BYU Law Review

Volume 2004 | Issue 4 Article 2

11-1-2004

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[When] principles break out into overt acts against peace and good order [it is the] rightful purpose[] of civil government, for its officers to interfere.

Thomas Jefferson[†]

[F]or such actions as are prejudicial to the interests of others, the individual is accountable, and may be subjected either to social or to legal punishments, if society is of opinion that the one or the other is requisite for its protection.

John Stuart Mill[‡]

Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government.

Employment Division v. Smith[§]

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† *An Act for Establishing Religious Freedom*, *1785*, *in* 12 STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 84, 85 (photo. reprint 1969) (William Waller Hening ed., Richmond 1823).

‡ ON LIBERTY 87 (David Spitz ed., 1975).

§ 494 U.S. 872, 882 (1990) (internal quotation marks omitted) (quoting Gillette v. United States, 401 U.S. 437, 461 (1971)).

I. INTRODUCTION

The only legitimate goal of a republican form of government is the public good, and the Constitution, including the Bill of Rights, sits firmly under this horizon.[1] If the public good is the end of government, all laws should contribute to the public good. The question this Article addresses is how to incorporate religious liberty into a system that is aimed at the public good. This Article situates the religion clauses in this constitutional context and answers that two principles define the parameters of religious liberty: (1) religious belief must be absolutely protected, and (2) religious conduct that harms others must be capable of being regulated. This second concept, which I call the no-harm rule, has become entrenched in Anglo-American culture after centuries of experience with religion as sovereign, separate ecclesiastical courts and legal spheres, and legal immunities. Each of those regimes has been rejected, because religious entities have not been unwavering servants of the public good.

This Article's focus on regulating harm caused by religious entities may well seem perverse in the United States, because "[t]here is a long history in this country of religion being reduced to Sunday school morality in service of the common good."[2] The reality, however, is that religious entities, like all other human

1. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 131, 135 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690); *see also* CHARLES LOUIS DE SECONDAT & BARON DE MONTESQUIEU, 1 THE SPIRIT OF THE LAWS 43–47 (J.V. Pritchard ed., Thomas Nugent trans., Rothman & Co. 1991) (1748). *See generally* M.N.S. SELLERS, REPUBLICAN LEGAL THEORY: THE HISTORY, CONSTITUTION, AND PURPOSE OF LAW IN A FREE STATE (2003); M.N.S. SELLERS, THE SACRED FIRE OF LIBERTY: REPUBLICANISM, LIBERALISM, AND THE LAW (1998) [hereinafter SELLERS, SACRED FIRE]. This republican principle is not limited to political theory; it also appears in Catholic Social Thought and in reformed theology. *See infra* Part III.C. The construction of the public good is a complex amalgam of history, religion, and culture. It is important to point out early in this Article, that it is not a purely secular construct. *See* William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 317 (1991) ("[T]he religious background of society will influence the nature of the state interest."). Indeed, no element of the United States' constitutional order is far removed from religious precepts and influences. *See, e.g.*, Marci A. Hamilton, *Direct Democracy and the Protestant Ethic*, 13 J. CONTEMP. LEGAL ISSUES 411 (2004) [hereinafter Hamilton, *Direct Democracy*]; Marci A. Hamilton, Why the People Do Not Rule (Aug. 2004) (unpublished manuscript, on file with the author).

2. Winnifred Fallers Sullivan, *Religious Freedom and the Rule of Law: Exporting Modernity in a Postmodern World*, 22 MISS. C. L. REV. 173, 174 (2003).

institutions, are capable of great harm to others,[3] and the fact that their conduct is religiously motivated does not alter the fact of the harm. Like every other human institution, they are capable of being tempted to abuse their power. Fortunately, the Framers were a pragmatic and disillusioned group that instilled into the United States' republican form of government a healthy distrust of any entity that holds power. The Constitution grants limited powers to each branch of government and pits governing powers against each other to limit their overreaching.[4] The mechanism that restrains private entities and fosters their social responsibility is the rule of law.[5] When it comes to the public good, the rule of law needs to govern religious institutions, just as it does other private entities.

Since its inception, the United States' constitutional system has been one of ordered liberty, not license.[6] Accordingly, the principles of republicanism have informed the Supreme Court's Religion Clause[7] jurisprudence, with the Court in the vast majority of cases requiring obedience to legislative determinations of the public good, unless there is evidence of animus or hostility towards religion.[8]

3. A more elaborate treatment of the harm that religious entities render can be found in MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND RULE OF LAW (forthcoming 2005).

4. *See* Marci A. Hamilton, *The Calvinist Paradox of Distrust and Hope at the Constitutional Convention*, *in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (Michael W. McConnell et al. eds., 2001) [hereinafter CHRISTIAN PERSPECTIVES]; *see also* Hamilton, *Direct Democracy*, *supra* note 1, at 456–57.

5. *See* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 13 (1997) ("Under the rule of law, citizens automatically have 'rights,' . . . [which are] the logical corollaries of justiciable restraints on private and public action . . . ."); Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1345–46 (2001).

6. Ordered liberty has been remarkable in engendering a robust and pluralistic religious culture. *See* William P. Marshall, *What Is the Matter with Equality? An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193, 216–17 (2000); *see also* DIANA L. ECK, A NEW RELIGIOUS AMERICA: HOW A "CHRISTIAN COUNTRY" HAS NOW BECOME THE WORLD'S MOST RELIGIOUSLY DIVERSE NATION (2001).

7. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

8. *See* Locke v. Davey, 124 S. Ct. 1307, 1315 (2004) (holding that in the absence of "hostility" or "animus" toward religion, a state's denial of funding for vocational religious instruction in order to avoid establishment is constitutional); City of Boerne v. Flores, 521 U.S. 507, 514 (1997) ("[N]eutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest."); Church of the

"There is one condition attached to all exercises of freedom: that the use of the freedom will not breach minimal responsibilities owed to the larger society as those responsibilities are embodied in legitimate laws."[9] This principle is as valid for religious entities as it is for nonreligious entities.

The corollary—that religious persecution is unconstitutional—can also be analyzed as part of the republican matrix. Religious persecution shifts the focus from the public good to a single entity. The legislature's responsibility to engage in a broad-ranging examination of the public good has been subverted by prejudice, ignorance, or both.[10] Thus, the rule against religious persecution does not stand outside the republican form of government, but rather contributes to it.

Yet, theoreticians of the First Amendment at times fail to advert to this larger, republican calculus. Instead, the focus of free exercise and even disestablishment theories is too often on the religious entities themselves, as though their well-being is an adequate proxy for the general public good.[11] This focus on religious entities and their corresponding interests alone is myopic and antidemocratic. The needs of religious entities and the public good are not necessarily equivalent.[12] Constitutional analysis is therefore inevitably faced with the question of how to square religious liberty with the public good.

Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) ("[A] law targeting religious beliefs as such is never permissible . . . if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." (internal citations omitted)); Employment Div. v. Smith, 494 U.S. 872, 878–79 (1990) ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition.").

9. Angela C. Carmella, *The Protection of Children and Young People: Catholic and Constitutional Visions of Responsible Freedom*, 44 B.C. L. REV. 1031, 1044 (2003).

10. The best example of this phenomenon can be found in the Court's discussion of the City of Hialeah's efforts to rid itself of the Santerians. *See Church of Lukumi*, 508 U.S. at 534–40.

11. *See, e.g.*, Kathleen Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of* Smith, 2004 BYU L. REV. 1633; Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385.

12. *See generally* Marci A. Hamilton, *Religion, the Rule of Law, and the Good of the Whole: A View from the Clergy*, 18 J.L. & POL. 387, 437 (2002).

Scholars and religious entities have suggested two paths to achieve religious liberty. One is judicial, and the other is legislative. Some have suggested that religious entities have a right to obtain exemptions from generally applicable, neutral laws in the courts.[13] In the face of a long tradition of treating religious actors as responsible social actors that must obey laws governing conduct, the Court experimented with this approach between 1963 and 1990, during which it subjected some general, neutral laws to strict scrutiny, thereby rendering those laws presumptively unconstitutional.[14] The doctrine required the courts to determine whether the conduct burdened by the law was central to the believer's religious universe and then to assess whether the government had a compelling interest in the purpose of the law. The first inquiry would appear to be a violation of the Establishment Clause, with courts put in the position of assessing religious doctrine. The second put the judiciary in the position of second-guessing legislative judgment, as opposed to identifying invidious discrimination or religious persecution. Normally, when strict scrutiny is applied in the constitutional arena, it is because the law bears indicia of unconstitutional purposes—and therefore the courts need to look closely at the law to determine whether in fact the Constitution was violated. In these cases, the court was addressing neutral, generally applicable laws that bore no outward indication of any improper legislative purpose. The strict scrutiny operated not to smoke out constitutionally suspect purposes, but rather to place the religious entity in a position generally superior to the law.

The approach was intolerable, however, because it threatened to make religious entities laws unto themselves and to undermine the rule of law, and therefore only a handful of neutral, generally applicable laws were subject to strict scrutiny. In 1990, the Court

13. *See, e.g.*, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1415 (1990) ("[C]onstitutionally compelled exemptions were within the contemplation of the framers and ratifiers as a possible interpretation of the free exercise clause.").

14. Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829, 832–33 (1989) (unemployment compensation); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 139–41 (1987) (same); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 716–17 (1981) (same); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (compulsory education); Sherbert v. Verner, 374 U.S. 398, 402–03 (1963) (unemployment compensation).

definitively rejected the approach in favor of general application of the laws governing conduct to religious entities.[15] In response, religious entities urged Congress to pass the Religious Freedom Restoration Act (RFRA), which made *all* laws in the United States that substantially burdened religious entities presumptively illegal.[16] At least as applied to state law, RFRA was held invalid in 1997, and the approach remains only in the small number of states that have passed state-level RFRAs and as applied to federal law.[17] The religious entities' preferred means of securing religious liberty weighed the religious interest considerably more than the public good and came into serious conflict with the no-harm principle.

The second path religious entities have followed is to lobby the federal and state legislatures to obtain exemptions from generally applicable, neutral laws. They have been quite successful.[18] Under a republican form of government, this second approach is more

15. Employment Div. v. Smith, 494 U.S 872, 878–79 (1990).

16. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb–1(b) (1993).

17. City of Boerne v. Flores, 521 U.S. 507, 534 (1997) ("The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*."); *see also* Alan E. Brownstein, *State RFRA Statutes and Freedom of Speech*, 32 U.C. DAVIS L. REV. 605, 644 (1999) (describing state RFRAs). Brownstein also compiled a helpful list of state RFRAs:

> Alabama Religious Freedom Amendment, S. 604, 1998 Reg. Sess. (Ala. 1998); New Jersey Religious Freedom Act, A. 903, 208th Leg., 1998 Sess. (N.J. 1998); New Jersey Religious Freedom Restoration Act, S. 321, 208th Leg., 1998 Sess. (N.J. 1998); Virginia Religious Freedom Protection Act, H.R. 668, 1998 Sess. (Va. 1998); Religious Freedom Protection Act, A. 1617, 1997–98 Reg. Sess. (Cal. 1997) (vetoed following enactment); Religious Freedom Restoration Act of 1998, H.R. 3201, 1998 Reg. Sess. (Fla. 1997); Religious Freedom Restoration Act, H.R. 2370, 90th Leg., 1997–98 Reg. Sess. (Ill. 1997); Religious Freedom Restoration Act, S. 1591, 90th Leg., 1997–98 Reg. Sess. (Ill. 1997); Michigan Religious Freedom Restoration Act, H.R. 4376, 89th Leg., 1997 Reg. Sess. (Mich. 1997); Religious Freedom, H.R. 1470, 155th Leg., 2d Sess. (N.H. 1997); Religious Freedom Restoration, S. 5673, 220th Leg., 1997–98 Reg. Sess. (N.Y. 1997); Religious Freedom Restoration Act, R.I. Gen. Laws § 42-80.1–3 (R.I. 1997); South Carolina Religious Freedom Restoration Act, H.R. 5045, 112th Leg., 1997 Reg. Sess. (S.C. 1997).

Id. n.4.

18. Many of these exemptions are detailed in HAMILTON, *supra* note 3.

legitimate, because the legislature is the most competent branch to consider and determine the public good. But while this approach is more sound theoretically, it has been implemented in an imperfect manner. The lobbying for religious exemptions has tended to occur behind closed doors, and legislators have been inclined to consider only the religious entity's interest, rather than the larger public good. The problem is that legislatures have abdicated the public interest in favor of religious interests. In effect, the legislatures have acted as rubber stamps for religious interests, rather than as an independent body responsible for assessing and serving the public good. In a properly functioning republican system, the legislature weighs the claim for religious liberty against the harm that will ensue if an exemption is granted.

The liberty that is consonant with the public good is ordered liberty,[19] which takes into account both liberty and the public good.

19. This is true in the history leading up to the Constitution, and in Supreme Court case law across the spectrum of constitutional topics. *See* POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA 1730–1805 (Ellis Sandoz ed., 1991); Elisha Williams, *The Essential Rights and Liberties of Protestants*, *reprinted in* POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, 1730–1805, *supra* (urging obedience to laws involving "those things which are the objects of the civil magistrate's power, *viz.* the civil interests of the people" but not on "matters of religion"); *see also Boerne*, 521 U.S. at 539–41 (Scalia, J., concurring) ("Religious exercise shall be permitted *so long as it does not violate general laws governing conduct*.") (citing the Maryland Act Concerning Religion of 1649, negating a license to act in a manner "unfaithful to the Lord Proprietary"; the Rhode Island Charter of 1663, requiring people to "behave" in other than a "peaceable and quiet" manner; the earliest New York, Maryland, and Georgia Constitutions, prohibiting interference with the "peace [and] safety of the State"; the first New Hampshire Constitution, forbidding anyone from "disturb[ing] the public peace"; and the Northwest Ordinance of 1787, prohibiting citizens from "demean[ing]" oneself in other than a "peaceable and orderly manner"); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 77 (1967) [hereinafter BAILYN, IDEOLOGICAL ORIGINS] ("Liberty, that is, was the capacity to exercise 'natural rights' within limits set, not by the mere will or desire of men in power but by non-arbitrary law—law enacted by legislatures containing within them the proper balance of forces."); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–87 (1969) [hereinafter WOOD, THE CREATION]. The importance of "ordered liberty" in Supreme Court jurisprudence cannot be overstated. *See* Sell v. United States, 539 U.S. 166, 180 (2003); Chavez v. Martinez, 538 U.S. 760, 774–75 (2003); Tyler v. Cain, 533 U.S. 656, 667 n.7 (2001); County of Sacramento v. Lewis, 523 U.S. 833, 847 (1998); Washington v. Glucksberg, 521 U.S. 702, 720–25 (1997); Kansas v. Hendricks, 521 U.S. 346, 356–57 (1997); O'Dell v. Netherland, 521 U.S. 151, 157 (1997); Carlisle v. United States, 517 U.S. 416, 429 (1996); Goeke v. Branch, 514 U.S. 115, 120 (1995); Gilmore v. Taylor, 508 U.S. 333, 345, 352, 360 (1993); Graham v. Collins, 506 U.S. 461, 478 (1993); Riggins v. Nevada, 504 U.S. 127, 134–36, 150–54 (1992); Milkovich v. Lorain Journal Co., 497 U.S. 1, 22, 36 (1990); Butler v.

Ordered religious liberty in the United States is grounded in pragmatic experience,[20] the history of abandoned religious privileges in Britain,[21] and the early Americans' experience of religious tyranny in Europe, all of which were viewed through the lens of the framing generation's Protestant worldview.[22] There was a time when churches did have autonomy from the law, and when the rights of religious institutions and their clergy were above those of ordinary citizens, but that was hundreds of years ago—before the common law was entrenched and before the creation of the United States.

The current revelations of worldwide sexual abuse of children by clergy, when combined with the concomitant secret knowledge of their individual religious institutions reinforces what the Founders of this country knew in the seventeenth and eighteenth centuries:

McKellar, 494 U.S. 407, 416, 427 (1990); Stanford v. Kentucky, 492 U.S. 361, 370, 392 (1989); Teague v. Lane, 489 U.S. 288, 307, 309, 311, 313–14 (1989); Yates v. Aiken, 484 U.S. 211, 215 (1988); United States v. Salerno, 481 U.S. 739, 744–47 (1987); Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 308 (1986); Bowen v. Roy, 476 U.S. 693, 702–04, 729–31 (1986); United States v. Bagley, 473 U.S. 667, 680 & n.8 (1985); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758, 769, 777, 787 (1985); Kolender v. Lawson, 461 U.S. 352, 357–58, 363 (1983); Moore v. City of East Cleveland, 431 U.S. 494, 499, 501–02, 504 n.10 (1977); Ingraham v. Wright, 430 U.S. 651, 665, 672–75 (1977); Whalen v. Roe, 429 U.S. 589, 599 n.3 (1977); Stone v. Powell, 428 U.S. 465, 483 (1976); United States v. Janis, 428 U.S. 433, 444 (1976); Paul v. Davis, 424 U.S. 693, 701–04, 710–14 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340–41, 384–85, 401–02 (1974); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65–66, 79 (1973); Roe v. Wade, 410 U.S. 113, 152 (1973); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); Coolidge v. New Hampshire, 403 U.S. 443, 453–54 (1971); Williams v. United States, 401 U.S. 646, 655 n.7, 666 (1971) (plurality opinion); Duncan v. Louisiana, 391 U.S. 145, 150 n.14 (1968); Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 414 n.12, 417 n.17 (1966); Ker v. California, 374 U.S. 23, 31 n.7 (1963); Gideon v. Wainwright, 372 U.S. 335, 342–43 (1963); Mapp v. Ohio, 367 U.S. 643, 650 (1961); Elkins v. United States, 364 U.S. 206, 213–15 (1960); Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 274–75 (1960) (per curiam); Napue v. Illinois, 360 U.S. 264, 269 (1959); Bartkus v. Illinois, 359 U.S. 121, 127, 151 n.2 (1959); Leland v. Oregon, 343 U.S. 790, 801, 803–04 (1952); Rochin v. California, 342 U.S. 165, 169–70 (1952); Stefanelli v. Minard, 342 U.S. 117, 119–20 (1951); Kovacs v. Cooper, 336 U.S. 77, 87–94 (1949); Bute v. Illinois, 333 U.S. 640, 649–53, 659, 663 (1948); Screws v. United States, 325 U.S. 91, 95–97 (1945); Palko v. Connecticut, 302 U.S. 319, 325–28 (1937) (wherein Justice Cardozo coined the phrase).

20. Justice Oliver Wendell Holmes put it best when he said that the "life of the law has not been logic: it has been experience." OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881). That is perhaps most true in the ongoing struggle to find the proper balance between the two most authoritative structures of human existence, religion and the state.

21. *See infra* Part I.A.

22. *See infra* Part I.B.

religious entities often will abuse what power they have.[23] To set aside the law for them without consideration of the public good is to choose liberty at the expense of order and to make society responsible for the harm religious institutions can cause. To be sure, religious institutions are no different from any other individual or institution on this score—all are human entities—but there has been a tendency in recent decades to forget or suppress this principle when it comes to religious entities.

The drive to avoid the law by contemporary religious entities is not a new development, but it is an anachronistic one. There was a time in Western culture when established religious entities were sovereign and the clergy occupied a favored category under the law, and it would have come as no surprise to anyone that the institution was immune to the requirements of the law and that clergy were relieved of its requirements while all other citizens were not.[24] For example, a citizen could be put to death for raping a child, for example, while a clergy member could commit the same crime and be sentenced to a year at a monastery.[25] That, however, was centuries ago. Since the twelfth century, when the concept of the common law was first introduced by Henry II, the justifications for that special treatment have become increasingly hollow.[26] The logic of Henry II's attempts to place clergy under the same justice system as all others was ineluctable: the victim of rape or murder by a clergy member is just as injured as the victim of an ordinary citizen, though it took centuries for Henry's intended reforms to be fully effected.

The internal logic of the common law, which has been worked out through Anglo-American history, has brought the United States to the understanding that the public good requires the deterrence and punishment of harmful actions, regardless of the identity of the actor. As the Court announced in its first free exercise case, well over a century ago, "Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land,

23. *See infra* Part II.B.
24. *See infra* Part II.A.
25. *See infra* Part V.
26. *See infra* Part II.A.2.

and in effect to permit every citizen to become a law unto himself."[27] This principle was reiterated by the Court when it stated in 1971 and then again in 1990 that "[o]ur cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government."[28] The "vast majority" of free exercise cases have recognized the principle that religious entities are subject to generally applicable, neutral laws,[29] because otherwise the public good will be sacrificed.

This is not to say that every religious institution has conceded its obligation to obey the secular law or that the logic of the common law has met no resistance. When the Supreme Court reiterated in *Employment Division v. Smith* the familiar doctrine that the rule of law applies to religious entities, the response by religious entities—spurred on by law professors—was to publicly proclaim their right to act above generally applicable, neutral laws.[30] Their outcry resulted in RFRA.[31] RFRA was a brash repudiation of the principle that laws governing conduct apply to United States citizens, regardless of identity, whether that identity is based on religion, or race, or gender. It was Congress's most expansive benefit for religion in United States history, and in *City of Boerne v. Flores*,[32] the Court held RFRA unconstitutional as applied to the states because it was beyond Congress's power.[33] In that decision, the Court also adhered to the

27. Reynolds v. United States, 98 U.S. 145, 166–67 (1879). The *Reynolds* principle has been reiterated in *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990), and *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 249 (1963) (Brennan, J., concurring).

28. Gillette v. United States, 401 U.S. 437, 461 (1971), *quoted in Smith*, 494 U.S. at 882.

29. *Smith*, 494 U.S. at 885; *see also* Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 402 (1987) ("[O]ur law frequently and presumptively rejects arguments designed to shield from public and judicial view the internal behavior of significant institutions.").

30. Hundreds of pages in the Congressional Record castigated the Supreme Court for presuming to hold that generally applicable, neutral laws apply to religious entities. City of Boerne v. Flores, 521 U.S. 507, 530–31 (1997); *see also* Petitioner's Brief at 36–37, *Boerne* (No. 95-2074).

31. 42 U.S.C. § 2000bb-3 (1994) ("[RLUIPA] applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.").

32. 521 U.S. 507 (1997).

33. *Id.* at 536.

rule that unless a legislature indicates otherwise, every person, including every religious person, will be governed by generally applicable, neutral laws.[34]

The most coherent reading of the Supreme Court's Religion Clause cases shows that there is no defensible rule that would permit a religious defense to laws that govern conduct injuring third parties.[35] There is an absolute right to believe,[36] but at the same time there can be no constitutional right to harm others in the name of religion.[37] If a legitimate legislature has duly enacted a law that

34. *Smith*, 494 U.S. at 890. The Supreme Court specifically addressed "neutral law[s] of general applicability" in *Smith*, *id*. at 879, but the principle undergirding the decision was the rule of law—the principle that laws apply neutrally to all and that, therefore, the arbitrary decisions of individual government decisionmakers may not rule. In the interest of full disclosure, I represented the City of Boerne before the Supreme Court.

35. While this is true of the Supreme Court's jurisprudence and is a view, in my experience, that American citizens hold generally, it is not held by some participants of this conference. *See, e.g.*, Thomas C. Berg, *The Voluntary Principle and Church Autonomy, Then and Now*, 2004 BYU L. REV. 1593; Esbeck, *supra* note 11; Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789.

36. *See Smith*, 494 U.S. at 877 ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."); Welsh v. United States, 398 U.S. 333, 372 (1970) (White, J., dissenting); United States v. Seeger, 380 U.S. 163, 184 (1965) ("The validity of what [the conscientious objector] believes cannot be questioned."); McGowan v. Maryland, 366 U.S. 420, 443 (1961) ("No person can be punished for entertaining or professing religious beliefs or disbeliefs." (internal quotation marks omitted) (quoting Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947)); Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940) ("Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."); *see also* Wooley v. Maynard, 430 U.S. 705 (1977) (invalidating the compelled display of a license plate slogan that offended individual religious beliefs); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 634 (1943) (invalidating a statute requiring school children to salute the U.S. flag during the Pledge of Allegiance, and noting that "[t]o sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind").

37. *See Smith*, 494 U.S. at 878–79 ("[A]n individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."); Minersville Sch. Dist. Bd. of Educ. v. Gobitis, 310 U.S. 586, 594 (1940) ("Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."); Reynolds v. United States, 494 U.S. 145, 167 (1878). *Smith* opened the door for legislators to create exemptions for religious entities, but there is no constitutional requirement of accommodation. *Smith*, 494 U.S. at 882 ("Oregon's drug law

makes certain conduct illegal because it harms particular individuals or the public as a whole, that determination cannot be overturned in the courts by claims that the motivation for the illegal conduct was religious. Nor can it be overturned based on the contention that the religious institution is naturally autonomous from the law.[38] The no-harm principle is at the core of the Court's Religion Clause jurisprudence.

"Church autonomy," the focus of this Conference, simply does not make sense in the context of the larger republican theory of the Constitution. "Republican liberty signifies government in pursuit of the common good, when no citizen is subject to the unfettered will of another."[39] Yet church autonomy would permit religious entities to avoid being legally accountable for the harm they have caused.

While this is not the article to provide an extended discussion of republicanism in the United States, a brief history should help the reader to understand the explanation of the religion clauses in this Article. Prior to the Constitutional Convention, the American experiment in government was a failure. Neither the Declaration of Independence nor the Articles of Confederation generated governing structures that had the capacity to serve the public good. The Declaration established thirteen states that were separate from Great Britain. Under the Articles, this federation of states was incapable of being coordinated to serve the larger good. At the same time, the state legislatures became vortices of corruption and unresponsive to the public crises of the day.[40] The Framers gathered because a more suitable government was necessary, and the focus of the debate was on how to stem the human impulse to abuse power to the detriment of the people's interest.[41] The Constitution's

represents an attempt to regulate religious beliefs . . . [however], '[o]ur cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government.'" (quoting Gillette v. United States, 401 U.S. 437, 461 (1971))).

38. *See Smith*, 494 U.S. at 882.

39. SELLERS, SACRED FIRE *supra* note 1, at 100.

40. *See* Hamilton, *Direct Democracy*, *supra* note 1, at 421–22.

41. *See* BAILYN, IDEOLOGICAL ORIGINS, *supra* note 19, at 57–60; WOOD, THE CREATION, *supra* note 19, at 135; *see also* Hamilton, *Direct Democracy*, *supra* note 1, at 421. *See generally* Marci A. Hamilton, *The Calvinist Paradox of Distrust and Hope at the Constitutional Convention*, *in* CHRISTIAN PERSPECTIVES, *supra* note 4, at 294–306.

representative structure was chosen and crafted for the purpose of making representatives accountable to the public good.[42]

"Autonomy," which means that an institution holds "[t]he right of self-government, of making its own laws and administering its own affairs,"[43] stands in stark contrast to the relationship between citizens and the public good contemplated by republicanism. As participants in this Conference have used the term at times, and at base, autonomy means that the entity creates its own legal universe. That is a notion that cannot be reconciled with the entrenched principle of ordered liberty embodied in the United States' republican system.[44] There is no legitimate independent legal universe and no entity that exists completely divorced from the society. A purely libertarian state is an abstraction, because humans live as a society, which entails the inevitability that one entity may harm another.[45] John Stuart Mill explained it as follows: "Though society is not founded on a contract . . . the fact of living in society

42. *See* SELLERS, SACRED FIRE, *supra* note 1, at 39–40 (discussing historical influences on the framing generation's choice of a republican form of representative government and concluding they chose it because "[t]his conception of liberty as subjection to equal laws made by common consent, for the general welfare, maintained the old republican connection between political rights and substantive freedom"); WOOD, THE CREATION, *supra* note 19, at 164 ("Only with the presence of the democracy in the Constitution [through an elected legislature] could any government remain faithful to the public good."); Hamilton, Why the People Do Not Rule, *supra* note 1, at 43 (discussing Calvin's influence on the Framers, and Calvin's notion that "[r]epresentatives were to be watched by the people and tethered to their common good, yet they bore the independent duty to make decisions serving the people on behalf of God").

43. 1 OXFORD ENGLISH DICTIONARY 807 (2d ed. 1989).

44. The Establishment Clause reinforces the fact that limitations are necessary for religious institutions. "The Religion Clauses of the First Amendment, coupled with the Fourteenth Amendment's guarantee of ordered liberty, preclude both the Nation and the States from making any law respecting an establishment of religion or prohibiting the free exercise thereof." Wallace v. Jafree, 472 U.S. 38, 67–68 (1985) (O'Connor, J., concurring) (holding an Alabama statute requiring a moment of silence at the start of each school day unconstitutional).

45. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 142 (Mark Goldie ed., 1993) [hereinafter LOCKE, TWO TREATISES]. Locke explained:

> [T]he end of law is not to abolish or restrain, but to preserve and enlarge freedom. For in all the states of created beings, capable of laws, where there is no law there is no freedom. For liberty is to be free from restraint and violence from others, which cannot be where there is no law . . . .

Id.

renders it indispensable that each should be bound to observe a certain line of conduct toward the rest."[46] Once one comes to understand the no-harm rule (and its distinguished pedigree), autonomy, or immunity, of any institution—including religious institutions—from the rule of law becomes intolerable.[47]

"Church autonomy" is not and should not be a doctrine recognized in the United States. In fact, the Supreme Court has never recognized a doctrine of "church autonomy," notwithstanding the title of this Conference or the use of the term in other articles.[48] It is an unfortunate term that does not begin to describe the actual or proper relationship between religious institutions and the law and was ill-chosen when it was coined by a 1952 New York appellate court, not for the purpose of immunizing religious institutions from legal accountability, but ironically rather for the purpose of explaining that courts may investigate ecclesiastical questions when "necessary . . . to determine the civil or property rights of the parties."[49] The Supreme Court has never used the phrase to describe

46. JOHN STUART MILL, ON LIBERTY 70 (David Spitz ed., 1975).

47. Religious institutions and individuals come into conflict with many general laws, including child abuse laws, medical neglect laws, zoning laws, prison regulations, antidiscrimination laws, fair housing laws, breach-of-the-peace laws, among others. The scope of the potential harm to the public good arising from the breach of such laws is enormous. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872 (1990); Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378 (1990) (showing that the religious organization made no showing that sales tax imposed a substantial burden on religious beliefs); Braunfeld v. Brown, 366 U.S. 599 (1961) (upholding a statute that proscribed retail sales on Sunday); Reynolds v. United States, 98 U.S. 145 (1879); Malicki v. Doe, 814 So. 2d 347, 351 (Fla. 2002) ("[T]he First Amendment does not provide a shield behind which a church may avoid liability for harm caused to an adult and a child parishioner arising from the alleged sexual assault or battery by one of its clergy . . . ."); Lundman v. McKown, 530 N.W.2d 807 (Minn. Ct. App. 1995) (holding that a church's appeal of compensatory damages awarded in the case of an eleven-year-old boy who died from medical neglect did not succeed on a First Amendment theory).

48. *See generally*, Brady, *supra* note 11; Esbeck, *supra* note 11; Lupu & Tuttle, *supra* note 35. Professor Lupu has written a very insightful article arguing that church autonomy is indefensible in the discrimination context. Lupu, *supra* note 29, at 401 (noting that in the context of discrimination claims, religious "institutions engaged in constitutionally protected activities are entitled to no special autonomy rights by virtue of their function").

49. Cadman Mem'l Congregation Soc'y of Brooklyn v. Kenyon, 279 A.D. 1015 (N.Y. App. Div. 1952). In *Cadman*, the court explained:

> In controversies such as this, ecclesiastical or doctrinal questions may be inquired into only insofar as it may be necessary to do so to determine the civil or property rights of the parties. . . . The court's jurisdiction is clearly established and a definite question is laid before us for determination. . . . I am not, however, in entire accord with the determination of the trial court. The Congregational Christian Church

its jurisprudence,[50] and it appears in the Supreme Court's cases only twice, solely as footnote references to law review articles.[51] The phrase was delivered to the academic mainstream in 1981 by Douglas Laycock, who popularized the use of the phrase in his article, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*.[52] While some have tried to transform the phrase into a notion of church freedom from the law, such an interpretation has not gained traction in the courts, which is as it should be.

The courts have not approached the issue of religious institutional liability or responsibility from the standpoint of rightful autonomy, but rather have divided cases involving religious institutions into three categories that have been crafted in light of the larger principles of republicanism, order, and liberty.

