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Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy

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Secular regulation of churches has increased substantially in recent years,[1] and litigation over the constitutionality of such regulation has increased as well. Regulation of church labor relations has been a particularly prolific source of litigation. There have been challenges to the National Labor Relations Act, the Fair Labor Standards Act, the Civil Rights Act of 1964, the Federal Unemployment Tax Act, and other statutes affecting church labor policy. A wide variety of religious groups have become involved in such litigation.[2]

Many of these cases have reached defensible results, but only a few have identified the competing interests with reasonable specificity. Most of the uncertainty results from the Supreme Court's failure to develop any coherent general theory of the religion clauses. This Article offers a start toward such a theory.

The first step is to restore the fundamental distinction between the establishment and free exercise clauses: that government support for religion is an essential element of every claim under the establishment clause.[3] The second step is to distinguish different kinds of rights protected by the free exercise clause.[4] One of these, the right of church autonomy, tends to be overlooked. Quite apart from whether a regulation requires a church or an individual believer to violate religious doctrine or felt moral duty, churches have a constitutionally protected interest in managing their own institutions free of government interference.[5]

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1. Ripple, The Entanglement Test of the Religion Clauses—A Ten Year Assessment, 27 U.C.L.A. L. Rev. 1195, 1230-32 (1980).

2. Throughout this Article, I use "church" to refer to any religious group; the term is not limited to organized Christian churches.

3. See text accompanying notes 57-121 infra.

4. See text accompanying notes 122-40 infra.

5. See text accompanying notes 122-227 infra.

This interest, like all others under the religion clauses, may be infringed for sufficiently compelling reasons, and the third step towards a general theory is to examine how this balancing should work. Interests are not arrayed on a single continuum from important to unimportant, and the balance cannot be struck reliably without analyzing the multivariate nature of the interests on each side.[6] Alleged state interests in regulating internal church affairs—e.g., protection of church members and church workers from exploitation—are usually illegitimate and should not count at all.[7]

Once the free exercise clause has been explored, it will be necessary to reexamine the relationship between it and the establishment clause.[8] The establishment clause limits the scope of claims for special treatment under the free exercise clause. But this inherent tension between the two clauses varies with the nature of the free exercise claim and is relatively unimportant in church autonomy cases.

This partial theory of the religion clauses is applied and developed in the context of the church labor relations cases, which are described in the first part of this Article. These cases are important in themselves; they are also prime illustrations of the right to church autonomy.

I. The Church Labor Relations Cases

The best known series of church labor relations cases resulted from the National Labor Relations Board's decision to assert jurisdiction over religious schools.[9] Two district courts and the Seventh Circuit held the NLRA unconstitutional as applied to teachers' unions in Catholic schools, on grounds of excessive entanglement between church and state,[10] and in the Seventh Circuit case, also on the more persuasive ground that colleetive bargaining would interfere with ecclesiastical control of church institutions.[11] The Supreme Court affirmed the Seventh Circuit, but on statutory grounds.[12] Finding a serious risk of excessive government entanglement with religion, the Court avoided the constitutional question by requiring " ' "the affirmative intention of the Congress clearly expressed" ' " that the Act extend to such religious schools.[13] Finding no such clear expression, the Court held the Act

6. See text accompanying notes 228-305 infra.

7. See text accompanying notes 232-70 infra.

8. See text accompanying notes 306-17 infra.

9. Henry M. Hald School Ass'n, 213 N.L.R.B. 415 (1974).

10. Catholic Bishop v. NLRB, 559 F.2d 1112 (7th Cir. 1977), aff'd on other grounds, 440 U.S. 490 (1979); McCormick v. Hirsch, 460 F. Supp. 1337 (M.D. Pa. 1978); Caulfield v. Hirsch, 410 F. Supp. 618 (E.D. Pa. 1977), cert. in advance of judgment denied, 436 U.S. 957 (1978).

11. 559 F.2d at 1124.

12. NLRB v. Catholic Bishop, 440 U.S. 490 (1979).

13. Id. at 500 (quoting McCulloch v. Sociedad Nacional de Marineros, 372 U.S. 10, 21-22 (1963)(quoting Benz v. Compania Naviera Hidalgo, 353 U.S. 138, 147 (1957))). The opinion emphasized the importance of schools and teachers; the Board will undoubtedly continue to assert jurisdiction over church-owned commercial businesses. See Polynesian Cultural Center, Inc., 222 N.L.R.B. 1192 (1976), enforced on other grounds, 582 F.2d 467 (9th Cir. 1978); Good Foods

inapplicable. Four dissenters agreed that the constitutional issue was serious,[14] but argued that it should not be avoided by such a major distortion of the statute.[15] More recently, the Ninth Circuit held the Act applicable to a church-owned motel that did a substantial commercial business.[16]

Similar questions arise under antidiscrimination laws.[17] An exception to title VII of the Civil Rights Act of 1964 permits religious institutions to discriminate on the basis of religion, but not on the basis of race, sex, or national origin.[18] Some courts have criticized this statutory accommodation of religion as clumsy and unconstitutional, too broad in some ways and too narrow in others.[19] For example, the Act forbids the requirement that Catholic priests be male.[20] But two district courts have concluded that the explicit statutory exception, and rejection of amendments that would have broadened it, clearly express congressional intent to regulate the churches.[21] The Fifth Circuit reached the same conclusion,[22] but implied an exception anyway to avoid a holding of unconstitutionality.[23] The court concluded that sex discrimination against a Salvation Army officer involved "matters of church administration and government and thus, purely of ecclesiastical cognizance," and that the Act would violate the free exercise clause if applied to the case.[24] In subsequent cases involving faculty at a church college and at a seminary, this exception was limited to ministers.[25]

Other sex discrimination cases have faced the constitutional issue squarely. A district court held title VII unconstitutional as applied to a Baptist seminary that attempted to maintain what the court variously described as "a

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Mfg. & Processing Corp., 195 N.L.R.B. 418, 418 (1972), enforced on other grounds, 492 F.2d 1302 (7th Cir. 1974).

14. 440 U.S. at 518 (Brennan, J., dissenting).

15. Id. at 508. See generally Comment, NLRB Has No Jurisdiction Over Lay Teachers in Parochial Schools, 58 Wash. U.L.Q. 173 (1980).

16. NLRB v. World Evangelism, Inc., 656 F.2d 1349, 1353-54 (9th Cir. 1981).

17. See generally Bagni, Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations, 79 Colum. L. Rev. 1514 (1979).

18. 42 U.S.C. § 2000e-1 (1976).

19. King's Garden, Inc. v. FCC, 498 F.2d 51, 54-55 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974); EEOC v. Southwestern Baptist Theological Seminary, 485 F. Supp. 255, 260 (N.D. Tex. 1980), rev'd in part, 651 F.2d 277 (5th Cir. 1981). But see EEOC v. Mississippi College, 626 F.2d 477, 489 (5th Cir. 1980), cert. denied, 101 S. Ct. 3143 (1981).

20. 42 U.S.C. § 2000e-1 (1976); Comment, Title VII and the Appointment of Women Clergy: A Statutory and Constitutional Quagmire, 13 Colum. J.L. & Soc. Probs. 257, 260-67 (1977).

21. Dolter v. Wahlert High School, 483 F. Supp. 266, 268-69 (N.D. Iowa 1980); EEOC v. Pacific Press Publ. Ass'n, 482 F. Supp. 1291, 1302-07 (N.D. Cal. 1979). Cf. Ritter v. Mount St. Mary's College, 495 F. Supp. 724, 726-29 (D. Md. 1980) (relying on absence of similar exceptions in Equal Pay Act and Age Discrimination in Employment Act, and concluding that these acts do not apply to religious institutions).

22. McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir.), cert. denied as untimely filed, 409 U.S. 896 (1972).

23. Id. at 560-61.

24. Id. at 560.

25. EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 283-85 (5th Cir. 1981); EEOC v. Mississippi College, 626 F.2d 477, 485-86 (5th Cir. 1980), cert. denied, 101 S. Ct. 3143 (1981).

pervasively religious environment,"[26] "an atmosphere of intense piety,"[27] and "a virtually cloistral environment."[28] The church expressed no desire to discriminate on the basis of race or national origin, but said its doctrines might require it to discriminate on the basis of sex under certain circumstances. But this was not the basis of the court's decision that it was totally exempt as to all its employees.[29] Rather, the court held that the seminary was entitled to be left alone—an entitlement I will call the right of church autonomy:

> Its employment decisions, steeped in a perception of divine will and inseparable from its mission, become matters of religious prerogative and warrant the fullest protection from governmental supervision. Enforcement of Title VII claims against a seminary based on race, sex, or national origin, even in the absence of articulated doctrinal compulsion, will lead inevitably to excessive governmental entanglement with religion in the process of dissecting employment functions into religious and secular components and in divining the good faith and legitimacy of religious grounds asserted as a defense to a prima facie case of discrimination.[30]

Similar defenses were rejected in three cases involving Seventh Day Adventists. One complaint alleged sex discrimination against an employee with editorial and secretarial responsibilities in a nonprofit publishing house;[31] one alleged Equal Pay Act[32] violations in the church's schools;[33] and one charged racial discrimination against a typist-receptionist.[34] But two of these opinions indicated that the result might have been different—if the job had been "close to the heart of church administration,"[35] if there had been a "doctrinal" reason for the discrimination,[36] if the victim had been a minister or member of a religious order,[37] or if the claim had threatened continual interference with church employment practices.[38] Similarly, in a case involving a secretary at a

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26. EEOC v. Southwestern Baptist Theological Seminary, 485 F. Supp. 255, 258 (N.D. Tex. 1980), rev'd in part, 651 F.2d 277 (5th Cir. 1981).

27. Id.

28. Id. at 261.

29. Id. at 259.

30. Id. at 261 (footnote omitted). The Fifth Circuit affirmed with respect to the faculty, but reversed with respect to the administration and staff, 651 F.2d 277 (5th Cir. 1981). The court held that the faculty were ministers and applied its rule that the church-minister relationship is exempt from regulation, see McClure v. Salvation Army, 460 F.2d 553 (5th Cir.), cert. denied as untimely filed, 409 U.S. 896 (1972).

31. EEOC v. Pacific Press Publ. Ass'n, 482 F. Supp. 1291 (N.D. Cal. 1979).

32. 29 U.S.C. § 206(d) (1976).

33. Marshall v. Paeific Union Conf. of Seventh-Day Adventist, 14 Empl. Prac. Dec. 5956 (C.D. Cal. 1977).

34. Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1363 (S.D.N.Y. 1975).

35. Id. at 1368.

36. Id. Also see Ritter v. Mount St. Mary's College, 495 F. Supp. 724, 729-30 (D. Md. 1980) (tentatively taking a similar position and denying defendant's motion for summary judgment).

37. EEOC v. Pacific Press Publ. Ass'n, 482 F. Supp. 1291, 1305 n.26 (N.D. Cal. 1979).

38. Id. at 1307-15.

Jesuit college, defendant's motion for summary judgment based on a sweeping theory of absolute autonomy was denied.[39] But the court acknowledged a free exercise "interest in unfettered administration" of religious institutions, to be balanced against the government interest in regulation, and held the issue for trial.[40]

One court has taken a similar approach to religious discrimination. Federal Communications Commission rules forbid employment discrimination,[41] with an implied exception for religious discrimination in employment "connected with the espousal of the licensee's religious views."[42] King's Garden, a fundamentalist religious organization licensed to operate two radio stations, refused to hire non-Christians for any job. The court of appeals rejected its claim of constitutional right.[43] Moreover, the court said in dicta that an exemption limited to religious activities is constitutionally required, but that any broader exemption is probably invalid as an establishment.

Cases involving sexual activity by church employees have been decided on grounds of conscience rather than autonomy. A San Francisco church successfully defended discharging its homosexual organist, in a suit under the local gay rights ordinance, on the ground of its belief that homosexuality is a sin.[44] But a court's inquiry into conscience caused problems for a Catholic school that fired an unwed pregnant teacher; it was forced to trial on nearly metaphysical issues of motive.[45] The court held that it must determine whether the church's moral precepts were applied equally to men and women, and whether the plaintiff "was in fact discharged *only* because she was pregnant rather than because she obviously had pre-marital sexual intercourse in violation of defendant's moral code."[46]

The National Conference of Catholic Bishops has challenged the requirements that its health insurance plan pay for abortions to protect the mother's life and that its sick leave plan pay employees who miss work to obtain abortions. The suit was dismissed for want of a case or controversy.[47]

There is also a pair of older cases rejecting challenges to key provisions of the Fair Labor Standards Act[48] and its state equivalents. The Supreme Court upheld state child labor laws against a child's claim that it was her religious duty to sell religious tracts, emphasizing the state's interest in protecting

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39. NOW v. President of Santa Clara College, 16 Fair Empl. Prac. Cas. 1152 (N.D. Cal. 1975).

40. Id. at 1159.

41. 47 C.F.R. § 73.2080 (1980).

42. King's Garden, Inc. v. FCC, 498 F.2d 51, 53 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974); In re Nat'l Religious Broadcasters, Inc., 43 F.C.C.2d 451 (1973); In re Anderson, 34 F.C.C.2d 937, 938 (1972).

43. King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974).

44. Walker v. First Orthodox Presbyterian Church, 22 Fair Empl. Prac. Cas. 762 (Cal. Super. Ct. 1980).

45. Dolter v. Wahlert High School, 483 F. Supp. 266 (N.D. Iowa 1980).

46. Id. at 270 (original emphasis) (footnotes omitted).

47. National Conf. of Catholic Bishops v. Smith, 653 F.2d 535 (D.C. Cir. 1981).

48. 29 U.S.C. §§ 201-219 (1976).

children.[49] And the Seventh Circuit upheld the minimum wage and maximum hour provisions of the FLSA as applied to employees in a church-owned printing plant, some of whom swore that they did not consider themselves "mere wage earners," but had come to the plant to help "in the work of the Lord."[50]

The most recent church labor relations issue emerged when the Secretary of Labor asserted for the first time that the Federal Unemployment Tax Act applies to church schools.[51] The Supreme Court recently found the Act inapplicable to schools that are not separately incorporated from their sponsoring churches.[52] It has now agreed to decide a case involving a religious school that is separately incorporated.[53]

These labor law cases illustrate a sufficiently broad range of the constitutional questions raised by regulation of churches to make them a useful tool for analysis. The analysis offered here should be applicable, perhaps with some modifications, to other kinds of regulation, including another set of current issues: regulation of church schools in matters of curriculum,[54] teacher certification,[55] and racial discrimination.[56]

II. Distinguishing the Establishment and Free Exercise Clauses

One obstacle to any coherent analysis of the religion clauses is the frequent failure to distinguish between them. Some courts have made no effort to do so.[57] Other courts and commentators have drawn distinctions without a difference, elaborately discussing whether religion was burdened by the state under the free exercise clause, and then whether it was entangled with the state

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49. Prince v. Massachusetts, 321 U.S. 158, 167-69 (1944). See id. at 164 (making clear that the child's rights were asserted).

50. Mitchell v. Pilgrim Holiness Church Corp., 210 F.2d 879, 881, 884 (7th Cir.), cert. denied, 347 U.S. 1013 (1954).

51. The Secretary's claim is set forth in Comment, Bringing Christian Schools Within the Scope of the Unemployment Compensation Laws: Statutory and Free Exercise Issues, 25 Vill. L. Rev. 69 (1979) (quoting letter from Hon. F. Ray Marshall to the Most Reverend Thomas E. Kelly, O.P. (April 18, 1978)). The statute is I.R.C. §§ 3301-3311 (1976 & Supp. III 1979).

52. St. Martin Evangelical Lutheran Church v. South Dakota, 101 S. Ct. 2142 (1981).

53. California v. Grace Brethren Church, 50 U.S.L.W. 3334 (U.S. Nov. 2, 1981) (No. 81-31).

54. Kentucky State Bd. for Elementary & Secondary Educ. v. Rudasill, 589 S.W.2d 877 (Ky. 1979), cert. denied, 446 U.S. 938 (1980); State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976); Comment, Regulation of Fundamentalist Christian Schools: Free Exercise of Religion v. The State's Interest in Quality Education, 67 Ky. L.J. 415, 423-25 (1979).

55. Kentucky State Bd. for Elementary & Secondary Educ. v. Rudasill, 589 S.W.2d 877 (Ky. 1979), cert. denied, 446 U.S. 938 (1980); Comment, supra note 54, at 422-23.

56. Bob Jones Univ. v. United States, 639 F.2d 147 (4th Cir. 1980), cert. granted, 50 U.S.L.W. 3278 (U.S. Oct. 13, 1981) (No. 81-3); Fiedler v. Marumsco Christian School, 631 F.2d 1144 (4th Cir. 1980); Brown v. Dade Christian Schools, Inc., 556 F.2d 310 (5th Cir. 1977), cert. denied, 434 U.S. 1063 (1978).

