

11-1-2004

The Autonomy of Church and State

Brett G. Scharffs

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>

 Part of the [Law and Politics Commons](#), [Religion Commons](#), and the [Religion Law Commons](#)

Recommended Citation

Brett G. Scharffs, , 2004 BYU L. REV. 1217.

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

The Autonomy of Church and State

*Brett G. Scharffs**

I.	Introduction	1219
	A. The Autonomy of Church and State	1219
	B. The United States and Europe: Why Compare?	1223
	C. Caveats	1225
II.	Religious Liberty as a Constitutional Guarantee and Human Right	1227
	A. The Grandparent and Neglected Stepchild of Human Rights	1227
	B. Historical Background and Jurisprudential Framework	1230
	1. The United States	1230
	2. Europe	1237
III.	Three Conceptions of Autonomy	1246
	A. Independence	1248
	B. Interdependence	1251
	C. Inter-Independence	1253
IV.	Institutional Autonomy	1258
	A. The Autonomy of the Church	1259
	1. State church	1259
	2. Direct state aid to churches	1261

* Professor of Law, J. Reuben Clark Law School, Brigham Young University; B.S.B.A., M.A. Georgetown University; B.Phil Oxford University; J.D. Yale Law School. I have benefited greatly from the suggestions and criticism of numerous people, including Cole Durham, Fred Gedicks, Frank Ravitch, and Cheryl Preston. I greatly appreciate the critical feedback from Marci Hamilton, Ron Garet, Mark Tushnet, and other participants at the BYU J. Reuben Clark Law School conference on church autonomy. I also benefited from the feedback on earlier versions of portions of this paper from the participants at the Oxford Roundtable at Lincoln College, Oxford, the Virginia Education Law Conference in Williamsburg, Virginia, and a work in progress seminar at BYU Law School. Mistakes and shortcomings that remain are exclusively mine. A special debt of gratitude is owed to my research assistants, Katherine Davidson, Marjorie Fannesbeck, Nathan Jennings, Aaron Miller, and Scott Smith. I wish also to thank the editors of the BYU Law Review, in particular Alec McGinn and Ryan Morris. This Article is dedicated to my father, Gilbert W. Scharffs, who spent much of his professional life studying, and seeking sympathetic understanding of, a wide array of world religions. Correspondence and feedback is welcome at scharffsb@lawgate.byu.edu.

3.	Tax exemptions.....	1263
4.	State aid to religious schools	1267
5.	Church property, officials, doctrine	1272
6.	Church standing	1276
7.	Church right to have organization and legal personality	1278
8.	Exemptions from general laws for churches	1279
9.	Summary of church autonomy issues.....	1284
B.	Autonomy of the State	1286
1.	Religious expression in public schools	1286
a.	Release time from public schools.....	1288
b.	Requiring Bible reading, prohibiting teaching evolution, and posting of the Ten Commandments in public schools.....	1292
c.	Use of public school facilities for religious clubs.....	1295
2.	Religious expression outside of schools	1297
3.	Church conduct of state functions.....	1299
4.	State laws and policies that converge with religious beliefs	1300
5.	Summary of state autonomy issues	1301
V.	Individual Autonomy.....	1303
A.	Oaths and Religious Requirements for Office	1304
B.	Conscientious Objection	1306
C.	Sabbath Work	1309
D.	The Right to Religious Education	1313
E.	The Right to Proselyte	1315
F.	Exceptions to Generally Applicable Laws.....	1319
G.	Summary of Individual Autonomy Issues.....	1326
VI.	Implications of these Conceptions in Areas of Dispute	1328
A.	Prayer in Public Schools	1329
B.	Vouchers and Other Forms of Indirect Aid to Churches.....	1331
C.	Charitable Choice	1334
D.	Public Displays of the Ten Commandments	1334
E.	The Pledge of Allegiance.....	1337
1.	The <i>Newdow</i> bombshell	1338
2.	The Ninth Circuit's analysis	1340
a.	The <i>Lemon</i> test	1341
b.	Endorsement	1342

c. Coercion	1343
3. Evaluating the Ninth Circuit's analysis	1344
4. Autonomy	1346
VII. Conclusion	1347

I. INTRODUCTION

A. *The Autonomy of Church and State*

Since the end of World War II, two visions of the proper relationship between church and state have vied for preeminence in U.S. law: one emphasizing the separation of church and state,¹ and the other finding greater space for the accommodation of religion in public life.² A third approach has prevailed in much of Europe, allowing for a much thicker interrelationship, engagement, and cooperation between church and state.³

1. For a representative sample of defenses of separationism, see THOMAS CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* (1986); DEREK DAVIS, *ORIGINAL INTENT: CHIEF JUSTICE REHNQUIST AND THE COURSE OF AMERICAN CHURCH/STATE RELATIONS* (1991); LEONARD LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (1986); LEO PFEFFER, *CHURCH, STATE AND FREEDOM* (1967); Mark V. Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 *GEO. L.J.* 1691 (1988); Mark V. Tushnet, *The Constitution of Religion*, 18 *CONN. L. REV.* 701 (1986). For a recent comprehensive critique of separation, see PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (2002).

2. For a representative sample of defenses of accommodationism, see CHESTER JAMES ANTIEAU ET AL., *FREEDOM FROM FEDERAL ESTABLISHMENT FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES* (1964); GERARD V. BARDLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* (1987); WALTER BERNS, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* (1976); ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* (1982); MICHAEL J. MALBIN, *RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT* (1978); Michael W. McConnell, *Accommodation of Religion*, 1985 *SUP. CT. REV.* 1; Michael W. McConnell, *Accommodation of Religion: An Update and a Response to Critics*, 60 *GEO. WASH. L. REV.* 685 (1992); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 *HARV. L. REV.* 1410 (1990).

3. See generally CAROLYN EVANS, *FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION OF HUMAN RIGHTS* (2001) [hereinafter EVANS, *FREEDOM OF RELIGION*]. As will be readily apparent, I have benefited from and relied extensively upon Carolyn Evans's excellent book about the jurisprudence of the European Court of Human Rights concerning freedom of religion or belief. I highly recommend her book for anyone interested in the jurisprudence of the European Court of Human Rights on this topic. See also MALCOLM D. EVANS, *RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE* 6-171 (1997); BAHIIYIH

In this Article, I will argue that each of these approaches has more in common with the other two than might appear on the surface. I will suggest that a single concept, autonomy, underlies each of these viewpoints, but that each of these visions of the proper relationship between church and state is animated by a strikingly different conception of what autonomy means and what is required for its exercise.⁴ Separation is animated by a conception of autonomy calling for stark *independence* of church and state.⁵ Engagement or cooperation is animated by a conception of autonomy calling for *interdependence* of church and state.⁶ In this view, the autonomy of both church and state depends upon mutual cooperation and support. Accommodation is animated by a conception of autonomy calling, somewhat counter intuitively, for what I term *inter-independence*.⁷ According to this conception, autonomy requires independence, but also requires inclusion, and rests upon respect and empowerment. In addition, the law in this area is concerned with three distinct sets of autonomy interests—the autonomy of churches, the autonomy of the state, and the autonomy of individuals.⁸

G. TAHZIB, FREEDOM OF RELIGION OR BELIEF: ENSURING EFFECTIVE INTERNATIONAL LEGAL PROTECTION 63–247 (1996); Javier Martínez-Torrón & Rafael Navarro-Valls, *The Protection of Religious Freedom in the System of the Council of Europe*, in FACILITATING FREEDOM OF RELIGION OR BELIEF: A DESKBOOK 209–38 (Tore Lindholm, W. Cole. Durham, Jr. & Bahia Tahzib-Lie eds., 2004).

4. In arguing that competing conceptions of autonomy underlie the separationist, accommodationist, and cooperationist viewpoints, I do not mean to suggest that courts consistently utilize the framework of autonomy for analyzing disputes in this area. For the most part, they have not and do not. Rather, my argument is that different conceptions of autonomy do in fact underlie these competing positions, and advocates of separation, accommodation, or cooperation have an obligation to defend as superior the particular conception of autonomy that animates their position.

5. See *infra* Part III.A.

6. See *infra* Part III.B.

7. See *infra* Part III.C.

8. Others have emphasized the importance of autonomy in analyzing the Religion Clauses of the First Amendment, and I am indebted to their insights and analysis. See, e.g., AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998); STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM (1995); Arlin M. Adams & William R. Hanlon, Jones v. Wolf: *Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291 (1980); Gerard V. Bradley, *Forum Juridicum: Church Autonomy in the Constitutional Order: The End of Church and State?*, 49 LA. L. REV. 1057 (1989); Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980); Perry Dane, *The Varieties of Religious Autonomy*, in CHURCH AUTONOMY: A COMPARATIVE SURVEY 117 (Gerhard Robbers ed., 2001); Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L.

Outcomes of cases involving the relationship of church and state or individual religious liberty are often determined by the underlying conception of autonomy adopted or assumed in a particular case, coupled with the understanding that autonomy interests are taken as preeminent. Unfortunately, both the Supreme Court and the European Court of Human Rights only intermittently appear to appreciate the centrality of the concept of autonomy in this area of the law. Often a particular conception of autonomy lies in the shadows of a case, but that conception is neither made explicit nor defended. Neither the Supreme Court nor the European Court of Human Rights does an adequate job of acknowledging and analyzing the autonomy interests that are implicated by a particular case, especially when the autonomy of the state lies at the heart of the case. The result of these failures is a body of law that is deeply unsatisfying. The U.S. Supreme Court, in particular, vacillates between different conceptions of autonomy and varying doctrinal tests, which results in church-state and religious liberty jurisprudence that is widely criticized as inconsistent, incoherent, and incomprehensible.⁹

The goal of this Article is twofold. First, I hope to explain the differences between these three conceptions of autonomy and how they manifest themselves in the church-state and religious liberty jurisprudence of the Supreme Court of the United States and the European Court of Human Rights. I argue that these competing conceptions of autonomy animate and undergird, though not always explicitly, current law regarding the relationships among church, state, and individual. Second, the Article aims to explain the differences between these three conceptions of autonomy and, by identifying the philosophical ground underlying each of these

REV. 347 (1984); Ronald R. Garet, *Communitarity and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001 (1983); Frederick Mark Gedicks, *A Two-Track Theory of the Establishment Clause*, 43 B.C. L. REV. 1071 (2002); Frederick Mark Gedicks & Roger Hendrix, *Democracy, Autonomy, and Values: Some Thoughts on Religion and Law in Modern America*, 60 S. CAL. L. REV. 1579 (1987); James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91 (1991); 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 (1981); Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391 (1987); Thomas R. McCoy & Gary A. Kurtz, *A Unifying Theory for the Religion Clauses of the First Amendment*, 39 VAND. L. REV. 249 (1986).

9. See *infra* note 14.

conceptions, to help focus and further the discussion concerning which conception of autonomy provides the best model for guiding jurisprudence in this area of the law. The strengths, weaknesses, limits, and implications of the separationist, cooperationist, and accommodationist positions can more readily be assessed if the respective visions of autonomy underlying each of these positions are made explicit and subjected to scrutiny. I conclude, that in order to bring coherence and consistency to the case law, courts must do a better job of identifying and analyzing the autonomy interests at stake in a particular case and articulating and defending a conception of autonomy that will guide the resolution of the dispute. If a particular conception of autonomy (either one that I identify and describe here, or some other, better conception) provides a superior account of what individual and institutional autonomy entails and what the conditions are in which autonomy can thrive, then this conception will have a strong claim to provide a better doctrinal rubric than existing tests and approaches for analyzing and deciding cases in this difficult and controversial area of the law.¹⁰

The Article will proceed as follows. Part II is a brief survey of the historical background of church-state issues and the jurisprudential frameworks for resolving them in the United States (under the Establishment Clause and Free Exercise Clause of the First Amendment) and in Europe (primarily under Article 9 of the European Convention on Human Rights). Part III discusses three conceptions of autonomy—*independence*, *interdependence*, and *inter-independence*. Parts IV and V address how these conceptions of autonomy manifest themselves in the religious liberty and church-state jurisprudence of the U.S. Supreme Court and European Court of Human Rights. Specifically, Part IV focuses on institutional autonomy and is divided into two parts, the first addressing issues concerning the autonomy of churches, and the second addressing issues concerning the autonomy of the state. And Part V focuses on liberty issues that implicate individual autonomy.

10. As may become evident, I believe the *inter-independence* conception of autonomy to be the most forceful and appealing account of autonomy; however, my purpose here is not to persuade readers of the superiority of this conception of autonomy but to explain the differences between these competing conceptions of autonomy, the philosophical underpinnings and assumptions of each, and the ways in which these conceptions animate and guide the attitudes of separation, accommodation, and cooperation.

Part VI focuses upon several significant current issues in the United States involving the interaction of church and state and how these different conceptions of autonomy suggest resolving those issues. These issues include (1) school prayer, (2) vouchers and other forms of indirect aid to churches, (3) charitable choice, or the ability of religiously affiliated institutions to qualify for receiving state funding for social welfare programs, (4) the posting of the Ten Commandments and other religious monuments in public spaces, and (5) the constitutionality of including the phrase “under God” in the Pledge of Allegiance.

I conclude in Section VII that, while the Supreme Court and the European Court of Human Rights have utilized a variety of doctrinal constructs to evaluate issues involving religious liberty and the interaction of church and state, autonomy is the most important and useful concept in analyzing such controversies. In order to bring coherence and consistency to this area of the law, courts should first identify the autonomy interests at stake in a case, then articulate and defend a conception of autonomy that explains the conditions that will facilitate the relevant autonomy interests. In so doing, the stage will be set for a more successful approach to deciding cases involving the interactions of church and state as well as cases involving claims based upon individual freedom of religion or belief.

B. The United States and Europe: Why Compare?

One might reasonably suppose that a comparative analysis of U.S. and European approaches to religious liberty issues might be of little value because the jurisprudential, historical, and philosophical contexts in which issues involving the freedom of religion or belief are adjudicated in the United States and Europe are so dissimilar.¹¹ The most obvious difference between Europe and the United States is that the First Amendment to the U.S. Constitution includes both a free exercise clause and a nonestablishment clause,¹² whereas the concept of nonestablishment is inapplicable in the European context where there is a wide spectrum of views about the proper

11. See *infra* Part II.B.1–2.

12. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .” U.S. CONST. amend I.

relationship between the dominant church and the state, and several countries still have established or quasi-established state churches.¹³

Additionally, the religious liberty jurisprudence of both the U.S. Supreme Court and the European Court of Human Rights is often criticized as being confused and chaotic.¹⁴ To a large extent such criticisms are valid and reflect the reality that the issues and problems in this area are extremely vexing and difficult to resolve. The fact that the jurisprudence of both the United States and Europe on matters of religious liberty is so severely criticized might be thought to be an additional reason why a comparative analysis is unlikely to shed much, if any, illumination.

But in spite of—indeed in large measure due to—these differences and difficulties, a comparative analysis is valuable because, among other reasons, in examining and comparing the approaches taken towards similar issues, it becomes easier to identify the

13. Some commentators suggest that because the U.S. Establishment Clause dictates the separation of church and state, and because no such consensus exists in Europe, there is little benefit from comparing the approaches taken in the United States and Europe. For example, Carolyn Evans asserts that “the large and sophisticated literature that has developed around religious freedom in the United States is of limited use when considering why religious freedom is important in Europe and what values underlie its adoption by so many States with different religious backgrounds.” EVANS, FREEDOM OF RELIGION, *supra* note 3, at 22.

14. For an example of criticism concerning the religious liberty jurisprudence in the United States, consider MARK V. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 247 (1988) (finding the constitutional law of religion to be “incoherent”); Stuart Buck, *The Nineteenth-Century Understanding of the Establishment Clause*, 6 TEX. REV. L. & POL. 399, 400 (2002) (arguing that religious liberty jurisprudence has departed from a true understanding of the Establishment Clause, “has become illogical, has undermined the values of both democracy and community, and has exacerbated political divisiveness”); Michael W. McConnell, *Neutrality, Separation and Accommodation: Tensions in American First Amendment Doctrine*, in LAW AND RELIGION 63, 64 (Rex J. Ahdar ed., 2000) (expressing the virtual consensus that the law of religious freedom in this country is “chaotic, controversial and unpredictable”).

An example of the criticism of religious liberty jurisprudence in Europe is available in Carolyn Evans’ work. EVANS, FREEDOM OF RELIGION, *supra* note 3, at 2. Professor Evans concludes that the bodies responsible for protecting the freedom of religion and belief under the European Convention have

approached their task in an incoherent and inconsistent manner. The principles which they have developed to assist in interpreting articles relevant to freedom of religion or belief have generally been favourable to States and have given little consideration to the importance of freedom of religion and belief, both to those whose freedom is being denied, and to the development of pluralistic and tolerant democracies where the risk of serious persecution based on religion or belief is less likely to occur.

Id.

assumptions and philosophical viewpoints that underlie the respective approaches, which might otherwise go unnoticed. And in spite of the fact that the U.S. Constitution is much older than the European Convention, almost all of the religious liberty jurisprudence of the Supreme Court has been developed since World War II, so the time frame in which these issues have been addressed by the U.S. Supreme Court and the European Court of Human Rights is quite similar.¹⁵

C. *Caveats*

Several important caveats must be stated at the outset. First, I will try to sketch with broad strokes the similarities and differences in the jurisprudential, historical, and philosophical approaches to religious liberty issues in the United States and Europe. This is a broad, complex topic, and I am mindful that identifying general themes and characteristics always results in oversimplification.¹⁶ In addition, my focus will be primarily upon the differing philosophical underpinnings that inform the development of the law in this area. This focus will also contribute to the relatively general nature of my observations and conclusions.

Second, I do not maintain that the Supreme Court or the European Court of Human Rights has utilized autonomy consistently as an analytical rubric in church-state and freedom of religion or belief cases, much less that these courts have been sensitive to the different conceptions of autonomy that undergird

15. JOHN T. NOONAN, JR. & EDWARD MCGLYNN GAFFNEY, JR., *RELIGIOUS FREEDOM: HISTORY, CASES, AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT* xi (2001) (“Prior to 1940 the Supreme Court of the United States had never upheld a claim of free exercise of religion, had never found any governmental practice to be an establishment of religion, and had never applied the religion clauses of the First Amendment to the states. . . . Beginning in 1940 the Court changed all that.”). The European Convention entered into force in September 1953, and currently, forty-four states are parties to the Convention. See Council of Europe, European Court of Human Rights, *at* <http://www.echr.coe.int> (last visited Nov. 1, 2004).