The courts' religious institution jurisprudence can be summed up under three fundamental principles: First, religious individuals and institutions are absolutely protected in the creation and observance of their beliefs, including self-governance that is driven by ecclesiology.[53] Following this principle, the Court has declined jurisdiction over "solely" ecclesiastical disputes, that is,

> (using the name collectively) is admitted to be one in which each individual church is completely autonomous. There is no hierarchy or single ecclesiastical authority beyond it to which it owes obedience. While through the years the various churches have associated themselves in matters of common interest within the framework of an underlying faith, what authority is vested in such associations, conferences and councils arises from the congregations. They are not designed or intended as a repository of any part of the church's autonomy.

Id. at 1015, 1017.

50. Indeed, it has been used by the Court only to quote the title of legal articles. Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 341–42 (1987) (Brennan, J., concurring) (quoting Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389 (1981)); Jones v. Wolf, 443 U.S. 595, 620 (1979) (Powell, J., dissenting) (referring to Paul G. Kauper, *Church Autonomy and the First Amendment: The Presbyterian Church Case*, 1969 SUP. CT. REV. 347).

51. *See supra* note 50.

52. Laycock, *supra* note 50. By labeling the notion as a "right," Professor Laycock gave the notion a status that it has not earned in either the Supreme Court's free exercise cases or American history. *See* Lupu, *supra* note 29, at 400–01 (critiquing Laycock's positing of a theory of church autonomy).

53. *See infra* Part IV.A.

intraorganizational disputes over belief.[54] These are the cases often cited as proof of church "autonomy," but they do not stand for independence from the law, but rather the legal principle that government may not determine belief—a principle that appears throughout First Amendment cases, whether they are religious institution cases, free exercise cases, or free speech cases.[55]

Second, there are cases in which the courts have declined to mediate church employment disputes, on the ground that the adult employee voluntarily shouldered the church's belief system. These are the judicially crafted "ministerial exception" cases. Under this reasoning, the relationship between a voluntary, adult religious employee and a religious employer has been shielded in some, though not all, instances from judicial intervention.[56]

This Article focuses primarily on the third category of cases—those involving (1) conduct rather than belief and (2) harm to third parties. The cases in this third group involve the conduct of religious institutions or individuals that harm innocent and unconsenting third parties, and they present instances in which the religious institution's arguments for freedom from the law are at their lowest ebb. They are properly governed by "'neutral principles of law'"[57] and have been explained by then-Justice Rehnquist as follows:

54. *Id.*

55. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872, 877 (1990); Wooley v. Maynard, 430 U.S. 705, 714 (1977); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633–34 (1943); Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940); Reynolds v. United States, 98 U.S. 145, 166 (1879).

56. *Compare* Bryce v. Episcopal Church in Diocese of Colo., 289 F.3d 648, 658 (10th Cir. 2002) (refusing jurisdiction over an employment dispute between a church and one of the plaintiffs who was clergy and therefore subject to the governance of the church, and a second plaintiff who "affirmatively interjected herself into the church's internal ecclesiastical dialogue"), *with* Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 964 (9th Cir. 2004) (holding that a minister's sexual harassment claim was limited to certain inquiries, but that "[a]s *Bollard* makes clear, accommodating Title VII's mandate and the First Amendment's strictures does not mean peremptorily dismissing all sexual harassment claims brought by ministers against churches"), Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 948 (9th Cir. 1999) (holding that the ministerial exemption is not applicable to a sexual harassment suit brought by a member of clergy where the order did not argue its actions were motivated by religious belief), *and* McKelvey v. Pierce, 800 A.2d 840, 857–58 (N.J. 2002) (holding that the ministerial exception does not apply to lay employees).

57. See *Malicki v. Doe*, 814 So. 2d 347, 357 (Fla. 2002) (citing Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969)), for the principle that "[t]here are neutral principles of law . . . which can be applied without 'establishing' churches to which the property is awarded."

> There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating intrachurch disputes. But this Court never has suggested that those constraints similarly apply outside the context of such intraorganizational disputes. Thus, *Serbian Orthodox Diocese* and the other cases cited by applicant are not in point. Those cases are premised on a perceived danger that in resolving intrachurch disputes the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs. *Such considerations are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religiously affiliated organization.*[58]

The Supreme Court's religious institution cases operate from the principle of no-harm, which is part and parcel of the core principle of ordered liberty embedded in republicanism—the maximal amount of liberty is calibrated to achieve the minimal amount of harm.[59] They reflect the Constitution's larger orientation towards republican democracy, which rests on the no-harm rule, not a principle of autonomy.

This Article makes the case that the Supreme Court has taken the proper approach in its Religion Clause cases by (1) favoring legislative determinations of the public good, which entails the exclusive power to craft exemptions from generally applicable, neutral laws, over judicially crafted exemptions; and (2) recognizing the obligation to obey neutral principles of law in the religious institution cases under the Establishment Clause.

Both sets of cases rest on the same principles. Both recognize an absolute right to believe anything, and both demand the accountability of religious institutions to the public good when they act. The Court has allowed for expansive religious liberty in the context of an ordered society.

58. Gen. Council on Fin. and Admin. of the United Methodist Church v. Superior Court of California, 439 U.S. 1369, 1372–73 (Rehnquist, Circuit Justice 1978) (citations omitted) (emphasis added) (denying application for stay); *see also Malicki*, 814 So. 2d at 356–57 (distinguishing internal church disputes from third-party harm cases).

59. *See* Carmella, *supra* note 9, at 1044 ("There is one condition attached to all exercises of freedom: that the use of the freedom will not breach minimal responsibilities owed to the larger society as those responsibilities are embodied in legitimate laws.").

This Article shows that the no-harm principle is a long-held moral and legal principle that history, philosophy, and theology support. It is the primary justification in Anglo-American culture for criminal law, tort law, and a significant amount of regulatory law.[60] It is so well respected and entrenched that attempts to avoid it by contemporary religious entities cannot and should not succeed. Ultimately, the no-harm principle dictates that religious entities be treated and regulated as any other entity in society—that is, under the no-harm doctrine. There can be no church autonomy in a society that values citizens equally.

This Article is divided into six Parts. Part II makes the case through history, philosophy, and theology that church autonomy is deeply at odds with ordered liberty and long-entrenched constitutional principles. The Framers of the Constitution and the First Amendment worked from within a republican frame of reference so that religious entities were not seen as beyond the boundaries of the law but rather as integral to society and therefore subject to the principle of no harm. This Part is subdivided into three sections. First, it describes the history of three abandoned religious privileges: the benefit of clergy, sanctuary, and charitable immunity. Second, it describes the Protestant and republican mindset at the time of the framing, a mindset that cannot be squared with church "autonomy." Third, it introduces the no-harm rule articulated by John Locke, which informed the Framers and was later refined and made a pillar of modern democracies in the philosophy of John Stuart Mill.

Part III explores possible philosophical and theological theories in the religious institution context and demonstrates their inconsistency with church autonomy and their consonance with the no-harm rule.

Part IV describes the Supreme Court's Religion Clause jurisprudence as it relates to religious institutions. This Part demonstrates that the same principles undergird the Free Exercise

60. *See generally* KEETON ON TORTS 6 (1984) ("So far as there is one central idea, it would seem that it is that liability must be based upon conduct which is socially unreasonable. The common thread woven into all torts is the idea of unreasonable interference with the interests of others."); Richard Epstein, *The Harm Principle—and How It Grew*, 45 U. TORONTO L.J. 369 (1995) (referring to the "deep philosophical pedigree" of the no-harm rule, which is "universal and durable").

Clause and the Establishment Clause in the Court's cases—belief is absolutely protected, but conduct may be regulated by the legislature in the interest of the public good.[61] The courts may not exercise jurisdiction when the issue is solely a matter of belief or ecclesiology, but they may and indeed must when the issue involves the application of neutral principles of law to a religious institution. Part IV further defines the no-harm principle. Part V employs the clergy abuse era in the United States Catholic Church as a case study to illustrate the necessity of a no-harm rule to deter abuses of power that undermine the public good. Part VI offers a short conclusion.

II. THE HISTORICAL, PHILOSOPHICAL, AND THEOLOGICAL BACKGROUND OF THE NO-HARM RULE

Modern-day claims to church autonomy and the myriad privileges invoked in cases involving tortious or criminal behavior by religious individuals and institutions are remnants of the now-discredited practices in Anglo-American history. There have been regimes during which religious entities were protected from the law. Their raison d'etre, however, has been overtaken by the growth of the common law, the rule of law, and the no-harm principle, which can be traced from John Locke through the Framers, John Stuart Mill, and his philosophical successors.

The logic underlying the common law is that all similarly situated individuals should be governed by the same laws.[62] In sum, the fundamental fairness that is at the foundation of the common law,[63]

61. A third category in addition to belief and conduct is religious speech. Religious speech cases have been decided under the Free Speech Clause, as opposed to the religion clauses, and therefore will not be addressed in the analysis of this Article. Suffice it to say that conduct is not speech and cannot receive the identical treatment. Belief does no harm to others, speech may do some, but conduct has the greatest capacity for harm. Accordingly, the force of law is strongest against conduct, as between belief, speech, and conduct. Because conduct is distinct from speech in terms of the public good, I do not agree with the theories that have tried to translate the Free Exercise Clause into the Free Speech Clause. *See, e.g.*, Robert W. Tuttle, *How Firm a Foundation: Protecting Religious Land Use After* Boerne, 68 GEO. WASH. L. REV. 861, 867 (2000); *cf.* Frederick Mark Gedicks, *Towards a Defensible Free Exercise Doctrine*, 68 GEO. WASH. L. REV. 925, 928 (2000) (advocating a free exercise doctrine that takes concepts from but is distinct from the Free Speech Clause).

62. A.R. HOGUE, ORIGINS OF THE COMMON LAW 5, 186–90 (1966).

63. *See, e.g.*, Rosenfeld, *supra* note 5, at 1344–45 (noting that the common law "is grounded in a common well of values, a widely shared sense of justice and fairness, and

the rule of law, and the no-harm rule combined to impose an inexorable logic that has led to a rejection of the notion that religious institutions deserve special immunity from laws that prohibit harm.[64]

From the third to the sixteenth centuries in Britain, church autonomy was in fact the order of the day. The Roman Catholic Church was cosovereign with the state, which means it was itself immune from prosecution. The Church was permitted to harbor fugitives from the law under the practice of "sanctuary,"[65] and it then instituted the benefit of clergy, ecclesiastical courts that provided separate (and far more lenient) justice for clergy.[66] After these privileges were rejected in favor of civil law, and after the Catholic Church lost its sovereign power in Britain, the Crown imposed legal liability on clergy and religious institutions. The spirit of the earlier privileges reappeared with the crafting of a judicial doctrine that shielded charitable, including religious, institutions from civil lawsuits demanding monetary damages for harm done by the institution or its employees. Britain has rejected this charitable immunity doctrine, and the United States has diluted it.[67]

Each of these tacks provided significant autonomy for religious institutions. These also permitted such institutions to avoid accountability to the public good. Eventually, each was overtaken by the interrelated dynamic of the common law, the rule of law, and the no-harm principle. These bedrock principles were fostered in the United States by the views of John Locke, James Madison, Thomas Jefferson, and John Stuart Mill, as well as others.[68]

dedication to elaborating a pragmatically oriented, empirically based working legal order that insures stability through steadfast adherence to core principles"); *id*. at 1348 ("At least under certain propitious circumstances, therefore, the rule of law can promote both predictability and fairness; this seems equally possible in an Anglo-American common law setting as in a continental civil law system . . . ."); *see also* Charles H. Koch, Jr., *Envisioning a Global Legal Culture*, 25 MICH J. INT'L L. 1, 54 (2003) ("[T]he common law judge is charged with applying the 'law' in order to render individual fairness, but is also committed to treating like cases alike.").

64. *See infra* Part III.

65. *See infra* Part II.A.1.

66. *See infra* Part II.A.2.

67. *See infra* Part II.A.3.

68. *See infra* Part II.C.

There are no longer the social practices, institutions, or widely accepted principles that at one point in time supported the notion that a criminal or tortious religious entity should be treated differently from one that is secular. The dispositive question is whether the entity's conduct has led to illegal harm. Where it has, the courts should hold the perpetrator liable—unless the legislature has provided an exemption upon a determination that permitting the religious entity to avoid the law will not harm the public good.

A. Historical Privileges That Permitted Clergy and Religious Institutions To Stand Above the Law

One might ask why history is relevant to the calibration of individual liberty and the public good. Contemporary legal debate often divides between those advocating an originalist approach and those opposing it. That fault `line is not relevant here. Rather, the history of special privileges for religion is being recited for the purpose of explaining the evolution of the relationship between religious entities and the law. There has been an ongoing dialectic between religious entities, the law, and the public good for centuries, and it has shifted from strong privileges for religious entities toward the persisting application of the rule of law. This play of power has yielded a construct that incorporates lessons learned. As Justice Holmes said, "the life of the law has not been logic: it has been experience."[69] It is not uncommon for United States constitutional theory to reach only as far back as the Constitutional Convention, but the forces that have brought the United States to the no-harm principle began long before the Framers were born.

There were three historical privileges directly benefiting religious individuals and entities in Britain: sanctuary, benefit of clergy, and charitable immunity. Britain has since discarded all three privileges. Analyzing this history provides crucial background for understanding that church autonomy is incongruous with the centuries-long development of the relationship between religious institutions and the law.

The United States Supreme Court has repudiated the spirit of these three historic principles, but they still haunt religious

69. HOLMES, *supra* note 20, at 1.

institution theories[70] and the legal tactics of religious institutions themselves.[71] It is important to learn and understand this history, because it was the background for the Framers and for the early formation of the law governing religious institutions and individuals in the United States. It is also important because it uncovers extended experience with church autonomy and shows how it became incongruous with the growth of the common law, republicanism, and the rule of law in Britain and then in the United States.

1. The sanctuary privilege

As early as the third century AD, secular authority recognized an ecclesiastical right to provide sanctuary, or protection, for any person threatened by "private vengeance for alleged wrongdoing."[72] Sanctuary permitted the Church to harbor fugitives—clergy and laity alike—from the law. The Church, in effect, was a separate universe above the law. The privilege was intended to forestall blood feuds and the vigilantism of the times.[73] Although secular government tried to retain rights of control over some categories of wrongdoers, the ecclesiastical authorities held full sway to determine whether and what kind of sanctuary would be made available.[74] The Church

70. *See* Brady, *supra* note 11; Perry Dane, *"Omalous" Autonomy*, 2004 BYU L. REV. 1715; Esbeck, *supra* note 11; Lupu & Tuttle, *supra* note 35; *see also* Locke v. Davey, 124 S. Ct. 1307, 1309 (2004); City of Boerne v. Flores, 521 U.S. 507, 534–35 (1997); Employment Div. v. Smith, 494 U.S. 872, 882 (1990); Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 389 (1990); Braunfeld v. Brown, 366 U.S. 599, 607 (1961); Reynolds v. United States, 98 U.S. 145, 166 (1879).

71. Religious institutions being sued or prosecuted for childhood sexual abuse have repeatedly asserted so-called privileges over the law, claiming that they need not provide internal documents, despite their relevance. The Catholic Church has asserted numerous privileges that purportedly prevent the state from seeing employee files in grand jury proceedings. *See, e.g.*, William Lobdell & Jean Guccione, *A Novel Tack by Cardinal*, L.A. TIMES, Mar. 14, 2004, at A1.

72. Wayne A. Logan, *Criminal Law Sanctuaries*, 38 HARV. C.R.-C.L. L. REV. 321, 323–24 (2003). The practice of sanctuary may date back much farther. The Bible explicitly mentions sanctuary three times, and temples in ancient Greece afforded sanctuary to criminals. *Id.* Roman temples, on the other hand, offered only a temporary refuge before turning criminals over to civil authorities. *Id.* at 324.

73. NORMAN MACLAREN TRENHOLME, THE RIGHT OF SANCTUARY IN ENGLAND: A STUDY IN INSTITUTIONAL HISTORY 47 (1903).

74. *Id.*

further refused to deliver anyone within its sanctuary unless promises were made that the wrongdoer would not be harmed.[75]

Seven centuries after the practice first appeared, the Crown created the chartered sanctuary, a form of asylum that had its force by virtue of a charter from the king.[76] Chartered sanctuaries provided greater protection than Church sanctuary, including broader geographic and temporal scope, and a greater range of protected offenses.[77] The fugitives hidden in chartered sanctuaries, which could be quite large geographically, were governed by the Church and lived in a fugitive community, apart from the rest of the world.[78] Secular authorities recognized this practice well into Tudor times. The sanctuary privilege shielded both laity and clergy, but clergy were often given special dispensation.[79] The church fortified the power of sanctuary by teaching the "fear of Divine vengeance." Thus, "when the Church said that those who sought her protection must be treated with leniency and mercy, and their lives and persons spared, no state or individual was strong enough or bold enough to refuse to comply."[80]

As the Crown sought to enlarge its jurisdiction and attitudes about the proper role of the Church changed, so too did secular deference to the practice of sanctuary. Beginning in 1467, the Crown began to reduce the types and locations of offenses covered by sanctuary, and by 1540, chartered sanctuary was abolished.[81] Sanctuary was completely repealed in 1623 by act of Parliament during the reign of James I. However, the practice persisted unofficially with regards to service of process until the end of the

75. *Id*. at 325.

76. *Id*. at 47.

77. *Id*; *see also* Logan, *supra* note 72, at 326.

78. TRENHOLME, *supra* note 73, at 47.

79. *Id*. at 43 (noting that, during the thirteenth and fourteenth centuries, the law forced clergymen to surrender to ecclesiastical courts for "spiritual offenses" and to secular authorities for common-law crimes). Once in secular courts, however, they would be permitted to invoke the benefit of clergy, which sent them to the ecclesiastical courts, where they escaped the most severe punishments. *Id*.

80. *Id*.

81. Logan, *supra* note 72, at 328.

seventeenth century.[82] By that era, the Crown found the separate justice system insupportable because it made criminal punishment inconsistent.[83]

The end of sanctuary did not signal the end of special treatment for the clergy, but rather only one stage in the progression from church autonomy through the common law to the rule of law. "Despite its formal demise, the spirit of sanctuary lived on in the practice known as 'benefit of clergy,' which did not offer outright immunity, but served, when available, to mitigate the severity of secular law."[84]

2. The benefit of clergy privilege and the sovereignty of established religion

The triumph of the common law over Church sovereignty coincided with the rise of Puritanism, the interregnum, and the Restoration, each of which contributed in some way to reduce the ruling power of the Roman Catholic Church.[85] By the end of the seventeenth century, the ecclesiastical courts retained jurisdiction only over discipline of clergy, certain types of sexual offenses committed by laypersons, and minor matters concerning worship services.[86] The history of a second religious privilege mirrors that of sanctuary—they both eventually disappeared—and provides useful insight into the emergence of the common law, the waning of ecclesiastical jurisdiction, and the end of church autonomy.

The second privilege was the "benefit of clergy." This privilege permitted clergy to avoid capital punishment and even conviction for crimes by (1) mandating lesser penalties for clergy in the secular, royal courts and (2) permitting clergy cases to be heard in the more lenient ecclesiastical courts.[87] The benefit of clergy principle, at least from the time of Henry II (1154–1189) until the era of Elizabeth I (1558–1603), placed clergy members above the royal law, creating

82. JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 491–92 (1883).

83. Logan, *supra* note 72, at 329.

84. *Id.*

85. *Id.*

86. *Id.*

87. *See* GEORGE W. DALZELL, BENEFIT OF CLERGY IN AMERICA & RELATED MATTERS 10–12 (1955).

two distinct classes of criminals—clergy and ordinary citizens. The clergy were quite literally a privileged class with a separate justice system and special punishment privileges; all other citizens were subject to the general laws in the secular royal courts. The benefit of clergy eventually lost its religious character and evolved into a rule of lenity for all first-time felony offenders.[88]

To understand the benefit of clergy principle, one must go back to twelfth-century Britain. In that era, King Henry II (1154–1189) succeeded the lax reign of King Stephen (1135–1154), who had permitted the barons and the Roman Catholic Church to exercise overweening power.[89] Henry II, who is known as the father of the common law, took on both the barons and the Church but ultimately failed to make the Church and its clergy accountable to the public good.[90]

From 1076, when William the Conqueror established the dual court system, to 1576, during the reign of Elizabeth I, the royal courts and the ecclesiastical courts shared jurisdiction over criminal law.[91] The question of jurisdiction brought conflict and dissension for centuries. Although Henry II saw the need to standardize criminal justice and sought to bring clergy under the jurisdiction of the civil courts, the scandal with Archbishop Thomas Becket derailed

88. *Id*. at 10; Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U. TOL. L. REV. 511, 515 (2002).

89. RICHARD BARBER, HENRY PLANTAGENET 30 (1967); C. WARREN HOLLISTER, THE MAKING OF ENGLAND: 55 B.C. TO 1399, at 149–50 (7th ed. 1996).

90. BARBER, *supra* note 89, at 106–10; HOLLISTER, *supra* note 89, at 162–64.

91. DALZELL, *supra* note 87, at 13; 4 EDWARD A. FREEMAN, THE HISTORY OF THE NORMAN CONQUEST OF ENGLAND: ITS CAUSES AND RESULTS 392 (1871); HOLLISTER, *supra* note 89, at 115. William the Conqueror divided the ecclesiastical courts from the secular courts, decreeing that "no bishop or archdeacon shall any longer hold pleas involving episcopal laws in the hundred [court]," and that instead bishops were to maintain separate courts of their own in which to try civil matters such as marriage, wills, debts, and criminal offenses committed by or upon all members of the Church. RICHARD WINSTON, THOMAS BECKET 17 (1967) (internal quotation marks omitted) (quoting H.I. STUBBS, HISTORICAL INTRODUCTIONS TO THE ROLLS SERIES (Arthur Hassell ed., 1902)). In the twelfth and thirteenth centuries, canon law claimed jurisdiction over criminal and civil cases arising out of sin and breach of faith, as well as over clerics and church property; secular law had jurisdiction over criminal and civil cases arising out of seisin of freehold land and breach of the king's peace. HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 516 (1983).

his plans and led to a system of special treatment of clergy criminals that lasted several centuries.

Under Stephen, the clergy became accustomed to unaccountability to the civil, or royal, courts.[92] Henry II viewed their privilege of being above the law as dangerous, and in 1164, he called a meeting with the bishops of England to require them to agree to observe the customary powers of the king in the area of criminal law.[93] Specifically, he demanded that criminal clerics be defrocked by the Church and handed over to the civil courts.

> Henry II was too astute a ruler not to perceive the immense evils arising from [the special treatment for the church], and the limitation which it imposed upon the royal power by emancipating so large a class of his subjects from obedience to the laws of the realm. When in 1164 he endeavored, in the Constitutions of Clarendon, to set bounds to the privileges of the church, he therefore especially attacked the benefit of clergy, and declared that ecclesiastics were amenable to the royal jurisdiction.[94]

At first, the Archbishop of Canterbury, Thomas Becket, agreed. Becket's approval signaled a victory for Henry, because the Archbishop of Canterbury was the most powerful prelate in Britain and was second only to the Pope.[95] As Archbishop, Becket had the power to excommunicate and was the cleric who would perform coronations in the event of a new king.[96] To Henry's dismay, Becket reversed his position under pressure from other bishops.[97] As a result

92. Peter D. Jason, *The Courts Christian in Medieval England*, 37 CATH. LAW. 339, 342 n.27 (1997) ("Overall, Stephen failed to preserve the barrier against papal authority over the English Church. Therefore, when Henry II succeeded Stephen, he was faced with the challenge of overcoming the increased authority of the Church." (citing Z.N. BROOKE, THE ENGLISH CHURCH AND THE PAPACY 188–89 (1968))).

93. Unless otherwise noted, the account of the feud between Henry II and Thomas Becket in the following paragraphs can be found in BARBER, *supra* note 89, at 110–21; HOLLISTER, *supra* note 89, at 160–64; WINSTON, *supra* note 91, at 166–91, 318–21.

94. HENRY C. LEA, STUDIES IN CHURCH HISTORY 187 (1869).

95. HOLLISTER, *supra* note 89, at 161.

96. WINSTON, *supra* note 91, at 319–20.

97. BARBER, *supra* note 89, at 110–11; HOLLISTER, *supra* note 89, at 133; WINSTON, *supra* note 91, at 167–68. As Archbishop of Canterbury, Becket (who had previously served as Henry's royal chancellor) was the head of the English Church, responsible for the crowning of kings and direct relations with Rome. HOLLISTER, *supra* note 89, at 161–63.

of the disagreement between the King and the Archbishop, Henry halted Becket's income and exiled him to France in 1164.[98]

In June of 1170, anxious to secure his succession, Henry sought to have his eldest surviving son crowned. Because Becket was in exile, and therefore unavailable, Henry had Canterbury's ancient rival, the archbishop of York, preside over young Henry's coronation. Becket was enraged at the affront and, with papal backing, threatened to lay England under the ban of interdict.[99] He and Henry reached a truce, which allowed Becket to return to England in the autumn of 1170. The Sheriff of Kent accused Becket of returning to unseat young Henry. Becket replied, "I have not the slightest intention of undoing the king's coronation. . . . But I have punished those who defied God and the prerogative of the church of Canterbury by usurping the right to consecrate him."[100] Despite the truce, just before returning to England, Becket further raised Henry's ire by excommunicating all the bishops who had participated in young Henry's coronation. It was after this incident that Henry commented out of frustration to his assembled court, "Will no one rid me of this turbulent prelate?"[101]

In response to this furious statement, four of Henry's barons murdered Becket in Canterbury Cathedral on December 29, 1170.[102] Although he publicly disavowed involvement with the murder, Henry was subsequently overcome with remorse and agreed to permit the ecclesiastical courts to exercise jurisdiction over clerics

98. Henry ordered Becket to stand trial in the royal court for various offenses allegedly committed when he was Henry's chancellor. Claiming clerical immunity from royal jurisdiction, Becket fled the country to appeal his case to the pope, which violated the prohibition of unlicensed appeals to Rome. BARBER, *supra* note 89, at 116–21; HOLLISTER, *supra* note 89, at 134; WINSTON, *supra* note 91, at 175–91.

99. BERMAN, *supra* note 91, at 262 ("Interdict was a partial or total suspension of public services and sacraments; it could extend to one or more persons or to a whole locality or kingdom.").

100. 3 MATERIALS FOR THE HISTORY OF THOMAS BECKET, ARCHBISHOP OF CANTERBURY 119 (James Craigie Robertson ed., 1875), *quoted in* WINSTON, *supra* note 91, at 319–20.

101. BARBER, *supra* note 89, at 143–44; HOLLISTER, *supra* note 89, at 134; WINSTON, *supra* note 91, at 302–05.

102. HOLLISTER, *supra* note 89, at 134.

accused of crimes.[103] From the aftermath of this feud, the practice known as benefit of clergy emerged in the common law.[104]

The benefit of clergy, or *privilegium clericale*, was often the difference between life and death.[105] In the king's courts, capital punishment was mandated for all felonies.[106] By contrast, capital punishment lay beyond the power of the ecclesiastical courts.[107] Hence, clergy and laypeople might commit the same illegal actions, but the layperson's sentence would be death while the cleric's sentence would be defrocking, incarceration in a monastery, or forfeiture of belongings other than land.[108]

There were also procedural advantages for clergy members. Ecclesiastical trials of criminal matters were conducted by compurgation—the accused would take a formal oath that he was innocent of the crime and bring into court an "arbitrary" number of compurgators who would swear to their belief in his oath.[109] Acquittal was typical, because evidence was only adduced for the defense and perjury by the defendant and compurgators was routine.[110] Additionally, the clergy were exonerated from all prior criminal acts upon conviction of a particular crime.[111] Thus, the rape of a girl and the murder of her father—both perpetrated by a single cleric—could be reduced to a single crime and a single punishment of suspension from ministry for two years.[112] The same crimes by any other citizen would have been tried as individual crimes and death would have been the likely sentence for either or both.

103. BARBER, *supra* note 89, at 161–65; HOLLISTER, *supra* note 89, at 134; WINSTON, *supra* note 91, at 375.

104. *See* 2 THE REPORTS OF JOHN SPELMAN 327 (J.H. Baker ed., 1978) (stating that the benefit of clergy appeared in 1170).

105. DALZELL, *supra* note 87, at 11.

106. Spector, *supra* note 88, at 515.

107. DALZELL, *supra* note 87, at 11 (stating that a "church tribunal could not enter a 'judgment of blood,' i.e., a capital sentence or an attainder").

108. *See id.*

109. R.H. HELMHOLZ, THE SPIRIT OF THE CLASSICAL CANON LAW 158–59 (1996).

110. DALZELL, *supra* note 87, at 11; R.H. Helmholz, *Crime, Compurgation and the Church Courts*, *in* CANON LAW AND THE LAW OF ENGLAND 137 (1987) ("Too many accused persons successfully underwent purgation for the method to inspire confidence as a fact-finding device. . . . Almost every person who came before the ecclesiastical courts accused of theft, murder, or other secular offense, and who went on to purgation, did so successfully.").

111. DALZELL, *supra* note 87, at 11.

112. *See* Spector, *supra* note 88, at 515.

Many laypeople, as well as Henry II, viewed this privilege for clergy as grossly unfair.[113] This negative response to preferential treatment eventually moved the privilege beyond the clergy, so that others could receive the benefit of this doctrine. First, it was extended to those who were literate (when it was first instituted, only the clergy were), and then to laypeople in general.[114] From this history, one can draw many interesting conclusions, but "the remarkable point is that the clergy should have been able to maintain for centuries a special privilege in crime. This is a corollary to the magnitude and power of the church. . . ."[115]

The power of religious institutions during the British monarchy was also felt through the operation of what might be considered the "high courts" of the royal and ecclesiastical courts: the Star Chamber and its ecclesiastical counterpart, the High Commission, the beginnings of which appeared during the reign of Henry VIII and came to full flower under Elizabeth I. These were the "prerogative courts."[116] "The court of High Commission stood to the church and to the ordinary ecclesiastical courts somewhat in the same relation as the Council and Star Chamber stood to the state and the ordinary courts of the state, central and local."[117] Upon declaring himself the head of the Church in England, Henry VIII used both courts to enforce spiritual uniformity on the people, a tradition followed by his successors (whether Catholic or Protestant) until these courts were abolished in 1641.[118]

113. DALZELL, *supra* note 87, at 12 ("From the time of the first Plantagenet the toleration of a class of privileged criminals was persistently assailed as iniquitous."); *see also* LEA, *supra* note 94, at 186–91.

114. Spector, *supra* note 88, at 515 n.22 (noting that in 1350, the privilege was statutorily extended to "all manner of clerks, as well secular as religious"). This statute was intended to extend the privilege to "inferior Orders" of the clergy rather than to laypersons. *Id*. Judges nonetheless interpreted "secular clerks" to include all literate males. *Id*. at 515 (citing 2 SIR WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 338 (2d ed. 1724)).

115. DALZELL, *supra* note 87, at 13.

116. Frank Riebli, Note, *The Spectre of Star Chamber: The Role of an Ancient English Tribunal in the Supreme Court's Self-Incrimination Jurisprudence*, 29 HASTINGS CONST. L.Q. 807, 826 (2002).

117. 1 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 608 (A.L. Goodhart & H.G. Hanbury eds., 7th ed. 1956).

118. *Id*. at 605–11.

By 1576, under Elizabeth I, the benefit of clergy privilege had been extended beyond clergy to those who were literate (the original logic being that only the clergy were literate). Therefore, the benefit of clergy was not only a means for the clergy to move their trials to the friendlier ecclesiastical courts, but it also became a tool for laypeople to reduce the likely sentence for a crime, even though they were being tried in secular courts.[119] It was assumed that a felony was "clergyable," i.e., capable of preventing capital punishment, unless Parliament explicitly stated otherwise.[120] Eventually, during the latter half of the sixteenth century and the beginning of the seventeenth, the benefit was inapplicable to murder, rape, abduction, thefts of the person exceeding a shilling, burglary, highway robbery, stealing horses, and stealing from churches.[121]

Also in 1576, Parliament abolished the ecclesiastical courts' jurisdiction over crimes committed by clergy.[122] At the same time, the "benefit of clergy" became a gambit to be invoked at sentencing for lay and clergy alike—that is, it was not a guarantee of a particular court, with special procedural rules, for clergy.[123] Parliament removed the jurisdiction of the ecclesiastical courts because it perceived that the Church had taken over a large portion of its criminal jurisdiction.[124] The Crown was appalled at the level of perjury and corruption in the ecclesiastical courts:

> This scandalous prostitution of oaths, and the forms of justice, in the almost constant acquittal of felonious clerks by purgation, was the occasion, that, upon very heinous and notorious circumstances of guilt, the temporal courts would not trust the ordinary with the trial of the offender . . . . As, therefore, these mock trials took their rise from factious and popish tenets, tending to exempt one part of the nation from the general municipal law; it became high time,

119. DALZELL, *supra* note 87, at 24.

120. John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 40 (1983).

121. *Id*. at 38–39.