57. E.g., Catholic Bishop v. NLRB, 559 F.2d 1112, 1131 (7th Cir. 1977), aff'd on other grounds, 440 U.S. 490 (1979); cases cited in note 176 infra.

under the establishment clause, with no identifiable difference between "burden" and "entanglement."[58]

The two clauses can be run together this way only at the risk of distorting their meaning. For example, the Seventh Circuit recently said that both clauses have "the identical purpose of maintaining a separation between Church and State."[59] Similarly, in some of the Supreme Court's opinions, "entanglement" seems to represent the full meaning of the religion clauses.[60]

Neither separation nor entanglement, however, is a sufficient principle of decision. As the courts have acknowledged, "total separation" is impossible.[61] Indeed, the separation metaphor can be positively misleading; it has led to the strange notion, so far rejected by the Court, that churches and religiously motivated citizens have no right to engage in political speech.[62] Additional principles must be brought to bear to decide which contacts between church and state should be permitted and which forbidden. Separate attention to the free exercise and establishment clauses is necessary to identify those principles.[63]

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58. E.g., EEOC v. Mississippi College, 626 F.2d 477, 486-89 (5th Cir. 1980); EEOC v. Pacific Press Publ. Ass'n, 482 F. Supp. 1291, 1307, 1309 (N.D. Cal. 1979); McCormick v. Hirsch, 460 F. Supp. 1337, 1351-58 (M.D. Pa. 1978); Marshall v. Pacific Union Conf. of Seventh-Day Adventists, 14 Empl. Prac. Dec. 5956 (C.D. Cal. 1977); Note, The Religion Clauses and NLRB Jurisdiction Over Parochial Schools, 54 Notre Dame Law. 263, 263, 282-83 (1978).

59. Catholic Bishop v. NLRB, 559 F.2d 1112, 1131 (7th Cir. 1977), aff'd on other grounds, 440 U.S. 490 (1979).

60. See, e.g., NLRB v. Catholic Bishop, 440 U.S. 490, 502 (1979); Walz v. Tax Comm'n, 397 U.S. 664, 670 (1970). See Ripple, supra note 1, at 1213-14.

61. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971); Catholic Bishop v. NLRB, 559 F.2d 1112, 1124 (7th Cir. 1977), aff'd on other grounds, 440 U.S. 490 (1979).

62. See McDaniel v. Paty, 435 U.S. 618 (1978); Walz v. Tax Comm'n, 397 U.S. 664, 670 (1970) (dictum); Ripple, supra note 1, at 1225-30; cf. Harris v. McRae, 448 U.S. 297, 319 (1980) (laws coinciding with religious tenets do not thereby violate establishment clause); McGowan v. Maryland, 366 U.S. 420, 442 (1961) (same); Adams & Hanlon, *Jones v. Wolf*: Church Autonomy and the Religion Clauses of the First Amendment, 128 U. Pa. L. Rev. 1291, 1336-37 (1980) (charging that "the misleading metaphor of a 'wall of separation' " has led courts to deny churches equal protection of the laws).

63. Professor Kurland's persistently held view that "the freedom and separation clauses should be read as stating a single precept" is not an example of objectionable failure to distinguish between the two clauses. His "single precept" is a summary formulation of two separate ones: "government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden." P. Kurland, Religion and the Law 112 (1962); Kurland, The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court, 24 Vill. L. Rev. 3, 24 (1979). I share his apparent view that the establishment clause is about conferring benefits and the free exercise clause is about imposing burdens. I join the "almost uniform reject[ion]" of his position, id. at 24, because his narrow focus on "classification in terms of religion" cannot be reconciled with constitutional text. The free exercise clause confers a substantive freedom, and not merely a right to equal protection. For example, national prohibition without an exception for sacramental uses of wine would prohibit the free exercise of the Christian and Jewish religions, and equal application of the law would not save it. For a recent article invoking this standard, see Adams & Hanlon, supra note 62, at 1297, 1339. Justice Rehnquist recently urged a free exercise standard quite similar to Kurland's. Thomas v. Review Bd., 101 S. Ct. 1425, 1434 (1981) (dissent). For another attack on Kurland, see Merel, The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment, 45 U. Chi. L. Rev. 805, 808-09 (1978).

One important source of confusion is the Supreme Court's three-part test for identifying an unconstitutional establishment, first announced in *Lemon v. Kurtzman*[64] and repeated ever since.[65] The *Lemon* test sets forth criteria for validity as follows:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive entanglement with religion."[66]

Part of the problem is the unstructured expansiveness of the entanglement notion.[67] But the more fundamental error is in the second part of the test: that the primary effect of the statute neither advance *nor inhibit* religion. Many lower courts and commentators,[68] and two Supreme Court Justices,[69] have read that to mean that any measure that inhibits religion in any way raises an establishment question. As a result, the establishment clause threatens to swallow the free exercise clause.

The "inhibits" language has become part of the acceptcd test for religious establishment through mindless repetition of dicta. The Supreme Court has never explained this language or applied it in a holding. *Lemon* simply cited *Board of Education v. Allen*.[70] *Allen* does not explain the rule, but cites

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64. 403 U.S. 602 (1971).

65. Committee for Pub. Educ. v. Regan, 444 U.S. 646, 653 (1980); Wolman v. Walter, 433 U.S. 229, 235-36 (1977); Roemer v. Maryland Pub. Works Bd., 426 U.S. 736, 748 (1976); Meek v. Pittenger, 421 U.S. 349, 358 (1975); Hunt v. McNair, 413 U.S. 734, 741 (1973); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 773 (1973).

66. 403 U.S. 602, 612-13 (1971) (citations omitted) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

67. For criticism of the entanglement test, see Gaffney, Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy, 24 St. Louis U.L.J. 205 (1980); Giannella, Lemon and Tilton: Thc Bitter and the Sweet of Church-State Entanglement, 1971 Sup. Ct. Rev. 147, 148, 170-76; Kurland, supra notc 63, at 19-20; Ripple, supra note 1, at 1216-24; Warner, NLRB Jurisdiction over Parochial Schools: Catholic Bishop of Chicago v. NLRB, 73 Nw. L. Rev. 463, 471 (1978); text accompanying notes 152-65 infra.

68. E.g., EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 285-86 (5th Cir. 1981); Chcss v. Widmar, 635 F.2d 1310, 1317 (8th Cir. 1980), aff'd sub nom. Widmar v. Vincent, 50 U.S.L.W. 4062 (U.S. Dec. 8, 1981); EEOC v. Mississippi College, 626 F.2d 477, 487 (5th Cir. 1980), cert. denied, 101 S. Ct. 3143 (1981); Dolter v. Wahlert High School, 483 F. Supp. 266 (N.D. Iowa 1980); EEOC v. Pacific Press Publ. Ass'n, 482 F. Supp. 1291 (N.D. Cal. 1979); McCormick v. Hirsch, 460 F. Supp. 1337 (M.D. Pa. 1978); EEOC v. Mississippi College, 451 F. Supp. 564 (S.D. Miss. 1978), vacated, 626 F.2d 477 (5th Cir. 1980), cert. denied, 101 S. Ct. 3143 (1981); Heritage Village Church v. State, 299 N.C. 399, 406-10, 414-16, 263 S.E.2d 726, 730-32, 735-36 (1980); Bastress, Government Regulation and the First Amendment Religion Clauses—An Analysis of the NLRB Jurisdiction Over Parochial Schools and Their Teachers, 17 Duq. L. Rev. 291, 310-11, 315-16 (1979); Notc, Marshall v. Pacific Union Conference of Seventh-Day Adventists: Expanding the Aplication of Excessive Entanglement, 6 Hastings Const. L.Q. 345, 349, 374, 376-78 (1978) [hereinafter citcd as Hastings Note]; Comment, supra note 54, at 516-17 n.8; Note, 24 Wayne L. Rev. 1439, 1455 (1978). But sec EEOC v. Southwestern Baptist Theological Seminary, 485 F. Supp. 255 (N.D. Tex. 1980) (regulatory intcrference with religion dealt with solely as a free exercise problem), rev'd in part, 651 F.2d 277 (5th Cir. 1981); NOW v. President of Santa Clara College, 16 Fair Empl. Prac. Cas. 1152, 1159 (N.D. Cal. 1975) (establishment clause attack on regulation recharacterized as free exercise issue).

69. McDaniel v. Paty, 435 U.S. 613, 636-42 (1978) (Brennan, J., joined by Marshall, J., concurring).

70. 392 U.S. 236 (1968).

School District of Abington Township v. Schempp.[71] *Schempp* does not explain the rule either; it cites *McGowan v. Maryland*[72] and *Everson v. Board of Education.*[73] Those two cases do not support a general rule that any inhibition of religion is an establishment, although they do say that some important kinds of inhibitions are establishments.[74]

This narrow version of the "inhibits" language is also unexplained. In context, it seems directed at efforts by established religions to suppress all competition. Its more general language, which may have been inadvertent, is supported only by an inaccurate paraphrase of Thomas Jefferrson's famous letter to the Danbury Baptist Association. The Court relies on Jefferson for the view that the establishment clause erects " 'a wall of separation between church and state.' "[75] Jefferson actually attributed the wall of separation to the combined effect of both the establishment and free exercise clause.[76] The metaphor still is not very helpful in deciding real cases. But at least in its original form it does not turn restrictions on religion into establishments, as the Court's dictum does. The "inhibits" part of the standard establishment clause test began by misquotation and exists by repetition. It is time to examine the question afresh.

The "inhibits" language is at odds with the constitutional text and with the Court's own statements of the origins and purposes of the clause. An established religion is one supported by the state.[77] The clearest case is a formally designated official state religion supported with tax money or with laws mandating universal adherence.[78] In *Everson*, the first modern establishment case, the Court found major roots of the clause in Madison's opposition to the formally established church in Virginia and to renewed tax support for ministers.[79] Similarly in *Lemon*, in the paragraph before it announced the current establishment clause test with its general ban on inhibiting religion, the

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71. 374 U.S. 203 (1963).
72. 366 U.S. 420, 443 (1961).
73. 330 U.S. 1 (1947).
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> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can . . . prefer one religion over another. Neither can force nor influence a person to go to *or remain away from* church against his will or force him to profess a belief *or disbelief* in any religion. No person can be punished for entertaining or professing religious beliefs *or disbeliefs*, for church attendance *or non-attendance*.

Id. at 15-16 (emphasis added), quoted in McGowan v. Maryland, 366 U.S. 420, 443 (1961).

75. 330 U.S. at 16 (citing the quotation of Jefferson's letter in Reynolds v. United States, 98 U.S. 145, 164 (1878)).

76. S. Padover, The Complete Jefferson 519 (1943) ("I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State," correctly quoted in Reynolds v. United States, 98 U.S. 145, 164 (1878)).

77. See Everson v. Board of Educ., 330 U.S. 1, 8-9 (1947).

78. See I The Oxford English Dictionary 897 (compact ed. 1971) (folio pp. 297-98) (definition of "establish").

79. 330 U.S. at 8-13; accord, Reynolds v. United States, 98 U.S. 145, 162-64 (1878).

Court said that it "must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' "[80] "Sponsorship" and "financial support" are clearly establishment clause concerns. "Active involvement" requires more explanation, which the Court did not give; I will address it in a moment.[81] But there is nothing in this language or history that expands the establishment clause ban on supporting religion to include its opposite, a general ban on inhibiting religion.

This is not to say that no inhibitions of religion result from religious establishments. One element of religious establishment in the early modern period was repression of all other religions. Such a law would plainly violate the free exercise clause, and that would be the most direct way of attacking it. But if support for one or a few religions and prohibition or restriction of all others are part of a single policy of establishing the preferred religions, there is no good reason not to say that the whole policy and all laws implementing it violate the establishment clause. Here then is a case in which the establishment clause bans inhibition of religion, but it is not a case that is likely to arise in the foreseeable future. Many modern cases of this type involve a restriction on one or a few religions that is alleged to establish all the others.[82] In this context the argument is silly; even if it is correct, a free exercise or equal protection analysis would be much more straightforward.[83]

A second way in which establishments lead to inhibition of religion is that government support often comes with strings attached. It is in this context that it makes sense to list "entanglement," or "active involvement of the sovereign in religious activity,"[84] as an establishment clause concern. In the extreme case, the established church may become completely or substantially subordinate to the state.[85] The typical modern American case involves a loss

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80. 403 U.S. at 612 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).

81. See text accompanying notes 84-86 infra.

82. See, e.g., Bob Jones Univ. v. United States, 639 F.2d 147 (4th Cir. 1980), cert. granted, 50 U.S.L.W. 3278 (U.S. Oct. 13, 1981) (No. 81-3). See also Valente v. Larson, 637 F.2d 562 (8th Cir. 1981) (discrimination between two large groups of religions struck down under establishment clause), prob. juris. noted, 49 U.S.L.W. 3893 (June 1, 1981).

83. A harder variation is government propaganda against a particular religion. See Church of Scientology v. Cazares, 638 F.2d 1272 (5th Cir. 1981). I once suggested that such propaganda tends to establish the other religions. Laycock, Civil Rights and Civil Liberties, 54 Chi.-Kent L. Rev. 390, 421 (1977). I now think it makes more sense to say that such propaganda penalizes the free exercise of the target religion.

84. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)); see text accompanying note 66 supra.

85. See, e.g., Saint Nicholas Cathedral of the Russian Orthodox Church v. Kedroff, 302 N.Y. 1, 32-33, 96 N.E.2d 56, 73-74 (1950) (subordination of established Russian Orthodox Church to Soviet government), rev'd on other grounds, 344 U.S. 94 (1952); M. Howe, The Garden and the Wilderness 36-43 (1965) (gross interference with established Protestant churches by South Carolina and Massachusetts in eighteenth and nineteenth centuries); B. Tuchman, A Distant Mirror 25-26, 42-44 (1978) (subordination of established Roman Catholic Church to French crown in fourteenth century).

of church autonomy with respect to the program that receives government support.[86]

If government support and government control are inextricably linked in the challenged government policy, it seems natural to review support and control as a package, and the cases on aid to church schools have done so.[87] But that has had unfortunate consequences. The Court has explained why taxpayers have standing to challenge government support of religion,[88] but it has never explained why taxpayers have standing to argue that an aid program entangles the state in a church's affairs. Only the church is harmed by such interference, and only it should have standing to complain. An atheist plaintiff asserting a church's right to be left alone even at the cost of losing government aid is the best possible illustration of why there are standing rules.[89] And if the church itself complained, its claim would sound most naturally in the free exercise clause. Thus, fear that support will lead to interference is reason to want an establishment clause,[90] but it is the support, and not the interference, that is the establishment.[91]

A third way in which government support inhibits religion is by reducing it to the least common denominator. Partly as a result of political pressures not to offend any mainstream sect, and partly as a result of efforts to avoid establishment clause invalidation, government sponsored religious rituals tend to be watered-down imitations of the real thing.[92] Indeed, supporters of such rituals often argue that they have no religious significance. The argument is almost always false, although the courts often accept it,[93] and in principle it

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86. See, e.g., Wolman v. Walter, 433 U.S. 229, 266 n.7 (1977) (Stevens, J., dissenting in part); Roemer v. Board of Pub. Works, 426 U.S. 736, 775 (1976) (Stevens, J., dissenting); Lemon v. Kurtzman, 403 U.S. 602, 619-22 (1971); id. at 660 (Brennan, J., concurring); id. at 668 (White, J., dissenting).

87. See, e.g., cases cited in note 65 supra.

88. Flast v. Cohen, 392 U.S. 83 (1968).

89. See generally Brilmayer, The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement, 93 Harv. L. Rev. 297, 310-15 (1979).

90. See generally M. Howe, supra note 85, at 5-31 (citing Roger Williams's fear that without a wall of separation, the state would corrupt the church, and suggesting that this evangelical desire for separation contributed to the religion clauses at least as much as the Enlightenment-spawned views of Jefferson and Madison).

91. Dean Katz once suggested, drawing on the views of Roger Williams, see note 90 supra, that the establishment clause forbids only those "aids" that actually hamper religion. Katz, Radiations from Church Tax Exemption, 1970 Sup. Ct. Rev. 93, 97. There is no hint of such a limitation in the text of the establishment clause. For those more interested in history than text, one can give full weight to Williams's views without denigrating Madison's: the most plausible conclusion is that both views contributed to the American commitment to disestablishment.

92. See School Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 283-87 (1963) (Brennan, J., concurring); Chambers v. Marsh, 504 F. Supp. 585, 589-90 (D. Neb. 1980).