16. To illustrate, a leading U.S. casebook on the religion clauses of the First Amendment includes citations to over 600 cases. See MICHAEL S. ARIENS & ROBERT A. DESTRO, *RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY* xxiii–xxxviii (1996). Moreover, a summary of cases decided under the European Convention through the year 2000 includes references to sixteen cases decided by the European Court of Human Rights and sixty cases heard by the European Commission on Human Rights that relate just to Article 9, the primary provision of the European Convention that addresses religious liberty issues. See BARBARA MENSAH, *EUROPEAN HUMAN RIGHTS CASE SUMMARIES* 1179–80 (2002).

cases in this area of the law. Rather, the Supreme Court, as well as the European Court of Human Rights, has utilized a variety of doctrinal tests and approaches in this area, resulting in a varied and fragmented set of outcomes that are difficult to reconcile and fit together. I do argue, however, that autonomy, both of institutions and of individuals, represents the deep, fundamental issue at stake in cases involving church-state relations and individual freedom of religion or belief. Since autonomy is the core issue in church-state relations, I suggest that explicit considerations of autonomy provide a more helpful analytical framework than the doctrinal tests the Supreme Court and the European Court of Human Rights have employed in this area of the law.

Third, in an important sense the comparison between the U.S. Supreme Court and the European Court of Human Rights is artificial because one institution is the court of last resort of a sovereign state, whereas the other institution is a court created by a multilateral treaty involving over forty European countries, each with different histories, political systems, and constitutional and legal systems. The European Court of Human Rights is a remarkable and unprecedented institution, a revolutionary attempt to create a pan-European court in which individual petitioners have standing to pursue a claim against their states.¹⁷ From the perspective of the states involved, the European Court of Human Rights represents a significant leap of faith to place what has historically been viewed as one of the primary rights of sovereignty into the hands of a multinational body over which each state in a particular case has relatively little control.¹⁸ Given the political sensitivities involved, it is nothing short of amazing that an institution such as the European Court of Human Rights even exists, and it is to be expected that the

17. See LUKE CLEMENTS, EUROPEAN HUMAN RIGHTS: TAKING A CASE UNDER THE CONVENTION 1-15 (1996) (discussing the development, challenges, growth, and adjustments that the Convention and Court of Human Rights have made as the number of contracting countries expands and the number of cases explodes); MARK W. JANIS & RICHARD S. KAY, EUROPEAN HUMAN RIGHTS LAW 87-96 (discussing the remarkable role and growth of the court and its effect on bringing human rights violations to light).

18. The European Court of Human Rights is composed of a number of judges equal to the number of contracting states (currently forty-four). There is no restriction on the number of judges of the same nationality, and thus, there is no guarantee to a country of judicial representation on the court. See European Court of Human Rights, Historical Background, Organisation and Procedure, at <http://www.echr.coe.int/Eng/EDocs/HistoricalBackground.htm> (last visited Nov. 6, 2004).

Court has exhibited a relatively high degree of deference to states and what might be viewed as timidity on their part.¹⁹ Such criticisms, while having some merit, must be viewed within the wider context of the remarkable fact that the institution exists at all and operates as well as it does. Additionally, each European state has its own legal and often constitutional protections of religious liberty and other human rights, so the jurisprudence of the European Court of Human Rights represents something more like a shared minimum standard rather than an accurate picture of the full extent of human rights protection in any particular state.²⁰

II. RELIGIOUS LIBERTY AS A CONSTITUTIONAL GUARANTEE AND HUMAN RIGHT

A. *The Grandparent and Neglected Stepchild of Human Rights*

Religious liberty is at once the grandparent and the neglected stepchild of international human rights norms.²¹ Recognized at least since the first century A.D., religious liberty, in this now secular era, has lost some of its urgency, perhaps due to the marginalization of religious belief, at least among academic and policy elites, and

19. See Dinah Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, 13 DUKE J. COMP. & INT'L L. 95, 125–36 (2003) (discussing the jurisdiction and role of the European Court of Human Rights and its struggle to balance State versus European standards).

20. For example, in the first case decided by the European Court of Human Rights involving a religious liberty claim, *Kokkinakis v. Greece*, the court stated, “[A] certain margin of appreciation is to be left to the contracting states in assessing the existence and extent of the necessity of an interference, but this margin is subject to European supervision. . . .” 17 Eur. H.R. Rep. 397, 422 (1994) (Westlaw).

21. Professor Cole Durham has described religious liberties as the “‘neglected grandparent’ of human rights.” See W.C. Durham, *Perspectives on Religious Liberty: A Comparative Analysis*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 1 (J.D. van der Vyver & J. Witte, Jr. eds., 1996); see also Judith A. Berling, *Is Conversation About Religion Possible? (And What Can Religionists Do To Promote It?)*, 61 J. AM. ACAD. RELIGION 1, 2 (1993) (“Religious Studies, the stepchild of a Supreme Court decision in the 1960s, is a newcomer to the university, whose presence is still questioned or threatened in a number of institutions.”); Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 341, 366 (1999) (“Religious speech is not some stepchild of constitutional law: It is fully protected by the Free Speech Clause, and once the government sets up a generally open subsidy program, it can’t discriminate against religious speech in operating the program. And education is, of course, predominantly speech.”).

perhaps due to the inevitable conflicts that arise between religious rights and other important human rights.²²

But because of the fundamental importance of religious liberty and the horrific problems with religious fanaticism, the once neglected grandparent has again moved to the fore. As Arcot Krishnaswami observed over forty years ago in his influential study of religious liberty,

[t]he right to freedom of thought, conscience and religion is probably the most precious of all human rights, and the imperative need today is to make it a reality for every single individual regardless of the religion or belief that he professes, regardless of his status, and regardless of his condition in life.²³

Nevertheless, whether viewed with a wide historical lens from antiquity—through the Roman Empire and the Middle Ages—or

22. JOHN THOMAS NOONAN, *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM* 44–45 (1998).

By the first century A.D. there is in the Mediterranean world a religion, which will spread widely in the West, that carries the concepts of a God, living, distinct from and superior to any human being, society, or state; of obligations to that God, distinct from and superior to any society or state; of authorized teachers who can voice these obligations and judge any society or state; of an inner voice of reason that is one way God speaks as well as by His authorized teachers. According to these concepts as taught by this religion, each person, individually and not as part of a family, tribe, or nation, will have to account to God as Judge for every thought and deed. Collectively, these concepts are at the core of liberty of conscience and liberty of religion.

Id.; see also Myres S. McDougal, Harold D. Lasswell & Lung-chu Chen, *The Right to Religious Freedom and World Public Order: The Emerging Norm of Non-Discrimination*, 74 MICH. L. REV. 865, 873 (1976) (“Even so fundamental a freedom as that of religious inquiry, belief and communication must, of course, be exercised and protected with due regard for the comparable rights of others and for the aggregate common interest in the preservation of all basic human rights.”). Critics of religious liberties often create an opposition between “fundamentalism” and human rights, and lump all religious liberties concerns into the category of fundamentalism. See, e.g., Courtney W. Howland, *The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis Under the United Nations Charter*, 35 COLUM. J. TRANSNAT’L L. 271, 273 (1997) (“Religious fundamentalism poses the most acute problems for women’s equality, but many conservative religious groups share substantial areas of doctrine with the fundamentalists. The two groups are often differentiated solely by the political activism of fundamentalists rather than by significantly different religious beliefs. This political activism throws into sharp relief the conflicts between rights of religious freedom and women’s rights of liberty and equality.”).

23. ARCOT KRISHNASWAMI, *STUDY OF DISCRIMINATION IN THE MATTER OF RELIGIOUS RIGHTS AND PRACTICES*, U.N. Doc. E/CN.4/Sub.2/200/Rev.1, U.N. Sales No. 60.XIV.2 (1960), reprinted in *RELIGION AND HUMAN RIGHTS: BASIC DOCUMENTS 2* (Tad Stahnke & J. Paul Martin eds., 1998).

through a prism focused on the terrible middle years of the last century and the attempted extermination of the Jewish people, or with a focus on the events of September 11, 2001, religion has served as a factor in much of the pain and suffering that human beings inflict upon one another.²⁴ Given the importance of religious liberty and the dangers associated with religious fanaticism and hatred, finding and developing appropriate approaches that allow for freedom of religion or belief while guarding against atrocities such as those mentioned above must be counted as one of the most pressing and vexing problems facing the world today.²⁵

24. Some commentators blame virtually all of the world's ills on religion. *See, e.g.*, Linda L. Ammons, *What's God Got To Do With It? Church and State Collaboration in the Subordination of Women and Domestic Violence*, 51 RUTGERS L. REV. 1207 (1999) (arguing that Judeo-Christian doctrines, ideologies, and institutions promote the subordination of women and condone domestic violence); Fawaz A. Gerges, *Islam: Enduring Myths and Changing Realities: Islam and Muslims in the Mind of America*, 588 ANNALS AM. ACAD. POL. & SOC. SCI. 73, 81 (2003) (asserting that in the eyes of the United States, "terrorism is basically religiously inspired, lacking any nationalist inspiration"); JAMES A. HAUGHT, *HOLY HORRORS: AN ILLUSTRATED HISTORY OF RELIGIOUS MURDERS AND MADNESS* (1990) (documenting that "[f]rom the times of religiously motivated battles recorded in the Old Testament through the days of the Crusades and the Jihad to the present day, much blood has been spilt in the name of religion and religious reclamation and dominance"); William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L.J. 843, 844 (1993) (suggesting that, in accordance with Dostoevsky's view, "the needs of humanity can lead to the creation of a church, which in order to make people happy, denies freedom and invites intolerance and persecution"). John Locke presents a contrasting, optimistic view of religion by asserting that religious activity of some kind is necessary for peaceful coexistence in a political community. *See* JOHN LOCKE, *A LETTER CONCERNING TOLERATION* 27, 51 (J. Tully ed., 1983). Other commentators also have focused on the positive aspects of religion and religious practice. *See, e.g.*, Lisa G. Shah, *Faith in Our Future?*, 23 WHITTIER L. REV. 183 (2001) (proposing that a neutral and informed exposure to religious principles in U.S. public schools would help alleviate increasing problems with drugs, alcohol, suicide, rape, and abortion); Rodney K. Smith, *Is American Progressive Constitutionalism Dead? Ethical and Historical Themes in Progressive Constitutionalism: The Role of Religion in Progressive Constitutionalism*, 4 WIDENER L. SYMP. J. 51, 74-75 (1999) (arguing that "religion and religious exercise are positive and warrant special protection" because religion presents a unique way of knowing, which is based on faith rather than on reason and the scientific method).

25. *See* William E. Nelson, *Changing Meaning of Equality in Twentieth-Century Constitutional Law*, 52 WASH. & LEE L. REV. 3, 102-03 (1995).

[T]he world bears constant witness to genocide, ethnic cleansing, and religious fanaticism, and even in America, intolerance and fear of difference appear to be increasing. Whether we like it or not, the central task for anyone who today believes in equality is to end discrimination based on ethnicity and culture. Emphasis upon the experience of Catholics and Jews in mid-twentieth-century New York establishes that this task can be accomplished. Emphasis, in contrast, upon the intellectual conceptions needed to accomplish it shows how much work remains to be done.

Id. Gerard Bradley asserts that

*B. Historical Background and Jurisprudential Framework**1. The United States*

The pursuit of religious liberty was one of the most powerful forces driving early settlers to the American continent and remained a powerful force at the time of the founding of the American republic.²⁶ According to James Madison, who drafted the Bill of Rights, the free exercise of religion is a right “precedent both in order of time and degree of obligation to the claims of Civil Society.”²⁷

The extensive jurisprudence of the United States regarding religious liberty is primarily based upon the interpretation of sixteen words of the First Amendment to the U.S. Constitution: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”²⁸ The first provision, somewhat misleadingly labeled the “Establishment Clause,” among other things forbids the United States from having a state church.²⁹ The second provision, known as the “Free Exercise Clause,” protects individuals and churches from governmental coercion.³⁰

[t]here are other reasons for a renewed look at the relationship among Christianity, separation of church and state, and religious liberty in contemporary American society. One is that the debate of recent memory is pretty much spent. Accusations against secular humanists by fundamentalists, and by secular humanists against fundamentalists have become tiresome, as are charges of godliness and fanaticism. Scholarly criticism of the Supreme Court’s church-state corpus has grown so caustic, and is so widespread, that almost any new departure would be welcome.

Bradley, *supra* note 8, at 1060–61.

26. See generally NOONAN & GAFFNEY, *supra* note 15, at 158–200 (Foundation Press 2001).

27. James Madison, *Memorial and Remonstrance*, in LETTERS AND OTHER WRITINGS OF JAMES MADISON, 4 vols., 1:163–64 (William C. Rives & Philip R. Fendall eds., 1865).

28. U.S. CONST. amend. I.

29. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (“The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church.”).

30. Justice Kennedy described the purpose of the Free Exercise Clause as follows:

The First Amendment protects speech and religion by quite different mechanisms. Speech is protected by ensuring its full expression even when the government participates, for the very object of some of our most important speech is to persuade the government to adopt an idea as its own. The method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse. In religious debate or expression the government is not a prime participant, for the Framers deemed religious establishment antithetical to the freedom of all. The Free

The First Amendment, along with the other rights included in the Bill of Rights, originally only applied against the federal government. It was not until after the Civil War and the passage of the Fourteenth Amendment that the First Amendment was “incorporated” against the states—that is, found by the Supreme Court to apply to the actions of state governments as well as the federal government.³¹ As they have been interpreted, the Establishment and Free Exercise Clauses apply to both the federal government and to state governments, and are sometimes in tension with each other—the Establishment Clause prohibiting the government from taking actions that benefit religion and the free exercise clause protecting religion, which is itself a benefit.³²

Debates rage about the original purpose and intent of the Framers in adopting the religion clauses.³³ Echoing Father Thomas Curry, Professor Fredrick Gedicks has argued that in the founding era, an “establishment of religion” was understood to “refer to a church which the government funded and controlled and in which it used its coercive power to encourage participation, like the Anglican

Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions. The explanation lies in the lesson of history that was and is the inspiration for the Establishment Clause, the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.

Lee v. Weisman, 505 U.S. 577, 591–92 (1992) (internal citations omitted). *But see* Mark V. Tushnet, *The Redundant Free Exercise Clause?*, 33 *LOY. U. CHI. L.J.* 71, 72 (2001) (asserting that “[c]ontemporary constitutional doctrine may render the Free Exercise Clause redundant” because “[m]uch religious activity is speech, pure and simple, and therefore protected by the Free Speech Clause”).

31. The Free Exercise Clause was first applied to the states in *Cantwell v. Connecticut*, 310 U.S. 296 (1940). The Establishment Clause was first applied to the states in *Everson v. Board of Education*, 330 U.S. 1 (1947).

32. *See* MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, *RELIGION AND THE CONSTITUTION* 3 (2002).

33. *See* Frank Guliuzza III, *The Practical Perils of an Original Intent-Based Judicial Philosophy: Originalism and the Church-State Test Case*, 42 *DRAKE L. REV.* 343, 362 (1993) (“What does the ‘Quest for Originalism’ in the church-state debate say about the ‘Case for Originalism’ in the larger interpretive debate? If the historical data is plentiful, as both sides maintain, and if the two sides can look at the evidence and reach two very different conclusions, then one might argue that there is no clear-cut, definitive ‘Framers’ intent.’ Or, if there is an obvious Framers’ intent, then some scholars cannot see it, or choose not to, because of their own political predilections.”).

Church in England or the Roman Catholic Church in southern Europe.”³⁴ It appears that there were three primary concerns that drove the adoption of the Establishment Clause. First, there was concern about the church exercising the coercive power of government, including the power to enforce criminal laws that reflected the church’s denominational and moral requirements.³⁵ Second, early Americans worried about direct financial support of the church in aid of its worship, rituals, and other denominational activities, through general tax revenue.³⁶ Third, they were also concerned with control by the state over the church, particularly in its definition of doctrine and selection of leaders.³⁷ These concerns seem to indicate that the Founders did not view what I term interdependence as a viable conception of autonomy within the United States.

Concern for the autonomy both of the church and of the state is at the heart of each of these three concerns.³⁸ From this perspective, if churches perform governmental functions, the autonomy of the state is threatened; if the state funds churches, the autonomy of churches is threatened, and the autonomy of the state may be jeopardized as well if a powerful church receives all or a predominant share of state funding since that church might exert considerable power in the political process; and if the state controls church doctrine, the autonomy of the church is undermined. Indeed, the primary purpose underlying the Establishment Clause and Free Exercise Clause of the First Amendment is the preservation of autonomy—of the state, of religious institutions, and of individuals.³⁹ This purpose, however, has often gone unrecognized and has been obscured by doctrinal constructions utilized by the Supreme Court. As a result, jurisprudence under the religion clauses is fragmented

34. Gedicks, *supra* note 8, at 1091 (2002) (citing THOMAS J. CURRY, *FAREWELL TO CHRISTENDOM* 16, 37, 109 (2001)); *see also* THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 191–92* (1986).

35. Gedicks, *supra* note 8, at 1098.

36. *Id.*

37. *Id.*

38. *See* HAMBURGER, *supra* note 1; MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* (1965); Mark DeWolfe Howe, *The Supreme Court, 1952 Term*, 67 *HARV. L. REV.* 91 (1953).

39. *See infra* Parts IV–VI.

and inconsistent.⁴⁰ Confusion and incoherence is supplemented by the fact that autonomy is a complex concept that bears multiple interpretations.

Since the end of the Second World War, two visions of the relationship between church and state have vied for preeminence in the United States, one emphasizing the ideal of “separation” of church and state,⁴¹ and the other finding greater space for the “accommodation” of religion and public life.⁴² As I will argue in greater detail below, the separationist and accommodationist positions each reflect very different conceptions of autonomy, with separationism favoring a conception of autonomy based upon strict *independence* and accommodationism favoring a conception of autonomy based upon the ideal of *inter-independence*.

Separationists argue that “the original purpose of the establishment clause was to create an absolute separation of the spheres of civil authority and religious activity by forbidding all forms

40. Establishment Clause jurisprudence has been notable for its apparent inconsistency and incoherence. For example, in the 1980s the Supreme Court ruled that religiously affiliated organizations could participate in a federally funded program to provide counseling to pregnant teenagers, *Bowen v. Kendrick*, 487 U.S. 589 (1988), but that it was unconstitutional for public school teachers to travel to parochial schools to provide remedial English and math instruction to needy children on the premises of their own school, *Aguilar v. Felton*, 473 U.S. 402 (1985). Although the Court reversed *Aguilar* twelve years later in *Agostini v. Felton*, 521 U.S. 203 (1997), “the Supreme Court’s jurisprudence leading up to *Agostini* has been a conglomeration of mixed messages,” Daniel P. Whitehead, Note, *Agostini v. Felton: Rectifying the Chaos of Establishment Clause Jurisprudence*, 27 CAP. U. L. REV. 639, 645 (1999). The Supreme Court has also ruled that the government is required to compensate Sabbatarians who refuse to work on Saturdays, *Sherbert v. Verner*, 374 U.S. 398 (1963), but not required to accommodate those who can demonstrate dire financial consequences from Sunday closing laws, *Braunfeld v. Brown*, 366 U.S. 599 (1961). The Court’s inconsistent religion clauses jurisprudence has produced a debate about the constitutional validity of religion-based exemptions. See William Marshall, *The Case Against the Constitutionality of Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357 (1990); Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); Ellis West, *The Case Against a Right to Religion-Based Exemption*, 4 NOTRE DAME J.L. ETHICS & PUB. POL’Y 591 (1990).

