken by government relied upon only one of the three approaches, to the relative exclusion of the others. For example, the approaches relied upon either (a) the use of laws or regulations to force the Archdiocese to make what might be termed substantive concessions, or (b) diplomatic efforts whose success or failure depended entirely upon the Archdiocese’s willingness to acquiesce. Second, all of the “solutions” proffered by government were comprised largely of ad hoc measures. As such, they provided neither well-designed strategies for uniform implementation nor systematic safeguards that could prevent similar problems from arising in the future.

Third, and most important, the regulatory and legislative solutions pursued by government were directed toward attempting to prevent closures, rather than toward addressing the only complaint to which the government had a colorable claim: concerns over the fairness of the closure process in relation to the public. While those in government may have been legitimately frustrated by the perceived unfairness of the results of the Archdiocesan reconfiguration, this unfairness was simply not within their authority to redress. Indeed, there is absolutely no serious dispute that the Archdiocese had the legal right to internally reorganize its affairs. As one Boston civil liberties attorney noted, “[t]here’s no question that the church has the right to open and close parishes

and doesn’t need the permission of the government to do so . . . ." 105 Instead, the government should have focused its energy on ways to redress the perceived unfairness of the process of the Archdiocesan reconfiguration, to the extent that this process created significant negative externalities for the public provision of social welfare services. In failing to make this crucial distinction, government and the Archdiocese engaged in a battle that left both sides weaker—and communities as the real loser.

IV. THE PROCEDURAL STATUTE ALTERNATIVE

As was noted above, the regulatory and legislative approaches failed because they attempted to create a substantive legal “sword” for the state to use against recalcitrant nonprofits, whereas the diplomatic solution failed because it relied solely on the goodwill of an unwilling party. However, no party considered a “third way” that would have drawn upon the advantages of all three approaches in order to reach a solution that would have addressed the underlying problem faced by government: the rapid, widespread, and unplanned loss of social services, the absence of which would leave a hole that state and local resources would need to fill.

This Note proposes that this “third way” is the little-used procedural statute. As is discussed in detail below, such a statute would provide the Secretary of State and the Attorney General with the option to participate—as nonbinding consulting parties—in the closure or transformation of a nonprofit entity when such changes would have the potential to significantly and adversely affect the ability of government to perform its social welfare functions. By virtue of being solely procedural, nonadversarial, generally applicable, and content-neutral, such a statute would avoid potential First Amendment conflicts. Moreover, by being narrowly focused on the colorable concerns of government, such a statute would potentially prove less confrontational and more effective than a purely legislative or regulatory “legalistic” approach. In sum, a procedural statute, designed as described in detail below, would meld the legal and the diplomatic, create a framework for resolving future similar scenarios, and help lay the groundwork for improved relations between all parties involved. Finally, although this Note uses Massachusetts as an example due to the topical relevance of the Boston case study, this proposed statute is designed to be transferable to almost any other state with only minimal changes, particularly as state nonprofit law is fairly similar in respect to the structural and legal issues raised below.

105. Paulson, supra note 42.
A. The Statutory Vehicle

Procedural statutes differ from substantive statutes in that although the procedures outlined therein must be followed, the decisionmaker subject to the procedural statute (in this instance, the Archdiocese, although the statute would apply to any nonprofit) is in no way bound by the results. These types of statutes, which could be also described as “information-forcing” statutes,\(^{106}\) are much less common than their substantive cousins. Most likely, this discrepancy results from the desire of legislators to demonstrate “results” for their constituents—and if given the option to legislate either procedurally or substantively, few would choose the former when the latter is a viable alternative. Nevertheless, procedural statutes are an integral component of the legislative arsenal and have been used successfully to great effect. The most prominent example of a procedural statute is the federal National Environmental Protection Act (NEPA), passed in 1970.\(^ {107}\) Any federal agency planning a major project (such as damming a river, constructing a highway, or filling wetlands) is required to comply with NEPA by engaging in an assessment of the environmental effects of the proposed action, consulting with appropriate third parties, and publishing an Environmental Impact Statement (EIS).\(^ {108}\) Once the federal agency has completed these procedural steps in good faith, the agency is free to continue the project. Importantly, the agency is under no obligation to cease or even to alter the proposed project—even if the EIS finds that the project will create significant detrimental environmental impacts.\(^ {109}\) Indeed, NEPA has been characterized as a “stop, look, and listen” statute,\(^ {110}\) the main benefit of which is ensuring that agencies take a “hard look” at the potential consequences of their proposed actions.\(^ {111}\) Put simply: if the consultative obligations have been met, the entire intent of the statute has been fulfilled.

Although to some this process may look like merely “delaying the

\(^{106}\) For a thorough discussion of the concept of “information-forcing” rule systems, see Ian Ayres & Eric Talley, Solomonic Bargaining: Dividing a Legal Entitlement To Facilitate Coasean Trade, 104 YALE L.J. 1027 (1995).