93. See, e.g., Florey v. Sioux Falls School Dist. 49-5, 619 F.2d 1311 (8th Cir.), cert. denied, 101 S. Ct. 409 (1980); Bogen v. Doty, 598 F.2d 1110, 1114 (8th Cir. 1979); Colo v. Treasurer, 392 N.E.2d 1195, 1200-01 (Mass. 1979); cf. School Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 303-04 (1963) (Brennan, J., concurring) ("In God We Trust" and one nation "under God" may have lost religious meaning); Aronow v. United States, 432 F.2d 242 (9th Cir. 1970) ("In God We Trust" has no religious signifieance). Such arguments were rejected in School Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 223-24 (1963), and Kent v. Commissioner of Educ., 402 N.E.2d 1340 (Mass. 1980). See also Hall v. Bradshaw, 630 F.2d 1018, 1022-23 (4th Cir. 1980) (dictum)

could someday be true. St. Valentine, St. Nicholas,[94] and All Hallow's Eve are examples of religious symbols and holidays from which nearly all vestiges of religious meaning have been drained; the Supreme Court claims that Sunday has suffered a similar fate.[95] Those who take religion seriously have reason to be alarmed when public officials proclaim that crosses[96] and Christmas carols[97] have no religious significance, or that the Ten Commandments are a secular code.[98] A case upholding school Christmas carols was recently cited to support the incredible proposition that a papal mass does not have the primary effect of advancing religion.[99]

But in all these cases of secularization, it is not clear that any individual plaintiff's exercise of religion has been restricted. No one is precluded from continuing to attach full religious significance to the symbols or rituals that government has secularized for others. Those for whom the symbols have been secularized are not likely to complain, and if they did, they would be hard pressed to make out a claim that the government had secularized the symbol for them against their will. This is one harm to religion best reached under the establishment clause. But once again, the origin of the harm is an effort to support religion, and it is the support that is the establishment.

If the establishment clause is construed as I have suggested, there is a clear definitional distinction between the two clauses. Government support for religion is an element of every establishment claim, just as a burden or restriction on religion is an element of every free exercise claim. Regulation that burdens religion, enacted because of the government's general interest in regulation, is simply not establishment. Magic words like "entanglement" cannot make it so. Such regulation is properly challenged under the free exercise clause; courts that have analyzed the church labor relations cases in establishment clause terms have invoked the wrong provision.[100]

(acknowledging a small number of historically accepted public religious ceremonies as an "unexpandable," "grandfathered" exception to the establishment clause), cert. denied, 101 S. Ct. 1480 (1981).

94. See Citizens Concerned for Separation of Church and State v. City of Denver, 481 F. Supp. 522, 526, 529 (D. Colo. 1979), appeal dismissed with instruction to vacate for want of jurisdiction, 628 F.2d 1289 (10th Cir. 1980), cert. denied, 101 S.Ct. 3114 (1981).

95. McGowan v. Maryland, 366 U.S. 420 (1961).

96. Meyer v. Oklahoma City, 496 P.2d 789, 792-93 (Okla. 1972); Paul v. Dade County, 202 So. 2d 833, 835 (Fla. Dist. Ct. App.), cert. denied, 207 So. 2d 690 (Fla. 1967), cert. denied, 390 U.S. 1041 (1968).

97. Florey v. Sioux Falls School Dist. 49-5, 619 F.2d 1311, 1316-17 n.5 (8th Cir.), cert. denied, 101 S. Ct. 409 (1980). Compare Allen v. Morton, 333 F. Supp. 1088, 1093-94 (D.D.C. 1971) (religious significance of crèche in Christmas display is insubstantial), with Citizens Concerned for Separation of Church and State v. City of Denver, 481 F. Supp. 522, 529 (D. Colo. 1979) (crèche "publicly perceived as a religious symbol"), appeal dismissed with instruction to vacate for want of jurisdiction, 628 F.2d 1289 (10th Cir. 1980), cert. denied, 101 S. Ct. 3114 (1981).

98. Stone v. Graham, 599 S.W.2d 157 (Ky.), rev'd, 101 S. Ct. 192 (1980).

99. Gilfillan v. City of Philadelphia, 637 F.2d 924, 939 (3d Cir. 1980) (Aldisert, J., dissenting).

100. See cases cited in notes 57-58 supra.

The "inhibits" language from the Supreme Court's three-part establishment clause test does not preclude this construction. Despite its frequent repetition, it is the rankest sort of dictum—unexplained, never relied on, and founded in an obvious mistake.[101] Its suggestion that any inhibition of religion raises establishment questions should be disregarded. If not disregarded altogether, it should be limited to inhibitions associated with government efforts to support religion.

Once it is recognized that government support for religion is an element of every establishment clause claim, other efforts to distinguish the two clauses become unnecessary. The Court has occasionally suggested that coercion is an essential element of free exercise claims but not of establishment clause claims.[102] The original context of that suggestion was the school prayer cases. School prayer established religion whether or not individual children were coerced to join in. But the distinction does not actually describe many cases. In the school prayer context itself, the Court immediately noted the coercive effect of social pressure to participate.[103] And any government support of religion that costs money, which is to say most such support, depends on the taxing power, one of the most coercive powers of government. So most establishment claims, like most free exercise claims, involve coercion. Indeed, the core case of religious establishment is coerced attendance at the established church.

However, there is a sense in which the Court's coercion distinction is fully consistent with, and illuminates, the support-burden distinction that I find fundamental. If "coercion" is construed to include the somewhat attenuated case of a burden that hinders or deters the exercise of religion, then it is true that all free exercise claims involve coercion. This is the most plausible construction, for the Court has long recognized that indirect burdens may also violate the clause.[104] Thus, the Court's statement that coercion is an element of every free exercise claim may simply be a variant formulation of the idea that I would express by saying that a burden or restriction is an element of every free exercise claim. In establishment cases, coercion is common but not essential to the claim. The plaintiff need not even claim that he was coerced to show standing; it is enough that he be directly affronted by a display of government support for religion.[105] The reason coercion need not be proved is precisely that support, not interference, is the essence of the violation.[106]

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101. On the Supreme Court's duty to correct its mistakes, see Laycock, Federal Interference with State Prosecutions: The Cases *Dombrowski* Forgot, 46 U. Chi. L. Rev. 636, 679-84 (1979).

102. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 786 (1973); School Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222-23 (1963); Engel v. Vitale, 370 U.S. 421, 430 (1962).

103. Engel v. Vitale, 370 U.S. 421, 430-31 (1962).

104. Thomas v. Review Bd., 101 S. Ct. 1425, 1431-32 (1981); Sherbert v. Verner, 374 U.S. 398, 403-06 (1963); Braunfeld v. Brown, 366 U.S. 599, 607 (1961) (plurality opinion) (dictum).

105. This is the best explanation of cases involving public sponsorship of privately financed religious displays. For example, in Stone v. Graham, 101 S. Ct. 192, 194 (1980), Kentucky required school officials to post the Ten Commandments in schoolrooms, provided that private contributions paid the expense. The Court properly held that the state had established religion by

A second proffered distinction between the two clauses is that "the establishment clause obviously deals with entities, i.e., the state and religion (the Church), whereas the free exercise clause apparently deals with persons . . . ."[107] But the original source of this suggestion immediately noted that "a collectivity" may exercise religion,[108] and it is clearly settled that religious institutions have free exercise rights.[109] And the establishment clause protects individuals from having to support or participate in religion whether or not any organized church is involved. For example, in the school prayer cases, it was no defense that the prayers were composed by state officials and not by any church,[110] or that the prayers were intended to be nonsectarian,[111] or even that the prayers would be composed and volunteered by the students themselves.[112] Like the coercion distinction, the collectivity distinction is incapable of accurately assigning claims to one clause or the other.

Finally, although it is clear that a compelling state interest can justify interference with interests protected by the free exercise clause, there have been hints that this is not true of the establishment clause.[113] If this were so,

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its sponsorship, even if no public moneys were spent. Id. at 194 (alternative holding) (per curiam). Standing was not discussed, but the plaintiffs included schoolteachers and parents of schoolchildren who objected to the displays and were directly exposed to them. Stone v. Graham, 599 S.W.2d 157, 159 (Ky.) (Lukowsky, J., dissenting), summarily rev'd per curiam, 101 S. Ct. 192 (1980). Compare School Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 225 n.9 (1963) (parents of schoolchildren have standing to challenge school prayer), with Doremus v. Board of Educ., 342 U.S. 429, 432-33 (1952) (similar case held moot because children had graduated and were no longer in position to be offended by school Bible reading; Court also commented on lack of specific allegations that they had been offended). Direct affront as a basis for establishment clause standing is more fully analyzed in Brief of Petitioner at 17-20, Valley Forge Christian College v. Americans United for Separation of Church and State (U.S. No. 80-327).

106. For the contrary view that only coercive or discriminatory establishments are forbidden to the states by the fourteenth amendment, see M. Howe, supra note 85, at 137-39, 142-43, 172-73. Howe argues that an establishment must take liberty or property to violate the due process clause. His conclusion depends on simultaneously accepting a noninterpretivist belief in substantive due process, a narrow interpretivist construction of liberty and property, and a belief that the establishment clause protects some things that are neither liberty nor property. A consistent noninterpretivist could conclude with the Court that the due process clause fully incorporates the establishment clause. See School Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 215 (1963); Everson v. Board of Educ., 330 U.S. 1, 8 (1947). A consistent interpretivist could conclude that the privileges and immunities clause fully incorporates the establishment clause. See Laycock, Taking Constitutions Seriously: A Theory of Judicial Review (Book Review), 59 Tex. L. Rev. 343, 347-49 (1981). Only one with Howe's peculiar combination of interpretivist and noninterpretivist views could come to his conclusion.

107. Kryvoruka, The Church, The State and the National Labor Relations Act: Collective Bargaining in the Parochial Schools, 20 Wm. & Mary L. Rev. 33, 49 n.63 (1978) (quoting, out of context, Forkosch, Religion, Education, and the Constitution—A Middle Way, 23 Loy. L. Rev. 617, 639 (1977)).

108. Forkosch, supra note 107, at 639.

109. See cases cited in notes 129-32 infra.

110. Engel v. Vitale, 370 U.S. 421, 425 (1962).

111. Id. at 430.

112. Karen B. v. Treen, 653 F.2d 897, 901-02 (5th Cir. 1981).

113. See Lemon v. Kurtzman, 403 U.S. 602, 625 (1971); McCormick v. Hirsch, 460 F. Supp. 1337, 1351-52 (M.D. Pa. 1978); Comment, supra note 54, at 416-17 n.8. But see Bob Jones Univ. v. United States, 639 F.2d 147, 154 (4th Cir. 1980) (applying compelling-interest analysis to claim that rules restricting operation of a few churches established all others), cert. granted, 50

the establishment clause would be the only first amendment clause[114]—indeed, the only broadly-worded substantive clause anywhere in the Constitution[115]—that is absolute. There is no basis in constitutional text or history to thus elevate this freedom above all others.[116]

It does seem likely that there would be few occasions to invoke the compelling-interest test in establishment clause cases. Any government interest in supporting religion as such is illegitimate and cannot be used to justify an establishment.[117] And few secular purposes are so inextricably linked with religion that government cannot pursue them without supporting religion. But in a proper case, there should be no rule that the establishment clause is absolute.

One example of such a case is the singular success of Catholic schools in educating disadvantaged children.[118] These children are frequently black Protestants whose public schools have failed them.[119] It is hard to imagine a

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U.S.L.W. 3278 (U.S. Oct. 13, 1981) (No. 81-3). See also School Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 294 (1963) (Brennan, J., concurring).

114. See, e.g., Gillette v. United States, 401 U.S. 437 (1971) (free exercise); Kovacs v. Cooper, 336 U.S. 77 (1949) (free speech).

115. See, e.g., Fullilove v. Klutznick, 448 U.S. 448 (1980) (equal protection); Baldwin v. Fish & Game Comm'n, 436 U.S. 371 (1978) (privileges and immunities of art. IV); United States v. Caltex, Inc., 344 U.S. 149 (1952) (just compensation); United States v. Miller, 307 U.S. 174 (1939) (bearing arms).

116. Cf. McDaniel v. Paty, 435 U.S. 618, 627 n.7 (1978) (plurality opinion) (acknowledging absolute freedom to believe, and cautioning against expansion of scope of absolute rights).

117. School Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222 (1963).

118. High school students in Catholic schools have substantially higher academic achievement than their peers in public schools. J. Coleman, T. Hoffer & S. Kilgore, Public and Private Schools 151-57, 180-85 (1981) (to be published by Basic Books as High School Achievement); A. Greeley, Minority Students in Catholic Secondary Schools, table 4.1 (typescript 1981) (to be published by Transaction Books in 1982). The effect is most dramatic for black and Hispanic students: academic achievement for such students is half a standard deviation higher than that of blacks and Hispanics in public schools. Id. Also see J. Coleman, T. Hoffer & S. Kilgore, supra at 177-78. A little more than half this difference is explained by differences in the students' backgrounds; the rest is explained by better teaching, better discipline, and the influence of religious orders in Catholic schools. A. Greeley, supra, at 58-61. Also see J. Coleman, T. Hoffer & S. Kilgore, supra, at 170-80, 197-219. Moreover, the greatest benefits of Catholic education over public education accrue to minorities, students whose parents did not attend college, and students whose families have incomes under $12,000. A. Greeley, supra, at 67-78. The correlation between social class and academic achievement is much lower in Catholic schools than in public schools, id. at table 7.1, and Catholic-school sophomores with low socioeconomic status nearly catch up to their more advantaged classmates by the senior year, id. at 71-74. See J. Coleman, T. Hoffer & S. Kilgore, supra, at 177-80. Other researchers also report that low income students do better in Catholic schools. G. Hancock, Public School, Parochial School: A Comparative Inpnt-Output Analysis of Governmental and Catholic Elementary Schooling in a Large City (Ph.D. dissertation in education at the University of Chicago Library, 1971) (see especially 36-38, 51-54); Morton, Examining the Difference Between Public and Parochial Education: The Rhode Island Experience 112-13, reprinted in T. Vitullo-Martin, Catholic Inner-City Schools: The Future, at 99 app. (1979). Similar results from a study of 64 randomly selected inner-city private schools are summarized in a letter to the New York Times, Jan. 21, 1981, at A22, col. 3; a formal research report is forthcoming.

119. There were 252,900 blacks and 256,000 Hispanics enrolled in Catholic schools in 1980-81. F. Bredeweg, A Statistical Report on U.S. Catholic Schools 1980-81, at 17. Black and Hispanic enrollment in Catholic schools increased substantially from 1970 to 1980, while white enrollment declined even more substantially. Id. Only half the blacks in Catholic high schools are Catholic. A. Greeley, supra note 118, at 9 n.2. See also T. Vitullo-Martin, supra note 118, at 77,

more compelling state interest than quality education for disadvantaged minority groups, and the state seems quite incapable of providing it directly. The state's interest in supporting these schools is great enough to justify the support for religion that such aid inevitably produces.[120] This is a claim that has not been presented to the Supreme Court. It is quite different from the more general claim that the Court has rejected—that the state saves money by supporting private schools and keeping their students out of public schools.[121] With a properly designed statute, and a good trial record on the failures of public schools and the comparative success of Catholic schools, we should see dramatic new developments in the cases on aid to church schools.

III. Free Exercise and the Right To Church Autonomy

A. *The Three Faces of Free Exercise*

It is commonplace to divide the right to free exercise of religion into the freedom to believe, which is absolute, and the freedom to act, which is necessarily limited.[122] The distinction is accurate as far as it goes, but it does not decide many cases. Freedom to believe is rarely infringed in this country.[123] Nearly all the cases involve freedom to act on religious beliefs, and analytic categories that do not subdivide further are not very helpful.

The free exercise clause protection for religious activity includes at least three rather different kinds of rights. In each category, some claims have been accepted and others rejected; none of these rights is protected absolutely.

One category is the bare freedom to carry on religious activities:[124] to build churches and schools,[125] conduct worship services,[126] pray,[127] proselyt-

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96. Two-thirds of all minorities in Catholic schools are in inner-city schools. Id. at 5. Minoritics are a majority or near-majority in Catholic schools in many major cities, including Chicago, Los Angeles, New Orleans, New York, and Washington. Id. at 53; Love, Freedom of Choice for Inner-City Parents, Nat'l Rev. 903, 904 (July 25, 1980). Over 75% of private, inner-city schools enrolling low income blacks are Catholic; another 15% are Lutheran, Baptist, Episcopalian, and Seventh Day Adventist. T. Vitullo-Martin, supra note 118, at 15. At least for Catholics, who traditionally rely on the local parish to support the school, these inner-city schools are the most difficult to keep open. Id. at 25-47, 77-80.

120. Cf. National Coalition for Pub. Educ. & Religious Liberty v. Harris, 489 F. Supp. 1248 (S.D.N.Y.) (aid to needy children relied on as valid secular purpose for giving funds to parochial schools under Elementary and Secondary Education Act of 1965), appeal dismissed for want of jurisdiction, 101 S. Ct. 55 (1980).

121. Lemon v. Kurtzman, 403 U.S. 602, 625 (1971).

122. See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 219-20 (1972); Cantwell v. Connecticut, 310 U.S. 196, 303-04 (1940); EEOC v. Pacific Press Publ. Ass'n, 482 F. Supp. 1291, 1307-08 (N.D. Cal. 1979).

123. But see Torcaso v. Watkins, 367 U.S. 488 (1961) (test oath for public official).

124. McDaniel v. Paty, 435 U.S. 613, 626 (1978) (plurality opinion).

125. See Columbus Park Congregation of Jehovah's Witnesses, Inc. v. Board of Appeals, 25 Ill. 2d 65, 182 N.E.2d 722 (1962); Diakonian Soc'y v. City of Chicago Zoning Bd. of Appeals, 63 Ill. App. 3d 823, 380 N.E.2d 843 (1978) (monastery); cf. Pierce v. Society of Sisters, 268 U.S. 510 (1925) (decided on substantive due process grounds). See also Society for Ethical Culture v. Spatt, 51 N.Y.2d 449, 415 N.E.2d 922 (1980); Faith Assembly of God v. State Bldg. Code Comm'n, __ Mass. App. __, 416 N.E.2d 228 (1981).

