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## The Voluntary Principle and Church Autonomy, Then and Now

*Thomas C. Berg\**

### I. THE FOUNDING ERA CHURCH-STATE SETTLEMENT AND THE VOLUNTARY PRINCIPLE

Professor Carl Esbeck's paper,<sup>1</sup> which offers a historical perspective on the issue of church autonomy, will serve as a terrific resource for future work by legal scholars. Professor Esbeck introduces into the legal literature a discussion of how church-state relations developed in the forty years after the ratification of the First Amendment. He surveys the writing on that period by leading observers and scholars of American religion, such as Robert Baird, Sidney Mead, Philip Schaff, William Warren Sweet, and Alexis de Tocqueville.<sup>2</sup> One can argue that, with respect to religious freedom, our nation's "founding era" really extends to encompass these later decades, concluding with the demise of the last state regime of tax assessments for religious teaching, that of Massachusetts, in 1833.<sup>3</sup>

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\* Professor of Law, University of St. Thomas School of Law (Minnesota), and Co-Director, Terence J. Murphy Institute for Catholic Thought, Law, and Public Policy. Thanks to Fred Gedicks and Deborah Wright for their hospitality at the Conference on Church Autonomy at Brigham Young University, J. Reuben Clark Law School, February 6–7, 2004, at which I gave the remarks on which this paper is based. Thanks to the participants in the conference, especially Kathleen Brady, for illuminating comments and discussion of various points.

1. Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385.

2. *Id.* at 1547–70; *see also, e.g.*, ROBERT BAIRD, RELIGION IN THE UNITED STATES OF AMERICA (Edwin S. Gaustad ed., Arno Press & The New York Times 1969) (1844); SIDNEY E. MEAD, THE LIVELY EXPERIMENT: THE SHAPING OF CHRISTIANITY IN AMERICA (1976); PHILIP SCHAFF, AMERICA: A SKETCH OF ITS POLITICAL, SOCIAL, AND RELIGIOUS CHARACTER (Perry Miller ed., 1961) (1855); WILLIAM WARREN SWEET, REVIVALISM IN AMERICA: ITS ORIGIN, GROWTH AND DECLINE (1944); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (J. P. Mayer & Max Lerner eds., Harper & Row 1966) (1851).

3. For other historical works connecting these periods, *see, for example*, EDWIN GAUSTAD, FAITH OF OUR FATHERS: RELIGION AND THE EARLY REPUBLIC, 1776–1826 (1987); WILLIAM MCLOUGHLIN, NEW ENGLAND DISSENT 1630–1833 (1971).

Professor Esbeck primarily describes the church-state “settlement” of the founding era and the early republic. The nature of that settlement combined basic religious freedom for all faiths (free exercise) with government noninvolvement in the distinctive sphere of religious life and in the churches (nonestablishment). The specific features of the settlement included:

(1) A separation of church and state that emphasized the exclusion of the state from “inherently religious” activities and that was designed primarily to protect the vitality and independence of religious groups.<sup>4</sup> This separation stood in marked contrast to a separationism founded on a suspicion of religion and a desire to protect society from religious oppression—a prime example of which is the *laïcité* principle arising out of the French Revolution.<sup>5</sup>

(2) Equal governmental treatment of all faiths—in part to avoid divisions that had arisen when colonial or state governments favored one faith.<sup>6</sup>

(3) A reaffirmation that religious principles and voices were crucial to the health of society and therefore were welcome in politics and public debate. Those religious principles, however, were to be nurtured in voluntary associations independent of the state.<sup>7</sup>

This founding-era settlement, Professor Esbeck notes, is well summarized in the “voluntary principle” described in the 1840s by Presbyterian historian Robert Baird. As Baird painted the picture, government would neither suppress nor promote worship:

In every state liberty of conscience and liberty of worship is complete. The government extends protection to all. . . . The proper civil authorities have nothing to do with the creed of those who open a place of worship.

. . . .

On the other hand, . . . neither the general government nor that of the States does any thing directly for the maintenance of public worship.

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4. Esbeck, *supra* note 1, at 1393–94, 1590–91.

5. For a thorough discussion of French *laïcité* and American religious freedom, critical of some of the applications of both, see T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 BYU L. REV. 419.

6. Esbeck, *supra* note 1, at 1394, 1396, 1569.

7. *Id.* at 1398–1400.

. . . [Religion relies] upon the efforts of its friends, acting from their own free will.<sup>8</sup>

Professor Esbeck's focus on this widespread historical consensus is salutary for our current debates about church autonomy and other church-state issues. Taking a historical consensus as a starting point helps us—and, more importantly, judges interpreting the Constitution—to choose among the wide array of possible approaches to church-state relations. When judges are disciplined by history, they cannot simply enunciate whatever approach to church and state they like and baptize it with the broad language of the First Amendment. Moreover, history affects our present situation. America may be a nation of frontiersmen and immigrants, but even here individuals and societies do not entirely reinvent themselves. If the voluntarist approach was the dominant principle of church-state relations adopted in our founding era, it deserves at least serious consideration as an approach today as well.

However, the lessons of history can also be complicated, and that is the issue I wish to explore in this commentary. Professor Esbeck aims to identify the widespread consensus about religion and government in early America. Consistent with this emphasis on consensus, he discusses two issues of current law whose proper resolution is unambiguous under the voluntary principle. First, Professor Esbeck argues that religious perspectives should be welcome in political debate and activity on the same terms as other perspectives.<sup>9</sup> Second, and related, he writes that religious speech and activity should be welcome in public schools on the same terms as their secular counterparts, as the Court has repeatedly held.<sup>10</sup>

But in setting forth this consensus, Professor Esbeck does not focus on issues that, as to the voluntary principle of antebellum America, were ambiguous or contained internal tensions. Where such ambiguities exist, the application of the founding-era settlement to these issues in modern times could be expected to produce hard

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8. BAIRD, *supra* note 2, at 287–88; *see also* Esbeck, *supra* note 1, at 259–62 (summarizing Baird's description).