41. For an elaboration and defense of the separationist position, see, *supra* note 1. For a historical perspective on the impact of separationist ideas on the American Founders, see Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559 (1989).

42. For an elaboration and defense of the accommodationist position, see, *supra* note 2. For an overview of the birth and growth of the accommodationist perspective, see Steven G. Gey, *Why Is Religion Special? Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75 (1990).

of government assistance or support for religion.”⁴³ This view was perhaps most forcefully articulated by Justice Hugo Black in the 1947 case, *Everson v. Board of Education*,⁴⁴ in which he stated that, “[T]he ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.”⁴⁵

A conception of autonomy based upon the idea of *independence* has had a strong influence upon much of the religion-clauses jurisprudence in the United States.⁴⁶ Most famously, Jefferson’s metaphor of a “wall of separation”—dividing religion on the one hand and the state on the other—is a clear example of a vision of autonomy that rests upon stark *independence*.⁴⁷ On this view, the domain of the state and the domain of churches are divided into respective spheres, and the mandate of the First Amendment prevents either from intruding upon the precincts of the other.⁴⁸ Territorial metaphors prevail, and the wall becomes an apt symbol for the ideal relationship—even if imperfectly realized—between church and state.⁴⁹ Because, according to this view, autonomy

43. DAVIS, *supra* note 1, at 47–48.

44. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (permitting state reimbursement of costs of busing children to parochial schools). Perhaps ironically, in spite of its strongly separationist rhetoric, the outcome in *Everson* was accommodationist, permitting state aid to parents to pay for busing their children to religious schools.

45. *Id.* at 15.

46. As noted below, a counter-theme in U.S. Establishment Clause jurisprudence is accommodation. See *infra* text accompanying notes 51–52.

47. See THOMAS JEFFERSON, THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 332 (Adrienne Koch & William Peden eds., 1944). President Thomas Jefferson, in his letter to the Danbury Baptist Association, declared “a wall of separation between Church and State.” *Id.* For commentary on Jefferson’s “wall of separation,” see, for example, Daniel L. Dreisbach & John D. Whaley, *What the Wall Separates: A Debate on Thomas Jefferson’s “Wall of Separation” Metaphor*, 16 CONST. COMMENT. 627 (1999); Stephen J. Safranek, *Can Science Guide Legal Argumentation? The Role of Metaphor in Constitutional Cases*, 25 LOY. U. CHI. L.J. 357 (1994); Jeffrey W. Stiltner, Note, *Rethinking the Wall of Separation: Zobrest v. Catalina Foothills School District—Is This the End of Lemon?*, 23 CAP. U. L. REV. 823 (1994).

48. The “theory of a high and impregnable wall of separation between government and religion mandates that the public sphere must be secular. Religion is swept away and confined to the private sphere of home, family, church and other places of worship.” Laurie Messerly, *Reviving Religious Liberty in America*, 8 NEXUS J. OP. 151, 156 (2003).

49. Another territorial metaphor of the garden and the wilderness was popularized by Roger Williams. See Stephen L. Carter, *Reflections on the Separation of Church and State*, 44 ARIZ. L. REV. 293 (2002). Carter describes the garden and wilderness metaphor as follows:

requires *independence*, the religion clauses mandate “mutual noninterference by church and state in each other’s affairs.”⁵⁰

In contrast, accommodationists argue that governmental aid to religious institutions is permitted as long as it is imparted in a nondiscriminatory fashion.⁵¹ Accommodationists explicitly reject Jefferson’s wall-of-separation metaphor. For example, in a dissenting opinion in *Wallace v. Jaffree*, Chief Justice Rehnquist wrote, “[t]he ‘wall of separation between church and state’ is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.”⁵²

To a large extent, the history of Establishment Clause jurisprudence, especially over the past thirty years, has been a story of the struggle for dominance between the separationist and accommodationist viewpoints.⁵³ One problem with both

For Williams, the garden was the place of God’s people, the community of people of faith, who gathered together to determine what the Lord required of them, nurturing and building their religious understanding in relative tranquility. Outside the garden was the unevangelized world, what Williams called the wilderness. And between the two, separating the wilderness from the garden, was a high hedge wall, constructed to protect the people of the garden in their work of religious nurture. The hedge wall existed to keep the wilderness out, not to keep the people of the garden hemmed in. It was the vital work of the garden, not the less vital work of the wilderness, that the wall was built in order to protect.

Id. at 296. Adams and Emmerich assert that the

American Founders were influenced profoundly by philosophers and theologians who reflected on the religious conflicts that occurred in the wake of the Reformation. From Martin Luther and John Calvin they inherited the view that God had instituted “two kingdoms”—a heavenly one where the church exercised its spiritual authority and an earthly one where the civil magistrates exercised temporal authority.

Adams & Emmerich, *supra* note 41, at 1561; *see also* PHILIP HAMBURGER, *supra* note 1 (discussing Roger Williams’ use of the wall metaphor); HOWE, *supra* note 38.

50. NORMAN REDLICH, JOHN ATTANASIO & JOEL K. GOLDSTEIN, *UNDERSTANDING CONSTITUTIONAL LAW* 505 (2d ed. 1999).

51. *See* Peter J. Weishaar, *School Choice Vouchers and the Establishment Clause*, 58 ALB. L. REV. 543, 545 (1994) (“The ‘nonpreferential accommodationists’ . . . claim that the religion clauses of the Constitution permit various forms of nonpreferential government support for religion. They argue that government may aid all religions, as long as it does not prefer one religion over another.”).

52. 472 U.S. 38, 107 (1985) (Rehnquist, C.J., dissenting) (striking down a state statute authorizing a moment of silence in public schools on grounds that there is no secular purpose underlying the statute).

53. *See* Raymond W. Mitchell, *A Small Departure from the Truth: When Private Religious Speech Runs Afoul of the Establishment Clause*, 23 LOY. U. CHI. L.J. 867 (1992).

Courts and commentators have noted that in the contemporary debate over the meaning of the Establishment Clause and the appropriate standard of review, both

“separation” and “accommodation” as doctrinal rubrics is that neither concept contains a principle to explain its limits. Thus, regardless of the analytical starting point, one is left without clear guidance with respect to the questions of how much separation or how much accommodation is required or permitted. The Supreme Court has utilized a number of different doctrines—including the so-called *Lemon* test,⁵⁴ variations of that test emphasizing “endorsement,”⁵⁵ and tests focusing upon “coercion”⁵⁶—as constitutional tests for differentiating between permissible and impermissible interactions between church and state. None of these doctrinal approaches, however, has received widespread support, and none appears up to the task of providing a satisfying analytical

sides in the debate have scoured primary sources in an effort to assemble an historical record permitting them to claim the legacy of the Framers’ original intent. This debate has generally broken down into two opposing factions: separationists and accommodationists.

Id. at 869.

54. The *Lemon* test, as it has come to be known, stipulates: “[first, a statute] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; [and] finally the statute must not foster ‘an excessive government entanglement with religion.’” *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)).

55. See *Lynch v. Donnelly*, 465 U.S. 668, 687–94 (1984) (O’Connor, J., concurring). According to Justice O’Connor’s reformulation, “[T]he purpose prong of the *Lemon* test asks whether government’s actual purpose is to endorse or disapprove of religion.” *Id.* at 690. The effect prong requires that “a government practice not have the effect of communicating a message of government endorsement or disapproval of religion.” *Id.* at 692. Justice O’Connor’s approach is endorsed in Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O’Connor’s Insight*, 64 N.C. L. REV. 1049 (1986). The “endorsement” test was later adopted by a majority of the Court in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

56. The “coercion” test was used by the Court in *Lee v. Weisman*, 505 U.S. 577 (1992) (holding that public school graduation prayer violates the Establishment Clause).

The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which “establishes a [state] religion or religious faith, or tends to do so.”

Id. at 587 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)). With regard to school prayer specifically, “[W]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.” *Id.* at 592.

framework for addressing problems that arise under either the Establishment Clause or the Free Exercise Clause.⁵⁷

2. *Europe*

The potential ways in which the relationship between church and state is organized are virtually limitless, ranging from near identification of the church and the state (for example, Iran)⁵⁸ to an adversarial posture where church and state are viewed as antagonists (for example, the former USSR).⁵⁹ While no members of the Council of Europe fall in either of these extremes, “nevertheless a wide variety of relationships exist between religions and States in” Europe.⁶⁰

Several European states, such as France⁶¹ and Turkey,⁶² adopt a strong separationist and secularist conception of the state. At the

57. See, e.g., Kenneth Mitchell Cox, *The Lemon Test Soured: The Supreme Court's New Establishment Clause Analysis*, 37 VAND. L. REV. 1175, 1177 (1984) (arguing that after the *Lynch* decision, “the Court’s apparent trend toward basing establishment clause analysis on the pervasiveness or historical significance of government-supported religious activities represents an undesirable move away from strict examination of the questionable law or activity under the *Lemon* test”); David Felsen, *Developments in Approaches to Establishment Clause Analysis: Consistency for the Future*, 38 AM. U. L. REV. 395 (1989) (arguing that the Court’s use of the *Lemon* test has resulted in an Establishment Clause jurisprudence that is confused and unprincipled); Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905 (1987) (suggesting that the *Lemon* test should be radically altered); John T. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83 (1986) (pointing to the *Lemon* test’s internal inconsistencies); Amy Louise Weinhaus, *The Fate of Graduation Prayers in Public Schools After Lee v. Weisman*, 71 WASH. U. L.Q. 957, 957–58 (1993) (“*Weisman* departs from the settled framework which has guided Establishment Clause analysis for more than twenty years and creates uncertainty as to the proper legal standards applicable in church-state jurisprudence.”).

58. See SAID AMIR ARJOMAND, *THE TURBAN FOR THE CROWN: THE ISLAMIC REVOLUTION IN IRAN* (1988) (charting the historic rise of modern Iran from the Constitutional Revolution of the early 1900s to the present day Islamic Republic); H. E. CHEHABI, *IRANIAN POLITICS AND RELIGIOUS MODERNISM: THE LIBERATION MOVEMENT OF IRAN UNDER THE SHAH AND KHOMEINI* (1990); NIKKI R. KEDDIE, *MODERN IRAN: ROOTS AND RESULTS OF REVOLUTION* (2003); DAVID MENASHRI, *POST-REVOLUTIONARY POLITICS IN IRAN: RELIGION, SOCIETY, AND POWER* (2001).

59. See PEDRO EVENS, *CROSS AND THE COMMISSAR: THE POLITICS OF RELIGION IN EASTERN EUROPE AND THE USSR* 42–54 (1987) (tracing the relationship of the Soviet government and religion over four historical periods, ending in 1987).

60. The following brief summary of the variety of relationships between church and state in Europe is largely drawn from EVANS, *FREEDOM OF RELIGION*, *supra* note 3, at 19–22.

61. See LA CONSTITUTION [Const.] art. 77 (Autonomy) (Fr.). Article 2(1) of the French Constitution states, “France is an indivisible, secular, democratic, and social Republic.

other end of the spectrum, in Greece, there is a very close supportive relationship between the Greek Orthodox Church and the state;⁶³ in Iceland, the Evangelical Lutheran Church is still established as the National Church, which according to the Constitution is to be “supported and protected by the State”;⁶⁴ and, in Italy, the Catholic Church lost its status as the state religion only in 1984, and the constitution continues to recognize that the “State and the Catholic Church are each within its own ambit, independent and sovereign.”⁶⁵ The Church of England remains the established church of the United Kingdom.⁶⁶ The Spanish Constitution specifically states that there is no established church,⁶⁷ but Spain has entered into a Concordat with the Catholic Church that grants the church significant financial and other privileges that are not available to all other religions in the state. Ireland does not have an established church, although the dominance of the Catholic Church is evident in a number of constitutional provisions (such as abortion and blasphemy), and the constitution states that the “State acknowledges that the homage of public worship is due to Almighty God. It shall hold his name in reverence and shall respect and honour religion.”⁶⁸ Other states, such as Germany⁶⁹ and the Ukraine,⁷⁰ have constitutional provisions requiring separation of church and state,

It ensures the equality of all citizens before the law, without distinction as to origin, race, or religion. It respects all beliefs.” Const. art. 2(1).

62. *See* CONST. OF THE REPUBLIC OF TURK. pt. II, ch. I, art. 24 (Freedom of Religion and Conscience) (“Everyone has the right to freedom of conscience, religious belief and conviction.”)

63. *See* CONST. OF GREECE sec. II, arts. 3 (Relations of Church and State) & 13 (Religion).

64. CONST. OF THE REPUBLIC OF ICE. arts. 63 & 64 (detailing the relationship between church and state).

65. COSTIZIONE [Cost.] arts. 7 (Relation Between State and Church) & 8 (Religion) (Italy).

66. While the United Kingdom has no constitution, it does publish an authoritative statement of legal framework on its International Constitutional Law Web site, http://www.uni-wuerzburg.de/law/uk00000_.html. *See* U.K. LEGAL SYS. sec. 18 (Freedom of Religion).

67. CONSTITUCIÓN [C.E.] arts. 16 (Religion, Belief, No State Church) & 44 (Religion) (Spain).

68. IR. CONST. art. 44 (Religion).

69. GRUNDGESETZ [GG] [Constitution] art. 4 (Faith, Religion, Conscience, Creed) (F.R.G.).

70. CONST. OF UKRAINE art. 35 (detailing the relationship between the individual, the state, and the church).

although the level of cooperation between the state and the dominant church is much greater than in the United States.

Despite the wide variety of attitudes toward the proper relationship between church and state, “almost all member States have adopted constitutional or statutory provisions prohibiting discrimination on the basis of religion and allowing for freedom of religion. The provisions take different forms but demonstrate a reasonably strong level of consensus that freedom of religion is an important, European-wide principle.”⁷¹

The primary pan-European basis for protecting religious freedom in Europe is the European Convention on Human Rights and Fundamental Freedoms (the “European Convention” or “Convention”).⁷² One distinctive characteristic of the European Convention is that it provides a forum of last resort for individuals, not just states, to press claims against states who are party to the Convention.⁷³

The main provision of the European Convention dealing with freedom of religion or belief is Article 9.⁷⁴ Article 9 establishes a two-tier structure for protecting religious liberties. First-tier rights, at

71. EVANS, FREEDOM OF RELIGION, *supra* note 3, at 22.

72. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention]. Various European States have separate provisions addressing religious liberty, which often provide greater protection of religious liberty than that provided under the European Convention. Thus, the decisions under the European Convention should be viewed as a floor of protection rather than a description of the entire edifice protecting religious freedom and belief, which varies from state to state.

73. Prior to November 1998, a petition to the European Commission on Human Rights could be filed by “any person, nongovernmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in [the European Convention].” *Id.* at art. 25.

74. Article 9 reads:

(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

(2) Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Id. at art. 9. Paragraph 1 of Article 9 is identical to Article 18 of the Universal Declaration of Human Rights. Paragraph 2 of Article 9 is very similar to Article 18, Paragraph 3 of the International Covenant on Civil and Political Rights, although the reference to “necessary in a democratic society” is missing.

least in theory, are absolute and include “the right to freedom of thought, conscience, and religion,” as well as the “freedom to change [one’s] religion or belief.”⁷⁵ Second-tier rights involve “manifestations” of religion or belief “in worship, teaching, practice and observance,” in “public or private,” “either alone or in community with others,” which may be subject to limitations provided that such limitations meet certain conditions, including conditions that (1) such limitations are “prescribed by law,”⁷⁶ (2) such limitations are necessary in a democratic society,⁷⁷ and (3) such limitations serve a legitimate aim in that they either (a) are necessary in the interests of public safety and for the protection of public order,⁷⁸ (b) are necessary for the protection of health,⁷⁹ (c) are

75. *Id.* at art. 9, para. 1.

76. To date, no Article 9 case has succeeded because a restriction on freedom of religion or belief was not prescribed by law. Generally, the European Court of Human Rights has explicitly held that the legislation under which State action was taken was prescribed by law, despite strong criticism of this approach by some dissenting members of the court. EVANS, FREEDOM OF RELIGION, *supra* note 3, at 139.

77. The European Commission on Human Rights and European Court of Human Rights engage in a balancing test to determine whether a limitation is necessary, and the court has developed the notion of a “margin of appreciation,” which is quite deferential to state determinations of necessity. *See Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 22 (1976), <http://hudoc.echr.coe.int> (“By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them.”). The court also sometimes conducts a “proportionality” analysis to determine whether a restriction is necessary in a democratic society. *See, e.g., Nat’l Union of Belgian Police v. Belgium*, 1 Eur. H.R. Rep. 578, 595 (1979–80), <http://hudoc.echr.coe.int> (determining proportionality based upon whether “the disadvantage suffered by the applicant is excessive in relation to the legitimate aim pursued by the Government”); *Larissis and others v. Greece*, 65 Eur. Ct. H.R. (ser. A) 363 (1998–V), 27 E.H.R.R. 329 (1999) (Lexis) (upholding convictions of military officers for unlawful proselytizing of men under their command on grounds that this was proportionate to the end of preventing abuses to the rights and freedoms of others).