126. See O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir.1979); Frank v. State, 604 P.2d 1068 (Alaska 1979); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964); Kcegan v.

ize,[128] and teach moral values. This is the exercise of religion in its most obvious sense.

Second, and closely related, is the right of churches to conduct these activities autonomously: to select their own leaders,[129] define their own doctrines,[130] resolve their own disputes,[131] and run their own institutions.[132] Religion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected by the clause.

Third is the right of conscientious objection to government policy. The phrase is most prominently associated with the military draft,[133] but there has also been conscientious objector litigation with respect to war taxes,[134] compulsory education,[135] medical treatment and innoculations,[136] social insurance,[137] Sabbath observance and nonobservance,[138] monogamy,[139] and other

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University of Delaware, 349 A.2d 14 (Del. 1975), cert. denied, 424 U.S. 934 (1976); cf. Widmar v. Vincent, 50 U.S.L.W. 4062 (U.S. Dec. 8, 1981) (decided on free speech grounds); Kunz v. New York, 340 U.S. 290 (1951) (decided on free speech grounds).

127. Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980), cert. denied, 50 U.S.L.W. 3486 (U.S. Dec. 14, 1981).

128. E.g., Heffron v. International Soc'y for Krishna Consciousness, 101 S. Ct. 2559 (1981); Follett v. Town of McCormick, 321 U.S. 573 (1944); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Jones v. City of Opelika, 319 U.S. 103 (1943); Largent v. Texas, 318 U.S. 418 (1943); Jamison v. Texas, 318 U.S. 413 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); McMurdie v. Doutt, 468 F. Supp. 766 (N.D. Ohio 1979); Robertson v. Robertson, 19 Wash. App. 425, 575 P.2d 1092 (1978).

129. E.g., Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Kreshik v. Saint Nicholas Cathedral of the Russian Orthodox Church, 363 U.S. 190 (1960) (per curiam); Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94 (1952); cf. Gonzales v. Roman Catholic Archbishop, 280 U.S. 1 (1929) (decided on common law grounds); Democratic Party of U.S. v. Wisconsin ex rel. La Follette, 450 U.S. 107 (1981) (political party has right to choose convention delegates antonomously).

130. E.g., Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969).

131. E.g., Jones v. Wolf, 443 U.S. 595 (1979); Maryland & Va. Eldership of the Churches of God v. Church of God, 396 U.S. 367 (1970) (per curiam); cf. Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871) (decided on common law grounds).

132. E.g., NLRB v. Catholic Bishop, 440 U.S. 490 (1979); cases cited in notes 129-131 supra.

133. E.g., Gillette v. United States, 401 U.S. 437 (1971); In re Summers, 325 U.S. 561 (1945); Selective Draft Law Cases, 245 U.S. 366 (1918).

134. Comment, War Tax Refusal Under the Free Exercise Clause, 1980 Wis. L. Rev. 753.

135. Wisconsin v. Yoder, 406 U.S. 205 (1972); State ex rel. Nagle v. Olin, 64 Ohio St. 2d 341, 415 N.E.2d 279 (1980); cf. Pierce v. Society of Sisters, 268 U.S. 510 (1925) (decided on substantive due process grounds).

136. E.g., Jehovah's Witnesses v. King County Hosp., 390 U.S. 598 (1968), aff'g mem. 278 F. Supp. 488 (W.D. Wash. 1967); Lewis v. Califano, 616 F.2d 73 (3d Cir. 1980); In re President of Georgetown College, 331 F.2d 1000 (D.C. Cir.), cert. denied, 377 U.S. 978 (1964); cf. Jacobson v. Massachusetts, 197 U.S. 11 (1905) (challenged on substantive due process grounds).

137. E.g., Kelly v. Terry, 629 F.2d 572 (9th Cir. 1980); Jaggard v. Commissioner, 582 F.2d 1189 (8th Cir. 1978), cert. denied, 440 U.S. 913 (1979); Varga v. United States, 467 F. Supp. 1113 (D. Md. 1979), aff'd mem., 618 F.2d 106 (4th Cir. 1980).

138. E.g., Sherbert v. Verner, 374 U.S. 398 (1963); Braunfeld v. Brown, 366 U.S. 599 (1961).

139. Cleveland v. United States, 329 U.S. 14 (1946); Davis v. Beason, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1878).

requirements that conflict with the moral scruples of certain sects or individual believers.[140] These cases are also within the clause, because one way to exercise one's religion is to follow its moral dictates.

Each of these rights has solid support in the case law, but many courts and commentators think only in terms of conscientious objection.[141] One of the most common errors in free exercise analysis is to try to fit all free exercise claims into the conscientious objector category and reject the ones that do not fit. Under this approach, every free exercise claim requires an elaborate judicial inquiry into the conscience or doctrines of the claimant. If he is not compelled by religion to engage in the disputed conduct, he is not entitled to free exercise protection. Thus, courts have tried to decide whether activities of organized churches were required by church doctrine or were something that the churches did for nonreligious reasons.[142] Courts have even allowed schools to deny student religious groups access to schoolrooms—freely available to other student groups—on the ground that the students' religion did not require prayer and services at the disputed time and place.[143]

This approach reflects a rigid, simplistic, and erroneous view of religion. Many activities that obviously are exercises of religion are not required by conscience or doctrine. Singing in the church choir and saying the Roman Catholic rosary are two common examples. Any activity engaged in by a church as a body is an exercise of religion.[144] This is not to say that all such activities are immune from regulation: there may be a sufficiently strong governmental interest to justify the intrusion. But neither are these activities wholly without constitutional protection. It is not dispositive that an activity is not compelled by the official doctrine of a church or the religious conscience

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140. E.g., Thomas v. Review Bd., 101 S. Ct. 1425 (1981) (working in defense plant); National Conf. of Catholic Bishops v. Smith, 653 F.2d 535 (D.C. Cir. 1981) (paying for employees' abortions); Palmer v. Board of Educ., 603 F.2d 1271 (7th Cir. 1979) (teaching patriotism in public school), cert. denied, 444 U.S. 1026 (1980); Moody v. Cronin, 484 F. Supp. 270 (C.D. Ill. 1979) (physical education uniforms); Bureau of Motor Vehicles v. Pentecostal House, 269 Ind. 361, 380 N.E.2d 1225 (1978) (picture on driver's license); Note, Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities, 90 Yale L.J. 350, 351-52 (1980) (collecting cases).

141. E.g., NLRB v. World Evangelism, Inc., 656 F.2d 1349, 1354 (9th Cir. 1981); EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 286 (5th Cir. 1981); EEOC v. Mississippi College, 626 F.2d 477, 488 (5th Cir. 1980), cert. denied, 101 S. Ct. 3143 (1981); Kryvoruka, supra note 107, at 52; Warner, supra note 67, at 493-97; Note, 11 Creighton L. Rev. 1321, 1337-38 (1978); Hastings Note, supra note 68, at 367; Note, supra note 140, at 373.

142. E.g., Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 311-14 (5th Cir. 1977) (en banc) (plurality opinion), cert. denied, 434 U.S. 1063 (1978); Dolter v. Wahlert High School, 483 F. Supp. 266, 269-70 (N.D. Iowa 1980).

143. Brandon v. Board of Educ., 635 F.2d 971, 977 (2d Cir. 1980), cert. denied, 50 U.S.L.W. 3486 (U.S. Dec. 14, 1981); Chess v. Widmar, 480 F. Supp. 907, 917 (W.D. Mo. 1979), rev'd, 635 F.2d 1310 (8th Cir. 1980), aff'd sub nom. Widmar v. Vincent, 50 U.S.L.W. 4062 (U.S. Dec. 8, 1981).

144. See Surinach v. Pesquera de Busquets, 604 F.2d 73, 77 (1st Cir. 1979) (providing highest quality education possible is "religious belief and practice" of Catholic school administrators); cf. Heffron v. International Soc'y for Krishna Consciousness, 101 S.Ct. 2559, 2566 (1981) (religious solicitation acquires no additional constitutional protection by inclusion in mandatory religious ritual).

of an individual believer. Indeed, many would say that an emphasis on rules and obligations misconceives the essential nature of some religions.[145]

Moreover, emphasis on doctrine and requirements ignores the fluidity of doctrine and the many factors that can contribute to doctrinal change. A church is a complex and dynamic organization, often including believers with a variety of views on important questions of faith, morals, and spirituality. The dominant view of what is central to the religion, and of what practices are required by the religion, may gradually change.[146] Today's pious custom may be tomorrow's moral obligation, and vice versa.

These characteristics of doctrinal change have two consequences. One is that the officially promulgated church doctrine, on which courts too often rely,[147] is not a reliable indication of what the faithful believe. At best the officially promulgated doctrine of a large denomination represents the dominant or most commonly held view; it cannot safely be imputed to every believer or every affiliated congregation. If an official statement of doctrine has not been revised in recent times, it may be that almost no one in the church still believes it. Occasionally, an official pronouncement is obsolete as soon as it is made: the 1968 papal encyclical forbidding artificial contraception never represented the beliefs of more than a minority of Roman Catholics in the United States.[148] This gap between official doctrine and rank-and-file belief means that courts are prone to err in deciding whether activities of a local church or small group of believers are compelled by conscience.

The complex and open-ended nature of the processes that lead to doctrinal change has a second consequence that is even more important. When the state interferes with the autonomy of a church, and particularly when it interferes with the allocation of authority and influence within a church, it interferes with the very process of forming the religion as it will exist in the future. For example, Professor Howe has shown that state law contributed substantially to the trend toward congregationalism in the early national period, and more subtly, to less rigorous standards of admission to church membership.[149] In the labor relations context, it is impossible to predict the

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145. See, e.g., Galatians 3:13 ("Christ has redeemed us from the curse of the law . . . ."); 2 Corinthians 3:6 ("[T]he letter killeth, but the spirit giveth life.")

146. See, e.g., A. Dulles, The Resilient Church (1977); M. Howe, supra note 85, at 49-55; D. Tracy, The Analytical Imagination (1981).

147. See, e.g., Lemon v. Kurtzman, 403 U.S. 602, 618 (1971); Fiedler v. Marumsco Christian School, 631 F.2d 1144, 1152-54 (4th Cir. 1980); Catholic Bishop v. NLRB, 559 F.2d 1112, 1123 (7th Cir. 1977), aff'd on other grounds, 440 U.S. 490 (1979); Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 313-14 (5th Cir. 1977) (en banc) (plurality opinion), cert. denied, 434 U.S. 1063 (1978); EEOC v. Pacific Press Publ. Ass'n, 482 F. Supp. 1291, 1307 (N.D. Cal. 1979); Marshall v. Pacific Union Conf. of Seventh-Day Adventist, 14 Empl. Prac. Dec. 5956, 5957-58 (C.D. Cal. 1977). The Supreme Court has avoided this error in adjudicating conscientious objection claims brought by individuals. See, e.g., Thomas v. Review Bd., 101 S. Ct. 1425, 1430-31 (1981).

148. III American Institute of Public Opinion, The Gallup Poll: Public Opinion 1935-1971, at 2157 (1972).

149. M. Howe, supra note 85, at 32-60.

long-term effect of forcing religious leaders to share authority with a secular union, or of substituting one employee for another as a result of a discrimination charge or a union grievance. A number of such substitutions may have a cumulative effect, especially if, as seems likely, there is some bias in the process making them. Employees who are more aggressive and less deferential to authority, and therefore more litigious, are more likely to invoke remedies that result in compulsory replacement of one employee with another. Thus, any interference with church affairs may disrupt "the free development of religious doctrine."[150]

Such government-induced changes in religion are too unpredictable to be avoided on a case-by-case basis. They can be minimized only by a strong rule of church autonomy. The free exercise clause therefore forbids government interference with church operations unless there is, to use the conventional phrase, a compelling governmental interest to justify the interference. Identifying those governmental interests that are sufficient is a complex task that requires further exploration.[151]

B. *Church Autonomy and Entanglement*

Anything that I would describe as an interference with church autonomy the Supreme Court might describe as an entanglement. But the two concepts are not interchangeable. "Entanglement" is such a "blurred, indistinct, and variable"[152] term that it is useless as an analytic tool. Sometimes it seems to mean contact, or the opposite of separation;[153] it has also been used interchangeably with "involvement"[154] and "relationship."[155] Sometimes it seems to mean anything that might violate the religion clauses.[156]

In the cases on aid to church schools, where the term has been given specific content, it has been used to describe at least three different phenomena. One is government control of churches—what I have called interference with church autonomy. Government regulation of church operations to assure that money given to church schools is not spent for religious purposes is an entanglement.[157]

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150. Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969). Government interference with the free development of religious doctrine is equally offensive to the free exercise clause whether it assists the proponents of change or the defenders of the status quo.

151. See text accompanying notes 228-305 infra. By using the phrase "compelling governmental interest," I do not mean to imply that there is a single standard for all intrusions.

152. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (describing the "line of separation" between church and state); see Roemer v. Board of Pub. Works, 426 U.S. 736, 766 (1976).

153. Meek v. Pittenger, 421 U.S. 349, 370 (1975); Lemon v. Kurtzman, 403 U.S. 602, 614, 619 (1971); Walz v. Tax Comm'n, 397 U.S. 664, 675-76 (1970); Kurland, supra note 63, at 19-20.

154. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971); Walz v. Tax Comm'n, 397 U.S. 664, 674-76 (1970).

155. Lemon v. Kurtzman, 403 U.S. 602, 614, 620, 622 (1971); Walz v. Tax Comm'n, 397 U.S. 664, 674-76 (1970); see id. at 675 ("a relationship pregnant with involvement").

156. NLRB v. Catholic Bishop, 440 U.S. 490, 501-03 (1979); Walz v. Tax Comm'n, 397 U.S. 664, 670 (1970); see Ripple, supra note 1, at 1214.

157. Meek v. Pittenger, 421 U.S. 349, 372 (1975); Hunt v. McNair, 413 U.S. 734, 747-49 (1973); Lemon v. Kurtzman, 403 U.S. 602, 620-21 (1971).

The second meaning of entanglement is surveillance, which may be necessary to enforce the rules that prevent diversion of money to religious purposes.[158] These two meanings of entanglement—regulation and surveillance to enforce the regulations—are at least closely related. But the Court has been careful to distinguish them and to give independent significance to the ban on surveillance. In explaining why surveillance is entangling, the Court has not emphasized its tendency to aggravate substantive restrictions on church operations—to shift decisions about how to implement regulations from church to state and press churches to please the state inspector. Rather, it has simply emphasized that surveillance requires contact. And at times, it has seemed more concerned about surveillance than about the substantive restrictions the surveillance would be designed to enforce.[159]

The third meaning of entanglement is quite unrelated to the first two, and the Court has begun to distinguish it by calling it "political entanglement."[160] Political entanglement occurs when a statute is likely to lead to a division of political factions along religious lines. Political entanglement is a private-sector phenomenon that does not in itself involve any church-state contact at all. Of course, if voters divide on religious lines on issues important to a church, the affected church will probably attempt to influence government action. But church lobbying is a constitutionally protected contact between church and state; churches and their members have the same political rights as other citizens and organizations.[161] If a particular form of aid to churches would be constitutional under the first two parts of the Court's establishment clause test,[162] it is hard to see how the aid becomes unconstitutional because of its tendency to incite constitutionally protected lobbying. Fear of such lobbying is like fear of state control of churches: it may be a reason to want an establishment clause, but it is government support, and not religious lobbying, that violates the clause.[163]

"Entanglement" does not clearly communicate any of the Court's three specific meanings. The first meaning is regulation, or interference with autonomy. The second is surveillance or inspection. The third is political division on

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158. Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 654, 659-60 (1980); Roemer v. Board of Pub. Works, 426 U.S. 736, 765 (1976); Meek v. Pittenger, 421 U.S. 349, 372 (1975); Hunt v. McNair, 413 U.S. 734, 745-46 (1973); Lemon v. Kurtzman, 403 U.S. 602, 620 (1971).

159. See Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 654 (1980); Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).

160. Roemer v. Board of Pub. Works, 426 U.S. 736, 765-66 (1976); Meek v. Pittenger, 421 U.S. 349, 372 (1975); see Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 661 n.8 (1980); Lemon v. Kurtzman, 403 U.S. 602, 622-24 (1971). For criticism of the doctrine, see Gaffney, supra note 67.

161. McDaniel v. Paty, 435 U.S. 618 (1978); Walz v. Tax Comm'n, 397 U.S. 664, 670 (1970) (dictum); see Harris v. McRae, 448 U.S. 297, 319-20 (1980); McGowan v. Maryland, 366 U.S. 420, 442 (1961). But see Ripple, supra note 1, at 1225-30 (noting reservations in Court's enforcement of right to religious lobbying).

162. The first two parts of the test require secular purpose and secular primary effect. See text accompanying note 66 supra.