\(^{107}\) 42 U.S.C. §§ 4321-4370 (2000); see also, e.g., Strycker’s Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227-28 (1980) (“The only role for a court [under NEPA] is to insure that the agency has considered the environmental consequences; it cannot interject itself within the area of discretion of the executive as to the choice of the action to be taken.” (internal quotation marks omitted)).

\(^{108}\) During this process, interested parties have the right to submit testimony or other documentation evidence about the impact of the proposed project on the environment, and the agency itself needs to write a report detailing the agency’s own studies of the impact of the project and the steps it has taken to mitigate those impacts.

\(^{109}\) As the Supreme Court held in Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989), “NEPA itself does not mandate particular results, but simply prescribes the necessary process . . . . NEPA merely prohibits uninformed—rather than unwise—agency action.”

\(^{110}\) Apache Survival Coal. v. United States, 21 F.3d 895, 906 (9th Cir. 1994).

\(^{111}\) Robertson, 490 U.S. at 350.
inevitable,” the hope is that if significant impacts are identified during the procedural consultative period, the federal agencies will work with those concerned to reach a mutually acceptable compromise—and indeed, this has occurred in numerous environmental situations. To cite just a few examples, the NEPA consultation process encouraged the United States Department of Agriculture during the mid-1980s to control gypsy moth infestations in Oregon by spraying less-toxic alternative pesticides,112 convinced the United States Navy in 2003 to mitigate the impact that a new airfield in North Carolina would have on migratory bird habitats,113 and is credited with the ongoing successful collaboration at Colorado’s Canyon of the Ancients National Monument between the Bureau of Land Management and environmental groups, creating a “win-win situation that balanced energy exploration with cultural resource protection . . . .”114 Moreover, while it might be expected that federal agencies would generally resent the imposition and delays caused by NEPA consultation, many agencies have actually embraced the value of the NEPA process. For instance, the federal Department of Energy publishes a quadrennial newsletter devoted to NEPA compliance entitled Lessons Learned Quarterly Report, which acknowledged unequivocally that “[t]he quality of our NEPA process affects the quality of DOE’s decisions.”115 In sum, NEPA’s procedural requirements frequently enable the agencies involved to make clearer and more effective decisions than they might otherwise make.

In the context of the Archdiocesan reconfiguration, the main concern of state and local governments was that the parish closings would adversely affect both the provision of social services and community stability. As the NEPA example illustrates, this type of situation—one in which an otherwise legal action has the potential to create adverse externalities—is a perfect candidate for a procedural statute. In this instance, the solution would be for the Massachusetts legislature to enact a general procedural statute applicable to all state nonprofits (not just religious organizations) that operate under the charitable corporation statute.116 The procedural legislation would amend the current statutory provision for dissolution of a nonprofit public charity, which currently mandates that the Attorney General be party to the dissolution of the

---

113. Id. at 2.
116. MASS. GEN. LAWS ch. 180, § 4 (2006) (concerning corporations established for charitable and certain other purposes). The statute defines a permissible nonprofit entity to include an entity formed for “any civic, educational, charitable, benevolent or religious purpose.” Id.
nonprofit and the reallocation of its assets.\footnote{Id. \S 8A (2004).} This new provision would be triggered whenever any nonprofit entity engaged—or had reason to believe that it would imminently engage—in consolidation actions that had the potential to create significant adverse effects on the governmental provision of social services.

The determination of whether this threshold of "significant adverse effect" had been reached in any given case would be made in one of three ways. First, a potentially eligible action could be self-reported directly by the reconfiguring organization itself (although this method is unlikely to be the predominant mode of determination, for obvious reasons). Second, the Attorney General or Secretary of State would be empowered to make such a determination after reviewing the request of either a state agency or a private individual. Third, the Attorney General or Secretary of State could make such a determination \textit{sua sponte}.

Once a consolidation action was deemed eligible for application of this procedural statute, the Attorney General and/or Secretary of State would then reserve the option to become involved in the consolidation process in a nonbinding consulting party capacity. If the Attorney General and/or Secretary of State exercised this option, the nonprofit in question would then have the legal obligation to provide reasonable and timely notice of a potential consolidation to the Attorney General and/or Secretary of State, meet with the Attorney General and/or Secretary of State to discuss the potential impact of the consolidation on the provision of public services, and to engage in good-faith consultation with these parties in an attempt to minimize any adverse effects of the consolidation on the citizens of the Commonwealth. Finally, this statute would be neutral and of general applicability, applying equally and impartially to all nonprofits as recognized by the state under the charitable corporation statute.