78. As Professor Evans explains, “There is clearly a need to allow restrictions to protect public order and safety, as some religious groups may be involved in inciting or organizing acts of violence.” EVANS, FREEDOM OF RELIGION, *supra* note 3, at 150; *see, e.g., Omkaranda and the Divine Light Zentrum v. Switzerland*, 25 Eur. Comm’n H.R. Dec. & Rep. 105 (1981), <http://hudoc.echr.coe.int> (imprisonment of leader of religious group which he led in acts of criminal violence); *X v. United Kingdom*, 3 Eur. Comm’n H.R. Dec. & Rep. 62 (1975), <http://hudoc.echr.coe.int> (right of free expression does not include right to incite others to desert army, to murder officers, and to supply weapons to the enemy). Nevertheless, “the public order limitation also has the potential to be interpreted very widely to allow States to intervene in religious practices at any time that they become inconvenient or annoying to those in power.” EVANS, FREEDOM OF RELIGION, *supra* note 3, at 150; *see, e.g., Hakansson v. Sweden*, 5 Eur. H.R. Rep. 297 (1983), <http://hudoc.echr.coe.int> (upholding the conviction of man who loudly proclaimed the evils of alcohol on grounds that doing so was necessary to

necessary for the protection of morals,⁸⁰ or (d) are necessary for the protection of the rights and freedoms of others.⁸¹

In the language of the European Court of Human Rights, Article 9's first-tier protections apply to the *forum internum*, and the second-tier protections apply to the *forum externum*. Given the wording of Article 9(1), one might expect there to be a large sphere of religious freedom that is absolute, including the right to change one's religion, and cannot be subject to derogation by the limitations on "manifestations" of religion that are contemplated in Article 9(2). But while the "Court has emphasized the importance of freedom of religion or belief, in particular at the level of the internal, individual conscience," it has not "given much consideration to the content of the freedom."⁸²

protect public order); *ISKON and others v. United Kingdom*, 76-A Eur. Comm'n H.R. Dec. & Rep. 90, 91 (1994), <http://hudoc.echr.coe.int> (enforcing local planning laws against a Hindu temple to restrict uses to which the temple could be put and the number of people who could attend); *Manoussakis and others v. Greece*, 17 Eur. Ct. H.R. (ser. A) 1347, 1369 (1996-IV), 23 E.H.R.R. 387 (1996) (Westlaw) (Martins, J., concurring) (noting that while the requirement of prior authorization for building a place of worship may be appropriate in some circumstances, it could also be used to disguise intolerance).

79. "There have been a number of cases that have come before the [European] Commission [on Human Rights] that suggest that the State does have a right to force protection of health even on those who have a serious religious reason for rejecting the protection." EVANS, FREEDOM OF RELIGION, *supra* note 3, at 156.

80. Although "[a]llowing a State to justify restrictions on the right to manifest a religion or belief by reference to morality potentially poses serious problems," Professor Evans notes that "the [European] Court [of Human Rights] and [European] Commission [on Human Rights] have tended to grant States a wide margin of appreciation" in such cases. *Id.* at 159-60.

81. Conflicts with the rights and freedoms of others might involve conflicts between the religious beliefs of one party and the religious beliefs of another party, or might involve a conflict between a religious belief of one party and a nonreligious right or freedom of another party. One area where the possibility and likelihood of conflict appears to be particularly high is between conservative or traditional religious groups or believers on the one hand, and equality rights of women on the other hand. Professor Evans notes that "[a]lthough it has not been a particular issue in the Convention case law, there is significant potential for conflict between the rights of women and the right to freely practice a religion that may include practices that emphasize the subordinate status of women." *Id.* at 161 n.147. Evans also notes that "sometimes the vague way in which 'the rights and freedoms of others' is used suggests that the limitations clause may have a wider scope than the rights under the Convention." *Id.* at 161.

82. *Id.* at 68. Evans notes that "[a]t the most basic level, [the freedom of religion] could be considered simply the right to hold opinions silently (on religious or other important issues) without interference by the State." *Id.* If so, the "content of the right is minimal," perhaps limited to limitations "against the dehumanizing techniques adopted in a police state." *Id.*

The court has tended to analyze religious liberty issues, even those involving the right to change one's religion, under the rubric of the scope of permissible limitations upon manifestations of religious belief permitted by Article 9(2).⁸³ At other times, the court simply assumes that a case involves a "manifestation" of religious belief without considering whether the case might involve a tier-one nonderogable right of conscience or religion.⁸⁴ For example, in *Buscarini v. San Marino*,⁸⁵ a Grand Chamber of the court held that a requirement that members of the parliament of San Marino "take an oath swearing on the Gospels" to perform their duties violated Article 9 since it "required them to swear allegiance to a particular religion."⁸⁶ But the court did not analyze the requirement under Article 9(1)'s absolute protection of "the right to freedom of thought, conscience, and religion."⁸⁷ Rather, the court held that the required oath was an impermissible limitation under Article 9(2) because the oath was not necessary in a democratic society.⁸⁸ Rather than consider the effect of requiring a non-Christian to make an oath on a Christian Bible, the court chose to focus on the manifestation such a requirement made concerning a particular religion.

In addition to Article 9, Article 14 of the European Convention contains a broad nondiscrimination provision prohibiting discrimination on the basis of religion, among other grounds.⁸⁹ Article 2 of the First Protocol to the European Convention provides that "[n]o person shall be denied the right to an education" and requires states when exercising functions in relation to education and teaching to "respect the rights of parents to ensure such education

83. *See, e.g.*, *Kokkinakis v. Greece*, 260-A Eur. Ct. H.R. (ser. A) (1993), 17 E.H.R.R. 397 (1994) (Westlaw).

84. *See* EVANS, FREEDOM OF RELIGION, *supra* note 3, at 68.

85. *Buscarini and others v. San Marino*, App. No. 24645/94 (Eur. Ct. H.R.), 30 E.H.R.R. 208 (2000) (Westlaw).

86. *Id.* at para. 34.

87. European Convention, *supra* note 72, at art. 9, para. 1.

88. *Buscarini*, App. No. 24645/94, at paras. 35–40; *see also* EVANS, FREEDOM OF RELIGION, *supra* note 3, at 68.

89. Article 14 of the European Convention reads, "The enjoyment of the rights and freedoms set out in this Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a minority, property, birth or other status." European Convention, *supra* note 72, at art. 14.

and teaching in conformity with their own religious and philosophical convictions.”⁹⁰

The history of the interpretation and application of the European Convention can be divided into two chapters, before and after November 1998, when Protocol 11 to the Convention took effect. Prior to November 1998, two bodies existed to “ensure the observance of the engagements undertaken” by the Contracting Parties—the European Commission of Human Rights (the “Commission”) and the European Court of Human Rights (the “European Court”).⁹¹ The role of the Commission and the European Court was quite complex. In order for a petition to the Commission to be admissible, an applicant must have exhausted all domestic remedies,⁹² the application could not be anonymous,⁹³ and the petition could not be “incompatible with the provisions of the present Convention, manifestly ill-founded, or an abuse of the right of petition.”⁹⁴ If the Commission found a case to be admissible, then it attempted to negotiate a friendly settlement between the parties,⁹⁵ and if a solution was not achieved, it prepared a report giving its opinion whether or not there had been a breach of the

90. Convention for the Protection of Human Rights and Fundamental Freedom, Mar. 20 1952, protocol I, art. II. Carolyn Evans explains that “[t]his Article was one of the most controversial in the Convention and had to be included in a separate Protocol because agreement on its wording could not be reached in time for the signing of the main instrument.” EVANS, FREEDOM OF RELIGION, *supra* note 3, at 6. The European Convention contains other provisions that might be relevant to the protection of religious freedom or belief, including Article 8 (concerning private and family life), Article 10 (concerning freedom of expression), and Article 11 (concerning freedom of peaceful assembly), but these provisions are beyond the scope of this paper.

91. European Convention, *supra* note 72, at art. 19.

92. *Id.* at art. 35, para. 1.

93. *Id.* at art. 35, para. 2(a).

94. *Id.* at art. 35, para. 3. According to Carolyn Evans,

[t]he power to determine that petitions were ill-founded allowed the Commission summarily to dismiss cases that were not procedurally inadmissible but that would clearly fail if taken to the merits phase. It allowed the Commission to weed out weak and hopeless cases at an early stage in order to expedite proceedings and avoid wasting time on cases with little or no merit.

EVANS, FREEDOM OF RELIGION, *supra* note 3, at 9.

95. European Convention, *supra* note 72, at arts. 28 & 30. Such settlements were reached in a number of freedom of religion cases. *See, e.g.*, Pentidis and others v. Greece, 39 Eur. Ct. H.R. (ser. A) 983, 990 (1997-III), <http://hudoc.echr.coe.int>; Hazar, Hazar and Acik v. Turkey, 73 Eur. Comm’n H.R. Dec. & Rep. 111 (1992), <http://hudoc.echr.coe.int> (friendly settlement).

Convention.⁹⁶ Commission reports were not binding upon states, and states (but originally not the petitioners)⁹⁷ could refer the matter either to a Committee of Ministers⁹⁸ or to the European Court, both of which had the right to make a final decision whether a state had breached an obligation under the European Convention, and to make decisions, including awarding “just satisfaction” to injured petitioners, which were binding upon the Contracting Parties.⁹⁹ When the Council of Europe adopted Protocol 11, it abolished the Commission, limited the role of the Council of Ministers, and established a new court, which is able to sit in smaller panels, enabling it to deal with a larger number of cases.¹⁰⁰

In comparison with the United States, one distinctive feature of church-state relations in Europe is that in many countries a much greater degree of cooperation or engagement of religion and the state is deemed appropriate. I will argue that like separation and accommodation, this cooperationist viewpoint is based upon a

96. European Convention, *supra* note 72, at art. 31.

97. *Id.* at art. 38 (original text). With the adoption of Protocol 9, petitioners as well as states gained the right to bring a case to the European Court, although a panel of the court was authorized to evaluate petitions to determine whether they raised a “serious question involving the interpretation or application of the Convention.”

98. If a State referred a matter to the Committee of Ministers and the Committee determined that there was a breach of the Convention, this conclusion was binding upon the parties, but the Committee never overruled the Commission in relation to any Article 9 complaints, and so it is largely irrelevant to the interpretation of Article 9. *See* EVANS, FREEDOM OF RELIGION, *supra* note 3, at 9.

99. *See* European Convention, *supra* note 72, at arts. 50–53.

100. EVANS, FREEDOM OF RELIGION, *supra* note 3, at 10. The Plenary Court, comprised of a number of judges equal to the number of member states, sits only for administrative matters, European Convention, *supra* note 72, at art. 21 (as amended). Committees of three judges can decide by unanimous vote whether a case is admissible, *id.* at art. 28 (as amended), and Panels of seven judges decide the admissibility of cases that are not unanimously decided by Committees and also hear the merits of cases, *id.* at art. 29 (as amended). When a Chamber believes a matter is sufficiently significant, it may refer the case to a Grand Chamber of seventeen judges, *id.* at art. 30 (as amended). Parties may also request a Grand Chamber to consider cases, *id.* at art. 43 (as amended). Some commentators have suggested that

[s]ome cases that have been summarily dismissed . . . require analysis . . . [, especially] cases that are found to be inadmissible on the basis that they are manifestly ill-founded . . . because often the failure of the Commission to deal seriously with these cases demonstrates its conservative approach to Article 9. Also, some members of the Court have suggested that sometimes the technical provisions that can be used to deem a case inadmissible (such as failure to exhaust domestic remedies) have been used by the Court to avoid looking into difficult or controversial areas.

EVANS, FREEDOM OF RELIGION, *supra* note 3, at 10 (citing case).

1217]

The Autonomy of Church and State

particular conception of autonomy, one which emphasizes *interdependence*.¹⁰¹

In Europe, the state is much less likely to be seen as an enemy of freedom and is much more likely to be seen as the champion or promoter of freedom. This is true with respect to liberty in general, as well as religious liberty in particular. For example, in describing the German experience with industrialization, Leonard Krieger suggests that the experience “set up the relationship between individuals and the authoritarian state in which the state was both favorable and necessary to the material side of personal freedom and in which the individual, consequently, was both beholden to the state and, to evade this dependence, withdrawn from it.”¹⁰² Much the same could be said about the relationship of the individual and the state with respect to spiritual freedom. According to Krieger, the Reformation resulted in

increased ecclesiastical powers of Lutheran and Catholic princes alike, a development which received theoretical expression for Lutheran princes in the doctrine of the *jus episcopale*. Ultimately both the fact and the doctrine, which conferred upon the prince the prime responsibility and the supreme power for the organization and maintenance of religion in his territories, were to contribute signally to the extension of authority which led to the organization of the sovereign state¹⁰³

This resulted in what became a “familiar mixing of [the prince’s] private and public capacities,” and the prince became “the agent of spiritual freedom for his society as well as of political power over it.”¹⁰⁴

101. Carolyn Evans argues that “one of the reasons that the [European] Court and Commission have not developed an adequate jurisprudence on religious freedom is that they have not taken seriously the importance of understanding the rationale for religious freedom.” *Id.* at 33. Evans suggests that “[t]he argument from autonomy seems to be the best approach for the [European] Court to take to interpreting Article 9.” *Id.* While I agree with Professor Evans that the concept autonomy appears to provide a promising basis for interpreting Article 9, as I argue throughout this paper, I believe that a certain conception of autonomy does actually underlie much of the European Court’s and the Commission’s approach to issues of religious freedom and belief, but that the conception of autonomy adopted by the court is quite different than the liberal conception favored by Evans. *See infra* Part III.A–C.

102. LEONARD KRIEGER, *THE GERMAN IDEA OF FREEDOM: HISTORY OF A POLITICAL TRADITION* 39 (1957).

103. *Id.* at 48.

104. *Id.* at 49.

The history of the relationship between church and state in Europe is extraordinarily complex and far beyond the scope of this paper.¹⁰⁵ But even today in Europe, in contrast with America, people are much less likely to view the state as an enemy or threat to religious freedom and more likely to view it as a protector and facilitator of religious freedom.¹⁰⁶ The clearest evidence of this difference in view between the United States and Europe can be seen in the jurisprudence concerning the institutional autonomy of the state and the institutional autonomy of the church.

III. THREE CONCEPTIONS OF AUTONOMY

In Part II of this Article, I suggested that three very different approaches to adjudicating issues involving religious liberty and the relationship between church and state—separation, cooperation, and accommodation—are each based upon competing conceptions of a single concept, autonomy. In Parts IV and V of this Article, I will illustrate how these three conceptions of autonomy influence jurisprudence relating to a wide variety of issues involving institutional autonomy (both of churches and of the state) and individual autonomy. In Part VI, I will consider the implications of these conceptions of autonomy for a few current areas of controversy in the United States. Before turning to these tasks, however, I must sketch the basic contours of these competing conceptions of autonomy. Each of these conceptions is based upon very different visions of what autonomy is and what conditions make its exercise possible.

The etymology of the term autonomy is from the Greek *autos* (self) and *nomos* (rule or law). The term was first applied by the Greeks to the concept of the city-state.¹⁰⁷ A city was autonomous if

105. See CHURCH AND STATE IN THE MODERN AGE: A DOCUMENTARY HISTORY (J.F. Maclear ed., 1995); PHILIP S. GORSKI, THE DISCIPLINARY REVOLUTION: CALVINISM AND THE RISE OF THE STATE IN EARLY MODERN EUROPE (2003); NEGOTIATING SECULAR AND ECCLESIASTICAL POWER: WESTERN EUROPE IN THE CENTRAL MIDDLE AGES (Arnoud-Jan A. Bijsterveld et al. eds., 1999); see also CHURCH AND STATE IN POSTWAR EASTERN EUROPE: A BIBLIOGRAPHICAL SURVEY (Paul Mojzes ed., 1987).

106. On the other hand, in states such as France and Turkey, where the emergence of a liberal democratic state was in large measure a struggle against a state dominated by a particular religious orthodoxy, the degree of separation of church and state that is deemed necessary to protect religious freedom is very high.

107. I will treat autonomy as a concept that is meaningful for both individual human beings and for institutions (both churches and the state). This view reflects both the history

its citizens made their own laws and the city was not under the control of an outside power. In his study of autonomy, Gerald Dworkin notes that the term autonomy is used “in an exceedingly broad fashion.”

It is used sometimes as an equivalent of liberty (positive or negative in Berlin’s terminology), sometimes as equivalent to self-rule or sovereignty, sometimes as identical with freedom of the will. It is equated with dignity, integrity, individuality, independence, responsibility, and self-knowledge. It is identified with qualities of self-assertion, with critical reflection, with freedom from obligation, with absence of external causation, with knowledge of one’s own interests. It is even equated by some economists with the impossibility of interpersonal comparisons. It is related to actions, to beliefs, to reasons for acting, to rules, to the will of other persons, to thoughts, and to principles. About the only features held constant from one author to another are that autonomy is a feature of persons and that it is a desirable quality to have.¹⁰⁸

Professor Dworkin concludes, “[i]t is very unlikely that there is a core meaning which underlies all these various uses of the term.”¹⁰⁹ There are, however, a number of central ideas that seem to be a part of all—or nearly all—accounts of autonomy. These ideas are self-direction, independence, and the ability to choose and implement a life plan.

One disputed issue—perhaps *the* disputed issue—in the philosophy of autonomy is the role or place for the influence of others on the individual or entity that is autonomous. What is the role of community in the exercise of individual autonomy? Is the state’s obligation to stay out of the way, or does it have an affirmative duty to create conditions that will facilitate the development of human autonomy? And must the state remain neutral regarding various conceptions of the good life, or can it take measures that will favor some conceptions of the good life over others?

and current usage of the term autonomy, but as will be clear from the discussion below, the conditions for exercising autonomy may be different in individual and institutional contexts. Institutional autonomy is discussed *infra* at Part IV, and individual autonomy is discussed *infra* at Part V.

108. GERALD DWORIN, *THE THEORY AND PRACTICE OF AUTONOMY* 6 (1988).

109. *Id.*

The conditions that must prevail in order for individuals or institutions to be able to lead autonomous lives is a matter of considerable disagreement. I will briefly outline three possibilities— independence, interdependence, and inter-independence—none of which is meant to describe the views of any particular author, but each of which illustrates broadly different approaches to understanding the conditions that must prevail in order for one to live an autonomous life.

The first conception is based upon an ideal of absolute *independence*. According to this vision, the key condition for being able to exercise autonomy is to be left alone, free from the influence or interference of others. The basic idea is that people should compose their own lives and be able to do so free from coercion in matters of fundamental importance. At an institutional level, the ideal of separation of church and state reflects this ambition, and the guiding metaphor is of a “wall of separation” between church and state, dividing each area into its own sphere of activity and influence, in which it will remain untouched by the other.

The second conception of autonomy is based upon an ideal of *interdependence*. According to this vision, autonomy is possible only within thickly contextualized social structures, where each person or institution has significant obligations to others that must be met in order for those others to have the ability to exercise autonomy.

The third conception of autonomy is based upon an ideal of *inter-independence*, a somewhat counterintuitive idea, which on the one hand requires neither separation nor isolation, but which on the other hand reserves a larger place for independence than does a conception of autonomy based upon *interdependence*.