9. Esbeck, *supra* note 1, at 1397 n. 30.

10. *Id.* at 1585–86; *see also, e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Lamb's Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981).

cases. And indeed it has. The three areas on which the precise contours of the voluntary principle were open to question were, as I will try to show: (1) government financial aid to the human services provided by religious organizations, such as education and social work; (2) government promotion of general religious ideas through nonfinancial, noncoercive means, such as prayers in public schools; and (3) constitutional protection of the private religious conduct of churches or individual believers against restrictions by general laws not aimed at religion.<sup>11</sup> Not surprisingly, these are the areas of church-state interaction that remain hotly disputed and regularly litigated.

In these comments, I look first at the history, proceeding from Professor Esbeck's solid foundation, to explore how the voluntary principle contained ambiguities with respect to each of these three areas. Next I look at translating that history into the present: I explore how circumstances have changed since the early republic and how those changes might affect the application of the voluntary principle to today's hard cases. I conclude that the changes have strengthened the case for forbidding government's own expression of its preferred religious view, but that they have also strengthened the case for exempting some private religious conduct from generally applicable laws and for permitting religious organizations to receive some kinds of government financial aid. In keeping with the theme of the conference, I concentrate on how the founding-era settlement might apply particularly to the autonomy of churches and other religious organizations.

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11. As Professor Esbeck puts it, "practice [in the 1800s] lagged behind principle" concerning the voluntarist settlement; "Americans did not always foresee the full ramifications when lofty principle was later worked out at the retail level." Esbeck, *supra* note 1, at 1400. This was particularly true with respect to "the state's verbal and symbolic endorsement" of Christianity in forms other than "funding support"—such as school prayers, legislative prayers, civic pledges, thanksgiving proclamations, and so forth. *Id.* at 1400 n.39. I discuss these practices *infra* in Part II.A.

## II. THE VOLUNTARY PRINCIPLE AND CHURCH AUTONOMY, THEN AND NOW

### *A. Government Noncoercive Religious Statements and Ceremonies*

The first issue on which the founding-era settlement contained ambiguities or internal tensions is the government's sponsorship of religious exercises, ceremonies, or teachings, such as legislative prayers, Thanksgiving Day proclamations, and prayers or Bible readings in public schools. Such official religious affirmations were pervasive in nineteenth-century America. Here and later, I quote Robert Baird, who, as Professor Esbeck notes, was virtually unequalled in his "comprehensive understanding of 'the whole range of religious activity in the [antebellum] United States.'"<sup>12</sup> Notwithstanding the principle that religious activity should be voluntary and all faiths equal, Baird noted that legislation in the states "is still decidedly favourable, in general, to the interests of Christianity."<sup>13</sup> Although the states "relinquish[ed]" all attempts to promote religion by what is called an establishment, yet they . . . deemed it neither unwise nor unjust to pursue the same end indirectly."<sup>14</sup> Baird cited as examples Sunday-closing laws, antiblasphemy laws, theistic oaths in court, and officially sponsored Bible readings in "most" of the (then very new) state-sponsored schools.<sup>15</sup>

Such indirect practices seemed to be approved by the church-state settlement: government noninvolvement in the province of the church did not mean total government separation from general religious ideas and affirmations relevant to civic life. As Professor Esbeck puts it, many Americans "rationalized" such nonfinancial support of religion "as not inconsistent with the American church/state settlement" in large part because it "was not coercive but only ceremonial; no one had to believe it," though the government would teach it.<sup>16</sup> Yet as Professor Esbeck also suggests,

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12. Esbeck, *supra* note 1, at 1552 (quoting ROBERT BAIRD, RELIGION IN AMERICA: A CRITICAL ABRIDGEMENT xiii (Henry Warden Bowen ed., 1970) (1856)).

13. BAIRD, *supra* note 2, at 273.

14. *Id.* at 277.

15. *Id.* at 274, 279; *see also id.* at 279 (adding that "[w]here [primary-school teachers] are pious, they find no difficulty in giving a great deal of religious instruction").

16. Esbeck, *supra* note 1, at 1400–01 n.39.

such practices also seemed to contravene several aspects of the voluntary principle.<sup>17</sup> They did constitute government involvement in religious matters; religion was not left wholly to private initiative. These practices could sap the vitality of religious ideas by corrupting them to serve government's ends rather than divine mandates. And the practices did, in at least an indirect sense, treat as less equal those who did not share the generalized Christian faith reflected in them.

In the late twentieth century, of course, the Supreme Court began to strike down such practices—beginning with state-composed prayers in the public schools—as violations of the Establishment Clause, incorporated into the Fourteenth Amendment.<sup>18</sup> These decisions can be justified in part on the basis of the autonomy of churches and religious life: the autonomy that, as Professor Esbeck shows, was central to the American church-state settlement. The original school prayer ruling stated that “a union of government and religion tends to [among other things] degrade religion.”<sup>19</sup> And as I have argued elsewhere, practices like school prayer lost the support of many elites in the 1960s precisely because of a sense that such practices had made mainstream American Christianity self-satisfied—had led it to ignore pervasive injustices such as racial segregation—because of “the illusion that America was a ‘Christian nation.’”<sup>20</sup>

Some prominent mainline Protestants, for example, argued that public religious ceremonies were “often in content little more than the national culture religion,”<sup>21</sup> encouraging a “national self-righteousness” and an “emphasis on social conformity.”<sup>22</sup> They

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17. *Id.* at 1400 (referring to “the state’s verbal and symbolic endorsement” as a case in which “practice lagged behind principle”).

18. *See, e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (majority-ratified official prayers at high school football games); *Lee v. Weisman*, 505 U.S. 577 (1992) (state-sponsored prayer by clergyman at school graduation); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (crèche erected in government building); *Stone v. Graham*, 449 U.S. 39 (1980), *reh’g denied*, 449 U.S. 1104 (1981) (posting of Ten Commandments in schools); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (school-sponsored Bible readings); *Engel v. Vitale*, 370 U.S. 421 (1962) (state-composed official school prayers).