122. DALZELL, *supra* note 87, at 24 (discussing 18 Eliz., ch. 7, §§ 2–3 (1576)).

123. Langbein, *supra* note 120, at 38 n.147 (citing 18 Eliz., ch. 7, §§ 2–3 (1576), *discussed in* 5 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 368 (Sir George Tucker ed., 1803)); STEPHEN, *supra* note 82, at 462.

124. Spector, *supra* note 88, at 516.

> when the reformation was thoroughly established, to abolish so vain and impious a ceremony.[125]

As a result, Blackstone writes, the 1576 statute abolished the practice of purgation (and with it, the ecclesiastical courts' jurisdiction over clergy members who committed crimes) by directing that an offender who pled benefit of clergy "shall not to be delivered to the [ecclesiastic courts], as formerly," but instead was to be burned on the hand to show that he had used the privilege for a first-time felony (a practice that became ceremonial in some cases) and, at the judge's discretion, sentenced to up to a year in prison.[126] The privilege was not available in later trials of the same individual.[127] The 1576 statute served two purposes: (1) Parliament did away with the corrupt practice of trial by compurgation, and (2) it effectively enlarged the crown's criminal jurisdiction at the expense of the ecclesiastical courts. The loss of ecclesiastical jurisdiction over crimes committed by clergy was significant, but it was not nearly as divisive in its era as Henry II's proposals in his era had been. One can detect in the British society a gradually developing assumption that the same crime deserved the same punishment, regardless of the actor.

The Church and the Crown continually came into conflict throughout the medieval period over questions of jurisdiction.[128] In the thirteenth century, the gap between them widened when common lawyers replaced ecclesiastics on the benches of the common-law courts.[129] Although the rival courts were separate systems of law, differing in many of their rules and deriving their force from different sovereigns,[130] they were based on the same philosophical foundation—"the will of God expressed through

125. BLACKSTONE, *supra* note 123, at 368–69.

126. *Id.* at 369.

127. *Id.* at 372.

128. HOLDSWORTH, *supra* note 117, at 584 ("As the state grew into conscious life it was inevitable that occasions for disputes between the temporal and spiritual powers should arise.").

129. *Id.* (noting that, "from that time onwards, the professional jealousy of the common lawyers led them to restrict the jurisdiction of the ecclesiastical courts whenever it was possible to restrict it").

130. *Id.* at 587.

authority," whether ecclesiastical or royal.[131] All this changed with the Reformation—the attack on the authority of the Church was in effect an attack on the whole medieval system of law.[132] Religion was no longer universally considered the basis of civil government, and the premises of the common law gained ascendancy over ecclesiastical law.[133]

It became clear that a "shift[] in the balance of power" to secular authority at the expense of the ecclesiastical "had to be carried out in the context of legal competition and compromise."[134] The ecclesiastical courts continued to exercise jurisdiction over some matters that had been in their purview since the medieval period, such as tithing, probate, marriage, defamation, and cases involving "mortal sins" such as fornication and adultery.[135] Ecclesiastical jurisdiction over most matters, however, had already begun to decline at the outset of the Reformation, reflecting a "basic shift in attitude towards the proper role of the Church in men's lives."[136]

131. THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 42 (1929).

132. *Id.* (noting that, by the time of Edward VI (1547–1553), the Reformation was used as a political weapon against Rome, and that after the brief reign of Catholic Mary (1554–1558), Elizabeth made the Reformation "the permanent basis of English political and religious life").

133. *Id.*

134. BERMAN, *supra* note 91, at 268.

135. *Id.* at 266–67.

136. HELMHOLZ, *supra* note 109, at 320–21; *see also id.* at 316–17 (noting that ecclesiastical jurisdiction over testamentary debt and probate began a slow decline in the mid-sixteenth century); SELECT CASES ON DEFAMATION TO 1600, at xxxvii–xli (R.H. Helmholz ed., Selden Society No. 101, 1985) (noting that royal courts began to prohibit the church courts from hearing defamation cases involving secular crimes and began to hear such cases on their own in the sixteenth century); Edward P. Steegmann, Note, *Of History and Due Process*, 63 IND. L.J. 369, 385 (1988) (explaining that sodomy was made a secular offense by statute in 1533 (citing STEPHEN, *supra* note 82, ch. 25)); Jeremy D. Weinstein, Note, *Adultery, Law, and the State: A History*, 31 HASTINGS L.J. 195, 225 (1986) (noting that Puritans of the Commonwealth made adultery a capital offense in 1650, although this was nullified in 1660 with the Restoration (citing BLACKSTONE, *supra* note 123, at 64–65)). On the other hand, the Church retained jurisdiction over other matters well beyond the Reformation. *See, e.g.*, R.H. HELMHOLZ, MARRIAGE LITIGATION IN MEDIEVAL ENGLAND 3 (1974) (explaining that jurisdiction over marriage and marital disputes was not withdrawn from the Church until 1857); HELMHOLZ, *supra* note 109, at 210 (noting that jurisdiction over bastardy litigation was not withdrawn until the nineteenth century).

The increasing entrenchment of the common law,[137] the Roman Catholic Church's loss of moral authority during the Reformation,[138] and the subsequent growth of Protestantism with its emphasis on accountability[139] undermined whatever argument the Church once had for sovereignty or to have its clergy immune from the criminal law. By 1641, one year after the Puritans gained control of Parliament, the jurisdiction of the prerogative courts—Star Chamber and the High Commission—was repealed, because "so large a prerogative," manifested in the courts' inquisitorial form and their arbitrary procedures, was "no longer compatible with liberty."[140] Additionally, in a dramatic move forward for the common law, the ecclesiastical courts were deprived of *all* criminal jurisdiction; the entirety of which was placed in common law courts.[141]

The rejection of the prerogative courts, whose abuses were attributed to the monarchs (who governed both the state and established church), was an early step toward the overthrow of the monarchy in 1649.[142]

137. *See* PLUCKNETT, *supra* note 131, at 43–44, 46. *See generally* HELMHOLZ, *supra* note 109, at 2 (discussing approaches to the relationship between the two systems during the rise of the common law).

138. *See* WILL DURANT, THE REFORMATION: A HISTORY OF EUROPEAN CIVILIZATION FROM WYCLIF TO CALVIN 1300–1564, at 584 (1957) [hereinafter DURANT, THE REFORMATION] (referring to "[t]he collapse of the spiritual and moral authority of the priesthood"); HOLDSWORTH, *supra* note 117, at 588 ("The wealth and corruption of the church, and more particularly the abuses of the ecclesiastical courts, were exciting extreme unpopularity."); FRANK LAMBERT, THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA 34–35 (Thomas LeBien ed., 2003) ("Whether or not the Church of England . . . was in as deplorable condition as its critics made out is beside the point; the fact is, widespread opinion that it was corrupt constituted the greater reality that shaped events.").

139. Of the Reformers, John Calvin in particular addressed the faults of the sixteenth-century Catholic Church as a problem in the structure of the church, with his primary concern being the lack of accountability of the clergy to the members or the higher good. It was his view that the Church had deviated from the ancient church's structures of accountability. *See, e.g.*, 2 JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION, bk. IV, ch. IV, §§ 1–2, at 1068–70 (describing the ancient practice of electing bishops and noting their accountability to "the assembly of his brethren"); *id.* at bk. IV, ch. VII, § 21, at 1141 (criticizing the contemporary pope for ruling in a "tyrannical fashion" and considering "his own whim as law," and opining that such "is utterly abhorrent not only to a sense of piety but also of humanity").

140. HOLDSWORTH, *supra* note 117, at 597.

141. BERMAN, *supra* note 91, at 113; HOLDSWORTH, *supra* note 117, at 61.

142. *See* BLACKSTONE, *supra* note 123, at 370; PLUCKNETT, *supra* note 131, at 53–54.

In England, the benefit of clergy eventually became a tool for all first-time offenders to avoid the death penalty.[143] In the eighteenth century, the benefit of clergy was gradually replaced by the "transportation" of convicts from England to the American and Australian colonies, and was ultimately abolished in the nineteenth century.[144] In the American colonies, the benefit of clergy never functioned as a special privilege for clergy. The states never recognized ecclesiastical courts for clergy that substituted for secular courts in criminal matters. Rather, clergy members were subject to the law of the secular courts as were all citizens.[145] The "benefit of clergy," therefore, never conferred any special benefit on clergy *qua* clergy in the colonies or the states. Instead, from the outset, it was merely a tool for juries and judges to avoid applying the death penalty to first-time felonies.[146]

This history is crucial for understanding the treatment of religious institutions under the First Amendment. Were there competing ecclesiastical courts for bringing clergy criminals to justice in the United States, there would be a stronger argument for the civil courts to abstain from jurisdiction over claims relating to the crimes of clergy (and their religious institutions). Although the justice meted out to clergy in England was lopsided in favor of religion, at least the possibility of trying a member of the clergy in the ecclesiastical courts existed for crimes committed until 1576. The only forum available for vindication of the state and federal laws in the United States, by comparison, has always been the civil courts.[147]

143. BLACKSTONE, *supra* note 123, at 370.

144. DALZELL, *supra* note 87, at 49.

145. EDMUND S. MORGAN, ROGER WILLIAMS: THE CHURCH AND THE STATE 67 (1967). Because there were no high officials of the Anglican Church in the New World, there were no ecclesiastical courts. Matters still subject to ecclesiastical jurisdiction in England—marriage, divorce, and probate—became purely civil matters in the colonies. *Id.*

146. Langbein, *supra* note 120, at 38.

147. *See* MORGAN, *supra* note 145, at 67. The exceptions to this rule were the attempts to establish ecclesiastical courts in colonial South Carolina. Colonists established an ecclesiastical court of twenty laymen to remove ministers "for cause." The English disapproved of this aberration because it violated the Episcopal governing structure of the Church of England. They then requested that a bishop of the Church of England be installed in the colonies, which never happened. *See* SANFORD H. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA: A HISTORY 416–18 (Burt Franklin ed., 1970) (1902); Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2142 (2003).

Thus, a claim of clergy benefit—or clergy autonomy—lacks support in the United States' legal history.

United States history suggests that not only is there no basis for clergy autonomy, but religious institutions are subject to the law in civil courts as well. In England, clergy benefited from special tribunals, while religious institutions were not held to account under the rubric of secular law, because the Church was a separate sovereign whose jurisdiction overlapped with that of the Crown.[148] The decision in the United States, expressed in the Establishment Clause, to forbid religious institutions from holding sovereign power was a radical departure from British history, where to this day there is a state-established church. The elimination of religious sovereign power by definition made religious institutions private and therefore on more equal footing with other private entities.

The primary assumption at the Constitutional Convention—and it is the most important principle that has contributed to the Constitution's success—was that every individual and every institution holding power was likely to abuse that power and therefore must be checked.[149] This principle led the Framers to structure the government so that each level and each branch would check the others.[150] With respect to religion, the First Amendment's

148. *See* BERMAN, *supra* note 91, at 269 ("Underlying the competition of ecclesiastical and royal courts from the twelfth to the sixteenth centuries was the limitation on the jurisdiction on each: neither pope nor king could command the total allegiance of any subject."); HELMHOLZ, *supra* note 109, at 124–26 (characterizing the Becket controversy as a battle over jurisdiction, and noting that trouble arose in "areas of law and life where both Church and State made a claim"); *see also* BERMAN, *supra* note 91, at 553 (arguing that a defining feature of Western society is the emergence of "the church in the form of a state" in the late eleventh century).

149. *See generally* Marci A. Hamilton, *The Calvinist Paradox of Distrust and Hope at the Constitutional Convention*, *in* CHRISTIAN PERSPECTIVES, *supra* note 4.

150. For example, the dual sovereignty of federalism was intended to divide power between the federal government and the states, with each checking the other. *See* THE FEDERALIST NO. 46 (James Madison) ("The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes."); *id.* (noting that federal and state governments each possess a different "disposition and faculty" with which to "resist and frustrate the measures of the other"). Similarly, the three federal branches were assigned discrete powers and the power to check the other branches. *See* THE FEDERALIST NO. 47 (James Madison) ("[T]he preservation of liberty requires . . . that the three great departments of power should be separate and distinct."); THE FEDERALIST NO. 51 (James Madison) ("[T]he defect must be supplied, by so contriving the

Establishment Clause made it clear that religious institutions would not be cosovereigns by prohibiting them from holding governing power.[151] The question then was how religious institutions were to be checked; it would have been inconceivable to think that no check was necessary, either from the Framers' world view or the dominant Protestant world view. While religious institutions would not be directly checked by the structures of the Constitution, the Establishment Clause relegated them to the private sphere, where they would be checked like other private entities—by the rule of law. Thus, the end, perhaps even the ineluctable, result of the privatization of religion in the United States is the Supreme Court's current doctrine that religious institutions are properly subject to "neutral principles of law."[152]

The end of benefit of clergy shifted power away from ecclesiastical courts to civil courts and led to a corresponding decline in the sovereign authority of the established church in Britain.[153] The structural mechanisms that had protected religious individuals and institutions from criminal liability in Britain no longer protected them, as the common law gained ascendancy. That is the milieu from which the colonies and then the states drew their own church-state arrangements. The seventeenth-century settlers in what would become the United States were part of a generation ruled by Queen Elizabeth, during whose reign the ecclesiastical courts were definitively removed from criminal jurisdiction. Neither the clergy's privileges nor the ecclesiastical courts made it across the Atlantic. At the time the United States was established, both the privileges and the ecclesiastical courts had given way in Britain to a system that

interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.").

151. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."). *See generally* LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (1983) [hereinafter LEVY, THE ESTABLISHMENT CLAUSE].

152. Jones v. Wolf, 443 U.S. 595, 602–03 (1979); *see also* Employment Div. v. Smith, 494 U.S. 872, 885 (1990); Gillette v. United States, 401 U.S. 437, 450 (1971); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940); Reynolds v. United States, 98 U.S. 145, 166–67 (1879).

153. In 1576, the ecclesiastical courts were relieved of their jurisdiction over clergy who committed crimes. DALZELL, *supra* note 87, at 24 (discussing 18 Eliz., ch. 7, §§ 2–3 (1576)). In 1641, the Puritan-dominated Long Parliament abolished all criminal jurisdiction of the ecclesiastical courts. *See* HOLDSWORTH, *supra* note 117, at 611.

permitted the government to bring clergy under civil court authority[154] and religious institutions to account for wrong doing.[155] Thus, the current attempts by religious organizations to avoid criminal liability by invoking alleged privileges have their roots in history, but they have long lost their moral or legal underpinnings.[156]

3. Charitable immunity

After religious institutions lost their immunity to civil lawsuits, the British courts, followed by the American courts, experimented with protecting the coffers of charitable institutions subject to liability. Charitable immunity was a rule that protected the financial holdings of charitable organizations from actions in tort. Unlike sanctuary and the benefit of clergy, it was not a privilege limited to churches or clergy. Rather, it was intended to shield volunteer or charitable associations in general.[157] The doctrine of charitable immunity protected charitable organizations from being sued in tort,

154. *See, e.g.*, Forbes v. Eden, 5 Macph. (H. L.) 36, L.R., 1 H.L. Sc. 568 (1867); Craigdallie v. Aikman, 1 Dow 1, 3 Eng. Rep. 601 (1813).

155. *See supra* note 149 and accompanying text.

156. In many jurisdictions, the Catholic Church has attempted to resist grand jury subpoenas for documents on the grounds of a First Amendment "privilege." *See* William Lobdell & Larry B. Stammer, *Mahony Criticized by National Review Panel*, L.A. TIMES, Feb. 28, 2004, at A1; *see also* James F. McCarty, *Bishop Pilla Walks Tightrope in Priest Sex Abuse Scandal*, CLEVELAND PLAIN DEALER, May 5, 2002, at A1 (describing church lawyers' tactics to avoid grand jury subpoenas); Peter Shinkle & Hannah Bergman, *Diocesan Cooperation Varies Across Country*, ST. LOUIS POST-DISPATCH, Jun. 21, 2003, at 12 (noting that Los Angeles and Metuchen, N.J., bishops are refusing to cooperate, while a St. Louis bishop and new Boston bishop are cooperating). In another jurisdiction though, the church fully cooperated without raising such defenses. *"Specific to the Facts" in N.H. Crisis in the Church/Statement*, BOSTON GLOBE, Dec. 11, 2002, at A32 (reporting the settlement of the New Hampshire Diocese sexual abuse claims and the bishop's statement that, "[t]he Diocese of Manchester has reached a legally binding mutual agreement with the Office of the Attorney General of New Hampshire which involves acknowledgment by the diocese that the state has evidence likely to sustain a criminal conviction against the diocese for a failure in its duty to care for young people").

157. *See* Bradley Canon & Dean Jaros, *The Impact of Changes in Judicial Doctrine: The Abrogation of Charitable Immunity*, 13 LAW & SOC'Y REV. 969, 971–72 (1979). Charitable organizations are those that serve the public, not just their members. *See* Charles Robert Tremper, *Compensation for Harm from Charitable Activity*, 76 CORNELL L. REV. 401, 408–09 (1991).

which meant that victims could not bring successful tort claims against the organization or its employees.[158]

Charitable immunity gave way to the dynamic force of the rule of law, which demands similar accountability for people wrongfully acting in the same way and rendering the same harm. The concept of "ordered liberty" and the principle of no-harm opened the door to those who had been harmed to sue religious institutions in tort.[159] The charitable immunity rule lasted for a very short period in Britain and has fallen out of favor in the United States, though it has been revived to a limited extent in the growth of limits on liability for charitable institutions.[160] This section examines the transformation.

In England, the doctrine of charitable immunity did not involve religious institutions specifically, but rather only shielded those organizations that provided aid to the poor.[161] In contrast, in the United States, the definition of charitable organization eventually

158. *See* Canon & Jaros, *supra* note 157, at 971; Tremper, *supra* note 157, at 401–02.

159. *See, e.g.*, Forbes v. Eden, L.R. 1 Sc. 568 (1867) ("Per Lord Colonsay: A Court of Law will not interfere with the rules of a voluntary association, *unless to protect some civil right or interest which is said to be infringed by their operation*." (emphasis added)); Craigdallie v. Aikman, 1 Dow 1, 3 Eng. Rep. 601 (H. L. 1813) (Scot.).

160. Prior to congressional action, any protection was provided by state law. Most states abandoned the doctrine of charitable immunity by the mid 1980s, only to see it revived in a limited fashion in some states after a perceived crisis in liability insurance for nonprofit organizations. Tremper, *supra* note 157, at 402 (noting that almost all states have abolished or constricted the doctrine of charitable immunity). "The common law doctrine of charitable immunity exists—to some degree—in nine states: Alabama, Arkansas, Georgia, Maine, Maryland, New Jersey, Virginia, Utah and Wyoming." NONPROFIT RISK MANAGEMENT CENTER, STATE LIABILITY LAWS FOR CHARITABLE ORGANIZATIONS AND VOLUNTEERS 8 (2001). The Volunteer Protection Act, 42 U.S.C. §§ 14501–05, which was passed in 1997, provides minimum levels of protection for churches and preempts any state law unless the state law provides greater protection. *Id.* at 5. The states that limit liability by capping damages are Colorado, Massachusetts, and South Carolina. *Id.* at 9. All other states have abolished charitable immunity by case law but have resurrected some immunity or caps by state volunteer protection acts. *See id.* at 14–118 (listing all states, applicability of charitable immunity, case law supporting the extension of abolishment of the doctrine, and the scope of all volunteer protection statutes); *see also* George v. Jefferson Hosp. Ass'n, 337 Ark. 206, 211 (1999) (giving narrow construction to protect "[t]he essence of the doctrine . . . that agencies, trusts, etc., created and maintained exclusively for charity may not have their assets diminished by execution in favor of one injured by acts of persons charged with duties under the agency or trust").

161. *See infra* notes 173–74 and accompanying text (discussing Feoffees of Heriot's Hosp. v. Ross, 8 Eng. Rep. 1508 (1846)); *see also* Georgetown Coll. v. Hughes, 130 F.2d 810, 815–17 (D.C. Cir. 1942) (discussing the history of the charitable immunity doctrine and its application to charitable corporations).

reached beyond the traditional nonprofit groups that served the poor to include hospitals, schools, and churches.[162] At its height, the immunity provided complete protection against any damage awards and therefore made charitable organizations' coffers autonomous of any countervailing social responsibility.[163] In the minority of U.S. jurisdictions, immunity extended only to certain persons (e.g., actual recipients of charity) or certain sources of the organizations' income (trust funds and donations).[164]

Charitable immunity appears to have been based on a variety of justifications. The doctrine, originally developed in England in 1846, was based on a trust theory "that the funds of the charity are not to be diverted from the purposes intended by their donors and applied to the payment of liabilities in tort."[165] Another theory offered was that since charities do not gain or benefit from the services they offer, they could not be held liable under the doctrine of respondeat superior for works done on their behalf.[166] A third justification was that the recipients of charity assume the risk of negligence when they accept the benefit, thereby waiving their right to sue.[167] It also has been put forward that the actions of charitable organizations are analogous to municipalities, and, therefore, charities deserve the protection that governmental immunity offers.[168] Finally, public policy—fueled by a fear that people and institutions working to improve society would no longer contribute if they were liable for actions associated with that work—justified it.[169]

The public policy argument was especially forceful in late nineteenth-century America. When public charities first emerged in the United States, they were foundering institutions run only on an experimental basis.[170] Any substantial judgment against them would

162. Canon & Jaros, *supra* note 157, at 971.

163. *Id.*

164. *Id.*

165. RESTATEMENT (SECOND) OF TORTS § 895E (1979); *see also* McDonald v. Massachusetts, 120 Mass. 432, 434–35 (1876).

166. RESTATEMENT (SECOND) OF TORTS § 895E (1979).

167. *Id.*

168. *Id.*

169. *Id.*

170. *See* Benjamin S. Birnbaum, Comment, Cashman v. Merident Hospital, *169 Atl. 915 (Conn.)*, 14 B.U. L. REV. 477, 478 (1934).

have led to their demise, or, at the very least, it would have discouraged contributions.[171] In an effort to foster their growth and thus benefit the public, most state courts adopted the policy of shielding charities from tort liability.[172]

The now largely disfavored doctrine entered the common law in 1846 as dictum in the House of Lords' decision in *Feoffees of Heriot's Hospital v. Ross*: "To give damages out of a trust fund would not be to apply it to those objects whom the author of the fund had in view, but would be to divert it to a completely different purpose."[173] The case was an action for damages for wrongful exclusion from the benefits of the charity, not for personal injury inflicted in its operation.[174] Thirty years later, Massachusetts was the first state to adopt the doctrine of charitable immunity in *McDonald v. Massachusetts General Hospital*,[175] with many other state courts following suit.[176] By 1900, seven state supreme courts had followed Massachusetts' lead, with another thirty-three joining the movement by 1938.[177] Ironically, by the time the doctrine was entrenched in the American courts, it was no longer good law in England.[178] By 1871, after only twenty-five years experience with the doctrine, the English courts rejected it on the ground that it made no sense to hold charities blameless for the harm they caused.[179] As a 1909 case characterized the doctrine, "[i]t is now well settled that a public body is liable for the negligence of its servants in the same way as

171. *Id.*

172. *Id.*

173. Feoffees of Heriot's Hosp. v. Ross, 8 Eng. Rep. 1508 (1846).

174. *Id.*

175. 120 Mass. 432 (1876), *overruled in part by* Colby v. Carney Hosp., 254 N.E.2d 407, 408 (Mass. 1969), stating:

> In the past on many occasions we have declined to renounce the defence of charitable immunity set forth in *McDonald v. Massachusetts Gen. Hosp.* . . . . Now it appears that only three or four States still adhere to the doctrine . . . . Accordingly, we take this occasion to give adequate warning that the next time we are squarely confronted by a legal question respecting the charitable immunity doctrine it is our intention to abolish it.

Id. (internal citations omitted).

176. Canon & Jaros, *supra* note 157, at 971.

177. *Id.*

178. *Id.*; *see also* Foreman v. Mayor of Canterbury, L.R. 6 Q.B. 214 (1871); Mersey Docks Trustees v. Gibbs, L.R. 1 H.L. 93 (1866).

179. *See Foreman*, L.R. 6 Q.B. 214.

private individuals would be liable under similar circumstances . . . ."[180]

By the early twentieth century, American scholars considered charitable immunity to be a faulty doctrine based on a weak foundation.[181] In *Georgetown College v. Hughes*, one of the first American cases rejecting charitable immunity, the court characterized concept as an "anomaly," stating that "[t]he doctrine of immunity of charitable corporations found its way into the law . . . through misconception or misapplication of previously established principles."[182] As one defender of limited liability for charitable organizations states, the "traditional rationales for denying all tort recovery against charitable organizations cannot withstand close scrutiny."[183] The reasoning is obvious: when the law is intended to redress harm, and charitable institutions are intended to assist those in need, permitting them to avoid liability for the harm they cause is perverse. As with sanctuary, and especially the benefit of clergy, the driving logic of the common law and the rule of law could not be squared with special dispensation for charitable organizations when they engendered harm.

Some vestiges of the doctrine remain, however.[184] While it has been thought appropriate to hold such organizations accountable for

180. Hillyer v. St. Bartholomew's Hosp., 2 K.B. 820, 825 (1909).

181. Tremper, *supra* note 157, at 422 n.107 (describing rejected theories behind charitable immunity).

182. 130 F.2d 810, 815 (D.C. Cir. 1942).

183. Tremper, *supra* note 157, at 422. The doctrine of charitable immunity established by common law still exists, to varying degrees, in nine states: Alabama, Arkansas, Georgia, Maine, Maryland, New Jersey, Utah, Virginia, and Wyoming. NONPROFIT RISK MANAGEMENT CENTER, *supra* note 160, at 8. In the face of the clergy sexual abuse cases, there is a movement to repeal the doctrine of charitable immunity. For example, a New Jersey senate committee has approved S540, an amendment to the state's charitable immunity statute that would bar immunity for charitable organizations in damage suits alleging negligent hiring or supervision of an employee that resulted in sexual abuse of a minor. *See* Valerie L. Brown et al., *2004 Capitol Report*, N.J. LAW, Apr. 5, 2004, at 708.

184. George v. Jefferson Hosp. Ass'n, 337 Ark. 206, 211 (1999) (giving narrow construction to protect "[t]he essence of the doctrine that agencies, trusts, etc., created and maintained exclusively for charity may not have their assets diminished by execution in favor of one injured by acts of persons charged with duties under the agency or trust"); *see also* Ryan v. Holy Trinity Evangelical Lutheran Church, 175 N.J. 333, 340–42 (2003) (discussing the language and history of New Jersey's charitable immunity act and the fact that it is broadly construed). New Jersey is currently considering a bill modifying its charitable immunity law. A

the actions of their employees, the institutions' liability for volunteers has been contested.[185] A minority of states, in addition, have imposed monetary caps on damage awards against charitable organizations.[186]

Like the benefit of clergy and sanctuary, charitable immunity largely gave way to the rule of law and its fundamental presupposition that all citizens are equal under the law. As in Britain, the United States nullified charitable immunity by the larger legal system within which religious and charitable organizations, their clergy, and their employees are accountable to those they harm.

bill to that effect has passed in the state senate and is pending in the state's general assembly. *See* S540, 2004 Leg., 211th Sess. (N.J. 2004), *available at* http://www.njleg.state.nj.us (last visited Nov. 5, 2004). In a step backward in the progression against charitable immunity, and in response to *Moses v. Diocese of Colorado*, 863 P.2d 310, 331 (Colo. 1993), *cert. denied*, 511 U.S. 1137 (1994) (holding that a church has a fiduciary duty to victims of its clergy), the Colorado legislature considered in 1999 whether to give churches financial immunity in cases involving misconduct by their clergy. H.B. 1290, 62d Gen. Assem., 1st Reg. Sess. (Colo. 1999). The bill was narrowly defeated.

185. In 1997, Congress enacted the Volunteer Protection Act, 42 U.S.C. §§ 14501–05 (2000), which immunizes volunteers from tort liability in certain, limited circumstances. The majority of state statutes follow this approach, with the VPA preempting those state laws that protect volunteers more narrowly. 42 U.S.C. § 14502. Representative Porter (R., Ill.) stated on the floor of the House of Representatives that:

> [T]here are 124 separate charitable organizations that support this legislation very strongly. They range from the American Association of University Women to the American Heart Association, to the American Red Cross, to the American Symphony Orchestra League, to B'nai Brith International, the Girl Scout Council USA, the National Association of Retired Federal Employees, the National Easter Seal Society, the Salvation Army, Save the Children, United Way, the YMCA. Any national organization that one can think of probably is a strong supporter of this legislation.

143 CONG. REC. H3098 (daily ed. May 21, 1997) (statement of Rep. Porter). Britain has not followed the United States' lead on volunteer immunity. *See* Tash Shifrin, *Volunteer Bill 'Could Be Deterrent,'* GUARDIAN, Mar. 5, 2004, *available at* http://society.guardian.co.uk/print/0,3858,4873706-106647,00.html (last visited Nov. 5, 2004) (reporting that the chief executive of Volunteering England said, "We have serious concerns that a bill intended to support and encourage volunteering could have exactly the opposite effect").

186. Those states are Colorado, Massachusetts, and South Carolina. NONPROFIT RISK MANAGEMENT CENTER, *supra* note 160, at 9; *see also* Martin v. Kelley, No. 02-684, 2004 Mass. Super. Ct. LEXIS 277, at *8–9 (Mass. Super. Ct. Aug. 12, 2004) (explaining the tort damages cap of $20,000 imposed on charitable organizations by the Massachusetts legislature in 1971).

B. The Protestant Mindset and the History of Abuses of Power by Religious Institutions Preceding and Informing the First Amendment

Were all religious institutions invariably beneficial to the public, this Article would not need to be written. The rule would be plain: religious institutions need not be deterred from tortious or criminal behavior, and therefore they are immune from suit. While many religious institutions supply important benefits to society, the notion that they are invariably beneficial and therefore need not be subject to society's general constraints on behavior cannot be supported either by history or experience.

No one was more aware of the capacity of religious institutions to harm the public good than the framing generation, many members of which had escaped England and the entrenched religious authorities that had persecuted particular faiths with the aid and acquiescence of the monarchy.[187] Only decades before the first emigrants started across the Atlantic, the Reformation initiated the pitched struggle for sovereign power between the Catholic Church and the Protestant churches.[188] Thus, "[w]hen English settlers first sailed for America in 1584, they carried with them a faith worked out over fifty years of religious turbulence."[189] This turbulence continued well into the next century; religious persecution finally abated when the Puritans rose to power and disbanded the Star Chamber and the High Commission in 1641.[190]

187. *See* HAROLD J. BERMAN, LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION 209–10, 215–16 (2003) [hereinafter BERMAN, PROTESTANT REFORMATIONS]. Between 1630 and 1640, an estimated twenty thousand religious dissenters fled to the Massachusetts Bay Colony, and a similar number emigrated to the Netherlands. *Id.* at 216.

188. The Reformation began on October 31, 1517, with Martin Luther's protest at Wittenberg. It ended at the close of the Thirty Years War in 1648. THE COLUMBIA ENCYCLOPEDIA (6th ed. 2001), *available at* http://www.bartleby.com/65/re/Reformat.html (last visited Nov. 5, 2004).

189. LAMBERT, *supra* note 138, at 38–39. Early attempts at colonization were unsuccessful—settlements founded in Virginia between 1585 and 1587, and again in 1602, were either abandoned or destroyed. *See* EDWARD P. CHEYNEY, A SHORT HISTORY OF ENGLAND 354–55 (1919). Jamestown, Virginia, founded in 1607, was the first permanent English settlement in America. *Id.* at 403.

190. HOLDSWORTH, *supra* note 117, at 611.

During the Tudor and Stuart years, 1485–1714,[191] which encompasses the years immediately preceding and during the colonization of America, the Crown engaged in a systematic suppression of religious dissent and persecution of those whose beliefs differed from the established church. For example, in 1526, Henry VIII divided his King's Council into two branches: a privy council to consider domestic and foreign policy issues, which came to be known as the Star Chamber, and the court of High Commission, which was to address ecclesiastical issues. When Henry VIII officially became the head of the Church eight years later in 1534,[192] he was able to use both commissions, or prerogative courts, to exercise control over religious belief and practice. The unification of church and state made "any deviation from the new religious order a threat to royal supremacy."[193] Thus, heresy and treason became indistinguishable as the Star Chamber, in cases involving "sedition" or "subversion," and the High Commission, in cases involving "heresy," worked in tandem to rid Britain of religious dissenters. "Those who continued to support the authority of the pope, Henry VIII sent to the executioner's chopping block; those who preached new doctrines he sent to the fires at Smithfield."[194] Henry VIII's successors carried on his practices. His son, Edward VI, was only ten when he ascended to the throne on Henry's death in 1547, but the Dukes of Somerset and Northumberland ruled in his name, both promoting Protestantism as the established and sole religion of the realm.[195] The Catholic Queen Mary (1553–1558)

191. *See* CHEYNEY, *supra* note 189, at 383–84.