A. Independence

The first conception, or really group of conceptions, of autonomy centers on the idea of *independence*. Echoing Kant’s argument for the fundamental importance of independence of the will, Joel Feinberg has stated, “I am autonomous if I rule me, and no one else rules I.”¹¹⁰

This conception of autonomy receives its classic articulation by John Stuart Mill in his essay, *On Liberty*, and was forcefully

110. Joel Feinberg, *The Idea of a Free Man*, in EDUCATION AND THE DEVELOPMENT OF REASON 161 (1972).

1217]

The Autonomy of Church and State

articulated in the Eighteenth century by philosophers and politicians such as Marie Jean Antoine Nicolas Caritat Condorcet, Thomas Paine, and Benjamin Constant. In its strongest formulation, autonomy requires complete independence from all other influences.¹¹¹ According to Isaiah Berlin, while personal freedom will have limits based upon protecting the liberties of others,

a certain vacuum round him has to be created, a certain space within which he may be allowed to fulfill what might be called his reasonable wishes. One should not criticize these wishes. Each man's ends are his own; the business of the State is to prevent collisions; to act as a kind of traffic policeman and night watchman . . . ; simply to see to it that people do not clash with each other too much in the fulfilling of those personal ends about which they themselves are the ultimate authorities. Liberty means non-encroachment; liberty therefore means non-impingement by one person on another."¹¹²

Autonomy is contrasted, in Kant's terminology, to heteronomy, the determination of one's will by forces outside oneself.¹¹³ Strong

111. Immanuel Kant and Jean-Paul Sartre, although very different in their ethical views, share a conception of autonomy that depends upon individuals living in a social context that affords complete moral independence. Kant encourages us to resist the "self-imposed immaturity" of trusting in the authority of others. CHARLES E. LARMORE, *PATTERNS OF MORAL COMPLEXITY* 78 (1987); *see also* IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 440–45 (James W. Ellington trans., 1981). Although Sartre did not share Kant's belief that all rational and autonomous agents will choose to abide a single moral law, like Kant, Sartre conceives of autonomous action being the work of independent actors operating in willful isolation. For Sartre the most important moral fact is the irrevocable reality of fundamental human freedom. Only by accepting one's radical freedom can a human being eschew the "bad faith" of relying upon a misconceived form of psychological determinism and recognize that the human will is the absolute origin of its acts. A human being, according to Sartre, is capable of acting as a moral agent only when she recognizes her freedom and takes complete responsibility for her choices. *See* JEAN-PAUL SARTRE, *BEING AND NOTHINGNESS* (Hazel E. Barnes trans., 1956).

112. ISAIAH BERLIN, *FREEDOM AND ITS BETRAYAL: SIX ENEMIES OF HUMAN LIBERTY* 52–53 (Henry Hardy ed., 2002). This recently published volume of Isaiah Berlin's influential BBC lectures has recently been posthumously published and provides an early and striking example of Berlin's lifelong occupation with the meaning of liberty and the various ways in which that term has been construed.

113. KANT, *supra* note 111, at 440–45. William Galston observes that Kant's view of autonomy combines, to borrow Isaiah Berlin's terminology, a view of ethics based on positive freedom and a view of politics based on negative freedom. *See* WILLIAM A. GALSTON, *LIBERAL PURPOSES* 83 (1991).

versions of autonomy require complete independence of the will, what I term “stark independence.”¹¹⁴

Conceptions of autonomy based upon the idea of independence, however, need not be conceptualized in such a strong manner. Professor Joseph Raz explains that the basic idea behind the ideal of personal autonomy is that people should compose their own lives: “The autonomous person is a (part) author of [her] own life. The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.”¹¹⁵ Professor Raz contrasts an autonomous life with a life devoid of choices or without awareness of choices, of coerced choices, or of simply “drifting through life without ever exercising one’s capacity to choose.”¹¹⁶

Professor Raz’s weaker conception of autonomy does not require complete independence, although it does contemplate an absence of coercion and invidious forms of psychological manipulation, as well as the existence of, awareness of, and the wherewithal to pursue a variety of life plans. Following Raz, Professor Carolyn Evans argues that

Coercion in matters of fundamental importance, such as belief in the existence of God, or an afterlife, or a religiously based set of morals or obligations towards others, would deny people the ability to be the authors of their own lives. The fullest personal autonomy will exist in a society in which a person sees the availability of a range of good choices in regard to religion or belief and is able to make meaningful decisions about which, if any, of these choices he or she wishes to adopt.¹¹⁷

A conception of autonomy based upon the idea of independence (of both individuals and institutions) had a strong influence on much of the religion-clause jurisprudence in the United States.¹¹⁸ Most obviously, Jefferson’s metaphor of a wall of separation dividing

114. For a critique of the political morality of stark independence, see ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 124 (1969); ALASDAIR MACINTYRE, *AFTER VIRTUE* 119 (1981); Michael Sandel, *The Procedural Republic and the Unencumbered Self*, 12 *POL. THEORY* 90–91 (1984).

115. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 369 (1986).

116. *Id.* at 371.

117. EVANS, *FREEDOM OF RELIGION*, *supra* note 3, at 30.

118. As noted above, a counter-theme in U.S. Establishment Clause jurisprudence is accommodation. *See supra* Part II.B.1.

1217]

The Autonomy of Church and State

religion on the one hand and the state on the other is a clear example of a vision of autonomy that rests upon independence. On this view, the domain of the state and the domain of religion are divided into respective spheres, and the mandate of the First Amendment is to prevent either from intruding upon the precincts of the other. Territorial metaphors prevail, and the wall becomes an apt symbol for the ideal relationship—even if imperfectly realized—between church and state. Because autonomy demands independence, the religion clauses require “mutual noninterference by church and state in each other’s affairs.”¹¹⁹

B. Interdependence

In sharp contrast to conceptions of autonomy that are based upon various understandings of independence, another group of conceptions of autonomy takes a markedly different tact in defining the social conditions that must prevail in order for autonomy to flourish. A conception of autonomy based upon conditions of thick social *interdependence* maintains that autonomy is possible only when exercised within a thick and embracing social setting, and only if one is true to one’s “real” self or “true” nature. On this view, the possibilities open to an autonomous agent are determined in large measure—perhaps almost completely—by the social context within which the agent is situated. Such conceptions of autonomy are closely related to Isaiah Berlin’s concept of positive liberty.¹²⁰

These views diverge significantly from independence-based conceptions of autonomy. A conception of autonomy based upon interdependence will suggest that human potential or nature can be truly realized only within a thick communal context. Religious, nonreligious, and a variety of utopian conceptions of the good life often posit a single truth or set of truths about human nature, the human good (or human flourishing), and the universe that justify significantly directing the choices available to a person, all in service of his or her own best interests.

A wide variety of eighteenth-century philosophers held views that either explicitly or implicitly endorsed such a conception of autonomy. For example, Claude-Adrien Helvetius, who is often

119. NORMAN REDLICH, JOHN ATTANASIO & JOEL K. GOLDSTEIN, UNDERSTANDING CONSTITUTIONAL LAW 505 (2d ed. 1999).

120. BERLIN, *supra* note 114, at 118.

viewed as a forerunner of Benthamite utilitarianism, believed that he had discovered the single principle governing ethics and politics, namely the pursuit of pleasure and the avoidance of pain. Armed with this knowledge, he asserted that an enlightened political leader could enact laws that would maximize pleasure and minimize pain, without regard for human rights.¹²¹ Jean Jacques Rousseau settled the conflict between liberty and authority by defining them as the same thing; liberty he defined as wanting that which is good for me, that which will satisfy my true nature. And since human nature is unitary, what is good for one man will also be good for another. So what one person can truly want will never collide with what another person truly wants, and a state that forces one to be true to one's nature is really acting to vindicate one's freedom.¹²² Johann Gottlieb Fichte reaches a similar conclusion by focusing not upon personal self-realization, but collective self-realization. According to Berlin,

Fichte contrasts *compositum*, which is a mere artificial combination, and *totum*, [or] total nation, which is something organic, single, whole, and in which the higher principle dominates, the higher principle which may take the shape of a great nation, or of history. And the greatest agent of this force is a divine conqueror or leader whose business it is to play upon his nation as an artist plays upon his instrument, to mould it into a single organic whole, as the painter, the sculptor moulds his materials, as the composer creates patterns of sound.¹²³

On this view, individual autonomy is realized when it is made to fit harmoniously with the triumphant state by acquiescing to its destiny.¹²⁴ Perhaps most influentially, such a view of autonomy was

121. BERLIN, *supra* note 112, at 13–20. Isaiah Berlin forcefully articulated utilitarianism's hostility towards rights.

To have a right which nobody may impinge upon, to have a right which nobody may trample, to have a right to do or be or have this or that, whether anybody likes it or not, is an obstacle to the transformation of society in the direction of the greatest happiness for the greatest number.

Id. at 19. For a utilitarian, according to Berlin, rights are (as Bentham insisted) “nonsense on stilts.” *Id.* at 25. Berlin further states, “If the sole criterion of action is happiness and unhappiness, these odd rights which stick out in an obstinate way, and may not be smoothed over by the legislator, must be flattened out.” *Id.* at 20.

122. *See id.* at 37–41.

123. *Id.* at 70.

124. “Individual freedom, which in Kant has a sacred value, has for Fichte become a choice made by something super-personal. It chooses me, I do not choose it, and acquiescence is a privilege, a duty, a self-lifting, a kind of self-transcendent rising to a higher level.” *Id.* at 71.

1217]

The Autonomy of Church and State

developed by Hegel, who focused upon the triumph of natural power in his dialectic of history in which liberty is seen as the recognition of necessity, and liberty consists in aligning oneself with what is necessary.¹²⁵

While these thinkers differ dramatically in their diagnosis and prescription of the true purpose or end of human beings, they share something important in common: a belief that there is one true good for humankind, and a belief that everything that a person can rationally want can be harmonized with that vision. As such, autonomy does not consist of having space in which there can be no interference with human choice, be it good or bad, foolish or wise; rather, autonomy is achieved when one realizes one's true potential, and it may take the strong hand of a tutoring state to educate and direct one towards that end.

A conception of autonomy resting upon *interdependence* has not been particularly influential in religious freedom jurisprudence in the United States, primarily because of the Establishment Clause. In contrast, in Europe where religious establishments are much more common, an understanding of the proper relationship between the church and the state is heavily influenced by this conception of autonomy.

C. Inter-Independence

A third conception of autonomy, which I label somewhat paradoxically *inter-independence*, seeks a middle ground between conceptions of autonomy based upon conditions of stark *independence*, as well as conceptions of autonomy based upon

According to Berlin, Fichte identifies "freedom with self-assertion, with the imposition of your will upon others, with the removal of obstacles to your desires, and finally with a victorious nation marching to fulfill its destiny in answer to the internal demands given to it by transcendental reason, before which all material things must crumble." *Id.* at 73.

125. Isaiah Berlin explains Hegel's conception of human freedom as follows:

What is freedom but doing what I wish to do, getting what I want to get, obtaining from life what I am seeking for? I can only get this if I do not run against the laws which govern the world. If I defy them I shall be inevitably defeated. . . . If I wish to be effective historically, I must not set myself against the laws which govern human beings and institutions. This non-defiance is not an acquiescence which I consciously adopt with resignation, although I would rather be free. To understand why things cannot be otherwise is to want them not to be otherwise, because to understand things is to understand the reasons from them.

Id. at 89.

conditions of thick *interdependence*. On this view, stark *independence* is unappealing because in a world where the government plays a significant social and economic role in the lives of citizens and institutions, requiring stark *independence* can easily manifest itself as indifference or hostility rather than neutrality. Since human beings are social creatures, we need some resources in order to be able to develop into autonomous agents. On the other hand, thick *interdependence* is unappealing because it is insufficiently respectful of the pluralism and diversity that has come to characterize, and in all likelihood will continue to characterize, our political communities. If the state strongly favors or forces upon its subjects a particular conception of the good, then this will retard the development of autonomy.

A conception of autonomy based upon *inter-independence* is difficult to conceptualize and articulate. Autonomy based upon the idea of *inter-independence* will be more willing than independence-based conceptions of autonomy to recognize that human beings are born into and raised within social contexts. When we are born, our condition is one of near complete dependence upon others for survival and nurture, and even as we mature and become increasingly independent, it is evident that the possibilities available to us are in large measure defined by the social conditions within which we find ourselves. We do not create ourselves *ex nihilo*, as self-defining adults, but emerge, through education and inculcation, as members of particular families and communities. If my polity insists on isolating me, insists on erecting walls of separation between me and its social institutions, and refuses on grounds of eschewing paternalism to educate and equip me to survive—and more, to have a range of life options and possibilities among which I may choose and pursue—such a state, for it would not even begin to qualify as a society, much less a community, could not in reality be said to be interested in my autonomy.

On the other hand, unlike conceptions of autonomy based upon thick *interdependence*, a conception based upon *inter-independence* will continue to insist that there must be a distinction between the public and private spheres. Such a conception of autonomy will recognize that autonomy is not possible if the state, or some other authority, discerns and coerces me to follow a particular plan that facilitates the realization of my “true” nature or potential. Even if I have a single true nature, and a single true course of action is

necessary for me to realize my innate potential, I cannot exercise autonomy if I am forced to abide by a plan for realizing my natural possibilities.

A conception of autonomy that is based upon relationships of *inter-independence* will view stark *independence* as a false ideal: untrue because autonomy is only possible within social settings; and unappealing because many of humanity's greatest achievements are the result of collective, cooperative, and coordinated interaction. Likewise, *inter-independence* will view a conception of autonomy based upon thick *interdependence* as a false ideal: untrue because autonomy cannot be forced upon us; and unappealing as an empirical matter because history is littered with corpses left by theocrats, idealists, tyrants, and despots of every persuasion who were dedicated to imposing upon others their view of a single, true vision of human nature, potential, and destiny.

Although a complete development and articulation of the conditions for exercising an ideal of *inter-independence* must await another day, a few general observations can be made.

First, *inter-independence* is committed to a muscular, though not unlimited, independence. Coercion and manipulation, but not the ability to influence and be influenced, are destructive of *inter-independence*. A life can be meaningfully called autonomous only if it is to a considerable extent the creation or composition of the person living it. Space must be left for what Isaiah Berlin described as negative freedom, a sphere within which we as individual agents are free to direct our own lives. This commitment to independence presupposes a distinction between private and public life, although there will be some overlap between these spheres, and although there will be mutual influences between them.

Second, a conception of autonomy based upon the idea of *inter-independence* implies inclusion, being allowed to play an active role in a collective community's social and political life. Inclusion is closely related to respect, for meaningful respect is not possible if one is ignored or pushed to the margins of public life. *Inter-independence* forbids exclusion. This implies the ability to influence and be influenced by others. Ultimately, *inter-independence* does not pretend that autonomous beings are, can, or should be completely free from the presence and influence of others.

Inclusion does not rest upon a hope for complete or perfect convergence of moral or social viewpoints. That is the false and

dangerous dream of thick *interdependence* and conceptions of autonomy based upon positive liberty.¹²⁶ A commitment to an ongoing, shared normative discourse need not rest upon the belief that we will come up with arguments for a moral theory, religious doctrine, or social program that no rational person can reject. Inclusive discourse is based upon the belief that discussion and argument in moral matters is largely about learning to understand and respect each other and about taking responsibility for the implications of our moral positions.¹²⁷ This is not to say that moral discourse is not about persuasion—it is—but it is not exclusively about persuasion. Stephen Macedo, for example, acknowledges that when “public reasonableness has done its work,” moral viewpoints will remain “plural and divergent.”¹²⁸ An ideal of autonomy based upon *inter-independence* aims at a polity characterized by political moderation and inclusion, for a form of fraternity that goes beyond bare toleration.

Third, *inter-independence* relies upon a shared commitment to mutual respect among autonomous agents. This respect will imply tolerance, but it includes more than mere forbearance of others. The respect grows out of both sides of the *inter-independence* ideal—the independence side, as well as the relational side. Hostility, discrimination, extreme variations in opportunity and access to social resources, or marginalization or exclusion of individuals from shared social and political life are all destructive of autonomy. Respect, however, requires not merely leaving another person alone, but helping her equip herself to live a life that can be characterized as autonomous, and engaging her in what Stephen Macedo has called a discourse of public reasonableness.¹²⁹

This type of discourse rests upon a commitment to public justification, which aims not only to give good reasons for state action, but also “seeks reasons that can be widely seen to be good by persons such as they are.”¹³⁰ Macedo asks, Why public justification? He answers:

126. See *supra* Part III.B.

127. See STANLEY CAVELL, *Knowledge and the Basis of Morality*, in *THE CLAIM OF REASON* 247–73 (1982).

128. STEPHEN MACEDO, *LIBERAL VIRTUES* 71 (1990).

129. *Id.* at 39–77.

130. *Id.* at 46.

We acknowledge, first of all, the permanent fact of pluralism: reasonable people disagree not only about preferences and interests, but widely and deeply about moral, philosophical, religious, and other views. While acknowledging pluralism we, secondly, respect as free and equal moral beings all those who pass certain threshold tests of reasonableness: we respect those whose disagreement with us does not impugn their reasonableness.¹³¹

This discourse of public justification requires listening to others; letting others speak; and giving reasons to them that they can understand and acknowledge when actions are taken that affect them. As Macedo puts it, “[p]ublic justification embodies a complex form of respect for persons: it respects both our capacity for a shared reasonableness, but also ‘the burdens of reason.’”¹³²

Fourth, *inter-independence* relies upon empowerment, having the abilities necessary to exercise autonomy. Although, as Joseph Raz has pointed out, it is part of the “special character of autonomy that one cannot make another person autonomous,” this does not mean that others cannot help, particularly in helping secure “the background conditions which enable a person to be autonomous.”¹³³ The ideal of stark *independence*, while romantic, makes the mistake of assuming that respect for others means just leaving them alone. As Raz points out, “There is more one can do to help another person have an autonomous life than stand off and refrain from coercing or manipulating them,” including helping them develop the “inner capacities required for the conduct of an autonomous life.”¹³⁴ The ideal of *inter-independence* also avoids one of the cardinal mistakes of an ideal of stark *independence*—a mistake, characteristic of arrogant youth, of believing that we are entirely self-made persons.

In the case of personal autonomy, an individual must be provided with an education and with enough other opportunities and resources that he or she is empowered to exercise independence and choice. An autonomous agent must have an adequate range of options from which to choose projects and commitments.¹³⁵ *Inter-independence* implies mutual obligation for individuals to help

131. *Id.* at 47.

132. *Id.* at 47 (quoting John Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y.U. L. REV. 233, 235–38 (1989)).

133. RAZ, *supra* note 115, at 407.

134. *Id.* at 407–08.

135. *See id.* at 410–12.

develop the inner capacities—mental, emotional, and physical—of others, which will enable them to conduct autonomous lives.

Autonomy based upon an ideal of stark *independence* posits that we may have nothing in common; autonomy based upon an ideal of thick *interdependence* posits that we have everything in common even though we may not have the good sense to realize it. *Inter-independence* posits a middle ground—that we share much, although not everything, in common, and that while we should cherish and nurture that common ground, we must also carve out space for each other to exercise our independent visions of who we are and ought to be.