\section*{B. Advantages of a Procedural Statute}

There are several advantages of a procedural statute in this situation. The first advantage is that procedural statutes are mandatory yet ultimately nonbinding. As the failure of the "diplomatic approach" demonstrated, the Archdiocese was not inherently inclined to respond in a timely manner to requests for negotiation and communication. As such, obtaining consultation was probably possible only if the Archdiocese faced a legal obligation to do so. By the same token, the "legislative approach" demonstrated that the attempt to implement substantively binding (as opposed to merely procedurally binding) legal measures could be counterproductive and, ultimately, largely
Faith Accompli?

unsuccessful. The procedural approach advocated herein would forge a compromise between these two poles—creating a legal obligation requiring nonprofit organizations to consult with government, but ultimately permitting the nonprofit to act as it wished. Moreover, it is critical to emphasize that the nonbinding nature of the procedural statute means that a nonprofit organization's administrative and financial burden for compliance would likely be quite minimal, consisting largely of providing timely notice to government and acting in good faith. While neither guaranteed nor designed to change the ultimate outcome, such a compromise would provide the opportunity for discussion between the affected parties in a way that was missing from the instant situation.

A second advantage of a procedural statute is that procedural statutes are less adversarial than their substantive counterparts. Many substantive statutes are triggered by discretionary determinations, and organizations subject to those statutes frequently attempt to avoid the substantive effects by disputing the fact that a discretionary threshold has actually been reached. For example, if a statute required the payment of a fine in the event of a company creating "substantial" pollution, the parties involved would often find themselves in court, arguing before a jury about whether the statutory threshold for "substantial" had been accurately assessed. However, because procedural statutes are ultimately only consultative and nonbinding, there is often less of a rationale for challenging the discretionary application of such a statute on the grounds that it will be burdensome or carry significant substantive consequences. This can be illustrated vividly by looking at the litigation created in the NEPA context. While parties do litigate over the adequacy of NEPA filings, typically only about 150 such lawsuits are filed nationwide every year—representing less than 1% of the actions that generate NEPA documents annually. Instead, negotiation and discussion seem to be the preferred alternatives.

This difference between procedural and substantive statutes would therefore significantly reduce the likelihood that a nonprofit would sue to prevent the application of the statute, or that the organization would need to be

119. See, e.g., Earthjustice, Citizens and Army Settle Lawsuit, Sept. 27, 1999, http://www.earthjustice.org/news/press/999/citizens_and_army_settle_lawsuit.html (noting that the U.S. Army agreed to stop conducting training at a Hawaiian military base until it had worked with local groups to assess comprehensively the environmental impacts of such training); Wilderness Soc'y, Bush Visits Central Oregon, Location of the Metolius Basin Forest Management Plan, http://www.wilderness.org/Library/Documents/MetoliusBasin20030821.cfm (last visited Dec. 15, 2006) ("Working under the guidelines of [NEPA], the Forest Service... picked a less environmentally harmful alternative that will provide for the thinning of smaller diameter trees to reduce fire risk and promote forest health on 12,600 acres, while also protecting endangered species habitat.").
sued by the state in order to enforce the right of the Attorney General and/or the Secretary of State to be included in consultation. This advantage of the procedural statute is particularly important in the case of religious nonprofits, given First Amendment concerns about the applicability of statutes that could unduly burden religion. Although such challenges to the proposed procedural statute would likely fail under the general applicability doctrine of Employment Division v. Smith, the fact that the statute is "procedural only" would reduce significantly the likelihood of such acrimonious and adversarial challenges being brought in the first place.

Third, and perhaps most importantly, the use of a procedural statute in circumstances such as this would actually serve the best interest of all parties involved. No legitimate nonprofit social service provider would want the community it serves to suffer due solely to the organization's own internal financial or managerial difficulties. Indeed, most social service providers that are forced to close or redirect their resources have an abiding interest in ensuring that the community that the organization had been serving continues to receive the services it needs, even if that particular provider is no longer capable of meeting those needs. Similarly, the government has an interest in learning about potentially major disruptions in crucial social services provided by nonprofits, in order to develop a plan for addressing the gaps in service provision that might otherwise ensue. A procedural statute would cool the power struggle between these two parties and would instead allow them to focus on their common interest: meeting the needs of the communities which would suffer if the parties failed to collaborate.

C. Executive Authority

The executive authority for the provisions of the statute would rest with the Secretary of State and the Attorney General, who already hold the legal authority for overseeing the actions of Massachusetts nonprofit organizations. Under Massachusetts law, the Secretary of State has the responsibility to regulate the incorporation, consolidation, merger, and dissolution of nonprofit organizations. This power exists in order to ensure the Commonwealth that its nonprofit organizations are adhering to the requirement that nonprofits have a charitable purpose, and that the nonprofit

---

121. 494 U.S. 872 (1990). Smith held that the application of a valid and neutral law of general applicability to religious conduct or organizations did not violate the Free Exercise Clause of the First Amendment.

122. Such powers are not unique to Massachusetts; in every state, there is a state officer (usually the Secretary of State or the Attorney General) who has legal authority over nonprofit entities. Massachusetts is used herein only as an illustrative example, as a statute such as the one proposed in this Note would be flexible enough to be adapted and implemented in other states with minimal changes.

Faith Accompli?

form is not being compromised (in the case of reorganization) or abused (in the case of dissolution). The Attorney General has the responsibility for enforcing nonprofit law on behalf of the citizens of the Commonwealth, ensuring that nonprofits do not engage in activities that would be improper (either because of their nonprofit status or because the activities are illegal per se). For example, the Attorney General has the responsibility to review the conversion of hospitals from nonprofit to for-profit status, in order to ensure that due care was followed, conflicts of interest were avoided, and that the proposed transaction was “in the public interest.”