192. HOLDSWORTH, *supra* note 117, at 591–92.

> The Act of Supremacy [26 Henry VIII. C.I.] recognized the king as "the only Supreme Head in earth of the Church of England," having full power to correct all "errors, heresies, abuses, offences, contempts, and enormities," which by any manner of spiritual authority ought to be reformed; and the form of oath taken under the provisions of this Act denied to the Pope any other authority than that of Bishop of Rome.

Id. The ecclesiastical authorities lost all power save that granted by the king, and ecclesiastical judges no longer needed to be clerics—a move that displaced Rome's canon law. *Id*. at 592.

193. Riebli, *supra* note 116, at 826 (internal quotation marks omitted) (quoting LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 96 (1986)).

194. *Id*.

195. *See* DURANT, THE REFORMATION, *supra* note 138, at 579 (noting that Somerset "favored a Protestant policy"); *id*. at 581, 584 (noting that in 1550, under Warwick who was made Duke of Northumberland in 1551, "[t]he protectorate was now definitely Protestant");

ruled in a country predominated by Protestants,[196] whom she believed invited divine retribution on her reign for their heresy.[197] She atoned for this sin by burning hundreds of Protestants at the stake, including Bishops Cranmer, Ridley, and Latimer, during her short reign.[198]

Protestant Elizabeth I (1558–1603) gained control of a country divided by religion. To reunite the country, she ruthlessly suppressed Catholicism (she was excommunicated by the pope in 1570)[199] through her enforcement of the Acts of Supremacy and Uniformity, which she employed to institute the High Commission, and through her use of the Tower of London to execute heretics.[200] After centuries of sovereign control in Britain, the Catholic Church found itself in the 1570s instructing Catholics to avoid Anglican worship services and to attend their own "despite the penalties for doing so."[201] James I (1603–1625) and Charles I (1625–1649) avidly suppressed religious opposition. Only five years before the end of James I's reign, in 1620, the Mayflower pilgrims sailed for America.[202] Throughout his reign, Charles I aggressively suppressed the Puritans.[203] Abuses by the Star Chamber and the High Commission were legion, and thousands of British citizens left for America (and the Netherlands), bringing with them certain knowledge of the consequences of a government dominated by a single religion.[204] After Charles I refused to convene Parliament from 1629 until 1640, in part because of his fear of the Puritans' growing

id. ("Religious persecution, so long of heretics by Catholics, was now in England, as in Switzerland and Lutheran Germany, of heretics and Catholics by Protestants.").

196. Although "numerically a minority," the Protestants were "financially powerful," and nearly every influential family held property taken from the Catholic Church. *Id*. at 590. *But see id*. at 588 (noting that London, however, was a "half-Protestant city").

197. *See id*. at 595 ("To her simple faith these heresies seemed mortal crimes, far worse than treason.").

198. *Id*. at 597–98 ("[Cranmer's] death marked the zenith of the persecution. Some 300 persons died in its course, 273 of them in the last four years of her reign.").

199. ROBERT E. RODES, JR., LAW AND MODERNIZATION IN THE CHURCH OF ENGLAND: CHARLES II TO THE WELFARE STATE 81 (1991).

200. *See* HOLDSWORTH, *supra* note 117.

201. RODES, *supra* note 199, at 81.

202. 7 THE CAMBRIDGE MODERN HISTORY 13 (W. Ward et al. eds., 1934).

203. Riebli, *supra* note 116, at 826.

204. *See supra* note 187 and accompanying text.

power, the Puritans seized power and soon thereafter abolished the prerogative courts and their abusive practices.[205]

In 1662, during the Restoration, Anglicans and Presbyterians attempted to form a national church, but their effort failed and Presbyterian ministers were expelled.[206] Parliament passed a new Act of Uniformity, and Presbyterian ministers who refused to conform were expelled from their congregations.[207] Dissenting Protestant worship became legal in 1689, but the dissenters were not allowed to hold property to construct churches unless they were subject to the oversight of the Court of Chancery.[208] Not until 1791 were the Catholics given parity with other Protestant dissenters.[209] The inability of the established Anglican Church to answer to the public good when dealing with issues involving taxation, tithing, local government, marriage, education, and charity led to the state's assumption of jurisdiction over those issues.[210] Thus, the public good was the measuring stick that finally transformed Britain from a country with only one recognized religion into one of religious liberty. "English pluralism was the result of a gradual wearing away of a unitary system through concessions made because it seemed right to make them."[211]

The United States, of course, did not begin as a fully pluralistic and tolerant society either. The early colonies and then some of the states, with the notable exception of Pennsylvania, had established churches with corresponding privileges for members and disabilities for dissenters, though there was no Tower of London or Star Chamber and High Commission to force the established church's beliefs on others. The establishments, such as they were, gave way not long after the Constitution and the Bill of Rights were ratified.[212]

205. BERMAN, PROTESTANT REFORMATIONS, *supra* note 187, at 104.

206. *See* RODES, *supra* note 199, at 87.

207. *Id.* The original Act of Uniformity, passed by Elizabeth's Parliament in 1571, required that all Church of England prayers, services, and rites conform to the Book of Common Prayer. *See* LAMBERT, *supra* note 138, at 40.

208. RODES, *supra* note 199, at 88–89.

209. *Id.* at 93.

210. *See id.* at 147. By excluding religious dissenters from these matters and therefore depriving them of a full place in the national life, the Anglican Church was unable to maintain a harmonious combination of religious connection and public concern. *Id.*

211. *Id.* at 147.

212. LEVY, THE ESTABLISHMENT CLAUSE, *supra* note 151, at 25–26, 110–19.

The Establishment Clause is testimony to the founding generation's rational fear of overweening religious power and of the mischief that religious institutions can foster, particularly when they hpld sovereign power. It cannot be, as Carl Esbeck argues, a rule solely intended to protect religious entities.[213] Neither the history leading up to the founding of America nor the Protestant cast of governance theories at the time of the framing supports his conclusion. Indeed, they argue against it.

The dominant mindset of the early Americans was Protestant,[214] and among Protestants, Calvinism predominated.[215] At its most fundamental level, all Protestantism incorporates the view that religious individuals and institutions have the capacity to stray from a holy path onto an evil one.[216] For Protestants, individuals are locked

213. Esbeck, *supra* note 11, at 1576–77.

214. *See* Hamilton, *Direct Democracy*, *supra* note 1, at 394 n.22; *see also* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 246–50 (1967) (discussing the predominant religions in the colonies before the Revolutionary War); ALICE M. BALDWIN, THE NEW ENGLAND CLERGY AND THE AMERICAN REVOLUTION 22–31 (2d ed. 1965) (detailing the social impact of the works of New England clergy before 1763); FRANCIS J. BREMER, SHAPING NEW ENGLAND: PURITAN CLERGYMEN IN SEVENTEENTH CENTURY ENGLAND AND NEW ENGLAND 82–88 (1994) (noting the influence of the clergy on education and government in seventeenth-century New England); GORDON S. WOOD, THE AMERICAN REVOLUTION: A HISTORY 129–35 (2002) (detailing the impact of Protestant ministers at the forefront of the Revolutionary movement); James T. McHugh, *A Liberal Theocracy: Philosophy, Theology, and Utah Constitutional Law*, 60 ALB. L. REV. 1515, 1520 n.16 (1997) (citing BALDWIN, *supra*, at 22–31).

215. *See* Donald S. Lutz, *Religious Dimensions in the Development of American Constitutionalism*, 39 EMORY L.J. 21 (1990). Professor Lutz argued:

> Much of what we now consider mainstream Protestantism in America shared a dissenting, Calvinist base. Except for the southern tidewater region—which was initially dominated by the Church of England—and a large Catholic minority in Maryland, New England, most of the central colonies (including the Dutch, Swedish, and German settlers), and the piedmont region of the South were dominated by essentially Calvinistic sects. This fact is essential when trying to explain the surprising similarity to be found in state constitutions and colonial documents written throughout America. The Calvinist assumptions and commitments were strongest in New England and weakest in the South, but they had their effect in all parts of the country.

Id. at 23–24.

216. The Reformation was instituted by Martin Luther and John Calvin because they believed that the Roman Catholic Church had turned away from all that is holy and become infested with evil. *See, e.g.*, 2 CALVIN, *supra* note 138, at 1141, 1144, 1147 (referring to "corruption of the present-day papacy"; "kingdom of Antichrist"; and "moral abandonment of the popes"). They were Church insiders who initially acted in order to reform the Church

into original sin. According to John Calvin, who along with Martin Luther sparked the Reformation and Protestantism, there was never a moment in history when humans could be trusted blindly to be or do good:

> [L]et us hold this as an undoubted truth which no siege engines can shake: the mind of man has been so completely estranged from God's righteousness that it conceives, desires, and undertakes, only that which is impious, perverted, foul, impure, and infamous. The heart is so steeped in the poison of sin, that it can breathe out nothing but a loathsome stench. But if some men occasionally make a show of good, their minds nevertheless ever remain enveloped in hypocrisy and deceitful craft, and their hearts bound by inner perversity.[217]

Thus, Calvin counseled in favor of a diligent surveillance of one's own actions and the actions of others; he also endorsed the value of the law (both biblical and secular) to guide human behavior away from its propensity to do wrong.[218] Granted, no man could ever live up to all of the law's demands, but it was necessary as a checking measure nonetheless. Calvin's view of human nature was powerfully transmitted to a significant number of Framers—for example, James Madison and Reverend John Witherspoon, who was president of the College of New Jersey, the leading Presbyterian college at the time and now Princeton University.[219]

itself, but the Church proved incapable of sufficiently rapid change to avoid having many of its members leave the Church to follow Luther, Calvin, or other reformation leaders into new churches. The instinct to schism, in response to the perceptions of corruption, has never left the Protestant movement, resulting in the thousands of modern-day sects that continue to divide. *See generally* STEVE BRUCE, A HOUSE DIVIDED: PROTESTANTISM, SCHISM, AND SECULARIZATION (1990).

217. 1 CALVIN, *supra* note 139, at 340.

218. Calvin wrote that the "principal use" of the law was to help believers know the will of God and to incite them to obedience:

> [The law] is the best instrument for enabling them daily to learn with greater truth and certainty what the will of the Lord is. . . . Then, because we need not doctrine merely, but exhortation also, the servant of God will derive this further advantage from the Law: by frequently meditating upon it, he will be excited to obedience, and confirmed in it, and so drawn away form the slippery paths of sin.

Id. at 360–61; *see also id.* ("Even the believers have need of the law."). The depravity of humans, however, never made obedience to the law alone sufficient to ensure redemption. *Id.* at 351–52.

219. *See* Hamilton, Why the People Do Not Rule, *supra* note 1; *see also* Hamilton, *Direct Democracy*, *supra* note 1, at 428–29.

Protestantism equally discounted the likelihood that a religious *institution* could be trusted on its own to serve the public good. "[Protestantism] is essentially an attempt to check the tendency to corruption and degradation which attacks every institutional religion."[220] The early Protestants, after all, were the Catholic dissenters who eventually rejected the sixteenth-century Roman Catholic Church for its malignant ways.[221] The belief that the Catholic Church had led the Christian Church down evil paths was a fervently held belief at the time of the framing as well, with John Adams identifying the "worst tyranny ever invented" as "the Romish superstition."[222]

The attitude of the vast majority of the framing generation on this subject was little different from Calvin's description of the sixteenth-century Roman Church's hubris and unaccountability:

> Because of the primacy of the Roman Church, they say, no one has the right to review the judgments of this See. Likewise: as judge it will be judged neither by emperor, nor by kings, nor by all the clergy, nor by the people. This is the very height of imperiousness for one man to set himself up as judge of all, and suffer himself to obey the judgment of none. But what if he exercise tyranny over God's people? If he scatter and lay waste Christ's Kingdom? If he throw the whole church into confusion? If he turn the pastoral

220. WILLIAM RALPH INGE, PROTESTANTISM 3–5 (1927); *see also* 1 EMILE G. LEONARD, A HISTORY OF PROTESTANTISM: THE REFORMATION 316 (H.H. Rowley ed., Joyce M.H. Reid trans., 1965) (noting that Farel agreed with Luther in condemning institutionalism, saying: "sects, organizations and institutions are born of the flesh"). Wylie explained this theory of Protestantism:

> [Protestants] replaced the authority of the Infallability with the authority of the Word of God. The long and dismal obscuration of centuries they dispelled, that the twin stars of liberty and knowledge might shine forth . . . and human society . . . might, after its halt of a thousand years, resume its march towards its high goal.

1 J.A. WYLIE, THE HISTORY OF PROTESTANTISM 2 (1870).

221. *See* DURANT, THE REFORMATION, *supra* note 138, at 329–33. On the eve of the Reformation in Germany, the Catholic Church was rife with abuses. There had been a breakdown of monastic discipline and clerical celibacy; greedy ecclesiastical authorities increased clerical rents, incomes, and taxes. The higher ecclesiastical orders brazenly displayed their wealth, to the chagrin of the people, "mercenary abuse of sacred things" was common, and hush money was often sent to Rome.

222. *See* CHARLES P. HANSON, NECESSARY VIRTUE: THE PRAGMATIC ORIGINS OF RELIGIOUS LIBERTY IN NEW ENGLAND 11 (1998). *See generally* PHILIP HAMBURGER, THE SEPARATION OF CHURCH AND STATE (2003).

> office into robbery? Nay, though he be utterly wicked, he denies he is bound to give an accounting.[223]

The solution for the wayward path of the Catholic Church, at least according to Calvin, was proper government, a need the early colonial Presbyterians (and Calvinists), identified both in the society and the Church:

> Man's depraved apostate Condition renders Government needful. Needful both in the State and the Church. In the former without Government Anarchy wou'd soon take place with all its wild and dire Effects and Men wou'd be like the Fishes of the Sea where the greater devour the less. Nor is Govern[ment] in the Church less needful than in the State and this for the same Reason.[224]

While drafting the Constitution, Madison—and the Framers in general—had the despotic practices of the Catholic Inquisitors stamped on their political consciousness, a fact proven by Madison's direct reference to the Inquisition in his *Memorial and Remonstrance*,[225] in which he argued against state payment of certain Christian educators as follows:

> Because the proposed establishment is a departure from the generous policy, which, offering an Asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens. What a melancholy mark is the Bill of sudden degeneracy? Instead of holding forth an Asylum to the persecuted, it is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be in its present form from the Inquisition, it differs from it only in degree. The one is the first step, the other the last in the career of intolerance. The magnanimous sufferer under this cruel scourge in foreign Regions, must view the Bill as a Beacon on our Coast, warning him to seek

223. 2 CALVIN, *supra* note 139, at bk. IV, ch. VII, § 19.

224. Leonard J. Kramer, *Presbyterians Approach the American Revolution*, 31 J. PRESBYTERIAN HIST. SOC. 72 (1953) (quoting minutes of the Synod of New England, 1776–82).

225. James Madison, *Memorial and Remonstrance*, *in* 8 THE PAPERS OF JAMES MADISON 301–02 (William T. Hutchinson et al. eds., 1962) [hereinafter Madison, *Memorial*].

> some other haven, where liberty and philanthrophy in their due extent, may offer a more certain respose from his Troubles.[226]

There can be no question that the excesses of the Inquisition (1184–1834), the later Spanish Inquisition (1474–1834), the public executions of those whose faith differed from the Crown in England (1531–1689), and the excesses generated by the unity of power between the monarchies and organized religion were part of the calculus that the framing generation used to calibrate the need for government, the reach of any religious institution's power, and the need to make religious institutions accountable to the public good. Nor can there be question that they believed in placing legal limitations on the religious institutions, because they believed at a visceral level that religious institutions were not worthy of blind trust.

Indeed, Madison's mentor, the Reverend John Witherspoon, explained the history of the United States in the context of the Inquisition:

> [A]t the time of the Reformation when religion began to revive, nothing contributed more to facilitate its reception and increase its progress than the violence of its persecutors. Their cruelty and the patience of the sufferers naturally disposed men to examine and weigh the cause to which they adhered with so much constancy and resolution. At the same time also, when they were persecuted in one city, they fled to another and carried the discoveries of Popish fraud to every part of the world. It was by some of those who were persecuted in Germany that the light of the Reformation was brought so early into Britain.
>
> [T]he violent persecution which many eminent Christians met with in England from their brethren, who called themselves Protestants, drove them in great numbers to a distant part of the New World where the light of the gospel and true religion were unknown.[227]

This historical background informed the framing generation of the qualities of religious organizations under the reign of Pope

226. *Id*. at 302.

227. THE SELECTED WRITINGS OF JOHN WITHERSPOON 135–36 (Thomas Miller ed., 1990). Witherspoon, whose stamp on the Constitution is visible, was also mentor to a number of other Framers. *See generally* Hamilton, Why the People Do Not Rule, *supra* note 1.

Gregory IX (1227–1241). At that time, and in response to the spread of "heretic" beliefs, Roman Catholic bishops conducted medieval "inquisitions" designed to rid France, Germany, and Italy of non-Catholics.[228] Investigation of heresy was the duty of the bishops.[229] The Inquisition, by then known as the Holy Office, is perhaps best known for convicting Galileo at trial in 1633 for his "dangerous" scientific beliefs.[230] Most Inquisition trials resulted in a guilty verdict, and those convicted faced a myriad of horrific punishments, including fines, imprisonment, and death.[231]

The Spanish Inquisition was independent of the medieval Inquisition but was also part of that history the framing generation would have known and used to judge contemporary ideas. The purpose of the Spanish Inquisition was to discover and punish converted Jews (and later Muslims) who were insincere.[232] It was established in 1478 by King Ferdinand and Queen Isabella with the reluctant approval of Pope Sixtus IV.[233] The institution was entirely controlled by the Spanish kings; the Pope's only check on the Inquisition was in appointing the nominees.[234] In 1483, the Crown created a new royal council of the Supreme and General Inquisition to expand its operation throughout Spain. The notorious Tomas de Torquemada was named Inquisitor General—the head of the council—and was responsible for creating branches of the Inquisition in various cities by establishing local tribunals.[235] The Spanish Inquisition was not finally abolished until 1834, nearly sixty years after the Declaration of Independence was signed.[236]

228. WILL DURANT, THE AGE OF FAITH: A HISTORY OF MEDIEVAL CIVILIZATION—CHRISTIAN, ISLAMIC, AND JUDAIC—FROM CONSTANTINE TO DANTE: A.D. 325–1300, at 779 (1950) [hereinafter DURANT, THE AGE OF FAITH].

229. *Id*.

230. WADE ROWLAND, GALILEO'S MISTAKE: A NEW LOOK AT THE EPIC CONFRONTATION BETWEEN GALILEO AND THE CHURCH 249–50, 255–56 (2003).

231. *See* DURANT, THE AGE OF FAITH, *supra* note 228, at 782.

232. *Id*. at 208–09.

233. 2 THE CAMBRIDGE MODERN HISTORY 650 (W. Ward et al. eds., 1934).

234. *See* DURANT, THE AGE OF FAITH, *supra* note 228, at 209.

235. *See* JOHN EDWARD LONGHURST, THE AGE OF TORQUEMADA 77 (1964).

236. *See* 4 HENRY CHARLES LEA, A HISTORY OF THE INQUISITION OF SPAIN 467–68 (1907) (noting that the Spanish Inquisition ended in 1834); 7 THE CAMBRIDGE MODERN HISTORY, *supra* note 233, at 208–09 (noting that the Declaration of Independence was signed in 1776).

The first permanently established English settlement in the United States, in Jamestown, Virginia, was established in 1607, a mere four years after the end of Queen Elizabeth's reign. Only fifty years before, the Tower of London was employed by Catholic Queen Mary (1553–1558) to imprison and execute Protestants, after she revived the heresy laws at the end of 1554.[237] The first Protestant martyr was publicly burned in 1555.[238] Between 250 and 300 were burned alive, while hundreds more were imprisoned.[239] Queen Mary's successor, Protestant Queen Elizabeth I (1558–1603) attempted to ward off Catholic Europe and those who refused to attend Church of England services by incarcerating bishops, archbishops, and others for years.[240] "There were as many executions of Catholics under Elizabeth as there were Protestants under Mary, though over a reign nine times as long."[241] James I (1603–1625) continued to use the Tower as a prison, as the Tudors had done.[242] In 1643, Parliamentarians seized control of the Tower during the Civil War in 1643. Throughout the Restoration, the Tower's function as a state prison declined and it became a military headquarters and munitions storehouse. The last execution was in 1747,[243] long after the first wave of emigrants left for the New World in the late sixteenth and early seventeenth centuries.[244] The Bloody Tower, as it is often called, is a London monument to the British history of religious dominance and intolerance. It was unquestionably stamped on the mindset of any British subject at the

237. 7 THE CAMBRIDGE MODERN HISTORY, *supra* note 233, at 532–33.

238. *Id.* at 533.

239. DURANT, THE AGE OF FAITH, *supra* note 228, at 596–99; *see also* CHEYNEY, *supra* note 189, at 325. The official Web site of the British monarchy places the figure at around 300 executed in three years. History of the Monarchy, *at* http://www.royal.gov.uk/output/Page45.asp (last visited Nov. 5, 2004).

240. 7 THE CAMBRIDGE MODERN HISTORY, *supra* note 233, at 586.

241. *See* JOHN COFFEY, PERSECUTION AND TOLERATION IN PROTESTANT ENGLAND: 1558–1689, at 169–70 (2000).

242. *See* RUSSELL CHAMBERLIN, THE TOWER OF LONDON 68–71 (1989).

243. *Id.* at 78.

244. *See supra* note 187 and accompanying text; *see also* CHAMBERLIN, *supra* note 242, at 78; CHEYNEY, *supra* note 189, at 403. Jamestown, founded in 1607 in Virginia, was the first permanent English settlement in America. Earlier attempts at colonization were unsuccessful—settlements founded in Newfoundland in 1583, in Virginia between 1585 and 1587, and again in Virginia in 1602 were either abandoned or destroyed. *Id.* at 354–55.

time, and scores of those subjects emigrated to the New World. The founding generation and the Framers thought about organized religion in this British context and did not have to leap to reach the conclusions that granting governing power to religion was dangerous and that religious individuals and entities needed to be curbed.

C. John Locke, Thomas Jefferson, James Madison, and John Stuart Mill on the No-Harm Rule

There is nearly universal agreement that the no-harm rule undergirds and justifies criminal law, tort law, and regulatory laws (at least those that prohibit harm to others).[245] The no-harm rule was a notion articulated by John Locke in the seventeenth century, widely shared by the framing generation in the eighteenth century, and entrenched in modern philosophy and law by the influential John Stuart Mill in the nineteenth century.[246] It was further elaborated in the twentieth century by H.L.A. Hart and Joel Feinberg.[247]

John Locke believed in a robust right of conscience, or belief.[248] He then argued that "God is the true proprietor" and therefore human beings could not "belong to one another."[249] From this

245. *See, e.g.*, Epstein, *supra* note 60, at 370–71.

246. *See* M.N.S. SELLERS, AMERICAN REPUBLICANISM: ROMAN IDEOLOGY IN THE UNITED STATES CONSTITUTION 133–41 (1994); SELLERS, SACRED FIRE, *supra* note 1, at 101–02.

247. *See* RICHARD A. EPSTEIN, PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD 50–54 (1998); JOEL FEINBERG, THE MORAL LIMITS OF CRIMINAL LAW (1984); H.L.A. HART, LAW, LIBERTY, AND MORALITY 4–5 (1962); *see also* JOEL FEINBERG, 1 THE MORAL LIMITS OF CRIMINAL LAW 214 (1988); Joel Feinberg, *The Expressive Function of Punishment*, *in* DOING AND DESERVING (1970).

248. Locke described his thoughts on liberty in this letter:

> [L]iberty of conscience is every man's natural right, equally belonging to dissenters as to themselves; and . . . nobody ought to be compelled in matters of religion either by law or force. The establishment of this one thing would take away all ground of complaints and tumults upon account of conscience . . . .

JOHN LOCKE, A LETTER CONCERNING TOLERATION (William Popple trans., 1689), *available at* http://www.constitution.org/jl/tolerati.htm (last visited Nov. 5, 2004).

249. LOCKE, TWO TREATISES, *supra* note 45 ("If human beings belong to God, they cannot belong to one another, or even to themselves. Since God is the true proprietor, no one else has the right to damage or destroy his property."). Russell L. Caplan offers helpful commentary on Locke's ideas:

> Under [Locke's] theory, individuals are born into a "state of nature," that is, without organized government, and agree out of "strong Obligations of Necessity,

precept Locke derived a general "no-harm" principle. Individuals were not to "take away, or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another."[250] For Locke, then, individuals joining together in society had a general liberty of conscience, or belief, but the state legitimately restrained those actions that harmed others.

Locke's no-harm principle was taken as commonplace during the framing era. Thomas Jefferson famously explained, "the legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbour to say there are twenty gods, or no God. It neither picks my pocket nor breaks my leg."[251] Freedom of belief and "free argument and debate" were essential human rights, but, when those "principles break out into overt acts against peace and good order," it is the "rightful purpose[] of civil government, for its officers to interfere."[252] He articulated the same principle when he wrote to James Madison in 1788 to outline the rights he thought necessary to include in a bill of rights. On the one hand, he backed a bill of rights, but he was also conscious that rights had the capacity to "do evil." Thus, he explained what the "freedom of religion" in the bill of rights would (and would not) accomplish: "The declaration that religious faith

> Convenience, and Inclination" to live in political communities. In so contracting, individuals must give up some of their natural rights so that the rest of those rights may be more effectively secured. The sole legitimate purpose of government, therefore, is the good of the contracting parties—the public. Accordingly, government has a right only to act for the benefit of the governed, to protect its citizens from rebellion within and invasion without.

Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 230 (1983).

250. LOCKE, TWO TREATISES, *supra* note 45, at 164; *see also* Caplan, *supra* note 249, at 230.

251. Thomas Jefferson, *Notes on the State of Virginia*, *in* THOMAS JEFFERSON: WRITINGS 123 (Merrill D. Peterson ed., 1984).

252. Thomas Jefferson, *An Act for Establishing Religious Freedom*, *1785*, *in* 12 STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 84, 85 (photo. reprint 1969) (William Waller Hening ed., Richmond 1823). On the absolute right to believe, see also Letter from Thomas Jefferson, to Benjamin Rush (Apr. 21, 1803), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 381 (Albert Ellery Bergh ed., 1905) (referring to "the common right of independent opinion, by answering questions of faith, which the laws have left between god and himself").

shall be unpunished, does not give impunity to criminal acts dictated by religious error."[253]

Many in the framing era were distrustful of religious organizations and clerics.[254] Deists at the time, like Jefferson, believed in Christ but were unwilling to align themselves with any particular organized religion, because in their eyes most organized religions were a corruption of Christianity.[255] Thus, he declared: "To the corruptions of Christianity I am indeed opposed; but not to the genuine precepts of Jesus himself."[256] Among Christians other than Deists, anticlericalism also was an entrenched viewpoint.[257]

James Madison—drafter of the First Amendment—equally recognized the right to complete freedom of belief: "Religious bondage shackles and debilitates the mind and unfits it for every noble enterprise every expanded prospect."[258] He admired the tolerance of religious beliefs in Pennsylvania, which exhibited a "liberal catholic and equitable way of thinking as to the rights of Conscience,"[259] but discussions of "conscience" were discussions about belief, and not conduct.[260] His mentor, the Reverend John Witherspoon, articulated the principle of no-harm in his Lectures on Moral Philosophy as follows: "[A]nother object of civil laws is, limiting citizens in the exercise of their rights, so that they may not be injurious to one another, but that the public good may be promoted."[261]

253. Letter from Thomas Jefferson, to James Madison (Jul. 31, 1788), *in* THE PAPERS OF THOMAS JEFFERSON 440 (Julian P. Boyd et al. eds., 1950).

254. *See supra* notes 187–244 and accompanying text (discussing Protestant mindset).

255. KERRY S. WALTERS, THE AMERICAN DEISTS: VOICES OF REASON AND DISSENT IN THE EARLY REPUBLIC 106–40 (1992). Jefferson, of course, was not solitary in his beliefs. Deists dominated the colleges during the latter eighteenth century. *Id.*

256. Letter from Thomas Jefferson, *supra* note 253, at 380.

257. *See generally* HAMBURGER, *supra* note 222.

258. ADRIENNE KOCH, MADISON'S "ADVICE TO MY COUNTRY" 15 (1966) (internal quotation marks omitted) (quoting James Madison).

259. Letter from James Madison, to William Bradford (Apr. 1, 1774), *in* 1 THE PAPERS OF JAMES MADISON 112 (William T. Hutchinson et al. ed., 1962).

260. *See* Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 893 (1995) ("For virtually all groups [at the founding], conscience was seen as a distinctly rational process; it involved the exercise of human reason, judgment, and understanding. Because of its involvement with human rational processes, conscience involved elements of free will, choice, and (ultimately) human responsibility.").

261. John Witherspoon, *Lectures on Moral Philosophy, Eloquence and Divinity*, *in* 7 THE

In the *Memorial and Remonstrance*, Madison expressed apprehension about the impact of religious institutions on society:

> What influence in fact have ecclesiastical establishments had on Civil Society? In some instances they have been seen to erect a spiritual tyranny on the ruins of the Civil authority; in many instances they have been seen upholding the thrones of political tyranny: in no instance have they been seen the guardians of the liberties of the people. Rulers who wished to subvert the public liberty, may have found an established Clergy convenient auxiliaries.[262]

These concerns dogged him through his distinguished career in public service. At the end of his presidency, he worried publicly that "[t]he danger of silent accumulations & encroachments by Ecclesiastical Bodies have not sufficiently engaged attention in the U.S."[263]

James Madison was particularly harsh regarding the potential abuses of power by both religious institutions and especially the clergy. When backed by state authority, he declared, the clergy "tend to great ignorance and corruption, all of which facilitate the execution of mischievous projects."[264] He castigated the state of liberty at the time: "Poverty and luxury prevail among all sorts: pride, ignorance, and knavery among the priesthood, and vice and wickedness among the laity. . . . That diabolical, Hell-conceived principle of persecution rages among some, and to their eternal infamy, the clergy can furnish their quota of imps for such business."[265]

Jefferson and Madison envisioned the potential for great harm to the public good when a religious organization abuses power.[266]

WORKS OF JOHN WITHERSPOON 148 (1815).

262. Madison, *Memorial*, *supra* note 225, at 301–02.

263. LEVY, THE ESTABLISHMENT CLAUSE, *supra* note 151, at 121 (internal quotation marks omitted) (quoting MADISON'S DETACHED MEMORANDA 554 (Elizabeth Fleet ed., 1946)).

264. Letter from James Madison, *supra* note 259, at 105.

265. *Id.* at 106.

266. *See, e.g.*, Madison, *Memorial*, *supra* note 225, at 298–304. Madison wrote:

> Because experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries has the legal establishment of Christianity been on

Thus, neither they nor their fellow citizens ever contemplated absolute liberty for religious organizations. Indeed, absolute liberty (religious or otherwise) was anarchy and called licentiousness. The early Americans' notions were reasonable in light of their knowledge of the excesses of religious dominance in Europe, including the Inquisition, the Spanish Inquisition, the clash of power between the Catholic and Protestant churches immediately preceding the founding of the New World colonies, and the years of bloody executions at the Tower of London.

As I have documented in a previous article, the dominant view at the time of the framing was to apply the rule of law to the actions of religious individuals and institutions.[267] In other words, the no-harm principle was widely accepted, even among religious believers. The arguments some have made for a mandatory constitutional right to avoid the application of the law to religious conduct, or for the application of strict scrutiny to neutral, generally applicable laws that substantially burden religious entities[268] simply cannot be supported.[269] Church autonomy—in the sense of an independent

> trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy, ignorance and servility in the laity, in both, superstition, bigotry and persecution.

Id. Similarly, Thomas Jefferson wrote:

> Had not the Roman government permitted free inquiry, Christianity could never have been introduced. Had not free inquiry been indulged at the era of the Reformation, the corruptions of Christianity could not have been purged away. If it be restrained now, the present corruptions will be protected, and new ones encouraged.