19. *Engel*, 370 U.S. at 431.

20. Thomas C. Berg, *Race Relations and Modern Church-State Relations*, 43 B.C. L. REV. 1009, 1014–16 (2002) (citing various sources).

21. *Hearing Before the S. Subcomm. on Constitutional Amendments* (Aug. 8, 1966) (statement of Robert S. Alley), *reprinted in* ROBERT S. ALLEY, *SCHOOL PRAYER: THE COURT, THE CONGRESS, AND THE FIRST AMENDMENT* 247, 250 (1994).

22. JOHN C. BENNETT, *CHRISTIANS AND THE STATE* 7 (1958).

charged that official prayers were “more akin to a national cult than to the faith of the New Testament” and that pervasive racial injustice revealed “the shallowness of the public religious sentiments of the era.”<sup>23</sup> They argued that eliminating official religious ceremonies would “dissipat[e] the myth that ours is a Christian country” and would deliver the Christian church from a posture of privilege into a posture of seeking justice and freedom for all people.<sup>24</sup> These sentiments reflect an application in the 1960s of the voluntarist warning that close government-religious interaction—even when meant to help religion—can threaten the independent, prophetic role of religious organizations and communities.

But in all likelihood, the primary rationale for the school prayer decisions was a concern that such practices relegated religious dissenters to an unequal position. In the decisions of the 1960s, the Court extended this concern beyond minority or dissenting Christian denominations to protect non-Christians and those with no religious faith at all. The 1961 decision striking down requirements that officeholders declare belief in God, for example, emphasized that the state may not “aid all religions as against nonbelievers, [or] those religions based on a belief in the existence of God as against those religions founded on different beliefs.”<sup>25</sup> This extension of Religion Clause limitations no doubt reflected the nation’s increasing pluralism in matters of religion. As that pluralism has increased, any official religious exercise by government—no matter how general its terms—has come more and more to seem partial, to exclude a significant number of views on religious questions.

To put it another way, the increase in religious pluralism is one of the developments since the early republic that has affected how the voluntary principle should apply today. As I have tried briefly to show, the voluntary principle as adopted in the early republic contained ambiguities and internal tensions on the question of government-sponsored religious ceremonies. Such practices were

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23. ALLEY, *supra* note 21, at 250.

24. *Id.* at 122 (internal quotation marks omitted) (quoting a 1962 statement by Rev. Gerald Burrill, Episcopal Bishop of Chicago); see also COLIN W. WILLIAMS, WHAT IN THE WORLD? 64 (1964).

25. *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961); see also *Engel v. Vitale*, 370 U.S. 421, 430 (1962) (“[T]he fact that the [state-composed official school] prayer may be denominationally neutral [cannot] . . . serve to free it from the limitations of the Establishment Clause . . .”).

widely accepted, but they conflicted in principle with many of the underlying goals of the voluntary approach. It is not surprising, therefore, that modern decisions have pushed the voluntarist approach toward greater disapproval of government-sponsored religious ceremonies. Because of later developments, internal tensions in the church-state settlement on this topic have been resolved in favor of striking down more and more of these practices.<sup>26</sup>

### *B. Government Aid to Religious Organizations*

A second key church-state question, in the early 1800s and today, is whether government may provide tax-supported assistance for valuable services—such as education and social services—that are rendered by religious organizations.

On this score, again, the antebellum church-state settlement contained some internal tensions. At its core, the voluntary principle (as described by Baird) includes some strong statements against government support for religious activity by private organizations. As I noted earlier, the voluntary principle meant that no level of government “does any thing directly for the maintenance of public worship[;] . . . no where does the civil power defray the expenses of the churches, or pay the salaries of ministers of the gospel, excepting in the case of a few chaplains connected with the public service.”<sup>27</sup> As a result, Baird said, religion in America had to rely, “under God, upon the efforts of its friends, acting from their own free will.”<sup>28</sup> The advantage of this was that Americans had “been trained to exercise the same energy, self-reliance, and enterprise in the cause of religion

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26. The argument here is not that later developments can justify striking down a practice that was clearly consistent with the original meaning of the Religion Clauses or the founding-era settlement. The argument is that where the original settlement contained ambiguities, later developments can help determine how to resolve the ambiguities in applying the settlement today.

The current case law, of course, also reflects ambivalence and tension about the permissibility of government-sponsored religion. *See, e.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301 (2004) (avoiding question of whether “under God” in school recitations of the Pledge of Allegiance is unconstitutional); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (permitting a crèche in a city-sponsored Christmas display); *Marsh v. Chambers*, 463 U.S. 783 (1983) (permitting official legislative prayers and chaplaincies).

27. BAIRD, *supra* note 2, at 288.

28. *Id.* (describing this as “the grand and only alternative” in America).

which they exhibit in other affairs.”<sup>29</sup> For example, if a church building were damaged or destroyed, “instead of looking to some government official for the means of needful repair, a few of [the congregation] put their hands into their pockets, and suppl[ied] these themselves, without delay or the risk of vexatious refusals from public functionaries.”<sup>30</sup> These passages quickly but forcefully make the case—still highly relevant today—that government support for a religious entity’s activities can rob the entity of its independence and vitality. Government assistance may be “delay[ed],” may come with “vexatious” strings attached, and may undermine a religious community’s “energy, self-reliance, and enterprise.”<sup>31</sup>

Remember, however, that Baird simultaneously emphasized the many “indirect” ways in which government could support Christianity or religion in general—ways that extended to tax-financed support for religious education and social services.<sup>32</sup> For example, governments in the antebellum period commonly assisted religiously inspired education, “though in doing so, they often assist[ed] the cause of religion, in what might be considered almost the most direct manner possible.”<sup>33</sup> States gave aid to “colleges directed by religious men, . . . while well aware that the colleges aided by such grants [were] under a decided religious influence;” states gave aid “without stipulating for the slightest control over these institutions.”<sup>34</sup> The states also aided many preparatory academies—schools for teenage males preparing for college—of which many were “conducted by ministers of the gospel and other religious men” and therefore were “nurseries of vast importance both for the church and the state.”<sup>35</sup> As to state-supported primary schools, Baird first made the relatively modest claim that their simple dissemination of knowledge, “although not religion, greatly facilitates [religion’s] diffusion by means of books.”<sup>36</sup> But he added—and other sources confirm—that the Bible was “read in most of the schools,” and that “[w]here [primary-school teachers were]

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29. *Id.* at 292.