In the case of the proposed procedural statute, the main advantage of vesting the executive authority in the Secretary of State and Attorney General is that no new oversight entity needs to be created. Indeed, it is already accepted that these executive offices have the authority to regulate and govern the operation of nonprofit entities regardless of their religious or secular nature. This new statutory obligation would merely be an extension of their existing responsibilities, which they execute in relation to both religious and nonreligious nonprofits alike.

An additional reason to vest the execution of this statute in the traditional oversight authority of the Secretary of State and Attorney General is that under existing Massachusetts law, there is no explicit or implicit “private right of action” against a nonprofit for breach of the charitable corporation statute. Under Massachusetts law, the right of action against nonprofits for violations of fiduciary duties or other noncompliance with the nonprofit statute is reserved to the Secretary of State or Attorney General. Indeed, the public can only petition the Secretary of State or Attorney General to enforce the law against a noncompliant nonprofit, and the Secretary of State and/or Attorney General retains the discretion as to whether or not doing so would be in the public interest. In the instant case, the proposed procedural statute would merely amend a statute under which the Secretary of State and Attorney General already retain such executive authority. Under the proposed statute, these

124. See, e.g., id. § 5 (investigation of proposed charitable corporations), § 7 (amendment of articles of organization or change of purposes), § 10 (consolidation and merger), § 11B (involuntary dissolution of corporation constituting a public charity).


127. Frequently, state civil statutes provide allegedly aggrieved parties with a private right of action, thereby enabling private parties to sue the alleged offender directly for statutory violations. In the case of a procedural statute, a private right of action (were it to be permitted) would provide a private party with the right to sue in order to require the entity subject to the statute to engage in consultation.

128. This is almost universally true in other states as well, as the authority to bring derivative suits against nonprofit entities in the name of the public is vested in the Attorney General.

129. See, e.g., MASS. GEN. LAWS ch. 12, §§ 8, 8H, 8I (2006).
two officers would have the sole discretion to determine whether the action of a nonprofit would place a "substantial" burden on the governmental provision of public services, and would also have the sole discretion to decide whether or not the state should exercise its right to consult. Because of this extremely limited and transparent right of enforcement—grounded in an existing and accepted statutory authority—nonprofits could therefore be assured that there would be no frivolous or private ad hoc attempts to enforce the statute's procedural consultation requirements.

D. Legal Authority and the First Amendment Religion Clauses

The legal authority for this procedural statute would derive primarily from the common law right of the legislature to pass laws of general applicability—in this instance, laws that affect either for-profit or nonprofit entities operating within the Commonwealth. As such, it is essential to address the inevitable concerns about whether the proposed statute would create impermissible First Amendment conflicts. Indeed, the creativity of state and local government in dealing with the Archdiocesan reorganization has been stymied by what the state apparently perceives to be insurmountable First Amendment barriers. As the Attorney General's spokesperson Corey Welford noted, "the attorney general's authority over charities is specifically limited in the case of religious institutions. That limitation is mandated by the First Amendment's recognition of a separation of church and state."130 However, this deference to the First Amendment is misplaced in the instant context because it suggests that the options available to the state are much more limited than is actually the case. Clearly, in the realm of secular nonprofit organizations, the state is able to exert the full extent of its police power authority. Because the state has the sole power to incorporate secular nonprofit entities, the state can use legislation or regulation to impose upon these organizations any reasonable requirements that it wishes. In contrast, the state is more restricted in its relationship with religious nonprofits because of the Free Exercise and Establishment Clauses of the First Amendment.

Yet the Religion Clauses are not fatal to the constitutionality of the proposed statute, for the following two reasons. First, the statute would almost certainly be deemed constitutional under the Free Exercise Clause if it is generally applicable and facially neutral, the test set forth in the Supreme Court's landmark opinion in Employment Division v. Smith.131 In the instant context, the proposed statute would be applicable to all nonprofits—religious and secular alike—and would not target religious nonprofits in particular in any way. Indeed, religious nonprofits already routinely comply with other laws of

130. Paulson, supra note 87.
Faith Accompli?

general applicability, ranging from those on employment discrimination to those on zoning, without any serious questions about First Amendment infringement. Moreover, the Attorney General and Secretary of State routinely exercise their general nonprofit authority over religious organizations, particularly when religious organizations engage in activities that, while not impermissible outside the nonprofit context, are impermissible for nonprofits per se (such as extensive political or lobbying activities). Because the Attorney General already has the responsibility and authority to ensure that all nonprofit entities meet the generally applicable statutory nonprofit standards, any facially neutral and generally applicable amendment to those statutory standards would not per se infringe upon First Amendment protections under the standards set forth in Smith.3