Jefferson, *supra* note 251, at 221–22.

267. *See generally* Hamilton, *supra* note 12.

268. Laycock, *supra* note 50, at 1416–17; Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1128 (1990); McConnell, *supra* note 13, at 1415 ("[C]onstitutionally compelled exemptions were within the contemplation of the framers and ratifiers as a possible interpretation of the free exercise clause."); *see also* Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555 (1991); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 3 (2000).

269. *See generally* Frederick M. Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L. REV. 555, 574 (1998) ("[T]he historical moment for exemptions has come and gone. There no longer exists a plausible explanation of why religious believers—and only believers—are constitutionally entitled to be excused from complying with otherwise legitimate laws that burden practices . . . ."); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 917 (1992); Hamilton, *supra* note 12; William P.

power to act outside the law—was not part of the Framers' intent, the framing generation's understanding, or the vast majority—and the best—of the Supreme Court's free exercise jurisprudence.[270]

As Justice Scalia explained in *Boerne*, the most plausible reading of early free exercise enactments permitted the application of laws protecting the public good to religious institutions:

> Religious exercise shall be permitted *so long as it does not violate general laws governing conduct*. The "provisos" in the enactments negate a license to act in a manner "unfaithfull to the Lord Proprietary" (Maryland Act Concerning Religion of 1649), or "behav[e]" in other than a "peaceabl[e] and quie[t]" manner (Rhode Island Charter of 1663), or "disturb the public peace" (New Hampshire Constitution), or interfere with the "peace [and] safety of th[e] State" (New York, Maryland, and Georgia Constitutions), or "demea[n]" oneself in other than a "peaceable and orderly manner" (Northwest Ordinance of 1787). At the time these provisos were enacted, keeping "peace" and "order" seems to have meant, precisely, obeying the laws.[271]

In fact, "[e]very breach of a law is against the peace."[272]

However, the no-harm principle was not only advocated in the framing era, but rather has continued to be persistent in American political thought. The most influential philosopher of the nineteenth century in the English-speaking world was John Stuart Mill, who further developed the principle of no-harm. He set forth the

Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 411–12 (1990); Ellis West, *The Case Against a Right to Religious-Based Exemptions*, 4 NOTRE DAME J. L. ETHICS & PUB. POL'Y 591, 624 (1989) (rejecting constitutionally compelled exemptions, but not legislative exemptions); *see also* Gedicks, *supra* note 61, at 950–51 ("[I]n the long run, no effective defense is possible [for judicially mandated exemptions]. To the extent that a residuum of religious exemptions persists under state law . . . , I say enjoy them while they last." (footnote omitted)).

270. The Warren Court's distortion of the Free Exercise Clause from a principle of no-harm to a virtually unfettered individual right was contrary to the intent of the First Amendment and fundamental common sense. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 423 (1963) (Harlan, J., dissenting) ("Those situations in which the Constitution may require special treatment on account of religion are, in my view, few and far between, and this view is amply supported by the course of constitutional litigation in this area.").

271. City of Boerne v. Flores, 521 U.S. 507, 539 (1997) (Scalia, J., concurring) (citations omitted).

272. Queen v. Lane, 87 Eng. Rep. 884, 885 (Q.B. 1704).

following maxims, which came to be known collectively as the Harm Principle:

> [F]irst, that the individual is not accountable to society for his actions, in so far as these concern the interests of no person but himself. . . . Secondly, that for such actions as are prejudicial to the interests of others, the individual is accountable, and may be subjected either to social or to legal punishments, if society is of opinion that the one or the other is requisite for its protection.[273]

Mill thereby refined the Lockean principle. It is a firm rejection of individual (or institutional) autonomy from the laws that protect others.

Mill also advocated absolute dominion over one's mind,[274] which entailed tolerance of conflicting beliefs: "If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind."[275] The universe of actions was divided into two categories: those that will not harm others and those that will. While the former category should not be regulated, the latter category should be.

Where the legislature outlawed actions that harmed no one, Mill's moral philosophy demanded liberty and would have voided the law. But where the legislature outlawed actions that did harm others, the law was valid.

In the 1960s, H.L.A. Hart elaborated upon Mill's views. Hart also believed that the line to be drawn between legitimate laws and illegitimate laws rested on the Harm Principle.[276] Joel Feinberg further developed this theory.[277] By the latter half of the twentieth century, the no-harm rule was widely accepted as the best way to

273. MILL, *supra* note 46, at 114.

274. *Id*. at 11.

275. *Id*. at 18.

276. Hart believed that "[r]ecognition of individual liberty as a value involves, as a minimum, acceptance of the principle that the individual may do what he wants, even if others are distressed when the learn what it is that he does—unless, of course, there are other good grounds for forbidding it." HART, *supra* note 247.

277. *See generally* Joel Feinberg, *The Expressive Function of Punishment*, in DOING AND DESERVING (1970); JOEL FEINBERG, 1 THE MORAL LIMITS OF CRIMINAL LAW 214 (1988).

explain the legitimacy of criminal, tort, and regulatory laws. It remains the dominant approach.[278]

The no-harm reasoning as it developed over the centuries brings the Supreme Court's Religion Clause jurisprudence into better focus. *Reynolds v. United States* was decided soon after Mill's passing.[279] The *Reynolds* decision reflects two of the crucial elements of Mill's reasoning. First, *Reynolds* explicitly recognized the absolute right to believe.[280] Second, it granted the legislature the power to make religious conduct illegal, at least where the religious conduct harmed others.[281] There was no question in the Court's reasoning that the federal antipolygamy statute prevented and punished a severe societal harm.[282]

Mill's third category—that it is immoral to regulate actions that hurt no one else—is not a doctrinal factor in the Supreme Court's religion-clause doctrine, but is implicit in its political theory. The Court in *Employment Division v. Smith* saw a natural limitation on the enactment of laws burdening religious conduct in United States' values:

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.[283]

278. *See* Epstein, *supra* note 60, at 370–71.

279. Mill died in 1873. THE COLUMBIA ENCYCLOPEDIA (6th ed. 2001), *available at* http://www.bartleby.com/65/mi/Mill-JS.html (last visited Nov. 5, 2004). *Reynolds* was decided in 1879. Reynolds v. United States, 98 U.S. 145 (1879).

280. *Reynolds*, 98 U.S. at 164 (determining what the Free Exercise Clause guaranteed, the Court said, "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order").

281. *Id.*

282. *Id.* at 164–66.

283. 494 U.S. 872, 890 (1990).

III. PHILOSOPHICAL AND THEOLOGICAL THEORIES IN SUPPORT OF THE NO-HARM RULE AND AGAINST CHURCH AUTONOMY

Even though history supports the general application of the no-harm principle to religious institutions, various theories might be advanced to justify church autonomy. But an examination of each of these theories leads to the conclusion that the no-harm rule is more grounded and better supported in these theories than the less nuanced notion of church autonomy. Scholars have argued the existence of church autonomy based on various theories, including utilitarianism, deterrence, Catholic thought, and Protestant thought, among others. However, each of these philosophical/theological theories supports the application of the no-harm rule to all individuals in society, including religious institutions and clergy.

One of the missing voices in the discussions concerning the regulation of religious institutions in this conference is a philosophical or theological defense of church autonomy. The defenders of church autonomy tend to assume without explanation that "church autonomy" is a good thing, without delving into a more nuanced defense. As opposed to a notion of church autonomy, the no-harm rule has a lengthy and distinguished philosophical pedigree, as discussed above, and can be justified on both a utilitarian and deontological basis.

Utilitarianism is a branch of consequentialist philosophy[284] by which one judges the rightness of an action according to whether the action leads to the greatest public good.[285] Utilitarianism has been broken down into act utilitarianism and rule utilitarianism. Act utilitarianism analyzes the consequences of each individual act in light of the larger good, weighs those consequences, and then determines the utility of individual actions.[286] Rule utilitarianism, in

284. I am indebted to Mark Tushnet for suggesting this line of inquiry.

285. *See* Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, *reprinted in* A BENTHAM READER 78 (Mary Peter Mack ed., 1969); *see also* Leo Katz, *Root of Formalism: Form and Substance in Law and Morality*, 66 U. CHI. L. REV. 566, 567 (1999).

286. "The creed which accepts as the foundation of morals, Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness." John Stuart Mill, *On Utilitarianism*, *reprinted in* ESSENTIAL WORKS OF JOHN STUART MILL 189, 194 (Max Lerner ed., 1961); *see also* Definition of Act-Utilitarianism, *at* http://www.utilitarianism.com/actutil.htm (last visited Nov. 5, 2004).

contrast, focuses on particular rules and asks which rule, if always followed, would produce the greatest good.[287] In fact, for purposes of legal analysis, these two approaches are virtually identical, and therefore I will use the generic term "utilitarianism" to analyze religious institutions. In either case, ethical choices are made in light of their consequences. Ultimately, church autonomy cannot be defended on utilitarian grounds.

Deontology, or libertarianism, asks a separate question: whether a choice is intrinsically good.[288] For the deontologists, the correct action is not linked inextricably to the question of the public good. Rather, the moral question turns on individual rights and whether the moral choice is good in itself, without reference to a general outcome. Robert Nozick prescribes a libertarian theory that attempts to move beyond anarchy to utopia by identifying "side constraints" on individual action, which are constraints defined by harm done to another individual.[289] Thus, the deontologist asks what would be the best action taken by the church,[290] not whether the church's action is good for society. Nozick includes in the calculation of what is the best action some consideration of "side constraints," a telling and necessary caveat for those libertarians who must live in society (which is all of them). Even under a deontological theory, church autonomy cannot be justified in many circumstances because the intrinsic value of the civil right, for example the protection of children from physical abuse, weighs more heavily in the balance than the intrinsic value of an autonomous religious institution. The rule that forbids harm to others—even at the expense of some autonomy for religious institutions—is favored over autonomy under both philosophical approaches.

287. *See* MILL, *supra* note 46, at 194; JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 88–125 (The Lawbook Exchange, Ltd. 1999) (1832); *see also* Definition of Rule-Utilitarianism, *at* http://www.utilitarianism.com/ruleutil.htm (last visited Nov. 5, 2004).

288. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 33–35 (1974).

289. *Id*. at 32.

290. *See* Brady, *supra* note 11; Lupu & Tuttle, *supra* note 35. Paul Ramsey defends a deontological approach to Christian ethics in his book *Basic Christian Ethics*, 235–45 (1977).

A. Utilitarianism Supports the No-Harm Rule and Does Not Support Church Autonomy

The Supreme Court has operated primarily out of a utilitarian framework in its religious institution cases. Following the guiding principle of no-harm, the Court has permitted religious institutions the broadest rights when the likelihood of involuntary harm to others is at its least—in the belief cases.[291] But the Court also has permitted restrictions of religious institutions when the likelihood that others will be harmed is at its greatest—in the conduct cases.[292] When religious institutions are capable of harming others, the Court has deferred to the legislature's determination of the cost to society and followed the legislature's dictate to restrict the liberty of religious institutions to act.[293]

The use of a utilitarian framework is in fact the best explanation of the Court's decision in *Jones v. Wolf* to permit the application of "neutral principles of law" in contested church property cases.[294] In that case, the Court provided legal guidance for churches in the future to avoid the sort of dispute that prompted the *Jones* litigation:

> Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property

291. *See* Employment Div. v. Smith, 494 U.S. 872, 877–79 (1990).

> "Laws," we said, "are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."

Id. (quoting Reynolds v. United States, 98 U.S. 145, 166–67 (1879)); *see also* McDaniel v. Paty, 435 U.S. 618, 626 (1978) (holding that the government may not impose special disabilities based on religious belief); Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (holding that the government may not compel affirmation of religious belief); United States v. Ballard, 322 U.S. 78, 86–88 (1944) (ruling that the government may not punish those with religious beliefs it believes false).

292. *See Smith*, 494 U.S. at 878–80; Gen. Council on Fin. and Admin. v. Superior Court of California, 439 U.S. 1355, 1372–73 (Rehnquist, Circuit Justice 1978); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (ruling that a mother could be prosecuted under child labor laws); *Reynolds*, 98 U.S. 145, 166 (1879) (upholding a bigamy conviction).

293. *See Smith*, 494 U.S. at 878–80; Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378 (1990); Braunfeld v. Brown, 366 U.S. 599 (1961); *Reynolds*, 98 U.S. at 145; *see also* Jones v. Wolf, 443 U.S. 595, 608 (1979); *Gen. Council*, 439 U.S. at 1372–73 (Rehnquist, Circuit Justice 1978) (denying motion to stay).

294. *See Wolf*, 443 U.S. at 608.

> in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy. In this manner, a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members. [295]

By sketching this legal map, the Court rejected church autonomy in favor of a system in which all of society—including the church and its members—would benefit. If churches followed the Court's principles from the beginning, there would be fewer conflicts, fewer cases, and more stability in terms of church property ownership. The impulse was utilitarian, not autonomy.

The utilitarian asks whether in the legal system the greater good is achieved through more or less restriction of a given institution or practice. Church autonomy, in contrast, would permit religious institutions to operate with a bare minimum of government regulation, on the theory that the public good is best served under such a regime. Church autonomy would argue against imposing a negligence standard on hiring decisions.[296] This conclusion, however, cannot be squared with the utilitarian's question regarding the greater good.

The no-harm rule would tend to support laws that reduce the likelihood that religious institutions will harm others. Its utility lies in its ability to decrease suffering and therefore increase the public good. Examples include torts, regulatory laws, and criminal laws. The no-harm rule has two prongs: belief and conduct, which I will analyze under utilitarianism.

1. Utilitarian analysis of the absolute protection of belief

The absolute protection of belief grants an unlimited right to individuals to believe whatever they choose. The question for utilitarianism is whether such absolute protection also serves the greater good. The absolute protection of belief serves a number of social ends. First, it increases the likelihood that there will be a variety of beliefs from which to choose. In a society of imperfect

295. *Id*. at 603–04.

296. This is in fact the argument made by Professors Lupu and Tuttle at this Conference. *See* Lupu & Tuttle, *supra* note 35.

humans, each with different and limited views, the absolute protection of belief fosters the search for truth.[297] When that belief is translated into speech or political action, religious belief "can be a resource for alternative human visions that challenge and enrich discussion of public policy."[298] Second, it prevents the situation in which those with unusual beliefs are driven to rebel against society, a phenomenon sometimes called the "venting function."[299] Third, it increases the collective creativity of the culture, which furthers industry, the arts, and scholarship.[300]

Failure to absolutely protect beliefs severely undermines society by reducing the robustness of the marketplace of ideas, by creating incentives for original thinkers to violently rebel, and by stifling creativity, and therefore industry, the arts, and scholarship. One might argue, however, that permitting the absolute protection of belief contributes to the dissemination of beliefs that are dangerous if they persuade others to act. It also permits individuals and groups to harbor antisocial beliefs, including racist, violent, and sexist views. However, in the absence of action (in the form of speech or conduct), those beliefs do not harm their targets.

For the utilitarian, these concerns are to be weighed against each other, and while the threat to the culture of dangerous beliefs is not

297. *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–7 (1970); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 880 (1963).

298. Sullivan, *supra* note 2, at 174.

299. *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

> Those who won our independence . . . knew . . . that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.

Id.; THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 12 (1966); Letter from Thomas Jefferson, to Elijah Boardman (July 3, 1801), *quoted in* Charles A. Beard, *The Great American Tradition: A Challenge for the Fourth of July*, 123 NATION 7, 8 (1923) ("We have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors and especially when the law stands ready to punish the first criminal act produced by the false reasonings; these are safer corrections than the conscience of the judge.").

300. The Founders' belief in the importance of this function is evident in the Constitution's limitation of time for copyrights "[t]o promote the Progress of Science and useful Arts." U.S. CONST. art. I, § 8, cl. 8; *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 785–86 (1988).

negligible, the benefits to society are enormous. On a utilitarian analysis, it is difficult to fault the rule favoring the absolute protection of belief.

2. Utilitarian analysis of the regulation of conduct that harms others

I will now apply a utilitarian analysis to a particular legal situation governing religious institutions. It is obvious that under a utilitarian analysis, the most serious crimes, even when done by religious entities, must be capable of regulation. These include murder, rape, theft, kidnapping, and assault. Many have believed that the closer questions arise in the tort context—in particular, liability for negligent hiring where a religious institution failed to do background checks on particular clergy, and the clergy subsequently sexually abused children. I have chosen this example not only because it has contemporary application, but also because the result may not be as crystal clear as issues involving criminal law or regulatory rules affecting safety and health.

If religious institutions were liable for negligent hiring, their liberty to choose clergy would be incrementally reduced by the requirement that they engage in background checks for every eligible clergy. Under utilitarian analysis, then, one must weigh the diminution in liberty against the good arising out of churches having the information provided by background checks.

In this era, the burden on the religious institution of doing a background check on a potential clergy member is not substantial. Businesses routinely do background checks on employees.[301] Day care centers, hospitals, and nursing homes and services are required to do similar background checks.[302] Even families typically do

301. John Bonné, *Most Firms Now Use Background Checks*, MSN News, *at* http://www.msnbc.msn.com/id/4018280 (Jan. 21, 2004) ("A report from the Society for Human Resource Management shows that 80 percent of companies said they run a criminal check on applicants before hiring, up nearly 30 percent from 1996—making the practice as common as checking references or prior work histories.").

302. *See* ILL. ADMIN. CODE. tit. 77 § 250.420 (2003) (requiring hospitals to perform background checks on employees); Julie A. Braun & Cheryl C. Mitchell, *Recent Developments in Seniors' Law*, 34 TORT & INS. L.J. 669, 690 (1999) ("The Elder Care Safety Act of 1997 . . . requires nursing facilities, home health agencies, and hospice programs to conduct criminal and abusive work history background checks for nurse aids and home health aides under the Medicare and Medicaid programs."); Michael Gibbons & Dana Campbell, *Liability*

background checks on those working in the home.[303] Criminal background checks are relatively inexpensive,[304] and because there is so much demand for them, the paths to such information are fairly clear.[305] It is true that criminal background checks will not capture some pedophiles, so in order to avoid being found negligent, the religious institution may have to do more. This could include old-fashioned methods of checking potential employees, such as contacting references and asking about character, or more specifically, asking why a seminarian or priest was reassigned from a previous position. Even these old-fashioned methods are not particularly onerous, and they present a negligible burden compared to the harm that the duty is intended to prevent. Psychological testing is also likely to be necessary to avoid charges of negligence. Many religious institutions already impose such testing on their candidates.[306]

of Recreation and Competitive Sport Organizations for Sexual Assaults on Children by Administrators, Coaches and Volunteers, 13 J. LEGAL ASPECTS SPORT 185, 209 (2003) ("[M]ost states require teachers and day care workers to undergo background checks as a condition of their employment."); Tony Fong, *Necessary Knowledge*, NAT'L COUNCIL OF STATE BDS. OF NURSING, *available at* http://www.ncsbn.org/news/ncsbninthenews_55E82069B54E4876928D9B9E331FD235.htm (last visited Oct. 14, 2004) ("Currently, hospitals must check with the National Practitioner Data Bank when they hire doctors. The databank contains information about criminal convictions, license suspensions and medical fraud convictions on doctors' records.").

303. There are many services that perform preemployment screening for in-home employees like nannies and housekeepers. The fees associated with these services depend on the number and depth of checks requested, but most basic screenings cost around fifty dollars. *See, e.g.*, http://www.nannycheck.com (last visited Nov. 5, 2004).

304. *See* Richard Burnett, *Do a Thorough Background Check on Workers—or Let the Hirer Beware*, Bankrate.com (May 15, 2000), *at* http://www.bankrate.com/brm/news/biz/Biz_ops/20000515.asp ("It doesn't take a Big 5 accountant or a rocket scientist to figure the value of pre-employment background checks. It's simple. Pay as little as $15 to run a basic criminal record check.").

305. *See generally* http://www.backgroundchecks.com (last visited Nov. 5, 2004) (offering several options for background checks, including a "US OneSEARCH Sex Offender" search, which allows subscribers to simultaneously search sex offender records of thirty-nine states).

306. For example, the Evangelical Presbyterian Church requires candidates for the ministerial positions to submit "cop[ies] of physical examination from physician and psychological assessment results." PROCEDURE MANUAL FOR MINISTERIAL AND CANDIDATES COMMITTEES 27–28 (2003), *available at* http://www.epc.org/general-assembly/documents/Procedure-Manual.pdf (last visited Nov. 5, 2004). One of the recommendations of the Catholic Church's Lay Review Board was to institute more intense screening of seminary candidates. NATIONAL REVIEW BOARD FOR THE PROTECTION OF CHILDREN AND

On the other side of the scale and weighing against requiring background checks are the cost to the religious institution's freedom to choose whomever it wishes to be a clergy member and the financial cost of the background checks. As discussed above, the financial cost is de minimis. The restriction on freedom posed by background checks is also minimal. Negligent hiring liability, especially when the concern is to prevent criminal child abuse does not dictate who can be chosen as clergy, but rather only requires that the religious institution know the background of those it places in positions of authority in proximity to children. The religious institution remains free to place its clergy where its theology directs, but it assumes the risk if harm results when it either fails to obtain the information that was available regarding the danger of the individual to children and certainly when it knowingly ignores such information. The knowledge gleaned from the background check—if used—is likely to save the religious institution money in the long run. Because the potential liability would encourage religious institutions to place fewer individuals who abuse children in positions of power, the cost to the institution of litigation arising from child abuse would decline. The cost of litigation following clergy abuse is likely to be far higher than the cost of the background check and more costly than the de minimis restriction on the religious institution's actions. Weighing the benefits that flow from the restriction against its costs, it would appear that negligent hiring liability is not contrary to the best interests of religious institutions and is clearly in favor of children's welfare.[307]

The religious institutions, however, are likely to respond that the cost of background checks may be de minimis, but there are other elements of the tort law governing employment that do not impose such a small cost. For example, religious organizations are fighting the imposition of punitive damages in clergy abuse cases.[308] While

YOUNG PEOPLE, A REPORT ON THE CRISIS IN THE CATHOLIC CHURCH IN THE UNITED STATES 140–41 (2004), *available at* http://www.usccb.org/nrb/nrbstudy/nrbreport.pdf (last visited Nov. 5, 2004) [hereinafter REPORT ON THE CRISIS IN THE CATHOLIC CHURCH].

307. *See* Tremper, *supra* note 157, at 439 ("Failure to hold charitable actors sufficiently responsible for their injury-causing activities may also threaten the legitimacy of the charitable sector. Thus, the tort rules for charitable actors should comport at least roughly with moral intuitions about responsibility and justice.").

308. In cases where punitives have been proven under standing law, they have been

the monetary cost of a background check is small, punitive damages can be quite large. The benefit of the damages lies in their power to deter future bad behavior and to punish the person for their wrongful action.[309] In the case of imposing punitive damages against the Catholic Church for the tortious actions of abusive priests, the justification is the same as that of any other master/servant relationship: "the imposition of punitive damages upon the employer serves as a deterrent to the employment of unfit persons for important positions."[310]

Opponents argue that such funds were never intended for abuse victims, and that they should go toward the good works for which they were originally intended. In effect, they are arguing that the funds' intended purposes are greater in value than the deterrence value of a punitive damage award. They are asking the courts to weigh more heavily in the balance their contributing members than their victims. The cost being claimed is that the institution cannot choose at will where its funds are directed. The institution, however, created the choice by permitting the victimization of children, so to now argue that punitives burden the choice is specious. Indeed, if that is their world view, deterrence is even more necessary than it might have been thought previously. This argument is attractive to many on its surface, but it shows how important it is to hold the

permitted to go forward. *See* Isely v. Capuchin Province, 880 F. Supp. 1138, 1159 (E.D. Mich. 1995) (deciding to submit punitive damages to jury for "non-abusing" defendant church because, under the law of Wisconsin, punitive damages are only "available when the defendant acts in wanton, willful, or reckless disregard," and the plaintiff did not meet the clear and convincing standard); Roman Catholic Diocese v. Secter, 966 S.W.2d 286, 291 (Ky. Ct. App. 1998) (rejecting Archdiocese argument and upholding punitive damage award of $700,000 on appeal); Mrozka v. Archdiocese of St. Paul & Minneapolis, 482 N.W.2d 806, 812–13 (Minn. Ct. App. 1992) (upholding punitive damage award for clergy sexual abuse in the face of archdiocese argument that punitive damages were inappropriate where the jury originally awarded $2,700,000 in punitive damages, but reducing the award to $187,000); Hutchison *ex rel.* Hutchison v. Luddy, 742 A.2d 1052, 1059 (Pa. 1999) (vacating order of Superior Court that reversed a jury's award of punitive damages in the amount of $1,050,000 against bishop and archdiocese because the Supreme Court found "[t]heir inaction in the face of such a menace is not only negligent, [but] it is reckless and abhorrent"); *see also* Associated Press, *Legal Group Argues Church Shouldn't Pay Punitive Damages in Lawsuits*, Sept. 1, 2004, *available at* http://www.azcentral.com/news/articles/0901churchlawsuits-ON.html (last visited Sept. 4, 2004) (reporting The Becket Fund's filing of an amicus brief against punitive damages in a recent Arizona clergy abuse case).

309. RESTATEMENT (SECOND) OF TORTS § 908(1) (1979).

310. *Id.* § 909, cmt. b.

institution liable to punitive damages in these cases. If the institution is culpable, and believers know that their donations are at risk, then perhaps they will monitor their own institution better and discard the blind trust that permits their institution to operate in such a reprehensible way that its actions justify punitive damages.

Even if a religious institution could show that the cost of the background check or of the punitive damages would bankrupt the church and even put it out of existence, the religious institution cannot win under a utilitarian analysis. It is difficult to imagine a more important social interest than protecting children from physical and sexual abuse. The interest is even higher when the children are likely to trust the individuals who would abuse them, as in the case of clergy. Clergy hold special places of privilege in their religious circles, which means that negligently letting a pedophile into the circle puts children at greater risk than if the individual were a clerk at a store. Even when weighing the interest of the children in being protected from pedophiles in positions of trust against the continued existence of a particular religious institution, the religious institution loses. Indeed, it would be unconstitutional for a legislature to take a position on whether a religious institution flourishes or expires. In the United States, religious institutions are part of a public market in belief, and it is the people, as believers, that choose whether a church will flourish or not, not the government. The government has no legitimate interest in choosing public policy based on the religious institution's continued existence, especially where that policy has been threatened by the institution's own decisions. Thus, when a religious institution is decimated by its illegal actions, society is not harmed by the disappearance of that one institution. This is not a threat to the marketplace in religions per se, because the vast majority of religious institutions (and individuals) will be law-abiding.

A cost-benefit analysis, however, is insufficient to fully answer the utilitarian question, which also requires the determination whether society at large will be better off with the rule. The cost to society of clergy abuse is enormous, and includes the victim's (the family's and the community's) physical and emotional suffering, the cost of therapy and treatment, the reduced productivity of the victim in later life, and the cost of prosecuting the perpetrators and litigating civil

harms. The increased costs in time and effort to the religious institution to obtain background checks simply cannot compare. In light of the extreme cost to society, the cost of punitive damages also fails to weigh in favor of autonomy. The greater good is served even when the religious institution bears a substantial financial burden.

B. The Libertarian Approach to the No-Harm Rule

The libertarian's or deontologist's approach is different from the utilitarian's in method, but not in outcome. The libertarian examines the intrinsic good in the rule and the actions governed.

1. The absolute protection of belief

The first prong of the no-harm rule, that belief is absolutely protected, is in fact a restatement of strict libertarianism. It protects liberty without any possibility of regulation.

2. The libertarian analysis of the rule permitting conduct to be regulated

Deontology would ask first whether imposing background checks on a church violates that church's intrinsic right to autonomy and whether the rule that religious institutions must investigate the backgrounds of potential clergy is intrinsically good. The intrinsic good of the rule favoring background checks lies in the civil rights of children, which have been codified in the international United Nations Convention on the Rights of the Child.[311] The rights of the

311. The international *Convention on the Rights of the Child*, which codifies the customary international law of children's civil rights, was adopted and opened for signature, ratification, and accession by G.A. Res. 94/25, U.N. GAOR (Nov. 20, 1989). It entered into force on September 20, 1990. Convention of the Rights of the Child, Nov. 20, 1989, U.N. 28 I.L.M. 1448 [hereinafter Convention on the Rights of the Child]. The Convention, among other things, makes the best interest of the child a primary consideration of courts and administrative bodies, ensures the protection and care of the child necessary for his or her well-being, and requires "that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision." *Id.* at art. 3. Additionally, the Convention requires the protection of children "from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) *or any other person* who has the care of the child." *Id.* at art. 19 (emphasis added). The protective measures should include judicial involvement when appropriate. The

religious institution reside in the libertarian notion of freedom from government and judicial involvement in all matters pertaining to clergy, or, more narrowly, the right to be free from any rule akin to a licensing requirement.[312] There is a problem for deontology in general when rights must be weighed against each other, because the theory in some of its versions rests on an assumption that rights are intrinsic, and therefore unassailable.[313]

In this situation, however, weighing rights against each other is unavoidable. Deontology thus weighs two civil rights against each other: the church's liberty interest or right to be free from any government oversight (or any rule even remotely akin to licensure), and the rights of the child to be free from sexual abuse. The rights of the child include having public policy interests considered in the "best interest of the child."[314] The best interest of the child demands that religious institutions take reasonable steps to obtain information to judge whether a particular employee in proximity of children is in the best interest of children. On this reasoning, encouraging background checks through tort liability would seem quite valuable. The deontological right of the religious institution, on the other hand, is more attenuated. While there may be a right based in libertarian notions to be free from some government or judicial involvement, there can be no absolute right. For example, there can be no question that the right of a religious institution to be free from judicial oversight cannot extend to murder.

Perhaps, however, the religious institution would nuance its argument by asserting that it is not claiming absolute liberty, but rather the solitary right to determine who its clergy are and to determine the reasons for choosing clergy and for dismissing them.

United States is a signatory to the Convention; to date, however, the Senate has not yet ratified the treaty. The United States and Somalia are the only countries to sign the treaty but fail to ratify it. 1 Multilateral Treaties Deposited with the Secretary-General, pt. I, at 283, U.N. Doc. ST/LEG/SER.E/21. The treaty's provisions, however, reflect international consensus on its principles, and therefore, even without ratification, the United States is bound by its principles as a matter of customary international law. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102 (1987).

312. Lupu & Tuttle, *supra* note 35.

313. *See generally* Kenneth W. Simons, *Deontology, Negligence, Tort and Crime*, 76 B.U. L. REV. 273 (1996).

314. *See* Convention on the Rights of the Child, *supra* note 311, at 1450.

Background checks infringe on that right by adding another criterion for decision. This is a typical argument in clergy abuse cases. This argument, though, is a red herring, because it is no different from the argument for absolute liberty. The only difference is that here the religious institution is suggesting that it should be immunized regardless of the consequences of its religious decisions in placing clergy. In effect, the interests of the child, on this understanding, are completely subjugated to a right to place clergy at will.

No civilized society could tolerate such liberty or licentiousness, and therefore no respectable theory—not even Nozick's libertarian approach—advocates absolute liberty of conduct. Nozick follows the libertarian path but then draws the line on liberty by introducing the concept of "side constraints" on one's actions. He articulates the same no-harm principle present in Locke, Madison, Jefferson, and Mill: "Side constraints express the inviolability of other persons."[315] In other words, one person's liberty ends when another person is violated, and rights determinations involve line drawing, not absolutism. The introduction of side constraints into libertarian theory transforms Nozick's theory into one that is consistent with the Supreme Court's recognition of ordered, rather than absolute, liberty.

Professors Lupu and Tuttle suggest that imposing negligent hiring theories and an obligation to engage in background checks on religious organizations is tantamount to a licensing scheme, which has been disfavored in constitutional analysis.[316] The problem with their approach, however, is twofold. First, their analysis begs the question by relabeling the tort in disfavored First Amendment terms. Second, their argument glosses over dispositive differences. A true licensing scheme would have the government choosing and releasing clergy members at will, or would give the government the final word on who will be a clergy member. In that circumstance, the religious organization's decisionmaking has been taken over by the government, leading to obvious Establishment Clause concerns. The serious problems with such a licensing scheme, however, do not

315. NOZICK, *supra* note 288, at 32.

316. *See* Lupu & Tuttle, *supra* note 35 (justifying a rule against negligent hiring liability on the theory that it is tantamount to a licensing scheme).

necessarily translate into an argument against tort theories that encourage background checks.

The two legal regimes are quite distinct: In the licensing scheme, the religious institution's decisions are displaced by the government. Under the tort theory, the religious institution makes its own decisions but is held responsible for the harm its conduct produces. The former dishonors the absolute right to believe, by letting the government make the choice. In contrast, the latter honors the right to believe and, at the same time, the right of others to avoid harm.