163. See notes 87-91 and accompanying text supra.

religious lines. Such gaps between the Court's concepts and its label for them make the label irrelevant or misleading in the process of adjudication.

The label has misled some commentators. Thus, NLRB lawyer Robert Warner has suggested that if churches voluntarily recognized unions, entered into collective bargaining, and avoided any unfair labor practices—he must mean any charges of unfair labor practices—the NLRB would have no occasion to investigate alleged violations of the labor laws and there would be no entanglement.[164] Warner's argument limits "entanglement" to its most nearly literal sense, surveillance or physical contact. He completely ignores the government-regulation sense of entanglement; this form of entanglement would be maximized by complete acquiescence in the NLRB's rules.

Moreover, Warner assumes that only church-state entanglement counts. A church that followed his suggestions would be maximally entangled with a union, both in Warner's sense of physical contact and surveillance, and in the autonomy sense—union demands would often determine church policy. Warner's attempt to limit entanglement doctrine to church-state entanglements is another consequence of blurring the line between the free exercise and establishment clauses. Entanglement has been an establishment clause doctrine, developed in cases challenging state aid to religion. Since Warner wrote, there have been hints that entanglement is to become a free exercise doctrine as well.[165] But the establishment cases give little guidance to this extension, so Warner had some basis for assuming that state-compelled entanglements between churches and other private organizations are not an establishment clause concern.

By contrast, a right to church autonomy under the free exercise clause focuses on the real interests at stake. The right is the right of churches to make for themselves the decisions that arise in the course of running their institutions. Because the general right is not absolute, it will not always be clear what specific rights are within it. But it is clear what interests weigh on the churches' side of the balance. A union rule and an identical government regulation are equal infringements of church autonomy: both interfere with church control of church institutions.

C. *The Church Autonomy Precedents*

The Supreme Court has not yet passed on a claim to church autonomy in the broad terms proposed here. But, as noted, church autonomy is a component of entanglement doctrine.[166] More importantly, the Court has recognized a right to church autonomy in a series of cases involving disputes over control of church property, church organization, and entitlement to ecclesiastical office.[167] All but one of these cases arose out of church schisms; the exception involved a claim to have inherited an endowed chaplaincy.[168]

164. Warner, supra note 67, at 484.

165. Ripple, supra note 1, at 1210-14, 1230-35.

166. See text accompanying note 157 supra.

167. Cases cited in notes 129-31 supra; Adams & Hanlon, supra note 62; Kauper, Church Autonomy and the First Amendment: The Presbyterian Church Case, 1969 Sup. Ct. Rev. 347.

168. Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1 (1929).

The doctrinal details of this right to autonomy are in flux and not entirely clear. In the ecclesiastical appointment and church organization cases, the Court has uniformly held that secular courts are bound by the decision of the highest church authority recognized by both sides before the dispute began.[169] In property disputes, the Court announced a similar rule as a matter of federal common law.[170] Much later, the Court held unconstitutional the rule in many states under which secular courts awarded disputed property to the faction that adhered to the original doctrines of the church.[171]

But the Court has not required states to follow the federal rule in property cases; it recently said that states are free to use any approach that does not require secular courts to determine questions of church doctrine or the allocation of church authority.[172] State courts may construe deeds, contracts, church constitutions, and similar documents that indicate property ownership, but only if these documents are construed under "neutral principles of law," i.e., as ordinary legal instruments and without regard to questions of religious doctrine.[173] This "neutral principles" approach was approved by a sharply divided Court. But the Court agreed unanimously on the goal of church autonomy. The argument turned on whether the dissenters' approach would better implement the decision of the church itself with less secular interference.[174]

When these rules of deference to the church's own decision were constitutionalized in *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church*, the Court relied squarely on the free exercise clause.[175] Since then, it has relied ambiguously on the "First Amendment."[176]

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169. Cases cited in note 129 supra.

170. Watson v. Jones, 80 U.S. (13 Wall.) 679, 727 (1871).

171. Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449-52 (1969).

172. Jones v. Wolf, 443 U.S. 595, 602 (1979); see Maryland & Va. Eldership of the Churches of God v. Church of God, 396 U.S. 367, 368-70 (1970) (Brennan, J., concurring); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449-51 (1969).

173. Jones v. Wolf, 443 U.S. 595, 602-06 (1979). Adams & Hanlon, supra note 62, reconcile the cases differently. They believe that what distinguishes the cases discussed in text accompanying note 169 supra, in which the rule of deference to the highest church authority was applied, is not that they presented claims to ecclesiastical appointment, but that in each, "a general church's hierarchical control over a local church and its property [were] undisputed." Id. at 1336. They may be right. But until the Court makes its intentions clear, I prefer the explanation in the text. Adams and Hanlon give insufficient weight to the Court's ban on secular resolution of disputes over church polity. Compare Jones v. Wolf, 443 U.S. 595, 602, 605 (1979), and Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709-10, 723 (1976), with Adams & Hanlon, supra note 62, at 1322-25. See text accompanying note 183 infra. For another reading similar to mine, see L. Tribe, American Constitutional Law § 14-12, at 879-80 (1978). Professor Ellman considers the cases indistinguishable. Ellman, Driven from the Tribunal: Judicial Resolution of Internal Church Disputes, 69 Calif. L. Rev. 1378, 1387-1400 (1981).

174. Jones v. Wolf, 443 U.S. 595, 604-06 (1979); id. at 610-14, 616-18 (Powell, J., dissenting); Adams & Hanlon, supra note 62, at 1317-18, 1325, 1338.

175. 344 U.S. 94, 100, 107-08, 115-16, 119-21 (1952).

176. Jones v. Wolf, 443 U.S. 595, 602, 605 (1979); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 698, 708-10, 712-13, 718-21, 724 (1976); Maryland & Va. Eldership of the Churches of God v. Church of God, 396 U.S. 367, 368 (1970) (per curiam); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U. 440, 441, 444, 449-51 (1969);

There is a reason to rely on both the free exercise and establishment clauses in these schism cases. When a secular court awards property or an ecclesiastical post on the basis of its resolution of a question of religious doctrine, it establishes the winning faction.[177] But this is merely a consequence of the primary constitutional violation—interfering with the right of the original church, which included both factions, to resolve the controversy itself. *Kedroff* properly identified this as a free exercise right, a right to church autonomy. More recent cases also implicitly treated the church's right to freedom from secular interference as a free exercise right.[178]

The Court's free exercise rationale is the one offered in this Article for a general right of church autonomy. The cases have arisen in situations in which the church's interest in autonomy is especially strong—responding to schism and appointing clergy—so no holding bears upon the right of church autonomy in a labor relations case or similar regulatory context. But regulation is in some ways a greater intrusion on church autonomy than is resolution of schisms. A secular court can attempt to resolve schisms in accord with preexisting church agreements, but regulation always imposes external rules.[179]

The Court's autonomy rationale in the schism cases is broad enough to include regulation cases. *Kedroff* relied on "a spirit of freedom for religious organizations, an 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."[180] Constitutional protection was extended to "church administration"[181] and "the operation of churches."[182] In *Serbian Eastern Orthodox Diocese v. Milivojevich*, the Court said that the ban on secular resolution of disputes over church doctrine "applies with equal force to disputes over church polity and church administration."[183] The reference to administration was part of the holding: *Serbian Diocese* invalidated secular interference with a decision to divide North America into three dioceses.[184]

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see McDaniel v. Paty, 435 U.S. 618, 638 (1978) (Brennan, J., concurring) (treating *Serbian Diocese, Presbyterian Church, Kedroff,* and United States v. Ballard, 322 U.S. 78 (1944), as establishment cases); Walz v. Tax Comm'n, 397 U.S. 664, 692 n.12 (1970) (Brennan, J., concurring) (treating *Maryland Churches* and *Presbyterian Church* as free exercise cases).

177. See Jones v. Wolf, 443 U.S. 595, 599 (1979); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969); Adams & Hamlon, supra note 62, at 1337-38. See also Ripple, supra note 1, at 1213-14.

178. Jones v. Wolf, 443 U.S. 595, 606 (1979); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 448 (1969).

179. Ellman, supra note 173, at 1422.

180. Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94, 116 (1952); accord, Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 448 (1969); see Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 721-22 (1976).

181. 344 U.S. at 107; accord, Jones v. Wolf, 443 U.S. 595, 605 (1979); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 710 (1976).

182. 344 U.S. at 107.

183. 426 U.S. 696, 710 (1976).

184. Id. at 720-24.

This right of autonomy logically extends to all aspects of church operations. There is nothing in the cases to indicate that the Supreme Court would disagree. The Court has consistently extended the right of church autonomy as far as necessary to include the cases before it. Dictum suggesting possible exceptions has been disapproved in the only attempt to apply it. One early case acknowledged a possibility that church decisions could be reviewed by secular courts for "fraud, collusion, or arbitrariness,"[185] and this dictum was alluded to in several subsequent decisions.[186] But when the Illinois Supreme Court relied on the "arbitrariness" exception,[187] it promptly got reversed, and the exception was squarely rejected.[188] The fraud and collusion exceptions would be equally inconsistent with the Court's rationale.[189]

The entanglement cases also support a broad rule of church autonomy. The church autonomy component of the doctrine has primarily been concerned with regulations designed to identify secular and religious functions and prevent diversion of public funds to the latter. Such rules require the state to define what is religious and are therefore especially sensitive. But the Court has recognized that this special sensitivity extends to many routine operations.[190] For example, it has noted that teachers of any subject have the opportunity to express religious sentiments or implement religious ideals.[191]

More importantly for present purposes, the Court has applied the church autonomy component of the entanglement doctrine to routine administrative matters without inquiring whether intrinsically religious exercise could be affected. It expressed concern about state power to set rents, fees, and rules for the use of facilities financed with state revenue bonds and built at a church-supported college.[192] This entanglement was held not excessive only because the power was construed to arise only if the bonds were in default, and even then the state's power was limited to efforts to assure repayment.[193] The Court had already found that the college was primarily engaged in offering secular education and was not pervasively religious,[194] and that state support for the facilities would have had a primarily secular purpose[195] and

185. Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16 (1929).

186. Maryland & Va. Eldership of Churches of God v. Church of God, 396 U.S. 367, 369 n.3 (1970) (Brennan, J., concurring); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 447, 450-51 (1969); Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94, 116 & n.23 (1952).

187. Serbian E. Orthodox Diocese v. Milivojevich, 60 Ill. 2d 477, 503, 328 N.E.2d 268, 281-82 (1975), rev'd, 426 U.S. 696 (1976).

188. 426 U.S. at 712-20.

189. See, e.g., id. at 714-15. But see Adams & Hanlon, supra note 62, at 1312. The Court reserved judgment on these exceptions. 426 U.S. at 713 n.7.

190. Meek v. Pittenger, 421 U.S. 349, 370-71 (1975); see Lemon v. Kurtzman, 403 U.S. 602, 618-19 (1971).

191. See, e.g., Meek v. Pittenger, 421 U.S. 349, 370-71 (1975); Lemon v. Kurtzman, 403 U.S. 602, 635 (1971) (Douglas, J., concurring).

192. Hunt v. McNair, 413 U.S. 734, 747-49 (1973).

193. Id. at 748.

194. Id. at 743-44.

195. Id. at 741-42.

effect.[196] The Court's concern over state power to set rents and fees in such a context gives some support to the thesis of this Article—that the churches' interest in autonomy extends to every aspect of church operations. The surveillance component of the entanglement doctrine, with its suggestion that any continuing contact between church and state is at least constitutionally suspect,[197] also supports the view that the churches' interest in autonomy extends to routine administrative matters.

If the churches' interest in autonomy is this extensive under the establishment clause, where state interference with a church is balanced by state aid to the same church and the church itself is not complaining, it must be at least as extensive under the free exercise clause, where there is no offsetting benefit to the church.

D. *Autonomy and Church Labor Relations*

Church labor relations rather plainly fall within the right of church autonomy.[198] Deciding who will conduct the work of the church and how that work will be conducted is an essential part of the exercise of religion. In the language of the Supreme Court's autonomy cases, labor relations are matters of "church administration";[199] undoubtedly, they affect "the operation of churches."[200]

Occasionally, a labor relations law requires a church to violate its official doctrine or collective conscience.[201] These cases present conscientious objection claims as well as church autonomy claims. But it is worth repeating that the right of church autonomy does not depend on conscientious objection.

Churches may object to regulation on church autonomy grounds even when their official doctrine seems to support the regulation. Two examples from the recent church labor relations cases illustrate the point. The Roman Catholic Church has long supported the moral right of workers to organize and bargain collectively, and the moral duty of employers to bargain.[202] Yet most local bishops resisted NLRB jurisdiction over teachers in parochial schools.[203] Similarly, the Seventh Day Adventists resisted the Secretary of

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196. Id. at 744-45.

197. See Roemer v. Board of Pub. Works, 426 U.S. 736, 763 (1976); Tilton v. Richardson, 403 U.S. 672, 688 (1971) (plurality opinion); Lemon v. Kurtzman, 403 U.S. 602, 621-22 (1971) (state specification of accounting procedures is an entanglement); text accompanying notes 152-59 supra.

198. See Ripple, supra note 1, at 1214 n.138 (suggesting that the Supreme Court's analysis in NLRB v. Catholic Bishop, 440 U.S. 490 (1979). "Fits confortably" within the line of church autonomy cases discussed in Part III, C supra).

199. See note 181 and accompanying text supra.

200. See note 182 and accompanying text supra.

201. See, e.g., National Conf. of Catholic Bishops v. Smith, 653 F.2d 535 (D.C. Cir. 1981); Walker v. First Orthodox Presbyterian Church, 22 Fair Empl. Prac. Cas. 762 (Cal. Super. 1980).

202. Pope Leo XIII, Rerum Novarum (1891). That encyclical, and the importance of unions, were recently reaffirmed in strong terms, Pope John Paul II, Laborem Excercens (1981).

203. See Laycock, supra note 83, at 415 n.148 (collecting cases).

Labor's authority to enforce the Equal Pay Act in their schools, even though official church doctrine endorsed equal pay.[204]

There are a variety of possible reasons, all constitutionally legitimate, for these examples of resistance to regulation that arguably reinforces church teaching. These churches may have been hypocritically seeking to exempt themselves from a moral duty they preach to others. Such conduct is not very admirable, but free exercise protection is not limited to churches the government admires. Alternatively, these churches may have resisted government regulation on principle, to avoid creating an adverse precedent that might support some more objectionable regulation in the future.

There is a third possible reason, and it casts further light on the nature of the right to autonomy. Even if government policy and church doctrine endorse the same broad goal, the church has a legitimate claim to autonomy in the elaboration and pursuit of that goal. Regulation may be thought of as taking the power to decide a matter away from the church and either prescribing a particular decision or vesting it elsewhere—in the executive, a court, an agency, an arbitrator, or a union. And regulation takes away not only a decision of general policy when it is imposed, but many more decisions of implementation when it is enforced.

For example, the NLRA initially takes away the decision whether to recognize a union. But once there is a union and a duty to bargain, a vast array of decisions that the church could once make autonomously must be shared with the union, and in the event of disagreement, with arbitrators, the NLRB, and the courts. A church might be willing to bargain with an uncertified union over wages and a few key working conditions, but resist NLRB jurisdiction to avoid the Board's expansive list of mandatory bargaining subjects.[205] Forcing church authorities to share control of religious institutions with a labor union may not stir quite the same emotions as forcing them to relinquish control to schismatics. But a common principle is at stake in both cases: each is an interference with church control of church affairs.

Similarly, antidiscrimination laws initially prevent the church from deciding whether to discriminate among its employees and applicants. Many churches may wish to discriminate on the basis of religion, and some on the basis of race, sex, or national origin. Equally important, churches that do not want to discriminate at all are deprived of the chance to define discrimination. Some may oppose unequal treatment of individuals because of race, sex, or

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204. Marshall v. Pacific Union Conf. of Seventh-Day Adventist, 14 Empl. Prac. Dec. 5956, 5957-58 (C.D. Cal. 1977).

205. See Nat'l Cath. Rep., June 19, 1981, at 5, col. 2 (superintendent of schools in Syracuse diocese proposed a "'covenant' of teachers, clergy, parents and administrators" as alternative to NLRB-certified union). For examples of the scope of mandatory bargaining, see NLRB v. International Longshoremen's Ass'n, 447 U.S. 490 (1980) (inefficient work rules to preserve jobs); NLRB v. Radio & Television Broadcast Eng'rs Local 1212, 364 U.S. 573 (1961) (jurisdictional rules forbidding substitutions or assistance between employees in different unions); J.I. Case Co. v. NLRB, 321 U.S. 332, 338-39 (1944) (forbidding ineentives for individual productivity).

national origin, but want to be free to act on any facially neutral basis even if it has disparate impact on racial, sexual, or ethinic groups.[206]

Even churches that accept the full scope of collective bargaining and the government's definition of discrimination may be seriously alarmed at the prospect of secular enforcement. This requires secular tribunals to review the church's comparisons of the responsibility and difficulty of jobs and of the skills, qualifications, and performance of workers;[207] its motives for personnel decisions and the credibility of its claims to have acted for religious reasons;[208] the religious or other necessity for employment practices that have disparate impact;[209] even the effect on workers of its bishops' prayers and Bible readings.[210] Similar review of church personnel decisions is required under the Federal Unemployment Tax Act.[211]

Some of the lower court decisions and commentary give no weight at all to the loss of autonomy inherent in the enforcement process. They assume that the churches' rights can be protected by determining whether a personnel action was required by church doctrine.[212] But the distinctions required by this approach are difficult,[213] especially for secular courts unversed in theological subtleties,[214] and an error can result in penalizing a church for an act of conscience. More importantly, as argued above, interference in personnel matters interferes with the further development of the religion.[215] And quite aside from these concerns about conscientious objection and the effects of interference with church labor relations, selecting and directing the employees

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206. For a detailed comparison of the two kinds of discrimination, see Brilmayer, Hekeler, Laycock & Sullivan, Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis, 47 U. Chi. L. Rev. 505, 508-11 (1980).