Thus far, I have identified three primary attitudes towards the proper relationship of church and state and of the scope of individual religious freedom—separation, cooperation, and accommodation. I have also argued that each of these attitudes is based upon a different conception of a single concept: autonomy. Separation is based upon a conception of autonomy that strives for *independence*. Cooperation is based upon a conception of autonomy that strives for *interdependence*. And accommodation is based upon a conception of autonomy that strives for what I have called *inter-independence*. In Part III, I have tried to sketch the characteristics and differences between these three conceptions of autonomy. In doing so, I have set the stage for an exploration of how these three conceptions of autonomy are manifested in cases involving religious freedom issues.

In the next three parts of this Article, I will explore the implications of these three conceptions of autonomy for issues involving the autonomy of churches, the autonomy of the state, and the religious autonomy of the individual. In Part IV, I will focus on institutional autonomy—first, the autonomy of churches, and second, the autonomy of the state. In Part V, I will turn to issues involving religion and personal autonomy. In Part VI, I will explore the implications of each of these conceptions of autonomy for several current controversies in the United States involving the relationship of church and state.

IV. INSTITUTIONAL AUTONOMY

In trying to determine the appropriate contours of interaction between church and state, the autonomy of two types of institutions is implicated: the autonomy of churches and the autonomy of the state. What autonomy means and what is required for church and

1217]

The Autonomy of Church and State

state to have autonomy will depend upon one's conception of autonomy. I will argue that in the United States since World War II, two conceptions of autonomy (one based upon the *independence* of church and state and the other based upon the *inter-independence* of church and state) have vied for dominance. In Europe, a third conception of autonomy based upon the *interdependence* of church and state has been dominant in the jurisprudence of the European Court. In Part IV.A, I will discuss a number of contexts in which the autonomy of the church is a primary concern, and in Part IV.B, I will focus upon situations in which the autonomy of the state is at stake.¹³⁶

A. The Autonomy of the Church

Issues concerning the autonomy of churches arise in a number of contexts, including: whether or not a state church is permitted; whether and the extent to which direct state aid to churches is permissible; whether churches qualify for and are permitted to receive tax exemptions; whether states can provide aid to religious schools, and if so, what the limits are on that aid; whether and the extent to which the state can influence or dictate decisions involving church property, officials, and doctrine; whether churches are entitled to have a distinct legal personality with standing to seek protection of its legal rights; and whether and the extent to which churches can qualify for exemptions from general laws.

In addition to their institutional dimension, many of these issues have implications for individual religious liberty as well, especially the freedom of religion or belief of people who find themselves in the minority with respect to matters of religion or belief. Thus, to some extent the outcomes of cases concerned with institutional autonomy also have implications for individual autonomy.

1. State church

An established church would clearly be unacceptable under a conception of autonomy based upon *independence*. It would also be

136. As will be apparent, classification is sometimes difficult and disputable. In many instances, a particular issue will implicate both the autonomy of the church and the autonomy of the state (for example, in the case of a state church). I have tried to classify issues according to the autonomy interest that seems to me to be primarily implicated, but the classification of an issue is more a matter of impression and convenience than of metaphysics.

unacceptable under a conception of autonomy based upon *inter-independence*, because a state church would not have the degree of independence required to realize the *inter-independence* ideal of self-direction and composition. From the perspective of *inter-independence*, an established church would present too great a possibility for coercion and manipulation of church affairs by political overseers. The possibility of church self-direction would be compromised, and the distinction between public and private spheres would be significantly weakened.

In contrast, a conception of autonomy based upon *interdependence* would permit a state religious establishment, since the roles and purposes of the state and the church are viewed as being complimentary and mutually reinforcing. If church-state relations are based upon the interdependence of church and state, a religious establishment will not necessarily be viewed as being inimical to the autonomy of the state, to the autonomy of the church, or to religious freedom. A shared state or national identity may be seen as important for social and political stability, and the role and purposes of the church and the state may be seen as being mutually supportive and reinforcing. Religion may be viewed as the social glue that holds society together. Overt coercion of membership may be recognized as being inconsistent with individual autonomy, but the existence of a church that is endorsed, supported, and even given preferential treatment by the state may not be seen as violating religious freedom human rights guarantees and as being not only fully consistent with but supportive of the autonomy of both the church and the state.

The jurisprudence of the Supreme Court and the European Court concerning a state church reflect different conceptions of autonomy.

United States: The Establishment Clause clearly forbids the United States from having a national church,¹³⁷ although it did not originally prohibit states from having state churches. By the time the Free Exercise Clause¹³⁸ and the Establishment Clause¹³⁹ were

137. See *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). Justice Black stated that, “[t]he ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church.” *Id.* at 15.

138. The Free Exercise Clause was first held to apply to the states in *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

incorporated to apply to action by states as well as by the federal government (following the Civil War and the adoption of the Fourteenth Amendment), no state still had an established church.¹⁴⁰ The prohibition in the United States of a state church is consistent with a conception of autonomy based upon the ideal of complete *independence* of church and state, as well as a conception of autonomy based upon *inter-independence*.

Europe: The European Convention permits an established state church. This conclusion was confirmed in *Darby v. Sweden*, in which the European Court held that an established church does not violate the Convention.¹⁴¹ The court did say, however, that a state church cannot force people to become members or prohibit people from leaving the church.¹⁴² The European Court's conclusion reflects a conception of autonomy based upon the *interdependence* of church and state.

2. Direct state aid to churches

A conception of autonomy based upon the *independence* of church and state would clearly prohibit direct state aid to churches. Although it may be viewed as a closer call, the same outcome would be expected from the *inter-independence* conception of autonomy, since independence, even if not perfectly realized, will be jeopardized by financial dependence of churches upon the state. While a prohibition on both direct and indirect state aid to churches comports with a conception of autonomy based upon *independence*, some aid, especially if it is indirect rather than direct, might be permitted by a conception of autonomy based upon *inter-independence*. However, such aid would be scrutinized based upon the purpose and effect such aid has upon the independence of churches and the independence of the state. On the other hand, a conception of autonomy based upon *interdependence* might easily permit significant levels of direct aid from the state to a favored church or group of churches.

139. The Establishment Clause was first applied to the states in *Everson v. Board of Education*, 330 U.S. 1 (1947).

140. Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1591.

141. *Darby v. Sweden*, 187 Eur. Ct. H.R. (ser. A) (1990), 13 E.H.R.R. 774 (1990) (Lexis).

142. *Id.* at para. 45.

United States: Under United States law, neither the federal nor state governments are permitted to provide direct aid to religion,¹⁴³ reflecting a conception of autonomy consistent with both *independence* and *inter-independence*. The distinction between direct and indirect aid, however, is not always clear, and as the recent debate about charitable choice illustrates, separationist and accommodationist viewpoints diverge sharply upon the permissibility of allowing religiously affiliated organizations to participate in such programs.¹⁴⁴ As will be discussed in greater detail below, allowing parochial schools to benefit from tuition voucher programs, allowing church-affiliated entities to qualify for state funding grants for social service programs, and allowing scholarships to be used by students studying for the clergy are examples of state aid to religion that could jeopardize the independence of churches to an extent that would violate the principle of *independence*. Thus, on the question of state aid to churches, in the United States there appears to be a significant movement from a conception of autonomy based upon *independence* to a conception based upon *inter-independence*.

Europe: In contrast, under the European Convention a relatively high degree of cooperation, support, and preferential treatment for a particular church is permissible. For example, in *Darby v. Sweden*, the court held that the state may directly collect taxes for an established church, and in order for an individual to be exempt from such a requirement, the state can require a person to notify the state that she has changed religious affiliation.¹⁴⁵ In addition, a nonbeliever may be required to pay the proportion of taxes to a state church that the church uses for carrying out “secular functions,” such as keeping records of births and deaths, performing marriages, and arranging funerals, even if the nonbeliever opposes such involvement of the church in secular functions.¹⁴⁶ A large degree of direct state aid to a particular church reflects a conception of autonomy based upon *interdependence* of church and state.

143. See *Everson*, 330 U.S. at 9, 15 (“The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.”).

144. Charitable choice is discussed in greater detail *infra* Part VI.C.

145. 187 Eur. Ct. H.R. (ser. A).

146. *Kustannus Oy Vapaa Ajattelijä AB and others v. Finland*, 85-A Eur. Comm’n H.R. Dec. & Rep. 29 (1996), 22 E.H.R.R. CD 69, 69 (1996) (Westlaw).

3. *Tax exemptions*

Autonomy conceived as requiring strict *independence* of church and state would not only permit, but also probably guarantee, tax-exempt status to churches. Thus, while separation is sometimes viewed as being hostile to religion, strict *independence* is not always inimical to the interests of churches. Autonomy based upon *inter-independence* would appear to permit a tax exemption for churches since doing so would facilitate churches' ability to utilize donations to pursue their self-defined missions and would reduce troubling entanglements of churches with the state. It is less likely, however, that *inter-independence* would view tax exemptions as required in order to preserve the autonomy of church and state, since a mild degree of engagement between church and state would be viewed as being permissible. Especially if churches are able to receive a significant degree of direct or indirect financial support from the state (for example, by being able to participate in access to state funds through finance social service programs), the payment of taxes as an ordinary burden of citizenship and participation in the program of public benefits may be seen as justifying the inclusion of churches in tax programs. Thus, under a view of autonomy based upon *inter-independence*, certain types of generally applicable taxes, such as sales tax on religious literature and perhaps even property taxes, would appear to be permissible. Autonomy based upon *interdependence* would not necessarily require or permit a tax exemption, since concerns about engagement and entanglement of church and state are much less likely to be perceived as problematic. Under *interdependence*, favorable tax treatment for preferred churches would be expected.

United States: Tax exemptions that benefit churches have been permitted under the Establishment Clause, but such benefits must be equally available to all churches and must be equally available to nonreligious charitable organizations. U.S. churches are exempt from paying taxes, not as a matter of constitutional right, but pursuant to legislative enactment. Churches are included in the list of charitable and other nonprofit organizations that can qualify for tax exempt status under section 501(c)(3) of the Internal Revenue Code.¹⁴⁷ The Supreme Court has held that the tax-exempt status of

147. I.R.C. § 501(c)(3).

churches does not violate the Establishment Clause on the grounds that it is a neutral benefit available to all churches and to other nonprofit organizations.¹⁴⁸ Churches have also been exempted from certain generally applicable tax laws. For example, in *St. Martin Evangelical Lutheran Church v. South Dakota*, the Supreme Court held that a church-sponsored school was exempt from paying unemployment compensation tax required under federal law.¹⁴⁹

In addition, the Supreme Court has disapproved of laws that disadvantage a particular religion but not religions generally. For example, in *Larson v. Valente*, the Court struck down a state statute requiring religious organizations that receive less than half their total contributions from members or affiliated organizations to register and report their income.¹⁵⁰ The statute in question affected only the Unification Church, and the Court stated that the exemption scheme violated the “clearest command of the Establishment Clause,” namely that “one religious denomination cannot be officially preferred over another.”¹⁵¹

The approach to tax-exemption issues in the United States has reflected the presumptions and concerns of a conception of autonomy based upon *inter-independence*. Tax exemptions are not a matter of constitutional right as one would expect from a conception of autonomy based on strict *independence*. The indirect benefits to churches created by a tax exemption are not constitutionally required, but neither are they constitutionally forbidden. Instead, tax exemptions may be permissible when the autonomy interests of churches are significantly implicated. For example, the Court has reasoned that tax exemptions are permissible because they reduce the entanglement of church and state, which is problematic from the perspective of *inter-independence*. Requiring laws that provide an

148. *Walz v. Tax Comm’n*, 397 U.S. 664, 672–73 (1970). Although the Court analyzed tax-exemptions from the perspective of neutrality (the government was exercising “benevolent neutrality towards churches and religious exercise generally so long as none was favored over others and none suffered interference”), autonomy would appear to be a much more promising basis upon which to justify the Court’s outcome. While neither outcome would be neutral towards churches (since they benefit from an exemption and are burdened by a tax obligation), the autonomy of church and state is enhanced when the state’s taxing authority does not cover churches.

149. *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 788 (1981).

150. *Larson v. Valente*, 456 U.S. 228, 255 (1982).

151. *Id.* at 244.

indirect benefit to religion not to discriminate against some religions is also consistent with the mandate of *inter-independence* for mutual respect and inclusion.

On the other hand, in cases involving commercial activities such as the sale of religious literature, the Supreme Court has held that the Establishment Clause does not exempt churches from paying a generally applicable sales tax.¹⁵² If autonomy required complete *independence*, such taxes should be prohibited. But when churches are participating in the commercial world, which falls squarely within the states' domain, *inter-independence* does not prohibit being included in a general tax mechanism.¹⁵³ The concept of *inter-independence* allows a degree of entanglement but places bounds on the extent of entanglement between church and state that would be permitted in an environment of *interdependence*. For example, in *Larson*, because the Minnesota Act in question had a "valid secular purpose" when viewed as a whole,¹⁵⁴ the Court did not rule out the idea that "the burdens of compliance with the Act would be intrinsically impermissible if they were imposed evenhandedly."¹⁵⁵ Thus both when allowing and disallowing exemptions from taxation, the U.S. Supreme Court has followed a path illuminated by a conception of autonomy based upon *inter-independence*.

Europe: The Commission has approved of tax arrangements that provide benefits to one or some churches to the exclusion of other

152. See *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378 (1990).

153. In *Swaggart*, the Court focused on the commercial nature of the literature sales rather than the religious nature of the literature:

The sorts of government entanglement that we have found to violate the Establishment Clause have been far more invasive than the level of contact created by the administration of neutral tax laws.

... [T]he imposition of the sales and use tax without an exemption for appellant does not require the State to inquire into the religious content of the items sold or the religious motivation for selling or purchasing the items, because the materials are subject to the tax regardless of content or motive. From the State's point of view, the critical question is not whether the materials are religious, but whether there is a sale or a use, a question which involves only a secular determination.

Id. at 395–96.

154. See *Larson*, 456 U.S. at 248 ("Appellants assert, and we acknowledge, that the State of Minnesota has a significant interest in protecting its citizens from abusive practices in the solicitation of funds for charity, and that this interest retains importance when the solicitation is conducted by a religious organization.").

155. *Id.* at 253.

churches. In *Iglesia Bautista 'El Salvador' and Ortega Moratilla v. Spain*,¹⁵⁶ the Commission held that a tax system that gave preferences to the Catholic Church, but not to Protestant churches, did not violate Article 9 or Article 14. In that case, the Catholic Church received a tax exemption from property tax, based upon a Concordat between the Catholic Church and Spain, and a Protestant church argued that it too should be exempt from property tax. The Commission denied the claim that the preferential tax system violated Article 9, on the grounds that there is no right to an exemption from ordinary tax obligations and there were “objective and reasonable” justifications for the difference in treatment.¹⁵⁷ Thus, according to Professor Evans, under the jurisprudence of the European Court, “the State may legitimately tax one Church and not another, and give financial assistance to one Church and not another, if there is some arrangement between the privileged Church and the State which imposes reciprocal obligations on the two parties.”¹⁵⁸

This outcome reflects a conception of autonomy based upon *interdependence* of church and state. From this point of view, the state is not required to be neutral toward religion or to give equal treatment among churches. Thus it is entirely natural for the state to view one church as having a particularly significant role in the life of the nation, and receiving favorable treatment from the state not only enhances the ability of that institution to perform that distinctive and valuable role, but also benefits the state through the social good accomplished by the favored church. Under a conception of autonomy based on *interdependence*, the state is viewed as being competent to make differentiations based upon “objective and reasonable” justifications for which religious institutions deserve special treatment and support. On this view, the autonomy of both the state and the favored church are reinforced by the mutually symbiotic relationship between these institutions.

156. 72 Eur. Comm'n H.R. Dec. & Rep. 256 (1992), <http://hudoc.echr.coe.int>.

157. In the *Iglesia Bautista* case, the Catholic Church had undertaken such reciprocal obligations by placing its historical, artistic, and documentary heritage at the service of the Spanish people in exchange for benefits from the state including the property tax exemption. *Id.* at 261.

158. EVANS, FREEDOM OF RELIGION, *supra* note 3, at 83.

4. State aid to religious schools

Autonomy conceived as requiring *independence* of church and state would not permit state aid to religious schools, whether direct or indirect. A view of autonomy based on *interdependence* would have no difficulty with such aid. A view based on *inter-independence* would be very skeptical of aid from the state to religious schools, since such aid might create dependence of religious schools upon the state and might also result in situations where church autonomy is threatened by conditions placed by the state upon access to the aid. Nevertheless, *inter-independence* might view certain types of aid as being permissible if the programs were carefully structured and limited. A conception of autonomy based upon *inter-independence* would consider the effects of such programs upon the independence of both church and state and the importance of inclusion and the impact upon the distinction between public and private spheres of life, as well as whether exclusion would evince hostility and discrimination, and whether participation is necessary for the empowerment required to exercise autonomy.

United States: State aid to parochial schools has been very controversial and the subject of extensive litigation in the United States.¹⁵⁹ The Supreme Court has struggled mightily to construct a coherent approach to such cases, and the result has been a complex, convoluted, and internally inconsistent series of cases. In 1947 in *Everson v. Board of Education*,¹⁶⁰ the first case that applied the Establishment Clause to the states, the Court upheld a state program that reimbursed parents for the costs of busing their children to religious schools, but the Court employed strongly separationist rhetoric.¹⁶¹ This case provided the wellspring for both separationist

159. For a sampling of the sheer number of state and Supreme Court cases addressing state aid to parochial schools, see, for example, Gary D. Spivey, Annotation, *Constitutionality, Under State Constitutional Provision Forbidding Financial Aid to Religious Sects, of Public Provision of Schoolbus Service for Private School Pupils*, 41 A.L.R. 3d 344 (1972); A.G. Barnett, Annotation, *Furnishing Free Textbooks to Sectarian School or Student Therein*, 93 A.L.R. 2d 986 (1964); C.C. Marvel, Annotation, *Public Payment of Tuition, Scholarship, or the Like, as Respects Sectarian School*, 81 A.L.R. 2d 1309 (1962).

160. 330 U.S. 1 (1947). Justice Black reasoned that busing was a “public function” akin to providing fire and police services, and did not promote a “religious function.” *Id.* at 17–18.

161. “Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between church and State.’” *Id.* at 16.

and accommodationist arguments and outcomes in a long line of cases over the next several decades.