Second, even if the proposed statute were challenged successfully as being either non-neutral or non-generally applicable, the proposed statute would still likely meet the more stringent test set forth by the Supreme Court in Church of the Lukumi Babalu Aye v. City of Hialeah. In Lukumi, the Court required that statutes failing the Smith test needed to demonstrate that they were “justified by a compelling governmental interest and . . . narrowly tailored to advance that interest.” Here, the state would be able to meet both of these high standards. Turning to the first prong, it is indisputable that the government has a compelling interest in ensuring that its citizens receive the services to which they are either statutorily or constitutionally entitled. Although religious organizations are under no obligation to provide social services that ease the burden of government, it is also indisputable that government allocates its limited social services resources based upon whether or not those services are being augmented by an alternative provider in any given area. For example, while the government has a legal obligation to provide a school place to every school-aged child in the Commonwealth, both state and local governments allocate funding to schools based upon the number of children who are actually present in the public system. In this way, and in numerous similar situations, the government relies upon the private provision of social services in planning how to deliver its own, and it has a legitimate compelling governmental interest in being kept informed as to how its own provision of services may be adversely affected by the actions of nonprofit entities. Requiring all nonprofits to engage in nonbinding governmental consultation in such situations would provide the government with the opportunity to restructure its own service provision strategy—something

---

133. See generally id.
135. Id. at 531-32.
136. See supra note 67; see also supra note 73.
government would not have found necessary except for the cessation of external nonprofit activities upon which government had reasonably relied.

The proposed statute would also almost certainly meet the second *Lukumi* requirement, that it be "narrowly tailored" to advance the compelling governmental interest. Even if passed, the constitutional problem that the Galvin legislation would face is that the requirement for churches to release *financial records* has little to do with the legitimate state interest of ensuring an orderly reallocation of *social services resources*. While the record release requirement might make religious organizations think twice about engaging in large property transactions, the state has little colorable authority to interfere in the otherwise legal financial transactions of religious organizations. Such an approach would therefore likely be deemed too blunt an instrument under *Lukumi* for advancing the legitimate governmental interest of social services provision. By contrast, it would be difficult to argue that the proposed procedural statute, directed as it is at specifically addressing a compelling interest of government in immediately providing social services to the needy, was too broad or intrusive to qualify as narrowly tailored under *Lukumi*.

E. *Summary of the Proposal*

As was noted in Part II, the reconfiguration process pursued by the Archdiocese created significant confusion, uncertainty, and animosity. These problems would likely have been mitigated considerably if the proposed procedural statute had been in effect, for three reasons. First, this statute would have provided government with the time and information necessary to design an action strategy and to develop the physical and personnel infrastructure necessary to fill the void left by the reconfiguration. Second, by virtue of being a permanent statutory solution, it would have avoided many of the problems that plague ad hoc solutions, including the frequent controversies about who has authority to demand what from whom. Such ad hoc approaches frequently create sound and fury while ultimately signifying nothing, consuming valuable time, energy, resources, and goodwill in the process. Finally, although the statute would create a "legal obligation to engage in diplomacy," its procedural nature would give government a *voice* without giving government *control*. Indeed, bringing a new voice into the reconfiguration process might even lead to more creative solutions—solutions that would balance *both* the reorganization goals of nonprofits and the planning needs of government. This reassurance of autonomy for nonprofit organizations would almost certainly help to improve relations between government and nonprofits. Given these advantages, it appears that a procedural statute—combining the legal and the diplomatic—offers an innovative "third way" for managing similar future nonprofit reorganizations.
V. POTENTIAL CRITICISMS AND CONCERNS

Despite the advantages of the proposed procedural statute, legitimate criticisms and concerns can be raised against it. On one side are those who may feel that this solution does not go far enough, and argue that this solution is of only limited effectiveness. On the other side are those who might believe instead that this solution goes too far, and argue that this proposal would either be unenforceable or would create a "chilling effect" in the nonprofit provision of social services. This Part anticipates these concerns by addressing each one directly and illustrating why each is unlikely to create significant problems for the practical implementation of the proposed statute.

A. Response to Concerns that This Proposal Is Too Limited

The first major potential public policy concern is that this particular statutory response, even if implemented as designed, would fail to make any noticeable or positive impact—in other words, that such a statute would merely delay the inevitable. This Section addresses two of the strongest potential criticisms in this regard, both of which originate from critics who would argue that the procedural statute option does not go far enough: first, that the statute would be too limited in scope to be of any practical use, and second, that the statute would merely create another bureaucratic process while having little or no impact upon substantive outcomes.

The first concern, regarding the limitations of statutory scope, comes from those who suggest that, in the context of parish reconfiguration, the Archdiocese would likely find it very easy—perhaps too easy—to satisfy its obligations under the proposed statute. For example, in the case of a threatened suburban parish that offers few social services, under the proposed statute the government involvement in such a closure would likely be extremely limited. Therefore, the critics' argument goes, the proposed statute will do very little (if anything) to prevent the closure of that parish. Empirically, this argument is almost certainly true: the statute will likely be triggered more frequently with regard to urban and rural parishes than suburban ones, given that it is parishes in the neediest areas that tend to provide the largest proportion of social services.