Thus, even with a tort, like a negligent hiring theory, by encouraging background checks, the religious institution retains the right to choose its clergy. If it chooses those whom it knows are potential pedophiles, it simply assumes the risk. That is liberty, even if it is the sort of liberty freighted with social responsibility, such as the liberty identified by libertarian Nozick.[317]

Both the utilitarian and the deontological philosophical theories respect and support the rule of no-harm to others. In contrast, the church autonomy theory is difficult to defend under either theory. A pure libertarian theory, without Nozick's side constraints, would favor the church autonomy notion however. But even Nozick does not favor a regime of unrestrained licentiousness. That sort of libertarianism cannot be squared with a society of equals in a republican form of government; at a minimum, individuals must be charged with the responsibility of avoiding harm to others.

C. Deterrence Theory, Which Is Based on a No-Harm Principle, Does Not Support Church Autonomy

Professor Brady argues that church autonomy is necessary because churches provide important benefits to society.[318] Professors Lupu and Tuttle argue in favor of a default rule, akin to that employed in *New York Times v. Sullivan*, in order to avoid even the semblance of a clergy licensing scheme.[319] What neither theory

317. *See generally* NOZICK, *supra* note 288, at 32; Carmella, *supra* note 9, at 1033.

318. *See* Brady, *supra* note 11.

319. *See* Lupu & Tuttle, *supra* note 35; *see also* N.Y. Times v. Sullivan, 376 U.S 254, 281–82 (1964) ("Any one claiming to be defamed by the communication must show actual malice or go remediless. This privilege extends to a great variety of subjects, and includes

adequately takes into account is the human character of religious institutions. Religious institutions are not merely religious, as in holy, or focused on higher values. Many are beneficent in various ways, to be sure, but beneficence is not even necessarily the religious institution's primary or dominant character when the focus is the public good. These are complex institutions that are run and staffed by humans who are inherently imperfect. This reality is, after all, the world view on which the constitutional scheme is based.[320] According to the Framers, humans are inherently likely to abuse whatever power they hold, and only a structured society based on the rule of law, and a structured Constitution pitting various power centers against each other, could forestall the inevitable temptations to abuse power.[321] Unlike government, which is checked by constitutional structures and principles, religious institutions and individuals are private entities and therefore, if they are to be checked, the rule of law must be applied. So long as the law does not target the religious institution, or religion in general, and so long as it does not mandate particular beliefs, it is the obligation of the courts to apply the law.[322] Far from being constitutionally required, exemptions are the task of the legislatures, which have the institutional capacity to consider whether exempting religious institutions burdened by particular laws is consistent with the public good.[323]

Much of the law exists to deter harm before it happens and to punish conduct when it renders harm; laws directed at harm include criminal, tort, and regulatory laws. "The 'prophylactic factor' of preventing future harm—that is, punishment and deterrence—has

matters of public concern, public men, and candidates for office." (internal quotations and citations omitted)).

320. *See generally* Hamilton, *supra* note 149 (discussing the paradox of hope and distrust at the base of constitutional vision). Indeed, Professor Lupu has made this very point in past writings. *See* Lupu, *supra* note 29 (describing the likelihood that religious institutions will use church autonomy to hide secular and illegal activities).

321. Hamilton, *supra* note 149.

322. *See* Locke v. Davey, 124 S. Ct. 1307, 1315 (2004); City of Boerne v. Flores, 521 U.S. 507, 529 (1997); Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993); Employment Div. v. Smith, 494 U.S. 872, 879 (1990).

323. *See infra* Part IV, notes 412–15, 482 and accompanying text; *see also supra* note 269 (listing articles opposed to judicially compelled exemptions).

always been an important reason for imposing tort liability."[324] Indeed, "[t]hese factors—punishment and deterrence—are obviously more important in situations in which the defendant has the clear ability to prevent the harm, so imposing liability will effectively and efficiently result in deterrence and therefore less future harm."[325] As I will discuss in more detail in Part IV, the recent clergy abuse litigation has revealed that Catholic Church authorities were aware that known child sexual abusers were working closely with children in their parishes.[326] These authorities had the ability to prevent the harm, but they did not. The Church's Lay Review Board found the Church's actions shocking,[327] and those actions are difficult to explain in the context of this society. One gets a sense that the social irresponsibility of their actions arose out of a sense of exceptionalism and perhaps even the vestiges of the clergy privilege and the ecclesiastical courts. Imposing liability on such negligent hiring, supervision, and retention decisions will effectively result in deterrence and less future harm to children.

Church autonomy reduces both deterrence and punishment for religious institutions and, as a result, increases the potential and likely harm to others. When left autonomous, i.e., unaccountable to the public good identified by the common law and the legislatures, religious institutions are left to rely on their own devices to deter criminal behavior. Yet, self-policing is never a successful gambit for securing the public good.[328] Over time, the United States has learned

324. Deana A. Pollard, *Wrongful Analysis in Wrongful Life Jurisprudence*, 55 ALA. L. REV. 327, 369 (2004); *see also* notes 65–67 and accompanying text. *See generally* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 149 (6th ed. 2002); GUIDO CALABRESI, THE COST OF ACCIDENTS 135 (1970).

325. Pollard, *supra* note 324, at 339.

326. *See generally* Richard Sipe, *Priests, Celibacy, and Sexuality: Preliminary Expert Report* (unpublished manuscript, on file with author).

327. REPORT ON THE CRISIS IN THE CATHOLIC CHURCH, *supra* note 306, at 91–93.

328. It has taken lawsuits against religious institutions for society to learn about pervasive child abuse and subsequent cover-ups in various institutions. *See, e.g.*, *Jury Awards $37M in Sex Abuse by Texas Minister*, BOSTON GLOBE, Apr. 23, 2004, at A4 (detailing a verdict for nine boys against the Lutheran minister who abused them); *Mormon Church To Pay $3 Million in Sex Abuse*, L.A. TIMES, Sept. 5, 2001, at A10; *Spotlight Investigation: Abuse in the Catholic Church*, BOSTON GLOBE, *available at* http://www.boston.com/globe/spotlight/abuse (last visited Nov. 5, 2004) (chronicling the scandal and lawsuits against the Catholic Church since January 2002); *see also* Marci A. Hamilton, *Shockingly, Only 2% of Catholic Clergy*

that it is not sound policy to leave self-policing to attorneys, doctors, accountants, daycare centers, charities, or corporations.[329] Each group has strong incentives to protect their own, and institutions in particular operate to perpetuate themselves.[330] There must be both internal and external checks on the natural inclination to abuse power.[331]

The burden rests on those who would grant churches autonomy from the law, or even individual laws, to prove that churches are sufficiently distinct from other institutions—in terms of the likelihood of their bad acts—to justify a diminished need for deterrence and punishment. While Professor Brady is undoubtedly correct that religious institutions make important contributions to society, so do all of the regulated groups listed above, from attorneys to day care centers. What she fails to prove is that religious institutions are less likely to harm the public good than other organizations. For the Christian realist Reinhold Niebuhr, that is an

Sexual Abusers Were Ever Jailed: A Demonstration that the Self-Policing of Criminal Behavior Will Never Work (Mar. 11, 2004), *available at* http://writ.news.findlaw.com/hamilton/20040311.html (last visited Oct. 14, 2004).

329. *See, e.g.*, Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (protecting investors by improving the accuracy and reliability of corporate disclosure made pursuant to securities laws); MODEL CODE OF PROF'L RESPONSIBILITY (2003) (many states follow the model code in their attorney ethics laws); Code of Medical Ethics (American Medical Association 2001) ("a body of ethical statements developed primarily for the benefit of the patient"); Code of Ethics and Statement of Policy Implementation & Enforcement of Ethical Requirements (International Federation of Accountants 2001) (model code which "endorses the concepts of objectivity, integrity, and professional competence and highlights how all accountants can attain the highest levels of performance in meeting their responsibilities to the public"), *available at* http://www.ifac.org/Ethics (last visited Nov. 11, 2004); National Association for the Education of Young Children (NAEYC) Code of Ethical Conduct (1997) (describing "guidelines for responsible behavior and set[ting] forth a common basis for resolving the principal ethical dilemmas encountered in early childhood care and education"), *available at* http://www.naeyc.org/resources/position_statements/pseth98.htm (last visited Nov. 5, 2004); Standards for Charity Accountability (Better Business Bureau Wise Giving Alliance 2003) (developed to "encourage fair and honest solicitation practices, to promote ethical conduct by charitable organizations and to advance support of philanthropy"), *available at* http://www.give.org/standards/newcbbbstds.asp (last visited Nov. 11, 2004).

330. Of course, the best, most recent example of this phenomenon lies in the Catholic Church's clergy abuse era, described in Part IV. *See also* DAVID BLOOR, WITTGENSTEIN, RULES AND INSTITUTIONS 32–35 (1997) (discussing the "collective pattern of self-referring activity" of institutions).

331. This is the same calculus employed by the Framers in crafting the Constitution. *See* Hamilton, *supra* note 149, at 293.

impossible burden to bear. Though one might find a religious individual capable of behaving selflessly in some circumstances, documenting such perfect behavior is a fruitless exercise.[332] Indeed, Lord Acton's phrase "Power tends to corrupt, and absolute power corrupts absolutely"[333] is as applicable to individuals in religious institutions as it is to those in secular institutions.

Examples of corruption are readily apparent; religious belief and institutions have been and continue to be an impetus to war and terrorism around the globe.[334] In the United States alone, religious groups have been responsible for the September 11th attacks that killed over 3,000 individuals,[335] the sexual abuse of children in the Catholic Church at a rate at least twice that of the average population,[336] and the death of children from easily treatable diseases or from severely misguided attempts at healing.[337] Adequate deterrence in all three of these categories cannot be achieved through autonomy and depends on the consistent application of both criminal and tort liability.

332. REINHOLD NIEBUHR, MORAL MAN AND IMMORAL SOCIETY 3–4 (1932) (discussing human nature and the fact that "sentiments of benevolence and social goodwill will never be so pure or powerful, and the rational capacity to consider the rights and needs of others . . . will never be so fully developed as to create . . . . [a] social utopia").

333. OXFORD DICTIONARY OF QUOTATIONS 1 (5th ed. 1999).

334. These wars include, to name just a few, the Crusades, the Inquisition, the Spanish Inquisition, the Yugoslavian breakup, and the Irish War between Protestants and Catholics. *See* John L. Esposito, *Practice and Theory*, *in* ISLAM AND THE CHALLENGE OF DEMOCRACY (Joshua Cohen & Deborah Cashman eds., 2004); RELIGION AND POLITICS IN SOCIETY 8 (Michael Kelly & Lynn M. Messina eds., 2002) (discussing "religious fault zones" including the Middle East, the southern Sahara, the Balkans, and central and southern Asia, among others); MICHAEL A. SELLS, THE BRIDGE BETRAYED: RELIGION AND GENOCIDE IN BOSNIA 89–92 (1996) (discussing the role of religion in the genocide that occurred during the Bosnian war). *See generally* RICHARD S. DUNN, THE AGE OF RELIGIOUS WARS 1559–1725 (1980).

335. *See* Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001, S. REP. NO. 107-351 and H.R. REP. NO. 107-792 (2003).

336. *See* JOHN JAY COLLEGE OF CRIMINAL JUSTICE, THE NATURE AND SCOPE OF THE PROBLEM OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS AND DEACONS IN THE UNITED STATES 18 (2004), *available at* http://www.nccbuscc.org/nrb/johnjaystudy (last visited Nov. 5, 2004).

337. *See* Seth Asser & Rita Swan, *Child Fatalities from Religion-Motivated Medical Neglect*, 101 PEDIATRICS 625, 625–29 (1988); *see also* CNN, *Autistic Boy Dies at Faith Healing Service*, Aug. 25, 2003, *available at* http://www.cnn.com/2003/US/Midwest/08/24/autistic.boy.death.

D. Catholic Social Thought, or the Doctrine of Subsidiarity, Is Based on a No-Harm Principle

The Catholic Church's precepts reject autonomy in the face of violations of public order: "[T]he state may intervene in intermediate communities in order to protect individuals. Communities have power; they should use that power to benefit people, not to harm people."[338] These precepts reflect the republican principles articulated at the beginning of this Article: "[S]ociety has the right to defend itself against possible abuses committed on the pretext of freedom of religion. It is the special duty of government to provide this protection."[339] When a religious institution's actions violate public order, the action "ceases to be religious exercise and becomes a penal offense."[340]

Pope Pius XI initiated what has become known as Catholic Social Thought in 1931.[341] Catholic Social Thought, and in particular the theory of subsidiarity, leads to the identical theory of the good republican government enunciated in the first sentence of this Article: "The attainment of the common good is the sole reason for the existence of civil authorities."[342] Catholic theory advocates the protection of freedom but simultaneously the necessity of legal intervention to prevent harm. "[C]hurches may 'govern themselves

338. Robert F. Cochran, *Tort Law and Intermediate Communities: Calvinist and Catholic Insights*, *in* CHRISTIAN PERSPECTIVES, *supra* note 4, at 498 ("In some situations, where communities have caused harm to people, the state should provide a remedy to the injured party.").

339. John Courtney Murray, S.J., *Annotations to Declaration on Religious Freedom*, *in* THE DOCUMENTS OF VATICAN II 675, 686 n.20 (Walter M. Abbott, S.J. ed., 1966) [hereinafter DOCUMENTS].

340. *Id.*

341. Quadragesimo Anno, *Encyclical of Pope Pius XI on Reconstruction of the Social Order*, *reprinted in* THE PAPAL ENCYCLICALS 1909–1939, at 415–42 (Claudia Carlen Ihm ed., 1981).

342. Angela C. Carmella, *A Catholic View of Law and Justice*, *in* CHRISTIAN PERSPECTIVES, *supra* note 4, at 265.

> Given our essential dignity, intelligence, free will, and social character, Catholic social doctrine offers a catalogue of rights and duties that 'flow[] directly and simultaneously from [our] very nature'. . . . The church recognizes . . . the right to participate in public affairs and contribute to the common good; and the right to juridical protection of these rights.

Id. (quoting Pope John XXIII, *Pacem in Terris* [Peace on Earth] 9 (1963), *reprinted in* THE GOSPEL OF PEACE AND JUSTICE 201, 203 (J. Gremillion ed., 1975)).

according to their own norms . . . [and] have the right not to be hindered, either by legal measures or by administrative action on the part of government, in the selection, training, appointment, and transferal of their own ministers.'"[343] But this principle of liberty is limited in turn by a principle of social responsibility: "[A]ll freedoms enjoyed by churches are subject to restriction whenever religious conduct violates the public order."[344]

The theory of subsidiarity rests in the first instance on the theology of original sin, which has been paraphrased as follows: "man is a self-centred creature. He can be trusted to abuse his freedom."[345]

> If the Christian conception of human dignity demands that people have the right to exercise as much control as possible over their own lives, then the Christian doctrine of original sin acknowledges that they will misuse that control and opt for morally dubious or unacceptable outcomes. Government is therefore necessary in order to restrain such sinful tendencies. However, because government itself is subject to the same sinful tendencies, it is right that it should be limited, by principles such as the Rule of Law and the Separation of Powers, in order that its potential for great harm may be constrained.[346]

Catholic Social Thought makes no exception for religious individuals or institutions on this theory. "Catholic teachings embrace both the affirmative duty (owed not to the state but to God) of church leaders to behave morally and promote the common good in conditions of freedom, and the recognition of the legitimate role of the state to limit that freedom in some circumstances."[347] This means that they, too, are rightly subject to the rule of law.[348] Thus, law must be applied to all citizens as enacted through accountable governmental

343. Carmella, *supra* note 9, at 1048 (quoting *Declaration of Religious Freedom*, *in* DOCUMENTS, *supra* note 339, at 682).

344. *Id.*

345. WILLIAM TEMPLE, CHRISTIANITY AND SOCIAL ORDER 45 (1942).

346. David H. McIlroy, *Subsidiarity and Sphere Sovereignty: Christian Reflections on the Size, Shape and Scope of Government*, 45 J. CHURCH & STATE 739, 746 (2003); *see also* Carmella, *supra* note 342, at 255.

347. Carmella, *supra* note 9, at 1045.

348. *See id.* at 1047 ("[F]reedom is to be restricted only in specific circumstances to correct injury, and only when it is prudent to do so.").

institutions. Accordingly, the rule of law must be applied to those that are religious in order "to prevent the selfishness of A from destroying the freedom of B."[349] While the state should give liberty to intermediate institutions like religious institutions, these institutions should not be permitted to harm others.[350] Rather, the Church must "accept[] limits to religious freedom when public order is violated."[351] Thus, the "biblical model for government is that of the shepherd, whose prime concern is for the welfare of his people (the sheep)."[352]

Professor Angela Carmella has encapsulated the concepts of Catholic Social Thought, the rule of law, and freedom in the apt phrase "responsible freedom."[353]

> Responsible freedom means first and foremost the proper, moral use of [a religious institution's] freedom in the promotion of the common good. Second, it means the recognition of, and appropriate response to, legitimate state authority. Finally, it also means the maintenance of independence and integrity when the Church must work with the state on matters of common concern.[354]

These principles, taken together, call for complete protection of a religious institution's power to determine its own ecclesiology but, at the same time, establish a rule of no-harm to third parties or the general public's interest in the rights of third parties.

E. Protestant Theology Supports a No-Harm Rule, Not Church Autonomy

The Protestant mindset, and its interpretation of the violent history of religion in Europe, holds relevance for understanding the legal system that emerged in early America. It can be no accident that the rise of Protestantism, its elemental rejection of the Roman Catholic Church and its practices, and its affirmation of the sinfulness of all humans—including and especially those who were

349. TEMPLE, *supra* note 345, at 68.
350. *Id*. at 70–71.
351. Carmella, *supra* note 9, at 1035.
352. McIlroy, *supra* note 346, at 747.
353. *See generally* Carmella, *supra* note 9.
354. *Id*. at 1033.

clerics—coincided with the demise of the ecclesiastical courts, sanctuary, and the benefit of clergy.[355]

Protestant theology, the reformed branch in particular, has long rested on a deep mistrust of human nature rooted in original sin, which has led to the necessity of government and a no-harm rule.[356] In fact, the Calvinist-Presbyterian branch of reformed theology contributed heavily to the construction of the United States Constitution's emphasis on checks and balances, separation of power, and the necessary division of power between state and federal governments.[357] This starting point is shared by the Framers, Catholic Social Thought, and reformed theology. All three equally value the rule of no-harm; that is, the necessity of deterring all citizens and institutions from harming others. For Protestant theology, government rightly exists to serve the common good, and that good is served best when the potential to do harm is restrained through duly enacted laws.

One particularly relevant idea in Protestant theology is the theory of "sphere sovereignty" introduced by reformed theologian Abraham Kuyper in the late nineteenth century.[358] Under sphere sovereignty (or authority as some have suggested), church and state (as well as the arts and business, among other social organizations) each have their own sovereign base, but each also has a distinctive role. "[T]he *telos* of the state is the common good."[359] Thus, the distinctive role of the state is to "prevent the spheres from infringing upon one another, and it may use compulsion when necessary to maintain order."[360] He further explained:

> The cogwheels of all these spheres engage each other, and precisely through that interaction emerges the rich, multifaceted multiformity of human life. Hence also rises the danger that one sphere in life may encroach on its neighbour like a sticky wheel that

355. *See supra* notes 133–53.

356. *See supra* notes 216–23.

357. Carmella, *supra* note 342, at 296–300, 302–04.

358. Frederick Nymeyer, *A Great Netherlander Who Had One Answer to the Problem of 'Liberty' Destroying Liberty, Namely Sphere Sovereignty*, *in* PROGRESSIVE CALVINISM (1956), *available at* http://www.visi.com/~contra_m/pc/1956/2-2great.html.

359. McIlroy, *supra* note 346, at 759.

360. *Id*. at 754–55.

> shears off one cog after another until the whole operation is disrupted. Hence also the raison d'etre for the special sphere of authority that emerged in the State. It must provide for sound mutual interaction among the various spheres, insofar as they are externally manifest, and keep them within just limits.[361]

This oversight role includes the power to protect the powerless in every sphere.[362] Thus, no sphere is considered immune from the sovereignty or power of another, but rather each sphere is to exercise its authority according to its own *telos*.[363] Moreover, the state holds the authority to "intervene when the authorities in other spheres *are manifestly abusing their power*."[364]

The just criticism of the sphere sovereignty theory is that it is fuzzy at the boundaries, and it does not fully articulate the specific role of either the state or the religious institution.[365] Its value for this Article, however, lies in its articulation of the *role* of government vis-a-vis the Church. It is not at all a stretch to claim that the powers identified are those undergirding the no-harm doctrine: the state is a neutral arbiter that ensures peace and protects the powerless. The state that chooses church autonomy is at odds with this notion.

Ultimately, history and theology illustrate that in the Anglo-American tradition all paths lead to the contemporary Religion Clause doctrine of no-harm.

IV. THE SUPREME COURT'S RELIGION CLAUSE JURISPRUDENCE AND THE DOCTRINE OF NO-HARM

Based on the history and theory described above, church autonomy lies far outside accepted republican principles. The no-

361. Abraham Kuyper, *Sphere Sovereignty*, NEW CHURCH SPEECH, Oct. 20, 1880, *cited in* McIlroy, *supra* note 346, at 755.

362. *Id.*; ABRAHAM KUYPER, LECTURES ON CALVINISM 124–25 (William B. Eerdmans ed., 1987) (1898–99), *available at* http://www.kuyper.org/stone/lecture4.html.

363. McIlroy, *supra* note 346, at 757–59.

364. *Id.* at 759; *see also* Johan van der Vyver, Sphere Sovereignty of Religious Institutions: A Contemporary Calvinistic Theory of Church-State Relations 24 (1999), *at* http://www.uni-trier.de/~ievr/konferenz/papers/vanvyver.pdf ("Persons engaged in government [have] the right and an obligation to scrutinize the conduct of their subjects . . . . Unbecoming conduct should not escape the power of the sword simply because it was committed in the name of religion.").

365. *See* Johan D. van der Vyver, *Culture and Equality: An Egalitarian Critique of Multiculturalism*, 17 CONN. J. INT'L L. 323, 329–31 (2002) (book review).

harm rule, by contrast, creates coherence between the religion clauses and our republican form of government. The Supreme Court has been correct to articulate its Religion Clause jurisprudence in belief, conduct, and harm categories, as it has never acknowledged legal independence for religious entities' actions.[366]

Not only does the no-harm rule bring the religion clauses into harmony with a republican form of government, but it also reinforces neutrality in the church-state relation. It does not depend on judicial assessments of the "centrality"[367] of beliefs or the identity of the religious entity.[368] Beliefs are absolutely protected, which leaves courts the task for which they are best equipped: applying "neutral principles of law" to findings of fact regarding actions.[369]

The cases usually included under the heading of "church autonomy" follow the no-harm principle, not a principle of church independence or immunity from the law. As discussed in Part I, the Court has recognized in both its Free Exercise cases and its religious institution cases (which have invoked both religion clauses) that there is an absolute right of conscience.[370] One can believe whatever one chooses, because freedom of belief confers numerous benefits on

366. *See supra* notes 48–52 and accompanying text (explaining that the Supreme Court has never adopted the term "church autonomy" to explain its religious institution cases).

367. *Compare* Employment Div. v. Smith, 494 U.S. 872, 887 (1990)

> Judging the centrality of different religious practices is akin to the unacceptable "business of evaluating the relative merits of differing religious claims. . . . [I]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.

(internal citations omitted), *with* Sherbert v. Verner, 374 U.S. 398, 407 (1963)

> Even if consideration of such evidence [of malingering or deceit] is not foreclosed by the prohibition against judicial inquiry into the truth or falsity of religious beliefs—a question as to which we intimate no view since it is not before us—it is highly doubtful whether such evidence would be sufficient to warrant a substantial infringement of religious liberties.

(internal citation omitted).

368. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 653–54 (2002); Agostini v. Felton, 521 U.S. 203, 230–31 (1997); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 10 (1993); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 488–89 (1986).

369. Jones v. Wolf, 443 U.S. 595, 602–03 (1979).

370. *See supra* notes 1–61 and accompanying text.

society. The greater good grants religious institutions, as well as individuals and nonreligious institutions, that which it grants all other citizens—complete freedom to develop and to share ideas and beliefs—because a thriving marketplace in belief and speech is good for the country.[371] The Court has included religious entities within the larger category of *all citizens*, all of which have an absolute right of conscience. These cases stand for the proposition that no court and no legislature may dictate what one believes, *either individually or as a group*. Far from placing religious institutions in a separate universe, this framework positions them as vital participants in a culture protective of belief and debate. In other words, even in the belief cases, religious institutions never stand above or beyond the laws that govern others, but rather they stand shoulder-to-shoulder with other citizen-believers. To be sure, religious institutions have merited special attention on this issue, because so much of who they are rests on belief itself and because the control of a people's beliefs has been a potent temptation for governments throughout the ages. However, these reasons do not make institutions any less full citizens deserving the utmost protection of belief.

Thus, religious institutions participate in the absolute right to believe, not because they are autonomous from the law, but rather because (1) the law requires such liberty in the interest of the greater good and (2) the belief itself will not harm others.[372]

By the same token, religious institutions are subject to "neutral, generally applicable laws" (to use the phrasing in the Free Exercise cases)[373] or, in other words, "the neutral principles of law" (the

371. McConnell v. Fed. Election Comm'n, 124 S. Ct. 619, 729 (2003) (Thomas, J., concurring) ("The very 'purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.'" (quoting Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969))); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("[D]ebate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").

372. *Sullivan*, 376 U.S. at 270.

373. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) ("In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."); Employment Div. v. Smith, 494 U.S. 872, 879 (1990).

phrase employed in the religious institution cases),[374] because action can harm others. To hold otherwise would be to permit religious institutions to inflict the harm that the law was intended to prevent.[375] Thomas Jefferson described the fault line in this doctrine: "[I]t does me no injury for my neighbour to say there are twenty gods, or no God. It neither picks my pocket nor breaks my leg."[376]

It is not that the religious institution was autonomous at one moment and then became encumbered by the social obligation to obey the law the next. Rather, religious institutions in the United States are and have always been part and parcel of the larger society. When a dispute extends beyond their shared beliefs into action that potentially harms others, religious institutions are treated as any other integral element of society. They are accountable to the larger good, as it is expressed through duly enacted laws.

Instead of using the concept or even the terminology of church autonomy, the Supreme Court has made harm the measure of laws governing religious conduct. In a recent free exercise case, the Court mandated strict scrutiny in circumstances when a law burdened *only* religious entities but failed to regulate similar harm caused by other entities.[377] The Court explained the rule, saying that strict scrutiny is required "[w]here government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort."[378] In other words, the government can legitimately make conduct that harms others illegal for everyone, including the religious, but when the government targets religious actors and religious actors alone, it has demonstrated that the purpose of the

374. *Jones*, 443 U.S. at 604 ("[A] State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute.").

375. That is the message the Court is delivering with its statement: "Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government." *Smith*, 494 U.S. at 882 (internal quotation marks omitted) (quoting Gillette v. United States, 401 U.S. 437, 461 (1971)).

376. Jefferson, *supra* note 251, at 221; *see also* Letter from Thomas Jefferson, *supra* note 253, at 442–43 ("The declaration that religious faith shall be unpunished, does not give impunity to criminal acts dictated by religious error.").

377. *Church of Lukumi*, 508 U.S. at 546–47.

378. *Id.* (applying strict scrutiny when laws target a religious institution for regulation).

law is not really the eradication of harm, but rather the targeting of religion.[379]

This rule was further explained in *Locke v. Davey*, which held that a presumption of unconstitutionality does not apply to laws governing religious entities in the absence of "hostility" or "animosity" toward a religious institution or institutions.[380] Hence, where a religious institution finds itself face-to-face with a legal obligation that exists to prevent harm to others, it has no First Amendment defense simply because the law imposes an incidental burden on that institution.[381]

These same principles undergird both the free exercise and religious institution cases. The meaningful difference between the two sets of doctrine lies not in a rule of legal obligation in one and autonomy in the other. Rather, when the Court has faced a free exercise case involving the regulation of belief, the Court has taken jurisdiction and rendered the law unconstitutional.[382] When it has faced a religious institution case involving solely a dispute over belief within a religious institution, the Court has declined jurisdiction, because deciding the case would place it in the position of determining belief.[383] Thus, the cases are procedurally distinguishable, but there is no difference in the underlying theory that belief cannot be regulated or determined by the government. Whereas under both the free exercise and religious institution cases, if the institution has engaged in conduct, that conduct can be considered by the courts when they apply neutral principles of law.[384]

379. *Id.* at 533; Fraternal Order of Police v. Newark, 170 F.3d 359, 364–67 (3d Cir. 1999); *see also Locke*, 124 S. Ct. 1307, 1312–13 (2004).

380. *Locke*, 124 S. Ct. at 1314–15 (holding that a presumption of constitutionality—strict scrutiny—applies when there is "animus" or "hostility" toward a religious institution).

381. Employment Div. v. Smith, 494 U.S. 872, 878 (1990).

382. Wooley v. Maynard, 430 U.S. 705, 717 (1977); Torcaso v. Watkins, 367 U.S. 488, 496 (1961); United States v. Ballard, 322 U.S. 78, 87–88 (1944); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

383. Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1 (1929) (affirming the dismissal by the Philippines Supreme Court of a claim improperly decided by the district court because it was solely ecclesiastical in nature).

384. *See, e.g.*, Jones v. Wolf, 443 U.S. 595, 604–05 (1979); Md. & Va. Churches v. Sharpsburg Church, 396 U.S. 367, 368 (1970) (dismissing an appeal for want of a federal question because "the Maryland court's resolution of the dispute involved no inquiry into religious doctrine"); *see also Smith*, 494 U.S. at 874.

Religious institutions have pushed for autonomy from judicial oversight, and therefore the rule of law, in three particular arenas: cases in which the parties are asking the courts to mediate a dispute *solely* based on ecclesiology or belief,[385] disputes between the religious institution and adult clergy or lay employees,[386] and claims

385. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 712–20 (1976) (holding that courts have no authority to decide solely ecclesiastical issues); Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 445–47 (1969) ("[It is] wholly inconsistent with the American concept of the relationship between church and state to permit civil courts to determine ecclesiastical questions[; hence, the First Amendment's] language leaves the civil courts *no* role in determining ecclesiastical questions in the process of resolving property disputes." (emphasis added)), *distinguished by* Gen. Council on Fin. & Admin. United States Methodist Church v. California Superior Court, 439 U.S. 1369, 1372 (1978) ("There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating intrachurch disputes."); *Gen. Council*, 439 U.S. at 1372 ("But this Court never has suggested that those constraints similarly apply outside the context of such intraorganization disputes. Thus, *Serbian Eastern Orthodox Diocese* and the other cases cited by applicant are not on point."); *see also Gonzalez*, 280 U.S. at 16 ("[D]ecisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise."); Watson v. Jones, 80 U.S. 679, 727 (1871) ("[W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them."); German Reformed Church v. Commonwealth *ex rel.* Seibert, 3 Pa. 282, 291 (1846) ("The decisions of ecclesiastical courts, like those of every other judicial tribunal, are final; as they are the best judges of what constitutes an offence against the word of God and the discipline of the church.").