207 See, e.g., International Union of Elec., Radio & Mach. Workers v. Westinghouse Elec. Corp., 631 F.2d 1094 (3d Cir. 1980); Sweeney v. Board of Trustees of Keene State College, 569 F.2d 169 (1st Cir.), vacated on other grounds, 439 U.S. 24 (1978).

208. See, e.g., Dolter v. Wahlert High School, 483 F. Supp. 266 (N.D. Iowa 1980); Warner, supra note 67, at 475-78, 485; cf. National Conf. of Catholic Bishops v. Smith, 653 F.2d 535, 540 (D.C. Cir. 1981) (religious employer argued that only it, and not government, could decide whether pregnant woman's life was sufficiently endangered to justify abortion).

209. See, e.g., New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 (1979); Dothard v. Rawlinson, 433 U.S. 321, 331-32 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425-37 (1975).

210. See Catholic Bishop v. NLRB, 559 F.2d 1112, 1125-26 (7th Cir. 1977), aff'd on other grounds, 440 U.S. 490 (1979); Warner, supra note 67, at 490.

211. Comment, supra note 51, at 98-99, 113-14.

212. E.g., Dolter v. Wahlert High School, 483 F. Supp. 266, 270 (N.D. Iowa 1980); Warner, supra note 67, at 475-78, 485-87, 490; cf. EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 284 (5th Cir. 1981) (faculty of seminary are equivalent to ministers, and their employment is exempt from regulation, but faculty of church college are not equivalent to ministers, and their employment is subject to regulation; court conceded that line between the two cases was "dimly perceived," and implication is that case-by-case adjudication will be required to classify various church employees). But cf. EEOC v. Mississippi College, 626 F.2d 477, 385 (5th Cir. 1980) (if religious employer presents "convincing evidence" that employment practice resulted from protected religious discrimination, EEOC lacks jurisdiction to investigate further to determine whether religious rationale is pretextual), cert. denied, 101 S. Ct. 3143 (1981).

213. See text accompanying notes 45-46 & 147-48 supra.

214. See M. Howe, supra note 85, at 48-49, 54.

215. See text accompanying notes 149-51 supra.

who will carry out the work of the church is an exercise of religion, which the churches are entitled to perform freely.[216]

The Supreme Court has recognized the importance of labor relations to autonomy. In the cases on aid to church schools, the single factor to which it has been most sensitive is the discretion exercised by employees.[217] The decision exempting church schools from the National Labor Relations Act emphasized the importance of "religious authority,"[218] the "key role" of parochial school teachers in the religious mission,[219] and the "encroachment upon the former autonomous position of management" that "necessarily" accompanies collective bargaining.[220] Thus, the serious constitutional issue that the Court avoided was the question of church autonomy in the labor relations context.[221]

An analogous holding may be found in *National League of Cities v. Usery*.[222] *Usery* announced a right to autonomy for state and local governments, based on state sovereignty, intergovernmental immunity, and the tenth amendment. Consequently, the Court held, the minimum wage and maximum hour provisions of the Fair Labor Standards Act are unconstitutional as applied to state and local employees engaged in traditional governmental functions.

Reasoning from *Usery* to church labor relations is problematic, because two different constitutional protections are involved, and because *Usery* may be wrong: the implied right to state autonomy has no basis in constitutional text.[223] But I cite *Usery* only for the scope of a right to autonomy, not for its existence. My argument that churches have such a right has already been set forth.[224] *Usery* is authority that organizations with a right to autonomy are entitled to control their own personnel policies. Substituting "religious" for

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216. See text accompanying notes 141-51 & 198-200 supra.

217. See, e.g., Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 648-50, 654-57 (1980); Wolman v. Walter, 433 U.S. 229, 240-41 (1977) (plurality opinion); id. at 253-54 (opinion of the Court); Meek v. Pittenger, 421 U.S. 349, 369-71 (1975); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472, 480-82 (1973); Lemon v. Kurtzman, 403 U.S. 602, 617-19 (1971).

218. NLRB v. Catholic Bishop, 440 U.S. 490, 501 (1979).

219. Id.

220. Id. at 503 (quoting Pennsylvania Labor Relations Bd. v. State College Area School Dist., 461 Pa. 494, 504, 337 A.2d 262, 267 (1975)).

221. See also id. at 518 (Brennan, J., dissenting); Catholic Bishop v. NLRB, 559 F.2d 1112, 1123-24 (7th Cir. 1977), aff'd on other grounds, 440 U.S. 490 (1979); cases discussed in text accompanying notes 22-40, supra; Laycock, supra note 83, at 418, 421.

222. 426 U.S. 833 (1976).

223. Laycock, supra note 106, at 366-67. More generally, there are many constitutional restrictions on state autonomy and none on church autonomy. For example, the fourteenth amendment exception to *Usery*, see Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Marshall v. Owensboro-Daviess County Hosp., 481 F.2d 116 (6th Cir. 1978), does not limit the right of church autonomy; the fourteenth amendment restricts states but not churches. Also see, e.g., U.S. Const. art. I, § 10; id. art. IV, §§ 1-2; id. art. VI, cl. 2; id. amend. XIII; id. amend. XIV; id. amend. XV; id. amend. XIX; id. amend. XXIV; id. amend, XXVI. These restrictions on states reflect the constitutional purpose to reduce their independence without eliminating it; there was no comparable effort to reduce the independence of churches.

224. See text accompanying notes 129-32, 141-51 & 166-97 supra.

"governmental" throughout the *Usery* opinion creates an argument that it is essential to the independent existence of the churches that they be able to determine the wages and hours of employees who carry out their religious functions.[225] And for reasons explored elsewhere,[226] the churches' interest in internal control of personnel selection and of other working conditions, especially of curriculum and pedagogy in religious schools, is closer to the heart of free exercise than their interest in internal control of wages and hours. Both principle and precedent support a broad right of autonomy in church labor relations.[227]

IV. Balancing Church Autonomy and Governmental Interests

In the religious observance and conscientious objector cases, the Supreme Court has balanced the citizen's interest in continuing his religious practice against the government's interest in the regulation that restricts him.[228] In *Wisconsin v. Yoder* the Court said that only a state interest "of the highest order and . . . not otherwise served can overbalance" the interest protected by the free exercise clause.[229]

The Court has not yet explicitly balanced interests in a church autonomy case, but sooner or later it will have to do so.[230] A church's legitimate interest in autonomy has few natural limits, but at some point that interest becomes sufficiently attentuated, and the government's interest in regulation sufficiently strong, that neutral regulation for secular purposes becomes consistent with free exercise. This requires a balancing test, but a balancing test tilted in favor of the constitutional right. The government's interest in regulation must compellingly outweigh the church's interest in autonomy.

The balance cannot be struck by drawing a line on a unidimensional continuum, or even by drawing concentric circles around a spiritual epicenter, as one commentator has recently suggested.[231] The spiritual epicenter image

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225. 426 U.S. at 845, 851.

226. Laycock, supra note 83, at 433-34.

227. But see Kryvoruka, supra note 107, at 57 n.100 (arguing that a free-exercise analogy to *Usery* does not apply to collective bargaining). See also EEOC v. Pacific Press Publ. Ass'n, 482 F. Supp. 1291, 1315 n.34 (N.D. Cal. 1979) (rejecting a somewhat different and overbroad argument based on *Usery*).

228. See Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398, 403-09 (1963); Prince v. Massachusetts, 321 U.S. 158 (1944); Clark, Guidelines for the Free Exercise Clause, 83 Harv. L. Rev. 327 (1969); Dodge, The Free Exercise of Religion: A Sociological Approach, 67 Mich. L. Rev. 679 (1969); Galanter, Religious Freedoms in the United States: A Turning Point?, 1966 Wis. L. Rev. 217; Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee, 80 Harv. L. Rev. 1381 (1967); Kilhlea, Standards for Expanding Freedom of Conscience, 34 U. Pitt. L. Rev. 531, 533-38 (1973); Kurland, The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses, 75 W. Va. L. Rev. 213 (1973); Laycock, supra note 83 at 416-17, 422-24; Pfeffer, The Supremacy of Free Exercise, 61 Geo. L. J. 1115 (1973).

229. 406 U.S. 205, 215 (1972). See Thomas v. Review Bd., 101 S. Ct. 1425, 1432 (1981).

230. See, e.g., the discussion of state regulation of curriculum in parochial schools in Laycock, supra note 83, at 422-24.

231. Bagni, supra note 17, at 1539.

implies that the strength of the churches' interest can be measured by a single variable—the centrality, or perhaps the religious intensity, of an activity. This variable is important, but it is not the whole story. It is now possible to identify several important variables, and one other that has been invoked but must be irrelevant.

A. *Internal v. External Relations*

An organization's claim to autonomy is strongest with respect to internal affairs,[232] including relationships between the organization and all persons who have voluntarily joined it. The voluntary nature of religious activity has played a prominent role in church autonomy cases from the beginning. The Court has repeatedly stated that all who join a church do so with the "implied consent" to its government, to which they "are bound to submit."[233] If one is ill-treated by his church, he can leave it; if he feels bound by faith or conscience to stay in, the government can offer him no remedy.

The Court recently called it "the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria. Constitutional concepts of due process, involving secular notions of 'fundamental fairness' or impermissible objectives, are therefore hardly relevant . . . ."[234] The point is overstated, but the lesson for the secular courts is not: if a church chooses to treat its members unfairly or irrationally, there can be no secular remedy. The state has no legitimate interest sufficient to warrant protection of church members from their church with respect to discrimination, economic exploitation, or a wide range of other evils that the state tries to prevent in the secular economy.

This is not to say that a church and its members may not agree to such protection and make their agreement enforceable in a secular court. Adams and Hanlon, and also Ellman, have persuasively argued that religious freedom is restricted if individuals or local churches are forced to choose between complete submission to a larger religious body or complete nonaffiliation; it should be possible to specify the terms and extent of affiliation.[235] But state enforcement of a voluntary agreement is quite different from coercive state regulation.[236]

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232. See Laycock, supra note 106, at 373-75.

233. Watson v. Jones, 80 U.S. (13 Wall.) 679, 729 (1871), quoted in Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 711 (1976); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 446 (1969).

234. Serbian E. Orthodox Diocese Church v. Milivojevich, 426 U.S. 696, 714-15 (1976) (footnote omitted).

235. Adams & Hanlon, supra note 62, at 1336-38; Ellman, supra note 173, at 1403-05. See also Casad, The Establishment Clause and the Ecumenical Movement, 62 Mich. L. Rev. 419, 432 (1964).

236. Ellman, supra note 173, at 1422. See also Granfield v. Catholic Univ. of America, 530 F.2d 1035 (D.C. Cir. 1976). Plaintiffs were priests employed as law professors who challenged a sectarian university's policy of paying ordained faculty less than lay faculty. The court decided on the merits plaintiffs' claims that the university had agreed to eliminate the disparity. Id. at 1037-43. But it rejected claims—purportedly based on the Constitution—that the disparity was illegal apart from the university's agreement, id. at 1043-48, holding that the dispute should be resolved within the church, id. at 1047.

Adams and Hanlon, and Ellman, go too far when they reject as unconstitutional a presumption that church disputes be resolved internally.[237] It is true that such a presumption requires churches to clearly indicate their desire for secular adjudication.[238] But this burden is far outweighed by the benefits of the presumption: church autonomy would be seriously threatened if any party to an internal dispute could invoke secular adjudication merely by alleging a previously unexpressed intent to resolve disputes in secular courts. Churches would be burdened with elaborate trials on whether there had been such an intent, and at least occasionally, probably frequently, courts would erroneously find such intent and adjudicate a dispute that should have been resolved internally.

Both my rule and the Adams-Hanlon-Ellman rule allow churches to choose or reject secular adjudication of internal disputes. Our disagreement concerns how to allocate the substantial risk of inadvertance. Under their rule, churches that desire internal dispute resolution but neglect to provide for it get secular adjudication; under my rule, churches that desire secular adjudication but neglect to provide for it get internal resolution. Which is the greater risk? That is partly an empirical question on which data is lacking and hard to obtain. But I am rather confident that in the "original position,"[239] before a particular dispute arises, most churches would choose internal dispute resolution. Suing the church or a fellow member is surely inconsistent with the norms of most religions.[240] And most churches and church members would

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237. Adams & Hanlon, supra note 62, at 1337; see Ellman, supra note 173, at 1414-21. Ellman goes astonishingly far in allowing secular courts to infer church intent to submit to secular adjudication and even to submit to particular rules of decision not found in any church document. Id. at 1421-37. He offers some appealing examples, but if such freewheeling secular resolution were common, clever lawyers could offer nonfrivolous arguments for secular interference on almost any issue a church might face.

238. I do not suggest that every legal document affecting internal church affairs must contain a separate clause specifying whether it is to be enforceable in secular courts. But churches would be well-advised to follow that practice. When they do not, implied consent to secular adjudication should be clear from the face of the document. A document that in form is an ordinary deed, contract, declaration of trust, corporate charter, etc., written in secular legal language, seems intended for secular enforcement unless it expressly provides to the contrary. But if the document uses religious language, or takes the form of a chruch constitution, by-laws, discipline, creed, or other church document, consent to secular enforcement is not clearly implied. In the absence of an express provision in such a document, secular courts should not speculate about intent; the church should resolve any disputes internally.

The superficially similar formal-title doctrine has been criticized as making cases turn on which piece of paper reflects the parties' intention. Ellman, supra note 173, at 1409. My point is different: in the absence of a clause specifically providing for secular enforcement, the tone of a document as a whole is the best guide to whether secular enforcement was intended. The formal-title doctrine distinguishes recorded deeds from all other documents, without regard to whether secular enforcement was intended; Ellman's criticism of that is well taken.

239. See generally J. Rawls, A Theory of Justice 12 (1971).

240. Cf. 1 Corinthians 6:1-8 ("If one of your number has a dispute with another, has he the face to take it to pagan law-courts instead of to the community of God's people?. . . Must brother go to law with brother—and before unbelievers? Indeed, you already fall below your standard in going to law with one another at all."); L. Landman, Jewish Law In the Diaspora: Confrontation and Accommodation 86-103 (1968) (rabbinic prohibitions of litigation in gentile courts).

surely expect that other members or church leaders would be more sensitive than a secular court to the doctrines and aspirations of the faith. As Ellman concedes, few church documents are "drafted with an eye toward creation of an enforceable contract."[241] I suspect that the desire for secular adjudication typically arises as an afterthought—after one group has lost internally.

Of course, one can think of counterexamples. When the Serbian Orthodox Church in North America negotiated its affiliation with the hierarchy in Belgrade, and insisted on guarantees of independence for the North American diocese, it might conceivably have anticipated disputes and desired adjudication of those disputes in American courts.[242] If so, it should have said so, because such circumstances are rare. The more typical case involves an unforeseen and bitter dispute that arises within a church after many years in which all disputes were successfully resolved internally and no one seriously considered going to a secular court.

Beyond this empirical judgment is a constitutional judgment—that the error of secular adjudication when that was not intended is more offensive to free exercise values than the error of leaving the church alone when it intended to submit to secular adjudication. The cases in which the Adams-Hanlon-Ellman argument has the most bite are cases in which religious association might be deterred if affilitating entities cannot expect secular adjudication of their disputes. But these are not cases of inadvertance. If the parties are thinking about secular adjudication enough to be deterred, then they are thinking about it enough to explicitly provide for it. If, as in *Serbian Orthodox*, they instead rely on plainly ecclesiastical sources and documents, with no clear indicia of a desire for secular adjudication,[243] a secular court should not turn those documents into a contract.

My disagreement with Adams, Hanlon, and Ellman over how to implement church autonomy is subordinate to the main point, on which we agree, that churches have a right to autonomy. It remains to explore the limits on that right.

Voluntary affiliation with the group is the premise on which group autonomy depends. If a church member is held in his church involuntarily, he retains all his civil rights and may enforce them in a secular court. Physical imprisonment would be a clear case. The brainwashing and deprogramming cases are a problematic extension of the same idea. The essence of the parents' claims in these cases is that their children are held in cults involuntarily.[244] The

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241. Ellman, supra note 173, at 1419.

242. Id. at 1405.

243. See Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

> The Mother Church is governed according to the Holy Scriptures, Holy Tradition, Rules of the Ecumenical Councils, the Holy Apostles, the Holy Faiths of the Church, the Mother Church Constitution adopted in 1931, and a "penal code" adopted in 1961. These sources of law are sometimes ambiguous and seemingly inconsistent.