However, this line of criticism fundamentally misconstrues the premise of the proposed statute. Put plainly, the proposed statute is not designed to provide a thinly disguised legal pretext for actively preventing the closure of specific parishes—even though a secondary effect of a successful consultation might be a recognition by the Archdiocese (after "stopping, looking, and listening") that a particular parish should remain open. It is absolutely critical to recognize that the statute is designed to assist the state in managing its social service obligations, not to prevent nonprofits from acting within their own legal
authority to manage their internal affairs. Indeed, the statute’s purpose will be fulfilled as long as the government has the opportunity to work with the Archdiocese to identify (and design plans to assist) the geographic areas that will suffer the most in terms of social service provision upon the closure of local parishes.

The fact that the proposed statutory scope is limited is a hard pill to swallow for many of those angered by the parish closings, for whom the ideal solution would be for the legislature to fashion a statute that would give the state substantive rights to stop closures. Yet constitutionally (and practically), such legislation is a nonstarter. Is the procedural statute the second-best alternative in these circumstances? Undoubtedly. The real question must be whether a procedural statute, with its potential for influencing decisionmaking through dialogue, information-provision, and persuasion, is better than the alternative of no consultation at all.

The second criticism is that a purely procedural statute will do little to change the mind of an organization—particularly if that organization is not legally required to take account of the results of the process. A corollary criticism is that imposing such procedural conditions merely creates more bureaucracy without generating a solution to the underlying problem. Yet although a procedural statute may appear at first to be an exercise that requires mere “hoop-jumping” before arriving at a foregone conclusion, two lessons from other contexts in which procedural statutes have been used demonstrate that this is not necessarily the case.

First, it is important to understand that in many real-life situations, the mere requirement that an entity comply with procedural statutes has led to a better, more inclusive, and more thoughtful decision-making process. Returning to the NEPA example, there are numerous instances in which the federal agency required to undertake a procedural NEPA review has altered, modified, or even cancelled its initial project proposal because of the NEPA process. In some instances, the comments that the agency received during the process pointed to new and innovative solutions that were both more cost effective and more environmentally sound than those originally proposed. In other instances, the prospective potential of receiving reasoned outside commentary was enough to convince agencies to take a more thoughtful and reasoned approach toward their initial project proposals. Again, these agencies were required to do no

137. See supra notes 112-114 and accompanying text.
138. Because these instances are evidenced by shifts in how agencies approach similar situations over time, the observation of this effect requires a longitudinal evaluation of institutional culture. This type of analysis is subtle and difficult to document, other than via instances in which a compromise has been reached through public negotiation and/or comment. But see SERGE TAYLOR, MAKING BUREAUCRACIES THINK: THE ENVIRONMENTAL IMPACT STATEMENT STRATEGY OF ADMINISTRATIVE REFORM 251 (1984) (arguing that NEPA has forced federal agencies to anticipate the environmental consequences of their proposed actions, and that this has led to the abandonment of projects that might
more than make a good-faith effort to meet their procedural statutory obligations. Despite this fact, the input and observations of those who participated in the nonbinding consultation process have frequently led the agencies involved to make substantive changes. Second, it is important to recognize that a procedural statute introduces a level of dignity into proceedings—a level of dignity that is absent when decisions appear to be made arbitrarily and without consultation. Convincing those affected that their concerns have been adequately represented in the process is crucial if organizations are to reduce the animosity and mistrust that result from decisions made without the input of concerned stakeholders.139

There is, therefore, no reason that in analogous circumstances—such as an Archdiocesan reconfiguration—similar results could not be achieved in many (though by no means all) instances. Moreover, given the undeniable failure of other, more traditional methods to fashion a meaningful governmental strategy during the Boston Archdiocesan reconfiguration process, it is eminently arguable that a statute like this one—which succeeded only occasionally—would be more valuable than the hodgepodge of entirely unsuccessful ad hoc approaches that eventually emerged in Boston during early 2004.

B. Response to Concerns that This Proposal Is Too Broad

The other set of potential concerns about the procedural statute will likely come from critics who believe that this option goes too far.140 Some of these critics might argue that the interplay between church and state will call the validity and enforceability of this proposal into question. Others might argue that this proposal creates an unintentional “chilling effect” on the provision of social services by nonprofits (by discouraging them from engaging in activities that they would otherwise have pursued), or imposes unnecessary administrative burdens on nonprofits precisely when they are in the most need of flexibility. This Section argues that far from being overbroad, the procedural statute alternative provides clear limits on just how far the government may go in dealing with nonprofits that are undergoing significant restructuring.