30. *Id.*

31. *Id.*

32. *See supra* note 8 and accompanying text.

33. BAIRD, *supra* note 2, at 277.

34. *Id.* at 278.

35. *Id.*

36. *Id.*

pious, they [found] no difficulty in giving a great deal of religious instruction.”<sup>37</sup>

State governments also provided liberal amounts of aid to social-welfare entities such as “asylums for the deaf and dumb, and for the blind, almost all of which institutions [were] under a decidedly religious influence.”<sup>38</sup> And states with large cities also gave support to religiously inspired “retreats or houses of refuge, where young offenders . . . who have not gone hopelessly astray, may be placed for reformation.”<sup>39</sup> The precedent for today’s charitable-choice and “faith-based” initiatives is unmistakable.

If we again take Baird’s description as accurate, the church-state settlement of the early republic seemingly drew a distinction between government: (a) supporting distinctively religious elements such as clergy, worship, and church buildings; and (b) supporting activities such as education and social services that were provided by religious organizations and contained religious elements. The latter activities offer a social benefit whether they are provided by religious or nonreligious organizations. Thus, one can argue that an entity providing the services should not be disqualified from state assistance simply because it is religiously affiliated or incorporates religious teachings into the activity. Such an idea has echoes in modern case law and legislation. The Court has held that states may include religious elementary and secondary schools in educational voucher programs<sup>40</sup> but has also left the states free to deny generally available scholarships to students engaged in ministerial training, which the Court called a “distinct category of instruction” from other subjects.<sup>41</sup> Likewise, recent charitable-choice programs offer aid to religious social-service providers on the same terms as their secular counterparts, but the aid may not go directly to distinctively religious activities such as “sectarian worship, instruction, or proselytization.”<sup>42</sup>

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37. *Id.* at 279; *see also* ANSON PHELPS STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES 371–72 (rev. one-vol. ed. 1964) (noting “the common practice [in the 1830s] of reading the King James Version of the Bible at the opening exercises in public schools”).

38. BAIRD, *supra* note 2, at 279.

39. *Id.*

40. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

41. *Locke v. Davey*, 124 S. Ct. 1307, 1313 (2004).

42. *See, e.g.*, Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 104(j), 42 U.S.C. § 604A(j) (2002).

But this line between “inherently religious” activities and education or social services reflects, again, an internal tension in the church-state settlement. Even aid to “inherently religious” activities typically provides some social benefit, as does aid to education or social services. Conversely, aid to activities such as education or social services provided by religious entities may likewise undercut some of the principles of voluntarism, as does aid to clergy or worship services. When religious schools or social services receive aid, they may become dependent on government rather than on the energy and philanthropy of their members, and so lose their vitality. They may also lose their independence because of conditions that government places on its aid. Such concerns continue to play a role in modern-day separationist arguments against government aid to religious schools and social services.<sup>43</sup>

If the voluntary principle contains internal tensions concerning educational or social service aid, how do modern developments affect the application of the principle? Within a few years after Baird’s 1844 book, many Protestants began to argue that the voluntary principle forbade state aid to the newly appearing Roman Catholic schools. By the end of the nineteenth century, this position had become dominant and was defended in part on the ground that it promoted voluntarism and the separation of church and state.<sup>44</sup> But the opposition to parochial school aid was also tainted with simple dislike of, and often unwarranted prejudice against, the Catholic Church and Catholic citizens.<sup>45</sup> Explicit theological attacks on

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43. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 650 (1971) (Brennan, J., concurring) (arguing that state inspections of religious schools receiving aid “raises more than an imagined specter of governmental ‘secularization of a creed’”); Derek H. Davis, *Mitchell v. Helms and the Modern Cultural Assault on the Separation of Church and State*, 43 B.C. L. REV. 1035, 1062 (2002) (warning that religious groups may “become nondescript members of a social service organization class vying for governmental aid”).

44. See, e.g., PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 219–23 (2002); Richard W. Garnett, *The Theology of the Blaine Amendments*, 2 FIRST AMENDMENT L. REV. 45 (2003).

45. For presentations of the evidence of anti-Catholicism, see, for example, Brief of the Becket Fund for Religious Liberty as Amicus Curiae in Support of Petitioners at 6–15, *Mitchell v. Helms*, 530 U.S. 793 (2000) (No. 98-1648); HAMBURGER, *supra* note 44, at 201–19, 246–51; LLOYD JORGENSEN, THE STATE AND THE NON-PUBLIC SCHOOL, 1825–1925 (1987); Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL’Y 551 (2003); John C. Jeffries, Jr., & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 297–303 (2001); Douglas Laycock, *The Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 50–51 (1997); Joseph P. Viteritti, *Blaine’s Wake: School Choice, the First*

Catholicism were common in the anti-aid movement. Moreover, the Protestant majority's arguments for private philanthropy and church-state separation were selective and self-serving. The aid opponents doggedly defended Protestant-style religious exercises in state-operated schools through most of the nineteenth century.<sup>46</sup> And as Baird's description indicates, the no-aid rule seldom if ever extended to colleges, the sector of education in which Protestants maintained their own institutions.<sup>47</sup> The Protestant majority's rules against aid to "sectarian" institutions were thoroughly self-serving.

The major development of recent decades has been the rise of the welfare state—the extension of government financial assistance (and regulation) into most areas of life, including education and social services. The welfare state sets new baselines. Generally, religious schools and social services now benefit from aid only as part of a broader program in which aid also flows to nonreligious counterparts: private entities, public schools, and social service agencies.