Id. at 699.

244. See generally Delgado, Religious Totalism: Gentle and Ungentle Persuasion Under the First Amendment, 51 S. Cal. L. Rev. 1 (1977); Dressler, Professor Delgado's "Brainwashing" Defense: Courting a Determinist Legal System, 63 Minn. L. Rev. 335 (1979); Delgado, A

voluntariness principle is also relevant to cases involving young children. The Court's tolerance of restrictions on free exercise to protect small children may in part reflect doubts about the validity of their consent.[245]

Courts have intervened to protect church members from serious bodily harm even when they voluntarily submitted. The snake-handling cases are the best examples.[246] Assuming true voluntariness, these results can be explained only on the ground that the state's interest in human life outweighs the snake handler's interest in free exercise. But such balancing must be narrowly limited with respect to internal affairs, or the right to autonomy will be lost.

It is much easier to justify regulation of a church's external affairs. An organization has no claim to autonomy when it deals with outsiders who have not agreed to be governed by its authority.[247] For example, merchants who sell goods to churches do not thereby implicitly consent to not being paid, or to having disputes adjudicated by church courts or without due process. In general, there is no free exercise problem in holding churches responsible to outsiders under the ordinary rules of contract, property, and tort.

The internal-external distinction should not be misapplied in ways that infringe the right to proselytize. Proselytizing is a core function of evangelical religions, and has long been accorded free exercise protection.[248] The nonmembers, often total strangers, who are approached by proselytizers have a right to be treated as outsiders entitled to the full protection of the law as against someone else's church.[249] But if proselytizing is not to be forbidden altogether, this is a right they must invoke. Until he indicates otherwise, even a stranger implicitly submits to church authority to the extent of agreeing to listen to the proselytizer.[250] Similarly, a church does not forfeit its autonomy by acquiring the means to proselytize more effectively. The District of Colum-

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Response to Professor Dressler, 63 Minn. L. Rev. 361 (1979); Comment, To Keep Them Out of Harm's Way? Temporary Conservatorship and Religious Sects, 66 Calif. L. Rev. 845 (1978); Note, Conservatorships and Religious Cults: Divining A Theory of Free Exercise, 53 N.Y.U. L. Rev. 1247 (1978). For more recent cases see Alexander v. Unification Church of America, 634 F.2d 673 (2d Cir. 1980); Rankin v. Howard, 633 F.2d 844 (9th Cir. 1980).

245. See Prince v. Massachusetts, 321 U.S. 158 (1944); Laycock, supra note 83, at 423 n.190. But cf. Wisconsin v. Yoder, 406 U.S. 205 (1972) (parents allowed to deprive children of high school education to which parents conscientiously objected). See generally Comment, Adjudicating what *Yoder* Left Unresolved: Religious Rights for Minor Children After *Danforth* and *Carey*, 126 U. Pa. L. Rev. 1135 (1978).

246. See, e.g., Lawson v. Commonwealth, 291 Ky. 437, 164 S.W.2d 972 (1942); State v. Massey, 229 N.C. 734, 51 S.E.2d 179, appeal dismissed for want of substantial federal question sub nom. Bunn v. North Carolina, 336 U.S. 942 (1949).

247. Cf. Note, supra note 140, at 368-69, 373-75 (reaching similar conclusion by analogy to conflicts of laws).

248. Fowler v. Rhode Island, 345 U.S. 67, 68 (1953); Follett v. Town of McCormick, 321 U.S. 573, 574 (1944); Prince v. Massachusetts, 321 U.S. 158, 161 (1944); Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943); Cantwell v. Connecticut, 310 U.S. 296, 300 (1940).

249. See Campbell v. Cauthron, 623 F.2d 503, 509 (8th Cir. 1980).

250. See Heffron v. International Soc'y for Krishna Consciousness, 101 S. Ct. 2559, 2567 (1981) ("The First Amendment protects the right of every citizen to 'reach the minds of willing listeners and to do so there must be opportunity to win their attention.'") (quoting Kovacs v. Cooper, 336 U.S. 77, 87 (1949)).

bia Circuit was simply wrong to hold that churches forfeit control over internal affairs to the extent they seek out a broadcasting license.[251]

Church employees have some characteristics of insiders and some of outsiders. Underlying much of the debate over church labor relations are unexamined assumptions about how employees should be classified.[252] In all the litigation that has arisen, employees have been cast as outsiders. Modern labor legislation is designed to aid the worker in the adversary aspect of his relationship with his employer. But there is another aspect to the relationship. Every employee is a fiduciary for his employer.[253] He has agreed to carry out his employer's business, to faithfully perform the tasks assigned him, and to always act in his employer's interest. He may resign at any time, but as long as he stays, he owes a duty of undivided loyalty to his employer.[254] An unskilled laborer may face fewer decisions to which his fiduciary duty is relevant than the corporate president, but the controlling common law principles are the same.[255]

Tension between the adversary and fiduciary aspects of the relationship inheres in all cases of principal and agent. This tension is easy to resolve in theory: the prospective employee is free to deal at arm's length in negotiating terms of employment and deciding whether to become or remain an employee, but once he begins to act as an employee, he is a fiduciary until he resigns.

In practice this breaks down with respect to both time and subject matter. Bargaining is not done once and for all when an applicant accepts employment. An employee can always quit if his employer does not make the job satisfactory to him. More importantly, collective bargaining, strikes, grievances, suits for reinstatement under the NLRA or the Civil Rights Act, and claims for pay or better conditions under the FLSA or OSHA, all allow employees to make arm's length demands without threatening to resign.[256] With regard to subject matter, employees may bargain over matters that would seem to come within any reasonable conception of fiduciary duty.[257]

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251. King's Garden, Inc. v. FCC, 498 F.2d 51, 60 (D.C. Cir. 1974). A similarly restrictive view of proselytization appears in dictum in EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 283 (5th Cir. 1981).

252. See Henry M. Hald High School Ass'n, 213 N.L.R.B. 415, 418 n.7 (1974).

253. See, e.g., Group Ass'n Plans, Inc. v. Colquhoun, 466 F.2d 469, 472-74 (D.C. Cir. 1972); Landau v. Percacciolo, 50 N.Y.2d 430, 436-37, 407 N.E.2d 412, 415-16 (1980); Wildman v. Ritter, 469 S.W.2d 446, 448 (Tex. Civ. App. 1971); Restatement (Second) of Agency §§ 1, 2, 13 (1957).

254. See, e.g., American Republic Ins. Co. v. Union Fidelity Life Ins. Co., 470 F.2d 820, 824 (9th Cir. 1972); Community Counselling Serv., Inc. v. Reilly, 317 F.2d 239, 243-44 (4th Cir. 1963); Lowndes Prods., Inc. v. Brower, 259 S.C. 322, 333, 191 S.E.2d 761, 767 (1972); Restatement (Second) of Agency, §§ 387-398 (1957).

255. See, e.g., Arnold's Ice Cream Co. v. Carlson, 330 F. Supp. 1185, 1188 (E.D.N.Y. 1971); Bull v. Logetronics, Inc., 323 F. Supp. 115, 132-33 (E.D. Va. 1971); Restatement (Second) of Agency § 2, comments c, d, § 25, comment a, § 220, comment a (1957).

256. Rights to reinstatement also change the traditional rule that employment contracts will not be specifically enforced, a rule based in part on the need for trust and confidence between employer and employee. See D. Dobbs, Handbook on the Law of Remedies § 12.25, at 929-31 (1973).

257. See, e.g., the subjects of mandatory bargaining cited in note 205 supra.

The courts have recognized that modern collective bargaining seriously conflicts with the fiduciary duty of employee to employer. They have responded by excluding from the NLRA a class of management personnel whose responsibilities make their fiduciary status particularly important. This group is not limited to high ranking executives: it also includes many confidential secretaries,[258] college professors,[259] buyers,[260] production schedulers,[261] time-study personnel,[262] and all persons in labor relations, employment, and personnel departments.[263] In addition, supervisors are excluded by express statutory exception.[264] The Court has said that "both exemptions grow out of the same concern: That an employer is entitled to the undivided loyalty of its representatives."[265]

The Court's acknowledgement that the loyalty of unionized employees is divided apparently means that the NLRA partially preempts the state common law rule that employees owe undivided loyalty to their employer. Four members of the Court do not even contemplate divided loyalty. In their view, a nonmanagerial employee acts "only on his own behalf and in his own interest."[266]

Both common law and statutory labor law offer models for considering whether church employees should be considered as insiders or outsiders in church autonomy cases. But neither is controlling; the question is one of constitutional law. The free exercise of religion includes the right to run large religious institutions—certainly churches, seminaries, and schools,[267] and I would add hospitals, orphanages, and other charitable institutions as well.[268] Such institutions can only be run through employees. It follows at the very least that the free exercise of religion includes the right of churches to hire employees. It surely also follows that the churches are entitled to insist on undivided loyalty from these employees.

The employee accepts responsibility to carry out part of the religious mission. He enters into a continuing relationship with the church in a way that independent sellers of goods and services usually do not. In so doing, he becomes a part of the church. He is not part of the church in the same way as a member, but in some ways he is more important. If an ordinary member

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258. NLRB v. Hendricks County Rural Elec. Membership Corp., 50 U.S.L.W. 4037 (U.S. Dec. 2, 1981), limits this exclusion so as not to apply to secretaries unless they act in a confidential capacity with respect to labor relations. But the Court speculated that most secretaries to high corporate officials would be excluded under this test. Id. at 4043 n.23.

259. NLRB v. Yeshiva Univ., 444 U.S. 672 (1980).

260. Swift & Co., 115 N.L.R.B. 752, 753 (1956); American Locomotive Co., 92 N.L.R.B. 115, 116-17 (1950).

261. Firestone Tire & Rubber Co., 112 N.L.R.B. 571, 573 (1955).

262. Yale & Towne Mfg. Co., 60 N.L.R.B. 626, 628-29 (1945).

263. NLRB v. Bell Aerospace Co., 416 U.S. 267, 283 (dictum) (citing legislative history).

264. 29 U.S.C. § 152(3) (1976).

265. NLRB v. Yeshiva Univ., 444 U.S. 672, 682 (1980).

266. Id. at 696 (Brennan, J., dissenting).

267. Cf. Pierce v. Society of Sisters, 268 U.S. 510 (1925) (decided on substantive due process grounds).

268. See Espinosa v. Rusk, 634 F.2d 477, 481 (10th Cir. 1980).

deviates from the faith, or fails to comply with some matter of church practice, the church itself may suffer little or no harm. Most churches have many marginal members, and no one relies on them. But churches rely on employees to do the work of the church and to do it in accord with church teaching. When an employee agrees to do the work of the church, he must be held to submit to church authority in much the same way as a member.

It follows that church labor relations are internal affairs, and the state's interest in interfering to protect employees must be judged accordingly. The state may not intervene to protect employees from treatment that is merely arbitrary or unfair; the remedy for that is to resign or renegotiate the terms of employment.[269] Modern labor legislation may have deprived secular employers of the fiduciary duty once owed them by their rank and file employees, but to deprive the churches of that duty would be to interfere with an interest protected by the free exercise clause.[270]

B. *The Religious Intensity of the Regulated Activity*

I said earlier that anything a church does is an exercise of religion.[271] Even so, its interest in conducting a worship service is clearly greater than its interest in organizing a trip to a baseball game for the church men's club. If the validity of regulation depends on somehow balancing the state's interest against the church's, these differences must be taken into account. This factor will be referred to as the religious intensity of the regulated activity. Religious intensity is the factor described by Professor Bagni's concentric circles around a spiritual epicenter.[272]

Religious intensity is analytically separate from the distinction between internal and external activity. For example, all church labor relations are internal matters, but a priest's job is more intensely religious than a janitor's. Similarly, contracts to purchase goods from merchants are external, but the

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269. One commentator has relied on the existence of such disagreements as a reason for concluding that mandatory collective bargaining does no harm. 1978 Wis. L. Rev. 927, 940-41. This misses the point. Of course there will be disputes between churches and their employees. But such disputes should be resolved internally, without government interference. See text accompanying notes 177-78 supra.

270. A casual dictum in *Jones v. Wolf* may be thought to suggest a contrary conclusion. The Court said that the "neutral-principles approach" to church property disputes "cannot be said to 'inhibit' the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, *hire employees*, or purchase goods." 443 U.S. 595, 606 (1979) (emphasis added). This remark was not intended to treat labor legislation as a body of neutral principles that can be constitutionally applied to churches. That would—in a phrase—decide the constitutional question that the entire Court had taken so seriously three months before in NLRB v. Catholic Bishop, 440 U.S. 490 (1979), seriously undermine Sherbert v. Verner, 374 U.S. 398 (1963), and change the rationale of Prince v. Massachusetts, 321 U.S. 158 (1944). The dictum's only plausible meaning is much narrower. A church can hire an employee only by entering into a contract. If the contract is ever litigated in a secular court, it will be construed under neutral principles of law, just as were the instruments affecting property rights in *Jones v. Wolf*. See Granfield v. Catholic Univ. of America, 530 F.2d 1035 (D.C. Cir. 1976), described in note 236 supra.

271. See text accompanying notes 142-45 supra.

272. See Bagni, supra note 17, at 1539.

purchase of communion wafers has more religious significance than the purchase of mop buckets. And proselytizing, one of the most intensely religious activities of all for many sects, becomes an external activity as soon as the listener invokes his right not to listen.[273] The importance of religious intensity stems from the particular subject matter of the free exercise clause. The internal-external distinction, by contrast, will be important in any substantive freedom that includes a right to autonomy.

I have analyzed the religious intensity of church jobs in another journal, distinguishing employees of church-owned commercial businesses from support personnel in intrinsically religious operations (e.g., the church janitor), and both from jobs with intrinsically religious responsibilities.[274] These categories should be thought of as ranges on a continuum. The ranges overlap to a much greater extent than I originally realized.

For example, consider the variety of church-owned commercial businesses. In the extreme case, such a business may be nothing more than an investment; any equally lucrative investment may have served as well, and employees may not even be aware that they are working for a church. This is still religious activity: the funds are being raised for the church.[275] But except for claims of conscientious objection, a claim that it is religiously important that the business be conducted in some particular way is not very compelling. The primary interest is in a profit, the same interest a secular owner would have.[276]

But some church-owned commercial businesses are owned for intrinsically religious reasons or run in intrinsically religious ways. A church may run a large business on a nonprofit basis as a charity; hospitals are common examples. A church may run a business to provide a religious working environment for its members, persons it hopes to proselytize, or persons in need of work. A monastery of contemplative monks should not forfeit its protection under the free exercise clause because it supports itself by selling sausage.[277] A church may run a business to produce goods for use in worship services, or goods that must be produced in accord with some ritual to comply with religious law. Thus, some operations that might be called commercial businesses are an integral part of the religious mission.

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273. See text at notes 248-51 supra.

274. Laycock, supra note 83, at 428-30.

275. See Valente v. Larson, 637 F.2d 562 (8th Cir.), prob. juris. noted, 101 S. Ct. 3028 (1981) (No. 80-1666); Espinosa v. Rusk, 634 F.2d 477 (10th Cir. 1980); Heritage Village Church v. State, 299 N.C. 399, 263 S.E.2d 726 (1980). Compare the bizarre statement in EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 285 (5th Cir. 1981), that a "Seminary's finance, maintenance, and other non-academic departments" represent an expansion of church operations "beyond the traditional functions essential to the propagation of their doctrine." If the seminary is essential to the church, as the court conceded, then finance and maintenance of the seminary are essential as well.

276. See NLRB v. World Evangelism, Inc., 656 F.2d 1349, 1353 (9th Cir. 1981); International Soc'y for Krishna Consciousness, Inc. v. Barber, 506 F. Supp. 147, 167-69 (N.D.N.Y. 1980).

277. To the extent that I once considered this a hard case, Laycock, supra note 83, at 430, I was wrong.

Because it is so frequently involved in church labor relations litigation, the job of schoolteacher deserves special attention. Church schools serve multiple purposes. In part, they are simply schools, teaching secular subjects and satisfying the compulsory education laws.[278] In part, they are philanthropic institutions, as when inner-city Catholic schools educate economically disadvantaged Protestant children.[279] But in part, as the Court has emphasized,[280] they are religious institutions, organized to transmit faith and values to succeeding generations. There can be no more important religious function for an institutional church; the very existence of the church depends on its success. And the employees who must carry out this function are the teachers.

There is evidence that religious schools do in fact perform this function. Survey research indicates the Catholic schools have measurable permanent effects on their graduates' values.[281] These effects are greater than the effects of the substitute religious instruction the church gives to Catholic students who attend public schools.[282] This difference suggests that more than just the religion class is important to the transmission of values in religious schools, and more tentatively, that the Court has been right in its intuitive judgment that faith and values can be incorporated into any subject.[283] Schools run by other churches have not been similarly studied. But some of them, the fundamentalist Protestant schools, strongly espouse the view that religion should be taught in every subject by every teacher.[284]

Not every religious school can or will insist that every teacher actively promote religion. But nearly all will at least require every teacher not to interfere. A religious school might hire a nonbelieving math teacher, but it is not likely to permit him to flaunt his nonbelief, to denigrate the church that runs the school, or to set a bad moral example. Thus, even the nonbelieving math teacher has some intrinsically religious responsibilities. And even for those who would minimize such a teacher's religious function,[285] there is no feasible way to distinguish him from teachers who actively seek to instill religious values, without intolerable litigation over the religious content of each teacher's instruction.[286] Churches have strong claims to autonomy with respect to employment of teachers.