386. *See, e.g.*, Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648 (10th Cir. 2002) (invoking the principle of church autonomy and refusing to decide an ecclesiastical question); Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299 (11th Cir. 2000) (observing a ministerial exception for clergy); Bollard v. Cal. Province of the Society of Jesus, 196 F.3d 940 (9th Cir. 1999) (declining to apply a ministerial exception for clergy); Combs v. Cent. Tex. Annual Conf. of United Methodist Church, 173 F.3d 343 (5th Cir. 1999) (same); EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996) (observing a ministerial exception for clergy); Young v. N. Ill. Conf. of United Methodist Church, 21 F.3d 184 (7th Cir. 1994) (same); Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360 (8th Cir. 1991) (same); Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985); Van Osdol v. Vogt, 908 P.2d 1122 (Colo. 1996) (observing a ministerial exception for clergy); Williams v. Episcopal Diocese of Mass., 766 N.E.2d 820 (Mass. 2002) (acknowledging, without formally adopting, the ministerial exception in affirming the dismissal of a claim brought by clergy); McKelvey v. Pierce, 800 A.2d 840 (N.J. 2002) (declining to observe a ministerial exception); Newport Church of Nazarene v. Hensley, 56 P.3d 386 (Or. 2002) (finding a statutory ministerial exception not unconstitutional); Church of Christ at Centerville v. Carder, 713 P.2d 101 (Wash. 1986) (upholding a church

brought by third parties against clergy and/or the religious institution.[387]

The Supreme Court's cases lay down a complementary set of rules for the three categories of cases involving religious institutions. First, the courts may not determine "solely" ecclesiastical matters.[388] Second, some courts have created a judicial doctrine, called the

board's termination of a minister); Gillespie v. Elkins S. Baptist Church, 350 S.E.2d 715 (W. Va. 1986) (same); *see also* EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795 (4th Cir. 2000) (observing a ministerial exception for lay employee); Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991) (same); Brazauskas v. Fort Wayne-South Bend Diocese, Inc., 796 N.E.2d 286 (Ind. 2003) (same); Montrose Christian Sch. Corp. v. Walsh, 770 A.2d 111 (Md. 2001) (finding constitutional a statute that applied a ministerial exception to lay employees); Madsen v. Erwin, 481 N.E.2d 1160 (Mass. 1985) (observing a ministerial exception for a lay employee's wrongful termination claims, but not for other claims), *distinguished by* Hiles v. Episcopal Diocese of Mass., 773 N.E.2d 929, 937 (Mass. 2002) (disallowing defamation claims if they "arise[] out of the church-minister relationship"); Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857 (Minn. 1992) (declining to apply the ministerial exception to lay employees in collective bargaining); South Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch., 696 A.2d 709 (N.J. 1997) (same); *cf.* Corp. of the Presiding Bishop v. Amos, 483 U.S. 327 (1987) (upholding a Title VII exemption for church employees).

387. *See, e.g.*, Davis v. Studdert, No. 02-4110, 2003 U.S. App. LEXIS 3622 (10th Cir. Feb. 25, 2003) (dismissing an action against a church for its leaders' alleged fraud); Kelly v. Marcantonio, 187 F.3d 192 (1st Cir. 1999) (sexual abuse action against a church and its leaders); Doe v. Hartz, 134 F.3d 1339 (8th Cir. 1998) (same); Ayron v. Gourley, 47 F. Supp. 2d 1246 (D. Colo. 1998), *aff'd*, 185 F.3d 873 (10th Cir. 1999) (same); Bear Valley Church of Christ v. DuBose, 928 P.2d 1315 (Colo. 1996) (allowing some claims in a sexual abuse action against a church and local leader); Malicki v. Doe, 814 So. 2d 347 (Fla. 2002) (action against church and local leadership for negligent hiring); Kliebenstein v. Iowa Conf. of United Methodist Church, 663 N.W.2d 404 (Iowa 2003) (holding that the Establishment Clause did not bar a defamation action against a church and its leaders); Odenthal v. Minn. Conf. of Seventh-Day Adventists, 649 N.W.2d 426 (Minn. 2002) (allowing an action against a church and local leader for negligence in counseling); Davis v. Church of Jesus Christ of Latter Day Saints, 852 P.2d 640 (Mont. 1993) (multiple causes of action against a church and local leadership for the local leadership's handling of an injury that occurred on church property); Gibson v. Brewer, 952 S.W.2d 239 (Mo. 1997) (allowing some claims in a sexual abuse action against a church and local leader); Franco v. Church of Jesus Christ of Latter-day Saints, 21 P.3d 198 (Utah 2001) (multiple causes of action against a church and local leadership resulting from harm suffered by the plaintiff after reporting sexual abuse); Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780 (Wis. 1995) (allowing some claims in a sexual abuse action against a church and local leader).

388. *See, e.g.*, *Serbian Eastern Orthodox Diocese*, 426 U.S. at 712–20; Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449–50 (1968); Kreshik v. St. Nicholas Cathedral, 363 U.S. 190, 191 (1960); Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94, 113–15 (1952); *Gonzalez*, 280 U.S. at 7–8; Shepard v. Barkley, 247 U.S. 1, 2 (1918); *Watson*, 80 U.S. at 727; *see also* Carmella, *supra* note 9, at 1039–40.

"ministerial exception," to avoid deciding cases involving the relationship between the religious institution and its adult clergy or employees in some circumstances.[389]

The cases in each of these first two categories cannot be justified by a theory that religious institutions stand autonomously outside society. Rather, the first is fully explained by the absolute right to believe, and therefore there is no cognizable harm. In the second, objections to the harm were waived by the adult's decision to accept employment with a religious employer. Neither category presents the specter of harm to innocent parties.

The third category of cases involves harm to third parties.[390] The courts may, and indeed must, apply neutral principles of law, even if the case involves a religious institution and religiously motivated conduct, because harm resulting from actions must be redressed or prevented to serve the public good.[391]

Where the law can be applied by reference to actions and not just belief, and where third parties are legally harmed, there is no constitutional justification for precluding the courts from exercising their usual function of applying neutral, generally applicable laws to defendants, whoever they may be. Although the Supreme Court has

389. *See supra* note 386 (listing cases); *see also* Carmella, *supra* note 9, at 1039 (explaining the ministerial exception cases as involving a "church-clergy relationship"; thus, "[b]ecause he or she is deemed to have consented to the internal governance of the employer institution, the clergy person, as employee, must rely on those protections" provided under church law).

390. *See* Carmella, *supra* note 9, at 1040 ("The general rule of broad institutional autonomy for the church-clergy relationship no longer applies . . . when a third party sues a church regarding clergy conduct. In fact, a growing majority of jurisdictions allow judicial scrutiny of church decision making in many tort actions.").

391. *See, e.g.*, Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546–47 (1993) (applying strict scrutiny when laws are not neutral and generally applicable and "[w]here government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort"); City of Boerne v. Flores, 521 U.S. 507, 539 (1997) (Scalia, J., concurring) ("[T]he most plausible reading of the 'free exercise' enactments . . . is a virtual restatement of *Smith*: Religious exercise shall be permitted *so long as it does not violate general laws governing conduct*."); Employment Div. v. Smith, 494 U.S. 872, 885 n.2 (1990) ("[I]t is hard to see any reason in principle or practicality why the government should have to tailor its health and safety laws to conform to the diversity of religious belief . . . ."); *Serbian Eastern Orthodox Diocese*, 426 U.S. at 713 (reserving the question of whether there may be an exception where civil courts may review ecclesiastical decisions in instances of fraud or collusion, while holding there is no exception for arbitrary decisions).

yet to directly address the liability of a religious institution for harm to third parties in certain circumstances,[392] the logic of its Religion Clause jurisprudence requires deference to legislative judgments when the dispute involves conduct resulting in legally cognizable harm, especially when the harms impact those who are incapable of consenting to such harm, e.g., children or emotionally disabled adults.[393] To be sure, some state court decisions have misread the principles justifying judicial intervention in the belief and adult employee cases and concluded that they lack jurisdiction even when there is third-party harm, but those cases are inconsistent with the parameters of the Supreme Court's Religion Clause jurisprudence, the no-harm rule, and the First Amendment's grounding in the United States' republican form of government.

A. The Solely Ecclesiastical Dispute Cases

The Court traditionally has refused to further investigate ecclesiastical disputes that invite the Court to settle intraorganizational disputes over belief or reopen ecclesiastical decisions made by an institution's highest authority. This is because religious institutions—just like individuals—have complete dominion over belief.[394] The key to understanding these cases lies in the

392. *See* ATLA-TORT § 54:42 ("The United States Supreme Court has not yet resolved the question of whether the First Amendment protects a religious organization from direct liability for the sexual abuse of third parties by clergy, either in the context of the sexual abuse of children or in the context of adult counseling.").

393. *See, e.g.*, Moses v. Diocese of Colo., 863 P.2d 310, 320–21 (Colo. 1993) (ruling that the plaintiff's claim was not barred by the First Amendment where she entered into a sexual relationship with her priest, who had counseled her regarding mental and emotional problems); Malicki v. Doe, 814 So. 2d 347 (Fla. 2002) (holding that the First Amendment cannot be used to "shut the courthouse door" on claims of negligence against a church in a sexual abuse case).

394. *See Smith*, 494 U.S. at 877 ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."); Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."); Welsh v. United States, 398 U.S. 333, 372 (1970) (White, J., dissenting) ("Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." (internal quotation marks omitted) (quoting Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940))); United States v. Seeger, 380 U.S. 163, 184 (1965) ("The validity of what [the conscientious objector] believes cannot be questioned."); McGowan v. Maryland, 366 U.S. 420, 443 (1961) ("No person can be punished for entertaining or professing religious beliefs or

Court's use of the term "solely" to modify "ecclesiastical." The mere presence of religious belief or ecclesiology, however, does not necessarily bar the Court's jurisdiction.[395] It is not possible to decide a free exercise or even many Establishment Clause cases without taking judicial notice of the religious entity's beliefs. For example, the Court took judicial notice of the Native American Church's beliefs in *Smith*, the Santerians beliefs in *Lukumi*, and the conscientious objector's beliefs in *Seeger*. The Court has only withdrawn from cases where it has been asked to be the arbiter of belief for the organization.

The Court has consistently declined jurisdiction in order to protect the religious institution's absolute right to determine its own beliefs. For example, in *Watson v. Jones*,[396] the Court was asked to settle a property dispute turning on the question of whether the church had changed its doctrine, an alteration which would invalidate its property interest in the local church building. The Supreme Court held: 1) civil judges are incompetent to resolve questions concerning religious doctrine; 2) members of a hierarchical church have voluntarily joined the general church body, thus giving implied consent to its internal governance; and 3) the structure of our political system requires a severe limit on involvement by civil courts in the affairs of religious bodies.[397] The Court noted that "it is a very different thing where a subject-matter of dispute, strictly and purely ecclesiastical in its character,—a matter over which the civil courts exercise no jurisdiction—. . . becomes the subject of its action."[398]

In *Serbian Eastern Orthodox Diocese v. Milivojevich*,[399] the Supreme Court of Illinois had held that the proceedings of the

disbeliefs . . . ."); *see also* Wooley v. Maynard, 430 U.S. 705 (1977) (invalidating the compelled display of a license plate slogan that offended individual religious beliefs); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 634 (1943) (invalidating a compulsory flag salute statute challenged by religious objectors and noting, "[t]o sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind").

395. *See infra* Part IV.B.

396. 80 U.S. 679 (1871).

397. *Id.* at 725–33.

398. *Id.* at 733.

399. 426 U.S. 696 (1976).

Mother Church respecting a bishop were procedurally and substantively defective under the internal regulations of the Mother Church and were therefore arbitrary and invalid. The United States Supreme Court ruled that the inquiries made by the state supreme court into matters of ecclesiastical cognizance and polity contravened the First and Fourteenth Amendments.[400] In doing so, the Court announced, "it is 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."[401]

In addition, in *Presbyterian Church in United States v. Mary Elizabeth Blue Hull*,[402] the question presented to the Court was whether the restraints of the First Amendment (as applied to the states through the Fourteenth Amendment) permitted a civil court to determine title to church property on the basis of the court's interpretation of church doctrine. The Supreme Court determined that civil courts had no role in determining purely ecclesiastical questions in the process of resolving property disputes.[403]

The Court did not intend the "solely ecclesiastical" category, however, to create a means by which religious institutions could use their beliefs as a smoke screen for illegal behavior. The presence of "fraud, collusion, or arbitrariness" would have altered the Court's decision to decline jurisdiction over the dispute, despite the ecclesiastical elements in the case.[404]

400. *Id*. at 698.

401. *Id*. at 714–15.

402. 393 U.S. 440 (1969).

403. *Id*. at 446; *see also* Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16 (1929) ("[D]ecisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise."). The Court reiterated this point in *Watson*:

> [W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.

80 U.S. at 727.

404. *Hull*, 393 U.S. at 447 (quoting *Gonzalez*, 280 U.S. at 16); *cf. Milivojevich*, 426 U.S. at 713–15 n.7 (holding that any inquiry into arbitrariness of church actions was foreclosed but noting that "[n]o issue of 'fraud' or 'collusion' is involved in this case").

B. The Ministerial Exception Cases

Many suits in the second category of cases—those involving claims brought by an adult employee against a religious institution—involve the question of the application of Title VII of the Civil Rights Act of 1964.[405] These cases involve judicial application of the law in the context of a relationship between a religious institution and its clergy. Before the Court's decision in *Smith*, which legitimated legislative exemptions but not judicially crafted exemptions, some courts crafted a "ministerial exception." It stood for the proposition that the religion clauses "require a narrowing construction of Title VII in order to insulate the relationship between a religious organization and its ministers . . . ."[406] The ministerial exception was first articulated in *McClure v. Salvation Army*.[407] Nearly every Circuit Court has adopted it, although it is enforced with varying degrees of vigor depending on the Circuit.[408] The Supreme Court has yet to rule on its constitutionality.

Courts adopting the exception justify it as "a long-standing tradition that churches are to be free from government interference in matters of church governance and administration."[409] What they

405. 42 U.S.C. § 2000e-2(a) (2000).

406. Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 945 (9th Cir. 1999). The ministerial exception is a doctrinal creation that protects churches from Title VII beyond the protection provided by the legislative exemption for employment of those of the same faith. *See* Corp. of the Presiding Bishop v. Amos, 483 U.S. 327 (1987).

407. 460 F.2d 553, 560–61 (5th Cir. 1972).

408. *Compare* EEOC v. Roman Catholic Diocese, 213 F.3d 795 (4th Cir. 2000) (affirming the application of a ministerial exception to a sex discrimination claim brought on behalf of a Cathedral's female Director of Music Ministry and part-time music teacher at the Cathedral elementary school), Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299 (11th Cir. 2000) (affirming a ministerial exception to a minister's retaliation and constructive discharge claim), *and* Combs v. Cent. Tex. Annual Conf. of the United Methodist Church, 173 F.3d 343 (5th Cir. 1999) (affirming a ministerial exception to a plaintiff minister's sex and pregnancy discrimination claims when she was terminated after returning from maternity leave), *with Bollard*, 196 F.3d at 947–48 (declining to apply the ministerial exception to sexual abuse). *See also supra* note 386 (listing church-employee cases).

409. *Gellington*, 203 F.3d at 1304 (citing, among others, *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94, 107 (1952)). The circuits have held that the ministerial exception was not overruled by *Smith* because

> it was not developed to provide protection to individuals who wish to observe a religious practice that contravenes a generally applicable law . . . [and] because the ministerial exception is [not] based . . . on strict scrutiny, [so] the Court's rejection

properly mean is that there is a long-standing prohibition on courts mediating solely ecclesiastical disputes, which is true; they err, however, when they decline jurisdiction in a case involving not only ecclesiology, but also the application of neutral principles of law, especially in a context where the law does not substantially burden any religious belief.[410]

While some courts have read the ministerial exception broadly, the Ninth Circuit did not apply it in a situation where the church did not claim that its right to oversee its ministers *was* infringed and where the behavior was not religiously mandated.[411] Additionally, the New Jersey Supreme Court declined to apply it in *McKelvey v. Pierce*,[412] remanding the case to the lower court to determine the issues, instead of assuming the courts lacked jurisdiction simply because the case was brought by a seminarian against a religious institution.

To be clear, the ministerial exception cases involve only the employee and the employer and hinge on the notion that no one is being harmed because the adults have consented to the religious institution's requirements.[413] In those jurisdictions that recognize the

in *Smith* of the compelling interest test does not affect the continuing vitality of the ministerial exception.

Id. This formalistic reading of the Court's free exercise cases, which does not address the issue of institutional competence to decide whether an exemption is warranted, is not terribly persuasive.

410. Employment Div. v. Smith, 494 U.S. 872, 878–79 (1990). In the absence of a substantial burden on religious belief, there is in fact no justification for invoking or applying the machinery of the religion clauses. The term has been imported into federal religious liberty legislation, again as a threshold issue. *See, e.g.*, Midrash Sephardi v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004); San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1035 (9th Cir. 2004); Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003), *cert denied*, 124 S. Ct. 2816 (2004); *see also* 106 CONG. REC. S7,776 (2000) ("[RLUIPA] does not include a definition of the term 'substantial burden' because it is not the intent of this Act to create a new standard for the definition of 'substantial burden' on religious exercise. Instead, that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence.").

411. *See Bollard*, 196 F.3d at 948.

412. 800 A.2d 840, 852–53 (N.J. 2002) (holding that despite the ministerial exception, the trial court should not have assumed that it lacked jurisdiction to hear a seminarian's claims without examining each one to determine whether it could be heard without excessive entanglement in religious affairs); *see also* Williams v. Episcopal Diocese, 766 N.E.2d 820, 824–26 (Mass. 2002) (acknowledging the ministerial exception without adopting it in affirming the dismissal of an employment discrimination claim brought by clergy).

413. *See infra* Part III.B.

ministerial exception, it is unlikely to be reversed in the near future, but it is in tension with the Court's most recent cases clarifying the Free Exercise Clause.

Title VII already provides an exemption for religious entities by permitting them to discriminate in their employment decisions on the basis of faith. The exemption was upheld in *Corporation of the Presiding Bishop v. Amos.*[414] On any measure of the public good, it makes tremendous sense. Without a doubt, there would be something unseemly about a federal law that would require an Orthodox Jewish shul to hire a Baptist as a rabbi, or a Pentecostal Church to hire a Muslim as a pastor.

The ministerial exception, however, is a judicial invention that has been used at times to extend Congress's exemption for discrimination on the basis of religious belief to other types of discrimination.[415] Strictly speaking, the judicially crafted ministerial exception is inconsistent with *Locke v. Davey*, *Boerne,* and *Smith* and may be vulnerable to reversal by the Supreme Court.[416] The principle at issue is whether the courts are institutionally competent to craft free exercise exemptions. Under the reasoning of these cases, courts are not competent to carve out individual exemptions from generally applicable laws; that is the province of the legislature. That is the explicit holding in *Smith.*[417]

This is not to say that the state or federal legislatures could not craft a statute that would do the work of the ministerial exception. They could. When the legislature does so, it brings better tools to assess the exemption options than a court has available. It can study the issue from many angles, from listening to constituents to using hearings, experts, and appointed commissions to assess the issue. The legislature is in a strong position to make a judgment regarding what degree of harm will result from permitting a religious institution to

414. Corp. of the Presiding Bishop v. Amos, 483 U.S. 327 (1987).

415. *See, e.g.*, Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 953 (9th Cir. 2004) (holding that a minister's claims of discrimination on the basis of sex, in the form of sexual harassment, could go forward); Smith v. Raleigh Dist. of the N.C. Conf. of the United Methodist Church, 63 F. Supp. 2d 694 (E.D.N.C. 1999) (finding that a ministerial exemption did not bar suit by secular church employees alleging discrimination on the basis of sex).

416. *Locke*, 124 S. Ct. 1307; *Boerne*, 521 U.S. 507; *Smith*, 494 U.S. 872.

417. 494 U.S. at 890.

discriminate "because of such individual's race, color, . . . sex, or national origin."[418] In sharp contrast, a court has only the evidence in one case and the views of two parties before it, and there is no guarantee that the facts before it or the parties' positions are representative of such disputes. Nor does a court have the capacity to independently investigate the issue. Indeed, its lack of investigative power makes it all too likely that its determinations will be based on opinion and personal views, rather than factors relevant to the public good. To be sure, legislatures are not perfect institutions; the point here is simply that they are comparatively better than courts in choosing which exemptions to carve out of a law and which to reject.

To be consistent with the Supreme Court's Religion Clause jurisprudence, the courts should apply Title VII as its neutral language dictates and leave ministerial exemptions to the legislative process.[419] For purposes of this Article, however, the ministerial exception cases are relevant because they are consistent with the no-harm principle. Their rationale is that the religious employee has acquiesced in the religious entity's governance and therefore is not harmed by the religious institution's application of its religious principles to him or her.

C. The Third-Party Harm Cases

This third category of cases involves church accountability for the harm caused by its clergy and its leadership. This is the arena where the notion of church autonomy stands in starkest contrast to the no-harm principle. Many of these cases involve instances in which members of the clergy abuse children or adults who are disabled or in a disabled state. While it can be argued that clergy members voluntarily have given up their rights against a hierarchical church and therefore may not sue for discrimination (though, again, that is a

418. 42 U.S.C. § 2000e-2(a)(1) (2000).

419. Of course, to the extent a clergy employee case involves solely questions of belief, the courts properly should refuse jurisdiction. *See supra* notes 366–76` and accompanying text. Where the relevant law does not require the courts to decide belief, however, under existing Supreme Court Religion Clause jurisprudence, the courts should take jurisdiction and apply the law. *See supra* notes 377–93 and accompanying text. There is also an emerging line of cases that only applies the ministerial exception where the religious institution claims that its conduct was driven by its religious beliefs. *See, e.g.*, Elvig v. Calvin Presbyterian Church, 375 F.3d 951 (9th Cir. 2004); Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940 (9th Cir. 1999).

question best left to legislatures, not courts), many victims of religious institutions, especially children, are not in a position to assent to the harm perpetrated by the clergy and the religious institution. The reasons for avoiding jurisdiction over solely ecclesiastical disputes "are not applicable to purely secular disputes between third parties and a particular defendant, *albeit a religiously affiliated organization*."[420]

If the claims in a case involve nothing more than a demand for the court to interpret and apply the religious institution's canon, the courts will not resolve the dispute, and barring other claims, the case is dismissed.[421] That is completely consistent with the position of Jefferson, Madison, and the Supreme Court that belief must be protected absolutely from government interference.[422] Where the claims involve the "legal effects and consequences" arising out of such beliefs,[423] however, the courts may take judicial notice of the beliefs, but they must rule solely on whether the actions taken were consistent with the legal standards governing those actions.[424] This is sometimes referred to as the "neutral principles" rule.[425]

Since 1990, the Supreme Court has articulated with increasing detail the constitutional metes and bounds regarding (1) the legislature's power to regulate a religious institution's conduct and (2) the judiciary's lack of power to create exemptions.[426] According

420. Gen. Council on Fin. and Admin. of the United Methodist Church v. Superior Court of California, 439 U.S. 1355, 1372–73 (Rehnquist, Circuit Justice 1978) (internal citation omitted) (emphasis added); *see also Malicki*, 814 So. 2d 347, 356–57 (Fla. 2002) (distinguishing internal church disputes from third-party harm cases).

421. *See supra* notes 394–98.

422. *See supra* Part III.C. It is also consonant with the Court's emerging freedom of association jurisprudence. *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) ("[P]rotection of the right to expressive association is 'especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.'" (quoting Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984))).

423. *Den*, 12 N.J.L. at 226.

424. *Nelson*, 18 Vt. at 567 ("In the decision of this case we have endeavored to conform our decision to the principles of law, as they are applicable to our State. If we have recognized no ecclesiastical jurisdiction, it is because none such exists here; and it certainly will contribute to our peace, that there is no such jurisdiction in this State.").

425. Solid Rock Baptist Church v. Carlton, 789 A.2d 149, 155 (N.J. Super. App. Div. 2002).

426. City of Boerne v. Flores, 521 U.S. 507, 514 (1997); Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

to the Court, legislatures are in the most appropriate position to determine whether harm needs be prevented, and so long as the legislature regulates to rid society of a particular harm, and does not single out a religious institution or individual in the process, the law is presumptively constitutional.[427] In other words, the proper focus of the legislature is the public good, the needs of society. The same public good horizon can then be applied by a legislature to create exemptions from neutral, generally applicable laws, but the exemption is driven by a full consideration of the public good, not constitutional necessity.[428]

In the religious conduct cases, the Court has held that accommodation is a more appropriate task for the legislature than the courts. The republican theory of government is needed to explain this. First, under a republican theory of government, the judiciary and the legislature play distinctive roles.[429] Second, the legislature is supposed to rule above the passions of the people and to govern in the interest of the larger public good.[430] That is its only legitimate role, and its inevitable role if the form of government is sufficiently well constructed.[431]

427. Locke v. Davey, 124 S. Ct. 1307, 1309 (2004) (holding that nothing in Washington's Promise Scholarship Program "suggests [the requisite] animus towards religion" needed to justify the application of strict scrutiny); *Boerne*, 521 U.S. at 535 ("When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs."). The Court also emphasized this point in *Smith*:

> It is a permissible reading of the text, in the one case as in the other, to say that if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.

494 U.S. at 878.

428. The Court discussed the applicability of legislative exemptions in *Smith*:

> [A] number of States have made an exception to their drug laws for sacramental peyote use. . . . But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts.

Id. at 890 (citations omitted).

429. SELLERS, SACRED FIRE, *supra* note 1, at 24–27; *see also* WOOD, THE CREATION, *supra* note 19, at 460–63.

430. *See* SELLERS, SACRED FIRE, *supra* note 1, at 75–77; WOOD, THE CREATION, *supra* note 19, at 371, 381.

431. *See* SELLERS, SACRED FIRE, *supra* note 1, at 75–77; WOOD, THE CREATION, *supra* note 19, at 608.

The question is left where to draw the line between legitimate exemptions and those that are illegitimate. There are two scenarios that raise questions: exemptions that involve laws making harmless conduct illegal and those exemptions that are not lifting a burden on religiously motivated conduct, but rather granting religious entities special privileges simply because they are religious. The first should raise red flags of potential discrimination, while the second is in violation of the Establishment Clause.

1. Exemptions that make harmless conduct illegal

Where the legislature addresses only actions by individuals that do not impact and harm others, there is a good question whether the public good has been or can be served. Laws outlawing harmless behavior are hard to justify in light of the public good. John Stuart Mill explained as follows:

> [T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.[432]

This is not to say that a law that regulates harmless conduct would be unconstitutional, but rather that the proper role of the legislature is to identify actions that actually harm others for the purpose of regulation.[433] If they do not, then the public good does not seem to be implicated, and the law is not a proper exercise of power by a republican form of government.

The slipperiness in this approach lies in the definition of harm. Some philosophers have abandoned the Mill/Hart/Feinberg concept because it does not lead to concrete conclusions about certain moral issues facing the society.[434] Others have found that the

432. MILL, *supra* note 46, at 10–11.

433. It may be that such laws could be invalidated under constitutional analysis—either as irrational or as pretexts for discrimination—but none comes to mind.

434. *See generally* Am. Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985) (wherein Judge Frank Easterbrook rejects the harm principle); JUDITH BUTLER, EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE (1997); Ethan A. Nadelmann, *Learning To Live with Drugs*, WASH. POST, Nov. 2, 1999, at A21.

principle is as valuable for conservative policies as it was at one time for liberal policies, which is to say that both sides in a debate over regulation are capable of arguing "harm."[435] Joel Feinberg rightly stated, "harm is a very complex concept with hidden normative dimensions. . . ."[436] This is a legitimate philosophical concern, but it need not deter its application in the legal-political arena.

The representative form of government assigns to the legislature the task of assessing the public good in light of all the circumstances and facts. In fact, the legislative task at its very core is to weigh competing social goods and harms. In this context, the task is no different. When considering whether to relieve a religious entity of a legal duty, the legislature should weigh on the one hand the importance of respect and tolerance for a wide panoply of religious faiths, and on the other whether the harm that the law was intended to prevent can be tolerated in a just society. For the philosophers, the problem with this approach is that it could result in endless cycling of the harm concept because there is no logical or hermeneutical principle that will finally determine actual harm. The finality problem is solved in the republican form of government, however, because a determination of harm can be made final. When the legislature determines that there should be no exemption or that there should be one, and enacts a law reflecting its judgment, it renders the final word on the balance of harms. The law reflects no more than contemporary understandings and need make no claims to transcendent value, but it is final for contemporary purposes.

The utility of employing legislative judgment here (as opposed to judicial judgment) is that the legislature has tremendous power to repeal the laws that it finds are noxious in practice. Precedent has not nearly the pull that it has in the judicial arena. Thus, judgments about relative harm can be revisited and reweighed. The repealability of the harm analysis takes into account the human nature of regulation—it is always based on imperfect understanding and always capable of being viewed through different lenses at a later time.[437]

435. *See generally* Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999).

436. FEINBERG, THE MORAL LIMITS OF CRIMINAL LAW, *supra* note 247, at 214.

437. That is in fact happening in the context of children's interests. Religious organizations have been successful in obtaining state and federal laws that exempt faith-healing parents from the force of the laws that protect children. *See* Rita Swan, *Moral, Economic, and*

What may be most interesting here is that the public good can be served best by exempting the religiously motivated conduct while retaining the rule against all other actors. A good example of this phenomenon can be found in the exemptions for the religious use of peyote,[438] which appear to be harmless to society. The drug, unlike heroin, is not quickly addictive or part of a worldwide illegal market. It is also unattractive to recreational users because it often leads to nausea and headaches and in a significant number of instances yields no result. Moreover, those who use it tend to stay in the place of worship well beyond its effectiveness and therefore do not drive impaired or engage in any other harmful behavior that could affect others following its use. Thus, the Church's use of peyote is harmless to society and therefore worthy of an exemption.

That does not mean, however, that its use should be legalized for all users. A recreational user (if one is inclined to take it despite its recreational defects) is likely to be more inclined to drive or otherwise harm others under the influence, because the use would not be limited to a religious ceremony that lasts longer than the effects of the hallucinogen. The harm calculus thus weighs in favor of a religious exemption but not in favor of outright legalization.

Social Issues in Children's Health Care: On Statutes Depriving a Class of Children of Rights to Medical Care: Can this Discrimination Be Litigated?, 2 QUINNIPIAC HEALTH L.J. 73, 79–80 (1998). Children's rights, however, have become internationally recognized, and the argument for giving such latitude to parents to harm their children, even if religiously motivated, has lost a significant degree of force. *See, e.g.*, *Weld Approves Child Abuse Law*, BOSTON GLOBE, Dec. 29, 1993, at Metro-24 (reporting the passage of legislation that "repeals a statutory provision that states a child shall not be deemed neglected if treated with spiritual healing alone"); CAL. PENAL CODE § 11166(a)(2)(c)(1)–(2) (2004) (noting that the duty-to-report statute excludes reporting information received during "penitential communication," but clarifies that "[n]othing in this subdivision shall be construed to modify or limit a clergy member's duty to report known or suspected child abuse or neglect when the clergy member is acting in some other capacity that would otherwise make the clergy member a mandated reporter").

438. The federal government and a majority of states exempt the religious use of peyote. *See* James D. Gordon III, *The New Free Exercise Clause*, 26 CAP. U. L. REV. 65, 77–78 (1997); *see also* Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

2. Exemptions that do more than lift a burden on religiously motivated conduct

The *Smith* Court implied that there are some legislative exemptions that may violate the Establishment Clause.[439] Legislative exemptions that only lift the burden placed on the religiously motivated because the conduct when done by the religious entity will not harm individuals or society, and do no more, have followed the Court's doctrine. The open question is what happens when a legislature grants an exemption for religious institutions that provides more than is needed to lift the burden. For example, the peyote exemptions for religious use are constitutional, but an exemption for any use by religious entities would not be. The latter gives religious entities the right to use peyote in all circumstances, not only in religious ceremonies, and therefore provides a benefit to religious entities solely because of their religious status, not because their religious conduct has been burdened. That is a violation of the Establishment Clause.[440]

The RFRAs violate the Establishment Clause in a different way, by flaunting the republican government principle. They make all or most of the federal or relevant state laws presumptively illegal. Justice Stevens referred to this as "a legal weapon that no atheist or agnostic can obtain."[441] The process of enactment is the precise opposite of what should occur in a legitimate legislative determination of exemptions. It is blind accommodation, where the legislature has given religious entities across the board power to trump thousands of laws. These across-the-board approaches make it impossible for any legislature to make the public good determination that legitimates an exemption. The legislature is handing religious entities a power to battle generally applicable, neutral laws, without taking upon itself the necessity of determining whether voiding the law for some is in the public's interest. It is a benefit without consideration of the public good and therefore is a subsidy as opposed to a legitimate exemption.

439. *Smith*, 494 U.S. at 886–87.

440. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (noting that to avoid violating the Establishment Clause, a statute's "principal or primary effect must be one that neither advances nor inhibits religion").

441. City of Boerne v. Flores, 521 U.S. 507, 537 (1997) (Stevens, J., concurring).

In sum, a discussion of so-called church autonomy starts at the wrong end when it begins—and certainly when it ends—with only a discussion of what the church needs or demands.[442] The constitutionally relevant question is not what is best for any church—indeed that question is forbidden by the neutrality principle underlying the Establishment Clause[443]—but rather whether the liberty accorded is consonant with the rule against harming others. If so, the public good has been properly served. If not, the public good, and therefore the constitutional order, has been subverted. Both values—liberty and no harm to others—are necessary elements of any First Amendment calculus.

Misunderstandings by some state courts have led them to conclude that because the religious institution chose a particular placement for a cleric on the basis of religious belief, that the courts are thereby barred from applying general, neutral laws regulating harm inflicted by such clerics.[444] These courts have made a category

442. *See, e.g.*, Brady, *supra* note 11; *see also* Lupu & Tuttle, *supra* note 35.

443. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 648–49 (2002); Good News Club v. Milford, 533 U.S. 98, 112–14 (2001).

444. *See, e.g.*, Swanson v. Roman Catholic Bishop of Portland, 692 A.2d 441, 445 (Me. 1997). The court in this case held that the First Amendment barred a negligent supervision claim against a church regarding the sexual relationship between an adult parishioner and priest during the course of marital counseling because

> on the facts of this case, imposing a secular duty of supervision on the church and enforcing that duty through civil liability would restrict its freedom to interact with its clergy in the manner deemed proper by ecclesiastical authorities and would not serve a societal interest sufficient to overcome the religious freedoms inhibited.

Id.; L.L.N. v. Clauder, 563 N.W.2d 434, 444–45 (Wis. 1997) (holding that the First Amendment barred consideration of a negligent supervision claim against a diocese for a sexual relationship between an adult parishioner and priest while the priest was counseling the parishioner in his position as a hospital chaplain); Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 790 (Wis. 1995) (concluding "that the First Amendment to the United States Constitution prevents the courts of this state from determining what makes one competent to serve as a Catholic priest since such a determination would require interpretation of church canons and internal church policies and practices" in the context of negligent retaining, training, and supervision). *But see* Malicki v. Doe, 814 So. 2d 347, 358–60 (Fla. 2002) (finding that the First Amendment does not preclude a religious institution's liability for tortious acts arising out of sexual misconduct of clergy); Gibson v. Brower, 952 S.W.2d 239, 248 (Mo. 1997) (affirming the dismissal of breach of fiduciary duty, negligent hiring and supervision claim, and conspiracy claims, but reversing dismissal on intentional failure to supervise clergy claim) ("This rule clearly applies to 'generally applicable criminal law.' It also logically applies to intentional torts. Religious conduct intended or certain to cause harm need

mistake. The law may not forbid religious institutions from believing clergy belong in certain positions, but it certainly can govern their actions that cause harm to third parties. Thus, courts are not being asked to resolve a dispute over religious doctrine, or even to apply religious doctrine, but rather to apply settled legal principles to actions. "Although normally the practice of transferring a priest is a religious decision left up to his superiors, in [the context of childhood sexual abuse by clergy] it comes squarely within the state's jurisdiction."[445] While the logic of the ministerial exception—if one accepts it as good law and sets aside the question whether courts are institutionally competent to make what is in fact a public determination—may provide some justification for protecting the relationship between a religious institution and its adult clergy from judicial scrutiny, it cannot justify failure of the courts to apply generally applicable laws when the church and its clergy have harmed a third party.[446] To return to the rule of *Smith* and its antecedents, once the church takes action, it opens itself to legal liability, and the fact that it acted out of religious motivation is irrelevant to a court's inquiry into whether the legally proscribed action was taken and the legally proscribed harm accrued.

V. A CASE STUDY OF THE NO-HARM DOCTRINE: THE CATHOLIC CHURCH'S CLERGY ABUSE ERA

The elephant in the room at a conference addressing "church autonomy" in the early twenty-first century is the worldwide phenomenon of childhood sexual abuse by members of the clergy—with the knowledge of their individual churches—around the world.[447] Although it has been a problem for children for decades,

not be tolerated under the First Amendment." (quoting Employment Div. v. Smith, 494 U.S. 872, 884 (1990), and citing Cantwell v. Connecticut, 310 U.S. 296, 308 (1940))).

445. Carmella, *supra* note 9, at 1049.

446. The Florida Supreme Court reasoned:

> Substantial authority in both the state and federal courts concludes that the right to religious freedom and autonomy protected by the First Amendment is not violated by permitting the courts to adjudicate tort liability against a religious institution based on a claim that a clergy member engaged in tortious conduct such as sexual assault and battery in the course of his or her relationship with a parishioner.

Malicki, 814 So. 2d at 358–59.

447. *See* JASON BERRY & GERARD RENNER, VOWS OF SILENCE (2004); DAVID FRANCE, OUR FATHERS: THE SECRET LIFE OF THE CATHOLIC CHURCH IN AN AGE OF SCANDAL

and in truth centuries, it became impossible to ignore or deny in the United States when the *Boston Globe* broke the story of the Boston Archdiocese's extensive clergy abuse.[448] The magnitude of clergy sexual abuse is shocking in the Catholic Church, but it is also present in many other denominations.[449]

In the Catholic Church, the phenomenon of child abuse by clergy members is an issue with which the Church has struggled for centuries, reaching as far back as the fourth century.[450] But the

(2004); *see also* REPORT ON THE CRISIS IN THE CATHOLIC CHURCH *supra* note 306, at 92; *Ireland Orders Priest Abuse Inquiry*, BBC NEWS, Apr. 5, 2002, *available at* http://news.bbc.co.uk/1/hi/world/europe/1912153.stm; *Jury Awards $37M in Sex Abuse by Texas Minister*, *supra* note 328; Brian Lavery, *Archbishop of Dublin, Under Fire, Is Replaced*, N.Y. TIMES, Apr. 27, 2004, *available at* http://www.nytimes.com/2004/04/27/international/europe/27irel.html; *Sex Abuse Scandal Flares in Australia*, CBS NEWS, June 3, 2002, *available at* http://www.cbsnews.com/stories/2002/06/03/world/main510854.shtml; *Thousands of Jehovah's Witnesses Abused, Groups Say*, WASH. POST, Mar. 28, 2004, *available at* http://www.washingtonpost.com/wp-dyn/articles/A29713-2004Mar27.html (relating that more than six thousand victims made allegations since 1991).

448. The *Boston Globe* received a Pulitzer Prize for uncovering extensive childhood sexual abuse by priests with full knowledge of the Boston Archdiocese. *See* Mark Feeney, *Globe Wins Pulitzer Gold Medal for Coverage of Clergy Sex Abuse*, BOSTON GLOBE, Apr. 8, 2003, at A1, *available at* http://www.boston.com/globe/spotlight/abuse/extras/pulitzers.htm. Every article written about the scandal by the *Globe*'s investigative reporters since they broke the story in January 2002 can be accessed by visiting http://www.boston.com/globe/spotlight/abuse.

449. "While recent cases have focused on Catholic clergy, virtually every religious denomination has had its scandals. Over the past decade, reports of sexual misdeeds by clergy have cut across the religious landscape, from Protestant and Mormon churches to Jewish, Muslim, and Buddhist congregations." Jeffery Sheler, *Unholy Crisis*, U.S. NEWS & WORLD REPORT, Feb. 11, 2002, at 25; *see, e.g.*, Kevin Eckstrom, *Presbyterian Church Mulls New Rules in Sex Abuse Cases*, WASH. POST, Oct. 5, 2002, at B9 (reporting that an internal Presbyterian church report indicates that a "serial molester might have been stopped had officials intervened"); *Jury Awards $37M in Sex Abuse by Texas Minister*, *supra* note 328 (reporting that, in addition to the jury award of $37 million to nine plaintiffs abused by a Lutheran minister, plaintiffs' attorneys disclosed that the church paid out more than $32 million in settlements prior to the verdict); *LDS Church, Hospital Settle Child-abuse Case Out of Court*, DESERET NEWS, March 28, 2000, at B6 (settling a $750 million child abuse case out of court); Carrie A. Moore, *Church Settles Abuse Case*, DESERET NEWS, Sept. 4, 2001, at A1 (reporting that the Church of Jesus Christ of Latter-day Saints settled a child abuse case in Portland for $3 million).

450. FRANCE, *supra* note 447, at 64; KAROL JACKOWSKI, THE SILENCE WE KEEP: A NUN'S VIEW OF THE CATHOLIC PRIEST SCANDAL 44–45 (2004); Frances Grandy Taylor, *Report Falls Short, Whistleblower Says*, HARTFORD COURANT, Feb. 28, 2004 (discussing Father Thomas Doyle's response to the John Jay and National Review Board Reports); Press Release, Fr. Thomas P. Doyle, The John Jay Report and The National Review Board Report (Feb. 26, 2004) (on file with author).

Church has continued to operate as though it were a separate sovereign legal system, which is the heritage of the now-defunct ecclesiastical court jurisdiction over crimes in Britain and elsewhere in Europe.[451] It has operated as though it was autonomous of the law and unaccountable to the public good. In 1962, the Vatican issued a directive addressing the abuse phenomenon, which ordered secrecy and excommunication for those who did not abide by that secrecy.[452]

The fundamental question posed and answered by this era of clergy abuse revelations is whether religious institutions should be left alone to discipline criminally errant, tortious clergy. In 1987, Professor Lupu described precisely the problem that occurs when religious institutions, like the Catholic Church, operate as though they are autonomous of the law:

> Recognizing such claims of autonomy will, by definition, insulate from regulation behavior that the political branches have decided needs regulating. As the autonomy cloak spreads, the quantity of such otherwise illegal behavior, and the harm it causes, will presumably increase. And as the scope of autonomy moves farther away from the special activities that legitimate the autonomy claim, tolerance of those harms becomes increasingly difficult to justify.
>
> Moreover, assertions of autonomy may be likely to cloak economically self-interested behavior as they are to protect ideological purity. Because institutional autonomy claims will provide this cloak for behavior that is self-interested and otherwise unlawful behavior, their availability will create incentives for organizations to hide a variety of non-religious or non-speech activity behind the cloak. This, in turn, will tend to debase activities which we have come to respect as constitutionally special, turning them into easily accessible havens for economic and social outlaws.[453]

It is painfully apparent that self-policing has not worked to protect thousands of children from severe childhood sexual abuse.[454]

451. *See supra* Part II.A.2.

452. Vatican Press, *Instruction on the Manner of Proceeding in Cases of Solicitation from the Supreme and Holy Congregation of the Holy Office to All Patriarchs, Archbishops, Bishops and Other Diocesan Ordinaries Even "Of the Oriental Rite"* (1962), *available at* http://www.survivorsfirst.org/downloads/Crimine.pdf (last visited Nov. 5, 2004).

453. Lupu, *supra* note 29, at 403.

454. REPORT ON THE CRISIS IN THE CATHOLIC CHURCH, *supra* note 306, at 92.

The church autonomy theory being proposed in briefs authored by Catholic Church lawyers across the United States argues in favor of letting the Church handle its problems internally, without legal or judicial involvement, regardless of the harm that has or will result from the Church's actions.[455] Other churches have not voluntarily come forward regarding abuse until they were haled into court.[456] Indeed, but for the law, the abuse may have stayed out of the public's awareness forever. Quite similar reasoning is present in papers presented at this conference.[457] The no-harm principle, however, drives to an opposite conclusion.

If all churches were internally and naturally inclined always to take into account and to act for the public good in the oversight of clergy actions taken with respect to children or disabled adults, a church autonomy doctrine might be consistent with the public good. The facts of this era prove without question that the public good cannot be entrusted to private ordering, even when the private entity is a religious institution. The public good was not a driving factor in the handling of clergy abuse within the Catholic Church over decades, to say the least. Rather than employing the "moral use of its freedom in the promotion of the common good," the Church

> Too many [B]ishops[']. . . responses were characterized by moral laxity, excessive leniency, insensitivity, secrecy, and neglect. Aspects of the failure to respond properly to sexual abuse of minors by priests included: (i) inadequately dealing with victims of clergy sexual abuse, both pastorally and legally; (ii) allowing offending priests to remain in positions of risk; (iii) transferring offending priests to new parishes or other dioceses without informing others of their histories; (iv) failing to report instances of criminal conduct by priests to secular law enforcement authorities, whether such a report was required by law or not; and (v) declining to take steps to laicize priests who clearly had violated canon law.

Id.

455. The Catholic Church has resisted releasing its files under subpoena in many jurisdictions, including Boston, Los Angeles, and Philadelphia. In Boston, Judge Constance Sweeney rejected the privilege claims, including arguments made not to release documents to the public, lamenting "the increasingly dreary attempts of the [Roman Catholic Archbishop] to slow or limit disclosure of discovery." Walter V. Robinson, *Judge Finds Records, Law at Odds*, BOSTON GLOBE, Nov. 26, 2002, at A1; *see also* William Lobdell and Larry B. Stammer, *Mahony Criticized by National Review Panel*, L.A. TIMES, Feb. 28, 2004, at A1 (quoting the National Review Panel, which said "the [Los Angeles] archdiocese engaged in a very public spat with law enforcement agencies who questioned his level of cooperation in the criminal investigation").

456. *See, e.g.*, *Jury Awards $37M in Sex Abuse by Texas Minister*, *supra* note 328.

457. Brady, *supra* note 11; Dane, *supra* note 70; Lupu & Tuttle, *supra* note 35.

has concentrated solely, almost narcissistically, on its power and public reputation.[458]

Despite clear knowledge of widespread pedophilia and ephebophilia[459] within the Church over the course of decades,[460] cardinals and bishops worldwide hid the sexual abuse of minors from prosecutors, parents, and professionals.[461] As a result, the hierarchy of the Church knowingly and negligently put children at risk of sexual abuse by repeat offenders. Given that most pedophiles abuse a series of children, not just one,[462] the repeated opportunities made available with each new parish virtually guaranteed the large number of victims that resulted. The Church's own numbers, which cannot reflect the many victims who have yet to report their childhood sexual abuse, indicate that at least 10,667 children suffered childhood sexual abuse at the hands of 4,392 members of the clergy within the Church between 1950 and 2002.[463] Rather than reporting this criminal activity to the authorities, the Church systematically covered up the criminal behavior and thereby created further opportunities for pedophile priests to access children.

For church autonomy to work in a society, the churches would have to take it upon themselves to ensure that their actions served

458. Carmella, *supra* note 9, at 1033; REPORT ON THE CRISIS IN THE CATHOLIC CHURCH, *supra* note 306, at 100–12.

459. Ephebophilia is the psychological term for the attraction of adults to adolescents. It is derived from the root "ephebe," which means "a young man." WEBSTER'S NEW ENCYCLOPEDIC DICTIONARY 610 (2002).

460. Sipe, *supra* note 326.

461. REPORT ON THE CRISIS IN THE CATHOLIC CHURCH, *supra* note 306; *see also* Sipe, *supra* note 326.

462. "Pedophiles molest four times the number of children than do non-pedophile molesters. On average, a pedophile molests 11.7 children compared to a non-pedophile molester, who molests, on average, 2.9 children." GENE G. ABEL & NORA HARLOW, THE ABEL AND HARLOW CHILD MOLESTATION PREVENTION STUDY 3 (2002), *available at* http://www.stopchildmolestation.org/pages/study3.html (last visited Nov. 5, 2004). One Catholic psychologist, Thomas Plante, expected an average of eight victims per clergy perpetrator and was surprised that the report's average was only three. *Clergy Abuse Report Cites 'Homo-Erotic Culture,'* S.F. CHRON., Feb. 28, 2004, at A2.

463. JOHN JAY COLLEGE OF CRIMINAL JUSTICE, *supra* note 336, at viii–ix. Victims of childhood sexual abuse report their abuse between five and thirty-five percent of the time, which means that the Report's numbers probably should be multiplied by three to twenty times. Sociologist and Catholic priest, Andrew Greeley, predicted that there are probably 100,000 clergy abuse victims in the United States. Michael Paulson, *Abuse Study Says 4% of Priests in US Accused*, BOSTON GLOBE, Feb. 17, 2004, at A1.

the public good, or at least did not harm it. In the clergy abuse context, the Church would have needed a foolproof plan to get pedophile priests away from children and to find the most effective ways of treating the problems of the children who were molested.

Neither the public good nor the best interest of children was an overriding concern of the Church; rather, perpetuation of the institution, avoidance of public scandal, and preservation of power were far more potent motivators. One commentator characterizes the problem as follows:

> Where was the deficiency? In each diocese, the bishop enjoyed virtually unlimited discretionary power without serious checks and balances. The life and employment of every priest depended on him, every complaint converged on him, and all decisions originated from him. He was immune from any control from within his jurisdiction . . . . In the diocese, the divine power of the bishop has been exaggerated to the point that protection from human frailties has been omitted or neglected.[464]

In the review of clergy sexual abuse written by the Church's own lay review board, the response to victims from too many bishops was "characterized by moral laxity, excessive leniency, insensitivity, secrecy, and neglect."[465] The result has been shocking; in effect, the Church was abetting, if not condoning, thousands of child rapes. It is the largest child abuse scandal in United States history.[466] And the

464. Ladislas Orsy, *Bishops' Norms: Commentary and Evaluation*, 44 B.C. L. REV. 999, 1025 (2003).

465. REPORT ON THE CRISIS IN THE CATHOLIC CHURCH, *supra* note 306, at 92. The report also notes that "Church leaders . . . were altogether too easy on their fellow clergy and too willing to take the easy way out . . . . All of the presumptions weighed in favor of the accused priest . . . . This tilt is attributable in part to 'clericalism' . . . ." *Id.* at 93; *see also* Scott Appleby, *The Church at Risk: Remarks to the USCCB* (June 13, 2002), *available at* http://www.usccb.org/bishops/appleby.htm (last visited Nov. 5, 2004) (noting that all Catholics agree that the cause of the scandal is "a betrayal of fidelity enabled by the arrogance that comes with unchecked power"); JASON BERRY, LEAD US NOT INTO TEMPTATION: CATHOLIC PRIESTS AND THE SEXUAL ABUSE OF CHILDREN (2000); BERRY & RENNER, *supra* note 447; A.W. RICHARD SIPE, CELIBACY IN CRISIS: A SECRET WORLD REVISITED (2003); A.W. RICHARD SIPE, A SECRET WORLD: SEXUALITY AND THE SEARCH FOR CELIBACY (1990); A.W. RICHARD SIPE, SEX, PRIESTS, AND POWER: ANATOMY OF A CRISIS (1995).

466. It is an extreme understatement to state that other institutional child abuse scandals pale in comparison. *See, e.g.*, Nancy Hass, *Margaret Kelly Michaels Wants Her Innocence Back*, N.Y. TIMES, Sept. 10, 1995, at 37 (describing a day care sexual abuse scandal in Maplewood, New Jersey, where a worker was charged with molesting twenty children); Lynn Sweet, *On a*

resulting harm to the public good is enormous. "The practice of reassigning abusive priests implicated public order in all three of its dimensions: it violated the rights of others, the public peace, and the public morality."[467]

It is difficult enough to concentrate elected representatives' focus on the common good, even though the system is geared to move their attention in that direction and even though that is their assigned obligation in the constitutional order. Relying on private institutions to act only in the interest of the public good is an exercise in futility. There are no checks in the system that can transform private entities into public-regarding entities. They are neither positioned to have all that is necessary to calculate the public good nor do they operate from a horizon that necessarily includes all classes of citizens.[468] In addition, they typically operate within a world view that measures harm from a self-interested perspective and, therefore, are likely to underestimate the actual quantum of harm to others.[469]

Quest for Vindication, CHI. SUN-TIMES, June 6, 1999, at 30 (describing a day care sexual abuse case in Chicago in which a worker was acquitted of molesting four girls); *see also* Taylor v. Litteer, No. 94-78-SD, 1994 U.S. Dist. LEXIS 15803 (D.N.H. Oct. 24, 1994) (describing one of several Boy Scout sex abuse cases involving a single child's allegations of abuse); MARTIN J. COSTELLO, HATING THE SIN, LOVING THE SINNER: THE MINNEAPOLIS CHILDREN'S THEATRE COMPANY ADOLESCENT SEXUAL ABUSE PROSECUTIONS 110–12 (1991) (analyzing child abuse prosecutions of staff at a youth theatre company in 1984); Barbara Baird, *Youth Groups Fear Specter of Sexual Abuse*, L.A. TIMES, Sept. 25, 1988, § 2, at 4 (describing abuse in the Little League and Big Brothers); Tom Coakley, *Brockton Preschool Withdraws State Appeal; License Revocation Stands in Sexual Abuse Case*, BOSTON GLOBE, Sept. 29, 1989, Metro-17 (describing abuse in a Massachusetts preschool); Steve Crane, *Woman Maintains Innocence in Preschoolers' Abuse Case*, WASH. TIMES, July 26, 1989, at B1 (describing abuse in a Maryland preschool); Seth Mydans, *Child Abuse: Some Prosecutions Win*, N.Y. TIMES, Jan. 20, 1990, at A12 (describing the notorious McMartin Preschool sexual abuse scandal in Manhattan Beach, California, where owners were charged with seventy-five counts relating to child molestation; Dade County day care owners convicted in Florida); Eileen Ogintz, *Jordan Sex Case Is Over; Trauma Isn't*, CHI. TRIB., Feb. 15, 1985, at C6 (describing child abuse sex ring in Jordan, Minnesota).

467. Carmella, *supra* note 9, at 1049.

468. *See supra* note 12 and accompanying text.

469. *See* John McElhenny, *Monsignor Says Harm of Abuse Wasn't Recognized*, BOSTON GLOBE, Feb. 23, 2004, at A1 (reporting the comments of Monsignor Richard S. Sniezyk, interim leader of the Springfield Diocese, during an interview in which he said that the scandal that has rocked the Catholic Church stems from a belief among some priests during the 1960s, 1970s, and 1980s that sex with young men was acceptable).

While the Church has a constitutional right to complete control over its belief system, including those beliefs that dictate clergy placement, it is not immunized thereby for the actions it takes that result in harm to third parties. For example, and taking an example distinct from childhood sexual abuse, a church may believe in purifying the bodies of babies by not feeding them.[470] A court may not mandate that the church alter its beliefs, or require admission into the church of those who disagree with those beliefs, no matter how heinous.[471] The church's beliefs are autonomous and may revolve in a completely autopoietic universe for eternity, untouchable by state control. When the group translates its beliefs into action, however, and children are near death or dying, the state has an obligation to interfere with the group by applying the laws against child neglect, endangerment, and murder, regardless of religious motivation.[472] When injurious conduct is present, the entity's religious beliefs, if invoked to forestall the law, are a smoke screen to accountability. Beliefs do not immunize actions,[473] and thus the state—through legislation and judicial enforcement—has the power to redress the harm caused by the religious entity even though the conduct was religiously motivated.

In the clergy abuse cases, the Church does not profess a belief in making children available to pedophiles, but it has expressed a belief in priest "formation," which entails guidance of priests by their religious superiors. That belief is sacrosanct, and no legitimate government can force the Church to alter the belief. But where the Church renders third-party harm through its conduct, that conduct is fair game for criminal, tort, and regulatory law.

The sole question before the courts in the third-party harm cases is whether the religious group or individual took illegal action that caused harm and whether the law is generally applicable and neutral toward all who took similar actions. If the law was neutral, the action was taken, and the proscribed harm ensued, the group or individual is culpable and liable under the law. For example, where a church

470. *See, e.g.*, Commonwealth v. Cottam, 616 A.2d 988, 993 (Pa. Super. Ct. 1992).

471. *See supra* note 36 and accompanying text.

472. *See, e.g.*, Hermanson v. State, 604 So. 2d 775, 775–76 (Fla. 1992); Nicholson v. State, 600 So. 2d 1101, 1102–03 (Fla. 1992).

473. *See supra* note 37 and accompanying text.

moves a pedophile from one parish to another, and new victims are created with each move, the church is accountable under the governing law, which may include prohibitions against reckless endangerment, negligent supervision, conspiracy to child abuse, aiding and abetting child abuse, accessory to child abuse, a panoply of tort laws, and regulations involving the operation of a school.[474] It is the price for living in a democratic society.

Some would argue that the no-harm rule is detrimental to "minority" religions, because they will be unlikely to obtain exemptions from generally applicable, neutral laws. Thus, they would raise the specter of mainstream religions obtaining numerous exemptions from the law, while minority religions cannot. The concern deserves some response, because it is based on multiple misunderstandings regarding the United States and its republican form of government.

Minority religions are not necessarily or even usually consigned to a life of belief divorced from action under a republican form of government. First, the reference to "minority" religions is somewhat misleading. In the United States, there is no majority religion. Protestantism, taken as a whole, which would encompass a vast number of faiths, is a dwindling majority and will not be the majority religion in the very near future.[475]

Second, it is a fact that minority religions have done quite well in obtaining exemptions in the legislatures, which would seem to weaken the argument significantly.[476] The often-stated concern that the courts are the better institution to secure religious liberty because they are better than legislatures at protecting minorities has not been proven as an empirical matter. During Prohibition, which

474. *See, e.g.*, Smith v. O'Connell, 986 F. Supp. 73 (D.R.I. 1997) (negligent supervision); Mark K. v. Roman Catholic Archbishop, 79 Cal. Rptr. 2d 73 (Cal. Dist. Ct. App. 1998) (negligent supervision, retention, and fraud and conspiracy to suppress facts); Gagne v. O'Donoghue, No. CA 941158 1996 WL 1185145 (Mass. Super. Ct. June 26, 1996) (negligent hiring and supervision, breach of fiduciary duty, and clergy malpractice); Kenneth R. v. Roman Catholic Diocese of Brooklyn, 229 A.D.2d 159 (N.Y. App. Div. 1997) (negligent hiring, supervision, and retention); Jones by Jones v. Trane, 591 N.Y.S.2d 927 (N.Y. Sup. Ct. 1992) (breach of trust, outrageous conduct, and negligent hiring); Hutchison *ex rel.* Hutchison v. Luddy, 742 A.2d 1052 (Pa. 1999) (negligent hiring, supervision, and retention); C.J.C. v. Corp. of Catholic Bishop of Yakima, 985 P.2d 262 (Wash. 1999) (negligence).

475. *See* Peter Smith, *Protestants Are Close to Losing Majority Status*, LOUISVILLE COURIER-JOURNAL, July 21, 2004, at 1A.

476. *See generally* HAMILTON, *supra* note 3.

was a time when anticlericalism was strong in the United States, Congress provided an exemption to the Catholic Church for the use of sacramental wine.[477] In more recent years, orthodox Jews obtained a right to wear yarmulkes in the military after the courts declined to create an exemption from the military's uniform rules.[478] Before and after the Supreme Court declined to craft an exemption for Native American Church members to use the prohibited drug peyote, many states and the federal government created such exemptions.[479] In all three of these instances, small or disfavored religious entities were able to obtain the legislative exemption they sought.

Third, the republican form of government is not a system whereby majorities of the people govern. Rather, a majority of the people choose their rulers, but those rulers are then set free from the majority to rule in the public good.[480] Political scientists moreover now accept as fact that minorities with a coherent message fare better in the legislative process than unorganized majorities.[481]

Fourth, the argument seems to be that small religions will be subject to covert discrimination. The religion clauses discourage legislatures from acting on such motives. Any law specifically singling out a particular religious organization for detrimental treatment is unconstitutional.[482] Where the legislature has decided that particular

477. *See* National Prohibition Act of 1919, ch. 85, tit. II, § 3, 41 Stat. 305, 308–09 (1919).

478. Goldman v. Weinberger, 475 U.S. 503, 509–10 (1986) (holding that a government prohibition on wearing a yarmulke did not violate the Free Exercise clause because the military evenhandedly regulated its interest in uniform and discipline). Congress responded by amending the regulations. *See* 10 U.S.C. § 774 (2000).

479. Employment Div. v. Smith, 494 U.S. 872, 884 (1990). After the decision in *Smith*, Oregon and the federal government joined other states and created legislative exemptions for the use of peyote. *See* Louis Fisher, *Indian Religious Freedom: To Litigate or Legislate?*, 26 AM. INDIAN L. REV. 1, 32–36 (2001).

480. *See generally* Hamilton, *Direct Democracy*, *supra* note 1; Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule With an Attorneyship Model of Representation*, 69 N.Y.U. L. REV. 477 (1994); Hamilton, Why the People Do Not Rule, *supra* note 1.

481. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 144 (2d ed. 1971); *see also* JEFFREY M. BERRY, THE NEW LIBERALISM: THE RISING POWER OF CITIZEN GROUPS 154 (1999) ("The dominant scholarly explanation of interest group mobilization—then and now—is Mancur Olson's selective incentive theory of collective action.").

482. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

actions are unacceptable, because they generate certain harm, and issued a blanket prohibition on the action, there is some insurance that the legislature has not acted out of discriminatory motives. The willingness to burden all actors with the law means that the legislature is concerned about the harm, not the identity of the actor.

Even then, perhaps there is a risk that some small, politically powerless religions that are incapable of putting together a coherent message for the legislature and incapable of enlisting the support of mainstream religions may well have problems obtaining exemptions. The system does not generate perfect results, no matter how exemptions are handled. In the end, the *Smith* Court weighed the alternatives in this scenario as follows:

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[483]

The legislature is the entity that is institutionally competent to hear the concerns of burdened religious entities and to make the determination whether relieving them of obligations to a particular law is consistent with the public good. Thus, the route for those individuals and institutions that find their religious conduct at odds with the prevailing law lies beyond the courts. The Supreme Court in *Smith* made it clear that religious entities may ask for legislative exemptions narrowly tailored to their religious practices.[484] If a religious entity can persuade a legislature that exempting it from the

483. *Smith*, 494 U.S. at 890.

484. *Id.*; *see also* Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 330 (1987) (upholding an exemption from Title VII for the secular, nonprofit activities of a religious organization). It is, however, interesting to note that for Justice Brennan, the religious nature of the organization was not important in this case:

> I write separately to emphasize that my concurrence in the judgment rests on the fact that these cases involve a challenge to the application of § 702's categorical exemption to the activities of a *nonprofit* organization. I believe that the particular character of nonprofit activity makes inappropriate a case-by-case determination whether its nature is religious or secular.

Id. at 340 (Brennan, J., concurring).

law will not harm the public good, then an exemption is consistent with ordered democracy.[485] If not, then the church is rightly prevented from doing the harm proscribed by the legislature.

An expansive church autonomy doctrine, in contrast, would turn the democratic process on its head. If churches were autonomous, courts would be jurisdictionally barred from examining any action that is religiously motivated, because they would have to address some ecclesiastical beliefs. In effect, the courts would have to abstain from applying the law to the religious entity or individual. Even a weaker version, wherein the courts weighed the church's interest in autonomy against the needs of the society, undermines the search for the larger public good because the courts' weighing is inevitably limited by the case and controversy requirement, which forbids the court from investigating the issues beyond the bounds of the parties' filings.

Courts are institutionally incompetent to determine what is in fact in the public's interest. The church autonomy that would remove courts from hearing legal disputes brought by third parties against religious institutions in effect nullifies those laws. Thus, the theory displaces the legislature's judgment regarding the public good. Moreover, where the courts would take jurisdiction, but would weigh the public interest against the religious entity, as in the *Sherbert* line of cases,[486] they are especially incompetent. The courts do not have the tools or the resources to investigate the larger public good and therefore are in no position to determine whether an exemption should be carved out of a particular law. The exemption decision properly belongs to the body entrusted with ensuring the public good—the legislature—which is situated through its many contacts with the people and its access to wide-ranging, independent investigation to determine how particular religious practices will impact and therefore potentially harm citizens.

485. For further elaboration of this concept, see Hamilton, Direct Democracy, *supra* note 1.

486. Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

When religious institutions demand autonomy from duly enacted laws, they are asking to be set outside society, which is an impossibility. Even more problematic, they are asking to be placed beyond the rule that demands accountability for actions that harm others.

VI. CONCLUSION

"Church autonomy" is no doctrine at all but rather a theory fundamentally at odds with the Constitution, its history, and the rule of law it institutes. An expansive church autonomy regime would turn all religious entities into potential threats to fellow citizens and inevitably cause the sort of interdenominational strife that this country largely has avoided to date. The era of immunity for religious institutions and individuals from laws that punish harm inflicted upon others has long passed, with the demise of the benefit of clergy, the ecclesiastical courts' jurisdiction over crimes, sanctuary, the decline in charitable immunity, and the inexorable rise of the no-harm rule.

The no-harm rule, with its distinguished pedigree in John Locke, Thomas Jefferson, James Madison, John Stuart Mill, H.L.A. Hart, Joel Feinberg, utilitarian and deontological philosophy, and Catholic and Protestant theology, ensures expansive liberty of conscience but protects citizens from the harmful actions of all others, whether religious or secular.

The no-harm doctrine is already deeply embedded in the Supreme Court's cases, in which the Court has repeatedly affirmed both the absolute liberty of conscience and the principle of no harm. The draw of the church autonomy theory among religious institutions in this era is a throwback to long-rejected principles that cannot coexist with the continual working out of the principle of the rule of law in a republican democracy. The Catholic Church's clergy abuse era is strong testimony to the cost to society of religious institutions that seek to operate in a secret sphere, where unchecked, they may harm untold numbers and forestall the administration of justice. It is no longer an open question whether religious institutions should be governed by the laws that govern everyone else, if it ever was; it is a proven necessity.