Turning first to concerns about validity and enforceability, the underlying validity of the proposed statute seems most likely to arise in relation to its constitutionality under the First Amendment. This issue has been discussed at length in Section IV.D in the context of Smith and Lukumi, and it bears repeating that a facially neutral and generally applicable statute—as this statute would be—would likely pass the legal threshold for subjecting religious

---

140. For example, some critics suggest that regardless of the collateral impact that parish closures may have on social services, no level of governmental involvement in the closure process is acceptable. See Richard W. Garnett, Downsizing and the Catholic Church, USA TODAY, July 17, 2006, at 13A.
organizations to a narrowly tailored public regulation promulgated to meet a compelling governmental interest. The more pressing potential criticism concerns the enforceability of the statute against religious nonprofits who do not voluntarily comply with its provisions. For example, it is conceivable that the Archdiocese of Boston could refuse to comply with the statute, and, if sued by the government to force compliance, argue that it has the exclusive right to determine when it can be sued in secular courts on ecclesiastical matters.

However, existing case law suggests that this type of a challenge would not likely succeed. Although the Archdiocese might argue that to grant enforcement jurisdiction to the civil courts would violate the holdings of the leading cases under the “church autonomy doctrine,” it is clear that the application of this statute would be distinguishable from each of the major church autonomy cases. Galich v. Catholic Bishop of Chicago presented an issue similar to that in Boston, with parishioners seeking to enjoin an Archdiocesan decision to close a church, whereas Serbian Eastern Orthodox Diocese v. Milivojevich concerned the civil appeal of the decision of a church to suspend a bishop. In both cases, however, secular courts were being asked to enjoin what was fundamentally an ecclesiastical decision—and in both instances, the religious organization argued successfully that the civil courts did not have the jurisdiction to make such a determination. These cases are therefore distinguishable from the situation that would arise under the procedural statute because the courts here would merely be asked to exercise their civil authority to enforce a civil nonprofit law that applied to religious organizations (as opposed to being asked to use their civil authority to compel the application of a religious law).

Moreover, Kedroff v. St. Nicholas Cathedral, while initially appearing to be applicable, is, upon closer inspection, of little or no relevance. In Kedroff, the Court noted that religious organizations should have “independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” However, the facts in Kedroff concerned New York state legislation that would have effectively deposed the then-head of the Russian Orthodox Church in the United States—an active intrusion into the governance of the church in which the state “len[t] its power to one or the other side in [a] controversy over religious authority or dogma.” In the instant situation, however, there is no such intrusion into either authority or dogma, because the proposed statute would not have any binding substantive impact upon the

Faith Accompli?

ultimate decision of the religious organization. Indeed, the proposed statute in no way prevents the Archdiocese from closing any church that it chooses to close (distinguishing this statute from the relief being sought by the parishioners in Galich), nor does the proposed statute provide the state with any rights either to propose specific parishes for closure or advocate for their continuance. The statute merely requires that the nonprofit entity engage in consultation with the state about mitigating the impact of the consolidation on the state’s own social services provision. In sum, such significant differences in scope, process, and intended outcome strongly suggest that this statute does not infringe upon the notion of church autonomy protected in the cases described above.

Turning next to the criticism that the proposed statute would have a “chilling effect” on churches and other nonprofit service providers, the specific concern seems likely to be as follows: such a statute would cause these organizations to avoid engaging in social service provision in the first place because they would not wish to subject themselves to potential governmental consultation if they decided to discontinue these activities at some future point. The basis of this concern is the view that any difficulties created by reorganizations are much less significant than the problems that would be created if nonprofits avoided engaging in these activities in the first place. Although it is certainly possible that some organizations may forego engaging in these activities in order to avoid the potential of future governmental consultation, this seems unlikely for four main reasons.

First, few organizations begin offering social services with the fatalistic presumption that these services will be discontinued at some point in the future. Second, the consultation obligation under the statute would be only procedural. As such, it is unlikely that the desire to avoid potential governmental consultation would be significant enough to outweigh the desire of an organization to engage in social service provision. Third, for most religious organizations, providing social services is an integral part of their social justice mission. This fact makes it highly unlikely that religious organizations would forego this aspect of their ministries simply because of a potential procedural obligation at some future date. Fourth, it is worth reiterating that many religious nonprofits (at both the parish and diocesan levels) already submit to other generally applicable state regulations and laws in relation to their social services. 144 The requirement that they do so has not prevented these organizations from providing these services, and it is unlikely that an additional procedural law such as the one proposed would have anything other than a

144. See, e.g., Catholic Charities (Archdiocese of Boston), Catholic Charities Child Care Program in Malden Receives NAEYC Accreditation (Oct. 12, 2004), http://web.archive.org/web/20041012052538/http://www.ccab.org/whats_new.htm (noting that the twelve child care programs run by the Archdiocese of Boston are all licensed by the Massachusetts Office of Child Care Services).
negligible impact upon their decision to continue doing so.