In cases dealing with state aid to religiously affiliated schools, the Supreme Court has vacillated between a conception of church-state autonomy requiring separation and *independence* and a conception based upon *inter-independence*, allowing for greater accommodation and inclusion. Some cases have reflected a view of autonomy based upon stark *independence* of church and state. For example, in *Lemon v. Kurtzman*,¹⁶² the Court held that states may not reimburse religious schools for the salaries of teachers of various secular subjects and that the state may not provide state-approved instructional materials to religious schools.¹⁶³ The Court also held that the Establishment Clause was violated by state salary supplements to teachers at religious schools who taught only subjects offered in public schools using materials used in public schools.¹⁶⁴ It also struck down grants to parochial schools that served low-income families to maintain and repair school facilities,¹⁶⁵ as well as small (fifty-dollar) tax credits for low-income parents of children attending religious schools. In addition, the Court struck down payments for state-mandated examinations prepared by teachers at religious schools,¹⁶⁶ and instructional materials such as maps, films, and laboratory equipment, provided to religious schools.¹⁶⁷ Finally, the Court struck down programs providing therapeutic services, such as remedial speech and hearing therapy, on the premises of religious schools¹⁶⁸ and the reimbursement of bus transportation for children attending religious schools to participate in educational field trips.¹⁶⁹

In recent years, the Supreme Court has moved away from a strongly separationist stance with respect to state aid to religious schools and has permitted certain types of aid that are generally

162. 403 U.S. 602 (1971).

163. *Id.* at 606-07.

164. *Early v. DiCenso*, 403 U.S. 602 (1971).

165. *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 798 (1973); *see also Sloan v. Lemon*, 413 U.S. 825 (1973) (reimbursements).

166. *Id.*

167. *New York v. Cathedral Acad.*, 434 U.S. 125 (1977); *Wolman v. Walter*, 433 U.S. 229 (1977); *Levitt v. Comm. for Pub. Educ. and Religious Liberty*, 413 U.S. 476 (1973).

168. *Meek v. Pittenger*, 421 U.S. 349 (1975).

169. *Wolman*, 433 U.S. at 225.

available to both religious and nonreligious private schools.¹⁷⁰ The concerns of *inter-independence* have been evident in a number of cases. For example, in *Board of Education v. Allen*,¹⁷¹ the Supreme Court upheld a state policy allowing public school boards to lend textbooks to religious schools.¹⁷² The Court allowed remedial instruction off school grounds,¹⁷³ later allowed remedial services on religious school premises¹⁷⁴ (reversing two earlier cases¹⁷⁵), allowed state reimbursement to religious schools for instructional materials such as maps and films¹⁷⁶ (reversing earlier cases¹⁷⁷), therapeutic services such as speech and hearing therapy at religious schools¹⁷⁸ (reversing an earlier case¹⁷⁹), and reimbursement to religious schools for the costs of bus transportation for educational field trips¹⁸⁰

170. See *infra* Part VI.B in which I discuss the Supreme Court's move away from a separationist stance with vouchers and other forms of indirect aid to churches. For an interesting perspective on Supreme Court "flip-flops" on Establishment Clause issues, see Christopher E. Smith, *Supreme Court Surprise: Justice Anthony Kennedy's Move Toward Moderation*, 45 OKLA. L. REV. 459 (1992).

171. 392 U.S. 236 (1968).

172. *Id.* at 243. In dissent, Justice Black advocated the view that the Establishment Clause requires complete independence of church and state.

It is true, of course, that the New York law does not as yet formally adopt or establish a state religion. But it takes a great stride in that direction and coming events cast their shadows before them. The same powerful sectarian religious propagandists who have succeeded in securing passage of the present law to help religious schools carry on their sectarian religious purposes can and doubtless will continue their propaganda, looking toward complete domination and supremacy of their particular brand of religion.

Id. at 251.

173. *Wolman*, 433 U.S. at 248 (1977).

174. *Agostini v. Felton*, 521 U.S. 203, 234–35 (1997).

175. See *Aguilar v. Felton*, 473 U.S. 402, 412–13 (1985) (holding that the use of federal funds to pay salaries of public school employees who taught in religious schools violated the Establishment Clause); *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 397 (1985) (holding that a school district's programs that provided classes to nonpublic students in leased classrooms at nonpublic schools violated the Establishment Clause).

176. *Mitchell v. Helms*, 530 U.S. 793, 835 (2000).

177. See *Meek v. Pittenger*, 421 U.S. 349, 366 (1975) (holding that a state's loan of instructional materials, such as maps and laboratory equipment, violated the Establishment Clause); *Wolman*, 433 U.S. at 250 (same).

178. *Mitchell*, 530 U.S. 793.

179. *Meek*, 421 U.S. at 371 (holding that state expenditures for auxiliary services "gave rise to a constitutionally intolerable degree of entanglement between church and state").

180. *Mitchell*, 530 U.S. 793.

(reversing an earlier case¹⁸¹). These cases represent a significant movement on the part of the Court from a conception of autonomy based upon *independence* to a conception of autonomy based upon *inter-independence*.

The Court exhibited a similar movement as it became increasingly willing to allow state funds to flow to the benefit of religious institutions. In *Tilton v. Richardson*, the Supreme Court allowed a program providing federal construction grants to church-related colleges for facilities devoted exclusively to secular educational purposes.¹⁸² Later, the Court approved a state revenue-bond program permitting church-related colleges to borrow funds for constructing buildings at low interest.¹⁸³ The Supreme Court has also allowed private religious colleges to participate in a state program providing noncategorical grants for nonsectarian use,¹⁸⁴ permitted a blind student to participate in a state vocational rehabilitation assistance program that paid the student's tuition to a private Christian college,¹⁸⁵ allowed the state to provide an interpreter to a deaf student at a sectarian school,¹⁸⁶ and given religiously affiliated organizations permission to participate in a federally funded program to encourage innovative services to deal with the problems of adolescent pregnancy.¹⁸⁷ The Supreme Court has become more accepting of aid that reaches religiously affiliated schools indirectly. For example, if vouchers are given to parents to spend at the school of their choice for the education of their children, the Supreme Court has allowed parents to direct that aid to religiously affiliated schools.¹⁸⁸

In sum, in the United States in cases involving state aid to religious schools, there has been a general trend over the past thirty years away from a conception of autonomy based upon *independence* towards a conception based upon *inter-independence*.

181. *Wolman*, 433 U.S. at 255 (holding that state funding of field trips created excessive entanglement and therefore violated the establishment clause).

182. 403 U.S. 672, 675 (1971).

183. *Hunt v. McNair*, 413 U.S. 734 (1973).

184. *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736 (1976).

185. *Witters v. Wa. Dept. of Servs.*, 474 U.S. 481 (1986).

186. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

187. *Bowen v. Kendrick*, 487 U.S. 589 (1988).

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

Europe: Under the European Convention, states may subsidize religious schools and may pay for certain types of religious education in both public and private schools if it so desires, but the state cannot be required to provide funds to private religious schools.¹⁸⁹ According to Carolyn Evans, “The concern of the drafters of the Convention was not (compared with the framers of the United States Constitution) to keep the State out of religion, including religious education, but rather to ensure that the State was not subject to financial demands that it did not wish to meet.”¹⁹⁰ However, the European Court has stated that the state has an obligation to respect the beliefs of parents within the public school system, even in areas not directly related to denominational instruction, and that it is not enough to allow parents to opt out of public schooling altogether and send their children to religious schools.¹⁹¹ The opportunity to opt out of specific religious instruction, however, has been held to satisfy the requirements of Article 9, even when doing so results in teacher and peer pressure to participate.¹⁹²

189. *See* W and KL v. Sweden, 45 Eur. Comm’n H.R. Dec. & Rep. 143, 148–49 (1985), 9 E.H.R.R. CD 247 (1987) (Westlaw) (allowing a state to means-test for grants available to students at private school even though aid was automatic in State schools); X and Y v. United Kingdom, App. No. 9461/81, Eur. Comm’n H.R. Dec. & Rep. 210 (1982) (holding that a State need not subsidize education at a private school even when parents feel their children must be educated there to receive an education consistent with their philosophical views); X. v. United Kingdom, App. No. 7782/77, 14 Eur. Comm’n H.R. Dec. & Rep. 179, 180 (1978) (allowing the State to provide less subsidies to a nondenominational private school than it did to a non-State-run schools).

190. EVANS, FREEDOM OF RELIGION, *supra* note 3, at 89.

191. *See, e.g.*, Kjeldsen, Busk Madsen and Pedersen v. Denmark, 23 Eur. Ct. H.R. (ser. A) 25, para. 53 (1976), <http://hudoc.echr.coe.int> (holding that a State could impose an integrated “sex education” curriculum in spite of parental objections based upon religious belief, but requiring the State to convey information in “an objective, critical and pluralistic manner” and prohibiting the state from pursuing “an aim of indoctrination that might be considered as not respecting parents’ religious and philosophical convictions”); *see also* Campbell and Cosans v. United Kingdom, 48 Eur. Ct. H.R. (ser. A) (1982), 4 E.H.R.R. 293 (1982) (Westlaw) (extending the requirement that schools respect parents’ wishes in a case of parents wishing to prevent their children from being subjected to corporal punishment).

192. *See* Bernard and others v. Luxembourg, 75 Eur. Comm’n H.R. Dec. & Rep. 57 (1993); C.J., J.J. and E.J. v. Poland, 84-A Eur. Comm’n H.R. Dec. & Rep. 46 (1996), <http://hudoc.echr.coe.int> (holding that religious instruction was “voluntary” when a student was required to wait in the corridor, received frequent questioning from teachers and pressure from a teacher and other students to take the classes, and eventually capitulated, against her father’s wishes, and joined the class). Professor Evans notes that the Commission

did not explore how voluntary a decision by a child in such a situation of social pressure could really be. It also refused to deal in any detail with the claim by the

The approach taken by the European Court in cases involving state aid to religious schools reflects a conception of autonomy based upon the *interdependence* of church and state. State subsidies to religiously affiliated schools are permitted, although some concern is expressed for the autonomy interests of dissenters who wish to opt out of religious instruction.

5. *Church property, officials, doctrine*

One area where the differing attitudes toward institutional autonomy are most striking is in controversies that arise with respect to church property, personnel, and doctrine. A conception of autonomy based upon *independence*, and to a slightly lesser extent a conception based upon *inter-independence*, would be highly suspicious of state involvement in the direction of the internal affairs of a church. In contrast, a conception based upon *interdependence* would be much less sensitive to negative impacts upon autonomy from state involvement in such affairs.

United States: The Supreme Court has demonstrated a high (although not absolute) degree of protectiveness of churches from interference by the state in controversies involving church property, officials, and doctrine. In an early case involving a property dispute between two groups claiming ownership of the same church property, the Court deferred to the Church's own internal rules for determining which group had the legitimate claim, an approach that the Court has generally followed in subsequent cases.¹⁹³ However, in a more recent case that did not involve an ownership dispute over church property, *City of Boerne v. Flores*, the Court upheld a general statute on historic preservation that prevented a church from adding

other applicant student (whose school offered the option of instruction in ethics as an alternative to religious instruction) that widespread social discrimination against non-Catholics, for example in the Labour market, meant that there was pressure to take religious instruction rather than ethics.

EVANS, FREEDOM OF RELIGION, *supra* note 3, at 96.

193. *See, e.g.*, *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94 (1952); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871). *But see* *Jones v. Wolf*, 443 U.S. 595 (1979) (allowing a state to resolve a church property dispute based upon "neutral principles of law"); *The Corp. of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1 (1890) (upholding the seizure of church property of Mormons on grounds that polygamy did not constitute religious belief).

to the size of its existing building.¹⁹⁴ Church autonomy was not viewed as a sufficient reason to create an exemption from a generally applicable zoning ordinance. This case was significant also because it was the vehicle the Supreme Court used to strike down the Religious Freedom Restoration Act, in which Congress had attempted to restore the compelling state interest standard to free exercise jurisprudence.¹⁹⁵

The Supreme Court has been very protective of church autonomy in matters relating to personnel and doctrine. The state cannot dictate to a church who it hires or fires as a minister, or what the church's doctrine will be.¹⁹⁶ Indeed, church autonomy over personnel and doctrine extends beyond employees with a directly

194. 521 U.S. 507 (1997).

195. See *Employment Div. v. Smith*, 494 U.S. 872 (1990) (holding that laws that burden religion need not be subject to heightened scrutiny, but are valid if neutral and of general application). Congress responded to *Smith* by enacting the Religious Freedom Restoration Act (RFRA), which attempted to restore the compelling-state-interest test. 42 U.S.C. §§ 2000bb to 2000bb-4 (1993). The Supreme Court declared the RFRA unconstitutional in *City of Boerne v. Flores*, 521 U.S. 507 (1997). The *Boerne* case elicited a broad scholarly response. In support of the Court's finding RFRA unconstitutional, see, for example, Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After City of Boerne v. Flores*, 1997 SUP. CT. REV. 79; Marci A. Hamilton, *The Religious Freedom Restoration Act Is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1 (1998); Ira C. Lupu, *Why the Congress Was Wrong and the Court Was Right—Reflections on City of Boerne v. Flores*, 39 WM. & MARY L. REV. 793 (1998). For a sampling of scholarly criticism of the Court's decision in *Boerne*, see, for example, David Cole, *The Value of Seeing Things Differently: Boerne v. Flores and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31; Robert F. Drinan, *Reflections on the Demise of the Religious Freedom Restoration Act*, 86 GEO. L.J. 101 (1997); Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743 (1998); Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997); John T. Noonan, Jr., *Religious Liberty at the Stake*, 84 VA. L. REV. 459 (1998).

196. See, e.g., Harold P. Southerland, *Theory and Reality in Statutory Interpretation*, 15 ST. THOMAS L. REV. 1, 32 (2002) (asserting that "it would be hard to imagine a more flagrant interference with the free exercise of religion than for Congress to dictate to a respectable church . . . whom it might or might not choose as its minister"); Laura L. Coon, Note, *Employment Discrimination by Religious Institutions: Limiting the Sanctuary of the Constitutional Ministerial Exception to Religion-Based Employment Decisions*, 54 VAND. L. REV. 481, 531 (2001) ("Courts holding that the adjudication of negligent hiring and supervision claims against church employers necessarily violates the First Amendment emphasize that in all decisions regarding hiring, firing, or discipline, the church's determination is necessarily guided by religious doctrine and practice. These courts reason that, regardless of whether or not a religious institution has a doctrinal reason for the challenged employment decision, examining church employment policies regarding ministerial employment to determine what is reasonable conduct necessitates 'inappropriate governmental involvement' in violation of the Free Exercise and Establishment Clauses." (footnote omitted)).

ecclesiastical function. For example, in *Corporation of the Presiding Bishop v. Amos*,¹⁹⁷ the Court unanimously held that even a church-owned nonprofit organization that did not have a directly religious mission was exempt from the general law prohibiting discrimination in employment based upon religion. In that case, the Church operated a gymnasium and was allowed to limit employment to individuals who adhered to certain religious tenets. The Court's reasoning invoked autonomy concerns, noting that a religious-employment exemption alleviated "significant governmental interference with the ability of religious organizations to define and carry out their religious missions."¹⁹⁸

As these cases illustrate, in sensitive matters involving church property, personnel, and doctrine, the Supreme Court has based its jurisprudence on a conception of autonomy that reflects a high degree of concern for the *independence* of churches, although in recent cases that degree of concern has apparently diminished.

Europe: The European Court has allowed quite a high degree of state involvement in issues involving church property, officials, and doctrine. For example, in *Holy Monasteries v. Greece*, the court dismissed a claim from a church involving transfer of land from monasteries to the government.¹⁹⁹

The European Court has also been deferential to state control of personnel and doctrine of a state church. For example, in *Knudsen v. Norway*, the Commission upheld the right of the state to dismiss a pastor of a state church on the grounds that the pastor had revoked his oath of loyalty to the state, thus implying that if there is an established church, the state has the right to set forth conditions for employment in the church generally or for a particular post.²⁰⁰ In another case, *Karlsson v. Sweden*, the Commission upheld the

197. 483 U.S. 327 (1987). For additional cases concerning corporeal punishment, see EVANS, FREEDOM OF RELIGION, *supra* note 3, at 93 n.132.

198. *Amos*, 483 U.S. at 335.

Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.

Id. at 342 (Brennan, J., concurring).

199. 301 Eur. Ct. H.R. (ser. A) 1347 (1994), 20 E.H.R.R. 1 (1994) (Westlaw).

200. 42 Eur. Comm'n H.R. Dec. & Rep. 247 (1985), 8 E.H.R.R. CD 63 (1985) (Westlaw).

decision of an employment board to deny a position to a pastor because he opposed the ordination of women.²⁰¹

State control of nonestablished churches is more limited. In *Serif v. Greece*, the court held that the Greek government violated Article 9 by prosecuting a man who claimed to be the Mufti of a local Muslim community, when another man had been appointed Mufti by the Greek government.²⁰² The court stated that to punish a person “for merely acting as the religious leader of a group that willingly followed him can hardly be considered compatible with the demands of religious pluralism in a democratic society.”²⁰³ The court’s holding was quite limited, however, noting that a different outcome might be warranted if the Mufti attempted to carry out functions with legal effect, such as marriage ceremonies.²⁰⁴

In an established church, the court has held that the state has the right to control church doctrine, and ministers can be required to comply or resign. For example, in *X. v. Denmark*, the state disciplined a clergyman in the state Church of Denmark who attempted to impose a requirement that parents take five lessons of religious instruction before he would baptize their children.²⁰⁵ The Commission upheld the state’s control over the clergyman’s behavior, taking the position that clergymen’s “individual right of thought, conscience or religion is exercised at the moment they accept or refuse employment as clergymen, and their right to leave the church guarantees their freedom of religion in case they oppose its teachings.”²⁰⁶ State control of religious doctrine was affirmed again by the Commission in *Knudsen v. Norway*, a case in which the state-appointed minister of religion was permitted to dismiss a clergyman who refused to carry out certain of his functions in protest of a new liberal abortion law.²⁰⁷

In cases involving church property, personnel, and doctrine, the European Court has based its jurisprudence upon a conception of autonomy that reflects the assumptions of *interdependence* of church

201. 57 Eur. Comm’n H.R. Dec. & Rep. 172 (1988), <http://hudoc.echr.coe.int>.

202. App. No. 38178/97 (Eur. Ct. H.R. Dec. 14, 1999), 31 E.H.R.R. 20 (1999) (Westlaw).

203. *Id.* at para. 51.

204. *Id.* at para. 52.

205. 5 Eur. Comm’n H.R. Dec. & Rep. 157, 158 (1976).

206. *Id.*

207. *Knudsen*, 8 Eur. H.R. Rep. CD 63.

and state. A very high degree of state involvement in church affairs has been permitted.²⁰⁸

6. *Church standing*

From the perspective of *independence* and *inter-independence*, a church's standing to sue to protect its legal rights would be viewed as an elementary component of church autonomy. A conception of autonomy based upon *interdependence*, on the other hand, would be less concerned with the ability of churches to have standing to pursue and vindicate their rights.

United States: The Supreme Court has long recognized standing for both individuals and churches in Free Exercise and Establishment Clause disputes. Churches have standing in U.S. courts,²⁰⁹ and for the most part standing issues have not been important in religious liberty jurisprudence in the United States.²¹⁰ The Court's jurisprudence involving standing issues reflects the view that church autonomy is based upon a degree of *independence*.