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278. See, e.g., The School Code, Ill. Rev. Stat. ch. 122, § 26-1.1 (1979).

279. See notes 118-19 and accompanying text supra.

280. Lemon v. Kurtzman, 403 U.S. 602, 617-18 (1971).

281. A. Greeley, W. McCready & K. McCourt, Catholic Schools in a Declining Church 157-95, 251-53 (1976).

282. Id. at 205-13.

283. Wolman v. Walter, 433 U.S. 229, 253-54 (1977); Meek v. Pittenger, 421 U.S. 349, 370-71 (1975).

284. See St. Martin Evangelical Lutheran Church v. South Dakota, 101 S. Ct. 2142, 2146 (1981); Comment, supra note 54, at 424-25; Lanouette, The Fourth R Is Religion, Nat'l Observer, Jan. 15, 1977, at 1, col. 1; Press & Wassner, Teaching from God's Point of View, Newsweek, Apr. 20, 1981, at 71.

285. See EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 283 (5th Cir. 1981); EEOC v. Mississippi College, 626 F.2d 477, 485 (5th Cir. 1980), cert. denied, 101 S. Ct. 3143 (1981).

286. Litigation over what does and does not have religious significance, although unavoidable, should be minimized. See Laycock, supra note 83, at 430-32. Because such litigation results

C. *The Nature and Extent of Interference*

Church autonomy cases rarely involve government regulation that would prohibit some church activity altogether. More commonly, the government permits the activity to continue but interferes with the church's control of the activity. Some such regulations are more intrusive than others, and this must weigh in any balance. Assessments of intrusiveness must include both qualitative and quantitative elements.

The qualitative element may be thought of as the nature of the interference, or more precisely, the aspect of control interfered with.[287] Whatever the label, the operative question is: What decisions have been taken away from the church? Elsewhere, I have distinguished four kinds of regulations:[288] those that merely increase the cost of operations, those that interfere directly with the way an activity is conducted, those that interfere with selection of those who will conduct the activity, and those that forbid an activity entirely or create incentives to abandon it.

Each kind of interference may vary in severity. A regulation that raises operating costs fifty percent is obviously more intrusive than one that raises costs five percent. A child labor law is much less intrusive than an EEOC order to reinstate a defrocked priest. Though both restrict the church's freedom to select its own employees, the child labor law leaves an enormous range of discretion; the EEOC order leaves none. Thus, the nature and extent of interference must be considered independently.[289]

D. *A Factor that Does Not Matter: Church Organization*

There are recurring suggestions that the right to church autonomy somehow depends on the way in which the church is organized. For example, the Seventh Circuit thought it important to the Catholic teacher union litigation that exclusive control of the schools was vested in the bishop.[290] One danger of this approach is that it forces the courts to consider sensitive theological arguments about the locus of church authority.[291] The more immediate danger is demonstrated by *Roman Catholic Diocese*.[292] There, on reconsideration in light of the Supreme Court's decision exempting church schools, the

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in a secular court approving some practices as "really religious," and rejecting others as "really secular," it poses both establishment clause problems, see New York v. Cathedral Academy, 434 U.S. 125, 133 (1977), and free exercise problems. The litigation process itself can be intimidating, especially to small or unpopular sects, and offensive to religious sensibilities. See NLRB v. Catholic Bishop, 440 U.S. 490, 502, 507-08 (1979).

287. Laycock, supra note 83, at 433.

288. Id. at 433-34.

289. Id. at 434-35.

290. Catholic Bishop v. NLRB, 559 F.2d 1112, 1122-23 (7th Cir. 1977), aff'd on other grounds, 440 U.S. 490 (1979).

291. See Laycock, supra note 83, at 421-22.

292. 243 N.L.R.B. 49, 101 L.R.R.M. 1436 (1979), enforcement denied sub nom. NLRB v. Bishop Ford Central Catholic High School, 623 F.2d 818 (2d Cir. 1980).

NLRB again ordered a Catholic high school to bargain. The Court's decision was held inapplicable to schools owned and managed by lay boards of trustees instead of bishops. The Second Circuit quite sensibly denied enforcement.[293] But Congress has made some statutory exemptions depend on whether a religious organization is separately incorporated from its sponsoring church.[294]

The view that forms of church organization matter to the scope of autonomy is partly a misapplication of a class of cases in which secular courts unavoidably inquire into the allocation of authority within a church. A rule of deference to church authority requires courts to identify the authority to whom they will defer. The Supreme Court has placed restrictions on such inquiries.[295] But they cannot be entirely avoided without denying all legal protection to churches and allowing church disputes to be settled by physical force.[296] Once a church dispute reaches the secular courts, the best those courts can do to safeguard church autonomy is to stay out of the merits and defer to the authority recognized by both factions before the dispute arose.

In identifying the authority entitled to deference, the Court found it useful to distinguish hierarchical from congregational churches. In hierarchical churches, the highest ecclesiastical authority to which a dispute has been carried is entitled to deference, not only on the merits, but also on questions of who within the church was empowered to decide the merits and what was decided.[297] This highest ecclesiastical authority can be identified without the "searching . . . inquiry"[298] needed to identify the authority with responsibility for the particular issue, just as a foreigner could easily identify the Supreme Court of the United States as the highest court in the land without understanding the many rules that make lower courts the highest authorities on particular issues.[299] In congregational churches, the highest authority is not so easy to identify. Unavoidably, secular courts are authorized to determine who, under the rules of the church, is entitled to bind it.[300] The hierarchical rule and the congregational rule are formulations of the same basic principle of deference to church authority; the differences reflect application of the principle to slightly different facts.[301]

Some courts, however, accorded congregational churches considerably less autonomy than hierarchical churches.[302] That cannot be what the Court

293. NLRB v. Bishop Ford Central Catholic High School, 623 F.2d 818 (2d Cir. 1980).

294. See, e.g., the Federal Unemployment Tax Act, I.R.C. §§ 3301-3311 (1976 & Supp. III), as construed in St. Martin Evangelical Lutheran Church v. South Dakota, 101 S. Ct. 2142 (1981).

295. Jones v. Wolf, 443 U.S. 595, 605 (1979); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-09, 722-23 (1976).

296. See Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 726 (1976) (Rehnquist, J., dissenting).

297. Id. at 709 (opinion of the Court); Watson v. Jones, 80 U.S. (13 Wall.) 679, 727 (1871).

298. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 723 (1976).

299. See, e.g., 28 U.S.C. §§ 1251-1258 (1976) (jurisdictional statutes); Minnesota v. National Tea Co., 309 U.S. 551 (1940) (adequate state ground rule); Fed. R. Civ. P. 52 (clearly erroneous rule).

300. See Jones v. Wolf, 443 U.S. 595, 607-09 (1979).

301. See Antioch Temple, Inc. v. Parekh, ___ Mass. ___, 422 N.E.2d 1337, 1341 (1981).

302. See Ellman, supra note 173, at 1383-84, 1386-87, 1406-07; Kauper, supra note 167, at 356, 362-63.

meant.[303] The one thing that everyone agrees the religion clauses mean is that government cannot discriminate among churches.[304] Regulation for congregational churches and autonomy for hierarchical churches would deny free exercise to the former and arguably tend to establish the latter.[305] The right of church autonomy is the right to keep decisionmaking authority over church operations within the church, free of outside control; how that authority is allocated internally is irrelevant. Churches may be hierarchical or congregational, episcopal or democratic, clerical or lay, incorporated or informally associated, a single entity or a network of subsidiaries and affiliates—all are entitled to autonomy by the free exercise clause. Unavoidable secular inquiry into church organization in some cases implementing the right of church autonomy does not justify distinctions based on church organization in determining the scope of the right or the strength of a church's interest in it.

V. The Limiting Effects of the Establishment Clause

This Article suggests that the free exercise clause frequently requires exemption from government regulation. An important counterargument is that such special treatment for religion would violate the establishment clause. The argument has been frequently made,[306] but never accepted by the Supreme Court.[307] It deserves to be taken more seriously.

An exemption from regulation raises establishment clause problems if it forces nonbelievers to financially support the conscientious objector's religion, as in *Sherbert v. Verner*.[308] There, the Court held that a Sabbatarian who lost her job because she refused to work on Saturday was constitutionally entitled to unemployment compensation. The result was to make the taxpayers pay the costs of her religion, supplying her with the income that her religion precluded her from earning. The Court brushed aside the establish-

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303. See Jones v. Wolf, 443 U.S. 595, 607-09 (1979); Kauper, supra note 167, at 369.

304. See, e.g., Everson v. Board of Educ., 330 U.S. 1, 15 (1947); Adams & Hanlon, supra note 62, at 1337; Casad, supra note 235, at 422-23; Ellman, supra note 173, at 1406-07.

305. See text accompanying notes 82-83 supra.

306. NLRB v. Catholic Bishop, 440 U.S. 490, 518 n.11 (1979) (Brennan, J., dissenting); TWA, Inc. v. Hardison, 432 U.S. 63, 80-85 (1977); Wisconsin v. Yoder, 406 U.S. 205, 220-21 (1972); Welsh v. United States, 398 U.S. 333, 338-40 (1970) (plurality opinion); id. at 344-61 (Harlan, J., concurring); Walz v. Tax Comm'n, 397 U.S. 664, 700-27 (1970) (Douglas, J., dissenting); United States v. Seeger, 380 U.S. 163, 165 (1965); id. at 188 (Douglas, J., concurring); Sherbert v. Verner, 374 U.S. 398, 422 (1963) (Harlan, J., dissenting); Catholic Bishop v. NLRB, 559 F.2d 1112, 1131 (7th Cir. 1977), aff'd on other grounds, 440 U.S. 490 (1979) (Sprecher, J., concurring); King's Garden, Inc. v. FCC, 498 F.2d 51, 56-57 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974); Bagni, supra note 17, at 1548-49; Kurland, Of Church and State and the Supreme Court, 29 U. Chi. L. Rev. 1, 22-26, 96 (1961); Kurland, supra note 63, at 15, 17.

307. See, e.g., Thomas v. Review Bd., 101 S. Ct. 1425, 1433 (1981) (work in defense plant); Wisconsin v. Yoder, 406 U.S. 205, 220-21 (1972) (compulsory education); Gillette v. United States, 401 U.S. 437, 448-60 (1971) (military service); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (taxation); Sherbert v. Verner, 374 U.S. 398, 409-10 (1963) (unemployment compensation for Sabbatarians); Selective Draft Law Cases, 245 U.S. 366, 389-90 (1918) (military service). See also Welsh v. United States, 398 U.S. 333, 371-72 (1970) (White, J., dissenting) (military service).

308. 374 U.S. 398 (1963).

ment issue, resolving it by authority but not by reasoned argument.[309] The Court recently decided a similar case on the authority of *Sherbert*.[310]

A different kind of subsidy is given when conscientious objectors are exempted from an onerous duty that must be performed by someone, thus increasing the burden on everyone else. The military draft illustrates the point nicely: if ten thousand conscientious objectors are exempt, then ten thousand others must serve. All nonobjectors are exposed to a greater risk of selection, in part because of their religion, and this shift of burden from objectors to nonobjectors is a form of subsidy.

Some commentators try to make this problem disappear by suggesting that "religion" should be construed broadly for free exercise purposes and narrowly for establishment clause purposes.[311] But this can only be explained by a preference for one clause over the other[312]—a preference with no basis in the Constitution.[313] This is not even a case in which one can argue that the same word was used twice with two different meanings: "religion" appears only once in the first amendment.[314]

Gail Merel has tried to dispose of the problem by distinguishing "irreligion" from "nonreligion."[315] By "irreligion," she means opposition to some or all religious views. She believes that the religion clauses require government neutrality between religion and irreligion: a Jehovah's Witness and an atheist have the same right to proselytize. But there need not be neutrality between religion and nonreligion: a Sabbatarian and a college football fan do not have the same claim to exemption from Saturday work.

Merel's distinction is helpful, but it does not eliminate the tension between the two clauses. It ignores the cases in which an exemption for one religion burdens or extracts a subsidy from all others. No first amendment interest is implicated when the football fan asks for Saturday off because he is a football fan, and any exemption given Sabbatarians is irrelevant to such a request. But assuming state action, there is a first amendment problem when the fan is asked to work an extra Saturday to cover for the Sabbatarian. In the second case, he is not burdened because he is a football fan, but because he is a non-Sabbatarian. He is discriminated against because of his religion or lack

309. Id. at 409-10.

310. Thomas v. Review Bd., 101 S. Ct. 1425, 1433 (1981) (unemployment compensation for worker who quit job in defense plant). For another such subsidy, see Lewis v. Califano, 616 F.2d 73 (3d Cir. 1980) (disability payments to patient who refused corrective surgery).

311. L. Tribe, supra note 173, § 14-6, at 827-31; Note, Toward a Constitutional Definition of Religion, 91 Harv. L. Rev. 1056, 1083-86 (1978).

312. Sometimes this preference is stated explicitly. Kushner, Toward the Central Meaning of Religious Liberty: Non-Sunday Sabbatarians and the Sunday Closing Cases Revisited, 35 Sw. L.J. 557, 575 (1981).

313. See Kurland, supra note 63, at 15; Merel, supra note 63, at 806.

314. U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."); Everson v. Board of Educ., 330 U.S. 1, 32 (1947) (Rutledge, J., dissenting); Malnak v. Yogi, 592 F.2d 197, 211-12 (3d Cir. 1979) (Adams, J., concurring).

315. Merel, supra note 63, at 813.

thereof. It should not matter whether he observes some other holy day, militantly opposes all holy days, or is completely nonreligious. What matters is that a burden has been shifted because of a difference in religious beliefs.

These cases require further analysis to resolve the square conflict between the apparent meanings of the free exercise and establishment clauses. Possible solutions are a balancing test, deference to Congressional resolution of the conflict in particular cases,[316] or allowing conscientious objectors to hire substitutes. Perhaps cases of direct subsidy, like *Sherbert v. Verner*, should be distinguished from cases where the only subsidy is to transfer a burden imposed by government in the first place, like the military draft.

These difficult problems do not cast doubt on this Article's construction of the free exercise clause. Many conscientious objector claims, and most church autonomy claims, do not involve any form of subsidy. The state does not support or establish religion by leaving it alone. No other organization has to comply with a regulation in place of a church in the way that other draftees must take the place of conscientious objectors. For example, no other employer has to bargain with a church's employees if the church is exempt; those employees simply will not be bargained with.

Nor does the usual church autonomy case present any claim that would require outsiders to subsidize religion. One can imagine exceptions. If the church were allowed to pay wages so low that its employees became public charges, the subsidy would be obvious. But in the absence of such a subsidy, the mere fact that the state does not impose on a church all the costs and burdens it imposes on secular organizations is not an establishment. And the fact that church employees may not earn as much or be as well treated as they would if the church were regulated is not a forced subsidy. Church employees are voluntarily part of the church; they are not to be treated as outsiders.[317] The much noted tension between the two religion clauses simply does not exist in the typical church autonomy case.

CONCLUSION

A workable general theory of the religion clauses must begin by distinguishing them from each other, abandoning misleading metaphors such as "wall of separation" and "entanglement," and recognizing the separate language and purposes of each clause.

There is a right to church autonomy in the free exercise clause. Efforts to base the right on the establishment clause are mistaken, because that clause forbids support of religion, not interference with religion. Moreover, the right to autonomy exists even if the interference is not accompanied by government

316. This would cut back the scope of both clauses in cases of conflict. Justice Rehnquist's solution is to radically cut back the scope of both clauses even when they do not conflict. Thomas v. Review Bd., 101 S. Ct. 1425, 1433-37 (1981) (dissent).

317. See text accompanying notes 252-70 supra.

support, and even if the government requires church "entanglement" with a private secular organization instead of with the government itself.

The right to church autonomy under the free exercise clause is not dependent on claims of conscientious objection. Individuals exercise their religion in ways not required by conscience, and they do so through organizations. Any interference with the autonomy of these organizations jeopardizes free exercise rights of their members, including the free development of religious doctrine. Consequently, any regulation of churches must be justified by a government interest that compellingly outweighs the church's interest in autonomy.

To strike this balance, a court must consider the internal or external nature and the religious intensity of the matter regulated, the nature and extent of the interference, and perhaps other factors not yet identified. Relations between the church and its adult members and employees are especially sensitive: even a little religious intensity is enough to insulate these relationships from most regulation—perhaps from all but physical health and safety regulations. Such exemptions do not raise establishment clause problems, because they require no subsidy to religion: they simply recognize the churches' right to resolve their own internal disputes internally and to control their own affairs. The free exercise clause requires no less.