By contrast, the voluntary principle (as Baird saw it) trained Americans "to exercise the same energy, self-reliance, and enterprise in the cause of religion which they exhibit in other affairs."<sup>48</sup> In the early republic, the elimination of tax support for clergy and churches put religion on the same voluntary footing as most other activities, which likewise were not government-supported. But in today's different circumstances, it is at best uncertain whether the voluntary principle is served by withholding funding for those schools or social services that are religiously inspired or incorporate religious messages. This is so for two related reasons.

First, equal support to religious choices, when secular choices are supported, may actually be necessary to achieve the ultimate goal of voluntarism: ensuring that religious activities thrive or fail on the basis of the free choice of individuals, or as the Supreme Court has put it, "according to the zeal of its adherents and the appeal of its dogma."<sup>49</sup> The exclusion of religious schools or social services from

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*Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 665–75 (1998), reviewed by Richard W. Garnett, *Brown's Promise, Blaine's Legacy*, 17 CONST. COMM. 651, 670–74 (2000).

46. Jeffries and Ryan, *supra* note 45, at 303.

47. See *supra* notes 31–32 and accompanying text.

48. BAIRD, *supra* note 2, at 292.

49. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

funding programs creates a disincentive for beneficiaries to use religious options as compared with subsidized secular options. In the welfare state, therefore, equal funding for religiously oriented activities often serves the goal of voluntary choice and indeed may be crucial to it. Religion must make its own way under the voluntary principle, but that does not mean forcing it to overcome special barriers and disabilities. Put differently, in the welfare state, excluding religious entities from assistance is just as much a state intervention into voluntary religious life as is including them—perhaps a greater intervention. The modern Court seems to have accepted this argument to the point of holding that religious choices generally may be included in funding programs,<sup>50</sup> though it has shown some reluctance to hold that they must be.<sup>51</sup>

Second, and related, the welfare state particularly complicates the effects of aid on church autonomy. The conditions that accompany government assistance can certainly cause religious organizations to lose vitality, stray from their distinctive mission, and become dependent on government. But in the welfare state, the vitality and mission of religious organizations also face threats if these organizations are denied assistance while their secular competitors receive it. Religious organizations must struggle to overcome the relative disability of being denied significant government benefits. They may be pressured to become wholly secular in order to receive aid on a level playing field. Or they may be pressured to alter their programs and messages in order to attract more private support—not the level of support that their original messages would attract, but the extra support necessary to compete against government-favored secular institutions.<sup>52</sup>

Thus, on the question of government assistance, the church-state settlement of the early republic again contained some internal tensions. And again, subsequent developments may have affected

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50. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793, 810 (2000) (plurality opinion); *id.* at 846 (O'Connor, J., concurring).

51. Compare *Locke v. Davey*, 540 U.S. 712 (2004) (permitting states to single out ministerial students for exclusion from state education scholarships), with *Rasenerberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (forbidding the exclusion of a student religious publication from a state university's general program of subsidizing publications).

52. See Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. CIN. L. REV. 151, 195–96 (2003); see also Vincent Blasi, *School Vouchers and Religious Liberty: Seven Questions from Madison's Memorial and Remonstrance*, 87 CORNELL L. REV. 783, 798 (2002).

how those ambiguities have been resolved in modern decisions. In this instance, the development of the welfare state has strengthened the case for the equal inclusion of religious schools and social services in funding programs.

*C. Religious Autonomy vs. Generally Applicable Laws*

The third major church-state dispute today concerns the conflict between religiously motivated conduct and generally applicable laws that in a given case restrict such conduct. Courts have pondered the extent to which religious conduct should be exempt from such laws. The Supreme Court, in *Employment Division v. Smith*,<sup>53</sup> ruled that individuals are not entitled to such exemptions under the Free Exercise Clause in most cases.<sup>54</sup> But other decisions suggest that religious organizations may enjoy some rights to exemption, either under the Free Exercise Clause or under principles of nonentanglement and church-state separation founded in the Establishment Clause.<sup>55</sup>

Under either rubric, free exercise or nonentanglement, some right of exemption from the law is important to the autonomy of religious organizations, as I will detail below.<sup>56</sup> And in turn, the autonomy of religious organizations is a corollary of the voluntary principle: autonomy allows religious communities to organize themselves and define their missions according to their own voluntary choices, without government interference.

Although autonomy is important to religious organizations either through free exercise or nonentanglement principles, the Court's decision in *Smith* has significantly limited free exercise claims and thus has posed a threat to the existence of a constitutional right of autonomy for religious communities. I am quite sympathetic to the efforts in this conference to preserve such a right in the face of *Smith*. These include Professor Kathleen Brady's argument that the freedom of communities is essential to the formation of their

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53. 494 U.S. 872 (1990).

54. Some recent decisions, however, suggest a limited impact for *Smith*, recognizing religious exemptions for individuals when the law in question already recognizes exemptions for comparable secular interests. *See, e.g.*, Fraternal Order of Police v. City of Newark, 170 F.3d 359, 364–67 (3d Cir. 1999); Rader v. Johnston, 924 F. Supp. 1540, 1550–53 (D. Neb. 1996).

55. *Cf., e.g.*, NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 501–04 (1979).

56. *See infra* notes 66–73 and accompanying text.

members' *beliefs*, which remain highly protected under *Smith*,<sup>57</sup> and Professor Perry Dane's argument that religious organizational autonomy claims are more bounded and defined than the open-ended claims to free exercise exemptions rejected in *Smith*.<sup>58</sup> But for purposes of this Comment on the founding-era voluntary principle and its implications for today, I want to treat church autonomy claims as simply a subset of the broader question of whether religious practices are ever constitutionally exempt from general laws that apply to them.