Finally, some critics may argue that the procedural statute saddles nonprofit organizations with unnecessary administrative burdens precisely at the moment when such organizations have the least amount of time and resources to meet them. Organizations may also fear that the procedural statute would be too heavily weighted toward maintaining the status quo, and would restrict their ability to shift resources and their strategic focus in order to respond to changing community needs. While both are legitimate concerns, it is important to reiterate that satisfying the statute’s legal requirements would likely require only minimal time and expense on the part of the nonprofit. First, because the primary purpose of the statute is simply to ensure open and timely communication between government and the nonprofit entity, it is difficult to envision the logistical steps requiring significant effort on the part of the nonprofit. Governments should, however, be sensitive to the fact that reorganizing nonprofits will almost certainly have limited resources, and governments should therefore endeavor to make compliance with the procedural requirements as simple and straightforward as is possible. Second, it is worth reiterating that the nonprofit organization would retain complete autonomy regarding final decisions about resource allocation and strategic focus under this proposal. As was noted in Section A, the purpose of the procedural statute is not to achieve substantive ends through procedural means, but rather to provide government with the information it needs to assist those who will be the most vulnerable when the nonprofit closes or reorganizes. In sum, to those critics who might argue that the proposed statute allows the government to go too far, this Section has sought to illustrate that the procedural statute proposed in this Note actually places clear limits on just how far the government may go.

CONCLUSION

Closing parishes is not a recent development; even in the Archdiocese of Boston, several parishes a year have been closed over the past decade as part of the normal evolution of the Archdiocese. In every area where there has been a demographic shift over the years, closure may indeed be a necessary component of diocesan management, in much the same way that an arborist removes branches from a tree in order to ensure the continued health of the whole. However, the extent of the 2004 reorganization in Boston was unprecedented, and the manner in which the reorganization process was conducted placed government in a position where it had no way to mitigate the

Faith Accompli?

adverse collateral effects. While the ad hoc approaches taken by governmental leaders to redress this situation may have been a product of the speed and surprise of the reorganization, these actions were ineffective because they took the wrong approach. In being either too punitive or too conciliatory, these actions were not designed to mitigate effectively the actual problems of social service provision that the closures would cause to state and local government.

Unfortunately, the magnitude of the Boston closings is not likely to be an aberration. As was noted in the Introduction, the Archdioceses of New York, Chicago, and Newark, New Jersey are all contemplating significant closure programs, and more archdioceses are almost certain to follow.\textsuperscript{146} Over the next decade, as Mass attendance continues to decline, priest shortages continue to multiply, and church coffers continue to empty, dioceses and governments across the country will face precisely the same problems that Boston faced during 2004. Moreover, although repeating Boston’s ad hoc approach to these problems is a recipe for breeding antagonism and mistrust, governments who do not have an alternative proactive policy in place will likely find themselves reliving the mistakes of their Massachusetts counterparts.

The procedural statute proposed in this Note would provide a new and unique way to address both the constitutional and practical concerns that appear to have impeded the variety of governmental responses that were proposed through early 2004. By melding the legal and the diplomatic, such a statute would be more likely than previous approaches to create benefits for all parties involved—government, the Archdiocese, and local communities and parishes. Although this statute would not necessarily prevent the closure of parishes—or of other faith-based social service providers, for that matter—it would provide government with an additional legal tool that might help mitigate the effects of the closures on social services. In a situation bound to be fraught with high emotions and impassioned argument, a statute such as this one would provide a measure of order and process—two factors that were notably missing from the scenario that unfolded in Boston.

It is incontrovertible that even if the proposed statute were passed immediately in Massachusetts, the effect would be prospectively preventative rather than retrospectively remedial. Yet those who do not learn from history are condemned to repeat it: the lessons of Boston should not be confined to Boston alone, or to the context of the Roman Catholic Church. This Note therefore offers a postmortem of the failures of the Boston reorganization in the hopes that the solution offered herein provides a clarion call to the hundreds of other communities nationwide who are increasingly likely to face similar closings crises in the near future. Indeed, as the percentage of social services

\textsuperscript{146} See supra note 9.
being provided through faith-based continues to increase, the need will continue to grow for policy mechanisms that help governments ensure that social service delivery is not adversely affected if such faith-based providers either cut back on their offerings or close altogether.

America has always held at its core the fundamental value of separation of church and state. Yet while church and state may be separated by law, they are frequently united in their common concern for the welfare of the oppressed, the poor, and the dispossessed. It is imperative for both governmental and religious leaders to work together in seeking creative and innovative ways to protect both religious independence and those in society who are most in need. As the Boston Globe observed, "public officials [are] eager to work together to minimize the pain of closings. But first, church leaders must show up." Hopefully, strategies like the one outlined above will provide church leaders—and leaders of other nonprofit social service providers that are facing consolidation or reorganization—with the incentive to do just that. For as it is written in the Book of Proverbs, "where there is no vision, the people perish."

147. See, e.g., White House Office of Faith-Based and Community Initiatives, Grants to Faith-Based Organizations: Fiscal Year 2005, at 7 (2006), available at www.whitehouse.gov/government/mbci/final_report_2005.pdf (showing, for example, that the number of grants made by the Federal Department of Health and Human Services to faith-based organizations increased by 82% between FY2002 and FY2005, and that the total dollar value of these grants increased by 64% over the same period).

148. Church-City Teamwork, supra note 68.