Which position on constitutionally mandated religious exemptions—recognizing them, or rejecting them—is more faithful to the founding-era settlement and the voluntary principle? This question has sparked a lively historical debate. Defenders of mandatory exemptions, such as Justice O'Connor and Professor Michael McConnell, argue that the founding generation understood free exercise as a substantive right to engage in religious practices except where the practice disturbed "public peace" or the rights of others.<sup>59</sup> They point to state constitutional provisions, which almost unanimously defined the limits of religious freedom in such terms, and they reason that such definitions would be superfluous if religious freedom was understood to be limited by any and every law that was generally applicable and did not single out religion.<sup>60</sup> On the other side, opponents of mandatory exemptions, including Justice Scalia and Professor Philip Hamburger, argue that the references to "public peace" encompassed any generally applicable law.<sup>61</sup> Hamburger quotes a number of leading proponents of free exercise during the founding era who emphasized only that the government should not purposely involve itself in religious matters

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57. Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 BYU L. REV. 1633.

58. Perry Dane, "Omalous" *Autonomy*, 2004 BYU L. REV. 1715.

59. See *City of Boerne v. Flores*, 521 U.S. 507, 549–64 (1997) (O'Connor, J., dissenting); Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 819 (1998) [hereinafter McConnell, *Critique*]; Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) [hereinafter McConnell, *Origins*].

60. *Boerne*, 521 U.S. at 552–55 (O'Connor, J., dissenting); McConnell, *Origins*, *supra* note 59, at 1462–63; McConnell, *Critique*, *supra* note 59, at 831–32.

61. See *Boerne*, 521 U.S. at 539 (Scalia, J., concurring); Philip A. Hamburger, *A Constitutional Right of Religious Exemptions: An Historical Analysis*, 60 GEO. WASH. L. REV. 915, 915–19 (1992).

and who conceded the duty to obey the general civil laws.<sup>62</sup> Professor Marci Hamilton presents similar evidence in this conference and elsewhere.<sup>63</sup>

Although I think that the proexemptions approach reads the founding era more accurately, the historical materials certainly provide grist for both interpretations. Let us assume, then, that exemptions present another issue on which the founding-era settlement and its principle of voluntarism were ambiguous or contained internal tensions. Accordingly, in choosing between these interpretations, we again might wish to consider the effect of intervening developments. Which view, then, better implements the voluntary principle in the light of those developments?

One primary development today is the increase of religious pluralism. The increase in religious pluralism may mean that religious exemptions are more necessary to preserve the substance of the voluntary principle. The vast range of newer religions and religious practices in America will generate many more unanticipated and unintended impositions on religion from general laws. To prevent such impositions, courts will have to declare religious exemptions in particular cases as the need becomes apparent. On the other hand, religious pluralism also includes a rise in the number of Americans who explicitly proclaim no religious faith and derive their deep moral convictions from unabashedly secular sources. This development makes it more difficult to justify, in a normative sense, a special concern for the autonomy of religious conscience and religious communities as against secular counterparts. One possible answer is to define “religious” conscience very broadly, as the Court did in the Vietnam-era draft cases.<sup>64</sup> Another answer is simply to press forward and continue to treat religious conscience differently from secular conscience, as I believe there are good reasons to do under our Constitution.<sup>65</sup>

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62. HAMBURGER, *supra* note 44, at 937–46.

63. See Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1157 [hereinafter Hamilton, *No-Harm Doctrine*]; Marci A. Hamilton, *Religion, the Rule of Law, and the Good of the Whole*, 18 J.L. & POL. 387 (2002).

64. See, e.g., *Welsh v. United States*, 398 U.S. 333, 339–44 (1970); *United States v. Seeger*, 380 U.S. 163, 176 (1965).

65. To put the argument briefly: If the First Amendment gives distinctive protection to religious practice by private groups, it also places distinctive limits on government espousing or promoting religious ideas. The common principle is minimizing government involvement in religious life and religious matters. In striking down government-sponsored prayers and

Whatever the implications of religious pluralism, the other major relevant development in modern America—the rise of the welfare state—points more clearly in favor of religious exemptions, institutional as well as individual. The rise of modern government vastly increases the number and scope of laws that can conflict with the voluntary choices of individuals and communities concerning religious exercise. Such conflicts will be relatively infrequent when government is small in scope and limits itself to preventing direct interference with the bodily or property interests of others. But the conflicts will multiply when government, as in the welfare state, prohibits certain actions to prevent diffuse harms throughout society, or harms that may occur indirectly or in the future rather than immediately.

As I have already mentioned, opponents of exemptions, such as Professors Hamburger and Hamilton, point out that many of the leading clergy proponents of free exercise in the founding era explicitly supported the rule of law and counseled obedience to the laws.<sup>66</sup> But this argument disregards the possibility that these writers endorsed laws limited to a certain scope—far more limited than the overall scope of laws today—and that they did not give carte blanche to whatever secular law was on the books. For example, when William Penn defended free exercise rights, he denied that religious believers sought exemption from laws “that tend to Sober, Just, and Industrious Living.”<sup>67</sup> Other eighteenth-century commentators on religious liberty likewise spoke of laws that served serious social interests, arguing for example that magistrates were “obliged to maintain society and punish all those who destroy the foundations, as murderers and robbers do.”<sup>68</sup> And religious-freedom pioneer

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rejecting the argument that this step would treat religious ideas differently from nonreligious ones, the Court said that “[t]he First Amendment protects . . . religion by quite different mechanisms” from other ideas; “[t]he design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission.” *Lee v. Weisman*, 505 U.S. 577, 589, 591 (1992). For fuller presentations of such arguments, see, for example, Thomas C. Berg, *The New Attacks on Religious Freedom Legislation, and Why They Are Wrong*, 21 *CARDOZO L. REV.* 415, 440–41 (1999); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 *DEPAUL L. REV.* 1 (2000).

66. HAMBURGER, *supra* note 44, at 937–46; Hamilton, *No-Harm Doctrine*, *supra* note 63, at 1156.

67. William Penn, *The Great Case of Liberty of Conscience*, in 1 *A COLLECTION OF THE WORKS OF WILLIAM PENN* 457 (photo. reprint 1974) (1726).

68. Pierre Bayle, *Philosophical Commentary on These Words of Christ: Compel Them To*

Roger Williams, in the words of a leading modern scholar, emphasized that “civil government was limited to its responsibility for preserving peace and civility”; therefore, Williams did not accept “subjecting the claims of conscience to *any* generally applicable law so long as it does not deliberately infringe upon religious belief or act. Rather, . . . Williams saw conscience subjected to particular laws, and he viewed these laws as within the specific scope of the government’s ordained responsibilities.”<sup>69</sup>

Similarly, Thomas Jefferson, who made statements suggesting that religious-freedom rights would never overcome general civic duties,<sup>70</sup> also proceeded from the premise that civic duties were limited to avoiding identifiable injury to others.<sup>71</sup> Professor Hamburger likewise observes that founding-era proponents of free exercise did not emphasize a general right of exemption in significant part because, at that time, “the jurisdiction of civil government and the authority of religion were frequently considered distinguishable”<sup>72</sup>—a premise that would no longer hold true once government’s jurisdiction greatly expanded in the twentieth century.

Consider just one example of expanded government that has major implications for the autonomy of religious communities. We now have numerous laws regulating private entities’ relations with their employees. Many such laws likely qualify as neutral and generally applicable under *Employment Division v. Smith*. But the founding generation would not have contemplated most of these laws, nor considered regulation of internal employment practices to be necessary to preserve “public peace.” Can one really argue that the concept of public peace, as the founding generation understood

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*Come In*, in PIERRE BAYLE’S PHILOSOPHICAL COMMENTARY: A MODERN TRANSLATION AND CRITICAL INTERPRETATION 7, 167 (Amie Goodman Tannenbaum trans., 1987).

69. Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U. L. REV. 455, 486 (1991). These and analogous quotes are collected in McConnell, *Critique*, *supra* note 59, at 825–26.

70. Jefferson stated that a citizen has “no natural right in opposition to his social duties.” Letter from Thomas Jefferson to Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson: A Committee of the Danbury Baptist Association (Jan. 1, 1802), in THE REPUBLIC OF REASON: THE PERSONAL PHILOSOPHIES OF THE FOUNDING FATHERS 135 (Norman Cousins ed., 1988) [hereinafter REPUBLIC OF REASON].

71. “The legitimate powers of government extend to such acts only as are injurious to others.” Thomas Jefferson, *Republican Notes on Religion and an Act Establishing Religious Freedom, Passed in the Assembly of Virginia, in the Year 1786*, reprinted in REPUBLIC OF REASON, *supra* note 70, at 123.

72. Hamburger, *supra* note 61, at 936–37.

it, would encompass requiring employers to pay for controversial medical procedures for their employees?<sup>73</sup> Likewise, the founding generation would not have contemplated the employment-discrimination laws, let alone that those laws would apply facially to the hiring and firing of ministers.

I certainly am not questioning the justice or wisdom of these statutes in their general application. But just as certainly, such statutes expand government's scope beyond what the founding-era leaders envisioned when they said that religious freedom must give way to laws preserving public peace. The welfare-state expansion of government's sphere will dramatically shrink the scope of religious autonomy from that of the founding era, unless there is some sort of doctrine exempting religious activity from some laws. Some principle of exemptions, whether under the Free Exercise or the Establishment clause, is necessary to preserve the terms of the church-state settlement under today's circumstances.

For these reasons, it is beside the point to argue against a doctrine of autonomy, as Professor Hamilton does in this conference, on the ground that it will immunize churches from liability for direct batteries against unconsenting third parties—that is, for sexual abuse of children.<sup>74</sup> These and other direct batteries have always been the paradigm case of conduct falling outside the free exercise of religion.<sup>75</sup> Those who espouse the antiexemptions position must deal with the tougher cases—the plethora of modern laws that rely on the possibility of diffuse or distant harms to restrict behavior today.

If institutional autonomy is to be preserved, we also must deal with some misunderstandings and misplaced priorities concerning the concepts of autonomy and nonentanglement. First, we need to recognize that facially neutral, generally applicable laws sometimes can promote religious autonomy but at other times intrude on it. In *Jones v. Wolf*,<sup>76</sup> the Court approved the application of “neutral principles of law” for disputes over church property. *Jones*' approval

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73. See *Catholic Charities of Sacramento, Inc. v. Super. Ct.*, 85 P.3d 67 (Cal. 2004) (rejecting an exemption from a law requiring coverage of contraceptives).

74. See Hamilton, *No-Harm Doctrine*, *supra* note 63, at 1210.

75. For documentation of a standard focusing on direct invasions of others' interests, see, for example, Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1145 (1990) [hereinafter McConnell, *Revisionism*].

76. 443 U.S. 595 (1979).

of “neutral principles” might be seen as precedent for the *Smith* ruling that a neutral, generally applicable law satisfies the Free Exercise Clause no matter how serious a restriction it imposes on religious practice. But as Professor Dane points out in his contribution, *Jones* reflected quite a different premise.<sup>77</sup> The Court there reasoned that the general laws of property and trusts are designed to “order[ ] private rights and obligations to reflect the intentions of the parties”; therefore, by including appropriate legal provisions, “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,” and “civil courts will be bound to give effect to the result indicated by the parties.”<sup>78</sup> *Jones* recognized that many neutral laws can facilitate a religious community’s self-definition precisely because their neutrality allows them to serve as vessels for a wide variety of organizational choices. But that argument only extends to laws that facilitate organizations’ choices. It provides no support for laws like the peyote prohibition in *Smith* or the employment discrimination laws as applied to church employees, which override choices and thus intrude on the autonomy of religious life.<sup>79</sup> Such laws should not get a constitutional pass just because they are facially neutral; they ought to be justified as enforcing legitimate boundaries on the scope of religious freedom.

A second complication arises from a misplaced priority between two aspects of church autonomy—or, put differently, two aspects of government nonentanglement in religion. One aspect concerns whether religious organizations are actually free to organize themselves, define their mission, and choose their workers without undue government interference—this might be called “substantive nonentanglement.” Another aspect concerns whether judges or other government officials rest their decision making on theological judgments that are (it is asserted) beyond their authority or competence—principles forbidding such judgments might be called

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77. Dane, *supra* note 58, at 1736.

78. *Jones*, 443 U.S. at 603–04, 606.

79. For fuller articulations of this distinction, see Thomas C. Berg, *The Federal Constitution*, in RELIGIOUS ORGANIZATIONS IN THE UNITED STATES, A STUDY OF IDENTITY, LIBERTY AND THE LAW (James A. Serritella et al. eds., forthcoming 2005); Dane, *supra* note 58; Ira Mark Ellmann, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CAL. L. REV. 1378, 1406–07, 1422–23 (1981).

“decisional nonentanglement.” Both of these principles of nonentanglement help secure religious autonomy from state interference. But today, decisional nonentanglement seems to be the dominant focus, rather than just one component, of religious autonomy. *Jones*, for example, allows courts to apply neutral principles of law to a church property dispute, except when doing so would require the court to “consider doctrinal matters, whether the ritual and liturgy of worship or the tenets of the faith.”<sup>80</sup> And one of the most common rationales for exempting churches’ decisions concerning ministers from the antidiscrimination laws is that such lawsuits would require courts to decide religious questions concerning the minister’s competence or suitability.<sup>81</sup>

I suggest that decisional nonentanglement, though often important, is less central to religious autonomy than is substantive nonentanglement. More important than whether courts avoid theological questions is whether religious organizations are substantively free to organize themselves and define their mission free from unwarranted governmental interference. The ministerial exemption should rest fundamentally on the right of a church to choose its leaders and those who speak for it; to say that it rests on saving the courts from confronting theological questions is to misplace priorities. We keep courts out of such questions not just for the sake of doing so, but ultimately for the sake of substantive religious autonomy: when judges make theological determinations, they may distort and unjustifiably override a church’s organization and self-understanding.

In fact, the emphasis on decisional nonentanglement may actually detract from substantive religious autonomy. *Smith*, for example, rejected the constitutional-exemptions approach in significant part because it would require courts to consider how central a practice was to a faith—before balancing it against the state’s interests—and such an inquiry “is akin to the unacceptable

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80. *Jones*, 443 U.S. at 602 (internal quotation marks omitted) (quoting *Md. & Va. Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 368 (1970) (Brennan, J., concurring)).

81. See, e.g., *Bollard v. Cal. Province of Soc’y of Jesus*, 211 F.3d 1331, 1332–33 (9th Cir. 2000) (Wardlaw, J., dissenting from denial of rehearing en banc); see also *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 800 n.\*, 804–05 (4th Cir. 2000); *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1302–04 (11th Cir. 2000); *Combs v. Cent. Tex. Annual Conf. of United Methodist Church*, 173 F.3d 343, 347–50 (5th Cir. 1999); *EEOC v. Catholic Univ.*, 83 F.3d 455, 467 (D.C. Cir. 1996).

‘business of evaluating the relative merits of differing religious claims.’”<sup>82</sup> The idea of decisional nonentanglement—the fear that saying anything remotely theological would intrude on religious autonomy—led the Court to cut back dramatically on the substantive autonomy of religious organizations under the Free Exercise Clause.

Of course, accepting in principle a doctrine of exemptions for church autonomy only begins the inquiry. There are serious questions as to how far any such exemptions should extend, and what social interests should limit them. Under any defensible approach, lines will need to be drawn. No serious commentator asserts that constitutional autonomy authorizes church leaders following church doctrines to inflict physical harm on others, even if the harm-producing conduct is central to the doctrines. Judges or legislators attempting to apply constitutional principles will have to distinguish clear or direct harms to others (such as sexual assaults on adults or children) from speculative and indirect harms (such as, perhaps, those following from peyote use). Or the proper distinction may be between matters truly “internal” to the church (perhaps the employment of clergy) and those better characterized as “external” (for example, the treatment of children attending a church-operated school). Even harms to others, of course, are not automatically attributable to the church entity, if the wrongdoer is acting outside the scope of his employment. And where the church entity is properly liable, autonomy may still impose limits on the size or scope of the remedy.<sup>83</sup>

The fact that constitutional autonomy has limits does not mean it is nonexistent. In her contribution to this conference, Professor Hamilton concedes that some religious practices that violate general statutes on the books are nevertheless consistent with the public good and ought to be exempted by the legislature.<sup>84</sup> But she asserts that courts are unable to draw such lines in constitutional litigation.<sup>85</sup>

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82. *Employment Div. v. Smith*, 494 U.S. 872, 887 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring)).

83. For varying views on these issues in the context of sexual abuse cases, see, for example, Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789; John H. Mansfield, *Constitutional Limits on the Liability of Churches for Negligent Supervision and Breach of Fiduciary Duty*, 44 B.C. L. REV. 1167 (2002). I take no position here on the scope of church autonomy in such cases.

84. Hamilton, *No-Harm Doctrine*, *supra* note 63, at 1174.

85. *Id.* at 1198.

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*The Voluntary Principle and Church Autonomy*

This concession switches the debate from substantive to institutional questions. It switches the debate from the meaning of religious freedom—does it point to exemptions in some legal form?—to the boundaries of justiciability and judicial competence. I think that coherent and judicially manageable lines do exist so that we are not forced to accept each and every generally applicable law no matter how severe its impact on religious autonomy.<sup>86</sup> But the location of those lines is a matter for other articles and future conferences.

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86. For efforts to develop principles distinguishing protected from unprotected religious conduct, see, for example, the articles in *Symposium: Restoring Religious Freedom in the States*, 32 U.C. DAVIS L. REV. (Spring 1999); Berg, *supra* note 65, at 429–32; 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, 1402–13 (1981); McConnell, *Revisionism*, *supra* note 75, at 1145–49; Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 BYU L. REV. 299.