Europe: The autonomy of churches was dealt an early blow by the Commission in the 1968 case of *Church of X v. the United Kingdom*,²¹¹ in which the Commission dismissed the case on the

208. The degree to which state involvement is permitted, however, may turn, to some degree, on whether the state is regulating a state church or another religion. When the state is regulating the state church, it will, of course, have greater latitude than when it is regulating other religions. In either scenario, though, the degree of state involvement permitted is demonstrative of *interdependence*.

209. *See, e.g.*, *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988) (holding that the Catholic church had standing to challenge a district court's lack of subject matter jurisdiction over the case); *Larson v. Valente*, 456 U.S. 228 (1982) (holding that a church and its followers had standing to challenge the Minnesota Charitable Solicitations Act).

210. *But see* *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986) (denying standing to the respondent in a high school religious club controversy); *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982) (denying standing to a citizen/taxpayer group in a constitutional challenge of the conveyance of a military hospital to a church-related college under a statute permitting "surplus property" to be conveyed to nonprofit, tax-exempt educational institutions).

211. 13 Y.B. Eur. Conv. on H.R. 306 (Eur. Comm'n on H.R.) (1968), <http://hudoc.echr.coe.int>. In *Church of X v. United Kingdom*, a church brought a complaint claiming its rights of religious freedom had been violated when the British government made a determination that it was a "cult" that was dangerous to society and took a variety of measures to limit the activities of the church, including deregistering its educational institutions, refusing to allow individuals into the country who wished to study or work with the church, and refusing entry to hundreds of delegates to an international conference of the church. The church, which was a corporation, brought the action on its own behalf and on behalf of its

grounds that a church does not have standing. The Commission reasoned that “a corporation being a legal and not a natural person, is incapable of having or exercising the rights mentioned in Article 9, paragraph 1 of the Convention and Article 2 of the First Protocol.”²¹² In 1971 the Commission reiterated that churches have no standing in *X v. Sweden*,²¹³ although it revised its decision and granted standing to a church in the 1979 case, *X and the Church of Scientology v. Sweden*.²¹⁴ The Commission explained that it was overruling its earlier decisions that denied standing to churches, stating that the Commission was

now of the opinion that the . . . distinction between the Church and its members under Article 9(1) is essentially artificial. When a church body lodges an application under the Convention, it does so in reality, on behalf of its members. It should therefore be accepted that a church body is capable of possessing and exercising the rights contained in Article 9(1) in its own capacity as representative of its members.²¹⁵

This change of view represents some movement away from a view of autonomy based upon *interdependence* towards a view of autonomy based upon a measure of *independence* for religious institutions. But Professor Evans notes, “[t]he right of a Church to bring a claim is derivative, however, based on aggregating . . . the rights of its members. It cannot claim a breach of its own rights.”²¹⁶ Thus, even under the revised doctrine, religious institutions still do

members, but no individual member was a named party to the complaint. Carolyn Evans maintains that “[t]he dismissal of cases on the grounds that they were brought by Churches rather than individuals allowed the Commission to refuse to deal with cases of widespread government action against particular religious groups on largely technical grounds.” EVANS, FREEDOM OF RELIGION, *supra* note 3, at 15 & n.76 (acknowledging that in *Church of X v. United Kingdom*, the Commission stated that even if the case had been brought by individuals, none of the actions taken by the United Kingdom amounted to a violation of a right under the Convention).

212. 13 Y.B. Eur. Conv. on H.R. at 314.

213. Karnell and Hardt v. Sweden, 14 Y.B. Conv. on H.R. 676 (Eur. Comm’n on H.R.) (1971) (denying standing under Article 9 and Article 2 of Protocol 1 to the Evangelical-Lutheran Church of Sweden to bring an action regarding religious education in schools).

214. 16 Eur. Comm’n H.R. Dec. & Rep. 68 (1979) (granting standing to the Church of Scientology in a challenge to prohibitions of advertisements of the “E-meter,” a device which the Church said measured individual mental well-being).

215. *Id.* at 70.

216. EVANS, FREEDOM OF RELIGION, *supra* note 3, at 14 (citing X & the Church of Scientology, 14 Y.B. Conv. on H.R. at 70).

not have standing in their own rights, but only as an aggregation of the rights of their members. The Commission has confirmed this view by holding that a legal person cannot exercise freedom of conscience,²¹⁷ and in continually denying standing to for-profit corporations who have lodged complaints regarding freedom of conscience or religion under Article 9.²¹⁸ Thus, the European Court's jurisprudence on church standing does not reflect a conception of autonomy requiring a muscular institutional *independence* of churches.

7. Church right to have organization and legal personality

Even more fundamental than the right to have standing to sue in order to protect one's rights is the right to organize oneself as a legal entity. A conception of autonomy based on *independence* and *inter-independence* would view the right to have a legal personality as a basic requirement for churches to have a measure of autonomy. A conception of autonomy based upon *interdependence*, however, might not recognize the importance of being able to organize a church and have a legal personality.

United States: In the United States anyone can create a church under the nonprofit corporation statutes of any state.²¹⁹ No permission of any government official or body is required. Having a legal personality is viewed as a basic requirement of exercising church autonomy. This is consistent with a conception of autonomy based upon *independence* or *inter-independence*.

Europe: While Article 9 states that the right to manifest one's religion is to be protected "either alone or in community with

217. Kontakt-Information-Therapie and Hagen v. Austria, 57 Eur. Comm'n H.R. Dec. & Rep. 81, 88 (1988), <http://hudoc.echr.coe.int>. Although the legal person at issue was a drug rehabilitation center and not a church, the Commission seemed to state the general rule and specifically mentioned that churches do not have rights of freedom of religion.

218. *See, e.g.*, Company X. v. Switzerland, 16 Eur. Comm'n H.R. Dec. & Rep. 85 (1979) (dismissing a claim that requiring a company to pay ecclesiastical taxes breached its freedom of religion on grounds that it had no rights under Article 9(1)).

219. *See* HOWARD L. OLECK & MARTHA E. STEWART, NONPROFIT CORPORATIONS, ORGANIZATIONS AND ASSOCIATIONS 1099-119 (6th ed. 1994) (discussing the various tax exempt and nonprofit incorporations available to religious organizations); *see also* Catherine M. Knight, *Must God Regulate Religious Corporations? A Proposal for Reform of the Religious Corporations Provisions of the Revised Model Nonprofit Corporation Act*, 42 EMORY L.J. 721, 721 n.3 (1993) ("Religious corporations are both a subset of and distinct from general nonprofit corporations. The lack of regulation over nonprofit corporations is an oft-sung lament in legal commentary.").

others,” and the Commission has recognized a group dimension to certain religious liberty rights,²²⁰ the Commission has also stated that Article 9 does not entitle a religious group to be formally recognized or registered as a religion and that states are permitted to distinguish between recognized and non-recognized religions. In *X v. Austria*, the court upheld the government’s refusal to allow followers of Reverend Moon to set up a legal association on the grounds that this did not interfere with the group’s right to worship in association with others because it was not “necessary” to have a legal association in order for members to be able to practice their beliefs.²²¹ On the other hand, the court has held that state interference with the ability of a minority religion to set up a place of public worship can result in a violation of rights of worship and observance.²²² More recently, in the case of *Canea Catholic Church v. Greece*, the court held that every religious denomination has the right not only to de facto existence, but also to be granted legal personality under rules that are fair and similar to those applied to other denominations.²²³

The European Court’s jurisprudence in this area reflects an increasing degree of concern about the institutional *independence* of churches, although much of the court’s work in this area reflects a conception of autonomy reflecting the assumptions and concerns of *interdependence*.

8. Exemptions from general laws for churches

One of the most significant recurring problems in church-state relations is the extent to which churches and individuals²²⁴ should be exempt from generally applicable laws. If churches are always exempt from such laws, then churches are in an important sense above the

220. See *X v. United Kingdom*, 22 Eur. Comm’n H.R. Dec. & Rep. 27, 33 (1981), 4 E.H.R.R. 126 (1982) (Westlaw) (ruling that a Muslim school teacher who wished to take time off on Friday afternoons to attend worship at a local mosque was not sufficiently accommodated by being given a room within the school where he could pray in private).

221. 26 Eur. Comm’n H.R. Dec. & Rep. 89 (1981).

222. *Manoussakis and others v. Greece*, 17 Eur. Ct. H.R. (ser. A) 1347, 1361 (1996–IV), 23 E.H.R.R. 387 (1996) (Westlaw).

223. 27 Eur. H.R. Rep. 329 (1999) (Westlaw); see also *Metro. Church of Bessarabia v. Moldova*, App. No. 45701/99 (Eur. Ct. H.R. Dec. 13, 2001), <http://hudoc.ehr.coe.int> (stating that Article 9 includes right of new churches to obtain legal personality on conditions equal to registered churches).

224. The subject of exemptions is also addressed below in the section on individual autonomy. See *infra* Part V.F.

law. On the other hand, if the state is unwilling to make exceptions for churches and religious adherents in order to protect religious observance, then the state can interfere significantly in the independence and self-direction of the church and of religious adherents.

If stark *independence* is the goal, then a concern for church autonomy and the autonomy of religious adherents might seem to require an extensive network of exemptions when state laws conflict with religious beliefs and obligations, since the state might vigorously try to create a separated social space for religious activity.²²⁵ If autonomy is based upon *inter-independence* of church and state, a more limited set of exemptions would seem to be recognized. Desired exemptions would be evaluated based upon their impact upon the independence of churches and their adherents, and based upon the independence and autonomy of the state. For example, exemptions that are deemed to threaten the state's ability to fulfill its functions of protecting public safety and morals would not be recognized. A conception of autonomy based upon *interdependence* would recognize an even narrower set of exemptions, since what is good for the state and what is good for the church might be seen as being harmonious. When *interdependence* prevails, the state is likely to be quite sensitive to the religious needs of majority religion adherents, and laws that facilitate religious belief and observance of powerful religions would be commonplace. A high degree of concern for the needs and claims for exemptions from adherents of minority religions, however, would be much less likely to prevail.

225. While it would seem that *independence* would recognize the need to protect religious exercise from encroachment (based upon a commitment between church and state to mutual noninterference), the reality is rather more complicated. It is possible that a conception of autonomy based upon *independence* could result in very limited recognition of exemptions. For example, if the realm of protected religious independence is limited to "belief" and the realm of government oversight is said to encompass everything that includes "action," then as a practical matter most assertions of a right to an exemption will be denied (since religious beliefs often require specific actions), while the state will claim (somewhat disingenuously) to be protective of institutional and individual independence with respect to religious freedom. This approach has been common in United States free exercise jurisprudence. *See, e.g.*, *Reynolds v. United States*, 98 U.S. 145, 165 ("Congress was deprived of all legislative power over mere opinion [or belief], but was left free to reach actions which were in violation of social duties or subversive of good order."); *see also* *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990).

United States: In recent cases the Supreme Court has exhibited remarkably little concern for church autonomy in situations involving religious exemptions from generally applicable laws. This was not always the case. Historically, churches have been granted exemptions from certain generally applicable laws, which had the effect of preserving the autonomy of both churches and religious adherents. For example, in *Wisconsin v. Yoder*, the Supreme Court granted an exemption to Amish school children based upon freedom of religion from a state law requiring compulsory education until the age of sixteen.²²⁶ The Court focused on whether the exemption in question was based upon religious belief or more general cultural factors and concluded that the Amish objection to compulsory education beyond the eighth grade was based upon religious belief.²²⁷

Additionally, in *NLRB v. Catholic Bishop of Chicago*,²²⁸ the Court ruled that church-run schools were exempt from a national law requiring schools to recognize unions.²²⁹ And in *Corporation of Presiding Bishop v. Amos*,²³⁰ the Court upheld a federal statute that exempted religious organizations from Title VII requirements forbidding discrimination on the basis of religion in hiring for church-related nonprofit enterprises that did not have a directly religious function. In that case, the Court explicitly invoked autonomy concerns in justifying its holding.²³¹

226. 406 U.S. 205 (1972).

227. In *Wisconsin v. Yoder* the Supreme Court exhibited a high degree of concern for the autonomy of the Amish religion. The Court held that laws that impose burdens on religious belief must be subject to heightened scrutiny. This means that the state must show a compelling state interest in order to justify such burdens. *Id.* at 210–11.

228. 440 U.S. 490 (1979).

229. The Court determined that “[t]he church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school. We see no escape from conflicts flowing from the Board’s exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow.” *Id.* at 504.

230. 483 U.S. 327 (1987).

231. *Id.* at 345–46 (“Sensitivity to individual religious freedom dictates that religious discrimination be permitted only with respect to employment in religious activities. Concern for the autonomy of religious organizations demands that we avoid the entanglement and the chill on religious expression that a case-by-case determination would produce. We cannot escape the fact that these aims are in tension. Because of the nature of nonprofit activities, I believe that a categorical exemption for such enterprises appropriately balances these competing concerns.”).

The right of churches and religiously affiliated organizations to receive exemptions, however, has never been unlimited, especially when exemptions apply to commercial for-profit operations. For example, in *Tony and Susan Alamo Foundation v. Secretary of Labor*,²³² the Court held that a religious organization's commercial enterprises were not exempt from the requirements of a labor statute. The Supreme Court also struck down a state statute that granted a sales tax exemption to religious publications but not other publications²³³ and upheld a state sales tax that covered the sale of religious materials.²³⁴

A conception of autonomy based on *inter-independence* would predict that a lesser degree of autonomy would be granted to churches when they are engaged in commercial activities as opposed to more overtly religious or nonprofit activities, since the regulation of economic affairs is an area of high engagement of churches with the regulatory powers of the state. If stark *independence* were the goal, then it would seem that exemptions for commercial activities should exist as well as other types of exemptions.²³⁵ Rather than treating sales of religious literature as ordinary commerce, a stark *independence* view would endeavor to separate transactions by churches from ordinary commerce.

In *Oregon v. Smith*,²³⁶ the Supreme Court retreated dramatically from its earlier approach of subjecting general laws that burden religion to heightened scrutiny (which required a compelling state interest and further required that the state employed the least restrictive available means of effecting the interest). Instead, the Court held that a law that burdens religion is permissible, as long as it is general and neutral, and does not specifically target religious belief.²³⁷

232. 483 U.S. 327 (1987).

233. *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989).

234. *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378 (1990).

235. As noted above, this assertion must be qualified because the belief-action distinction can be used to bring all religious "action," including commercial transactions, within the sphere of state regulation. So interpreted, an *independence*-based conception of autonomy would not recognize assertions of exemptions involving action as opposed to pure belief.

236. 494 U.S. 872 (1990). The Supreme Court subsequently struck down as unconstitutional a federal statute enacted to return free exercise jurisprudence to a pre-*Oregon v. Smith* footing. See *Boerne v. Flores*, 521 U.S. 507 (1997).

237. The *Smith* decision elicited a wide range of scholarly commentary. In defense of *Smith*, see, for example, William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*,

The Court's approach in *Smith* reflects a view of autonomy that approaches the European *interdependence* conception of autonomy. If autonomy requires *independence*, or even *inter-independence*, then one would expect a higher degree of concern about the religious beliefs and needs of minority religious adherents.²³⁸ Instead, a view of autonomy based on *interdependence* would be satisfied if laws are neutral on their face and general in application, since the interests and needs of churches and the state are not viewed as being in conflict with each other. It is unlikely that majority or powerful religions will be burdened by laws that are on their face neutral and general, but as the *Smith* case illustrates, it is much less likely that the religious claims and needs of minority religions will be protected.²³⁹

Since *Wisconsin v. Yoder*, the Supreme Court's treatment of religious exemptions has exhibited a general pattern of transition from a conception of autonomy based on *independence* of church and state, to a conception based on *inter-independence* (for example, involving for-profit activities of churches), to a conception in *Oregon v. Smith* that approaches a model of autonomy based on *interdependence* of church and state.

Europe: There do not appear to have been any cases decided as of yet by the European Court concerning claims that churches are entitled to an exemption from generally applicable laws. There are, however, cases involving individual claims (based upon religion) for exemptions from generally applicable laws, which are discussed in Part V.F below.

58 U. CHI. L. REV. 308 (1991). In opposition to the Court's holding in *Smith*, see, for example, Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990).

238. In *Oregon v. Smith*, 494 U.S. 872 (1990), Justice Scalia acknowledges that the approach taken by the Court affords less protection to minority religions. Justice Scalia wrote,

It may fairly be said that leaving accommodating 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.

Id. at 890.

239. Thus while sacramental use of peyote by the Native American Church may not be exempted, it is much more likely that sacramental use of wine in a Catholic Mass will receive legislative protection.

9. *Summary of church autonomy issues*

Figure 1 summarizes the approaches of the U.S. Supreme Court and the European Court to issues involving the autonomy of churches.

1217]

The Autonomy of Church and State

Figure 1
Institutional Autonomy: The Autonomy of Churches

Issue	United States	Conception of Autonomy	Europe	Conception of Autonomy
State church	prohibited	<i>independence</i> or <i>inter-independence</i>	permitted	<i>interdependence</i>
Direct state aid to churches	not permitted (although this may be changing)	<i>independence</i> or <i>inter-independence</i>	permitted, including preferential treatment	<i>interdependence</i>
Tax exemptions	permitted (but not in commercial affairs)	<i>inter-independence</i>	permitted, including preferential treatment	<i>interdependence</i>
State aid to religious schools	increasingly permitted	move from <i>independence</i> towards <i>inter-independence</i>	direct state aid permitted	<i>interdependence</i>
Church property, officials, doctrine	strong limits on state involvement	<i>independence</i> or <i>inter-independence</i>	high degree of state involvement permitted	<i>interdependence</i>
Church standing	recognized	<i>independence</i> or <i>inter-independence</i>	originally not recognized; now is recognized	some movement from <i>interdependence</i> to <i>inter-independence</i>
Right to legal personality	recognized	<i>independence</i> or <i>inter-independence</i>	not recognized	<i>interdependence</i>
Exemptions from generally applicable laws	movement towards less recognition of exemptions	move from <i>independence</i> to <i>inter-independence</i> and towards <i>interdependence</i>	no cases	<i>interdependence</i>

In cases generally involving church autonomy in the United States, there has been a struggle between a conception of autonomy based on *independence* and a conception of autonomy based on *inter-independence*. This struggle has been particularly apparent with respect to laws concerning state aid to religious schools, where a

view of autonomy based on *independence* has been supplanted by a view based on *inter-independence*. In Europe, a conception of autonomy based on *interdependence* has been dominant in cases involving the autonomy of churches.

For those who believe that *interdependence* is not a compelling conception of autonomy to guide U.S. church-state relations, one area of potential concern in the United States is the availability to churches of exemptions from generally applicable laws. The cases in this area have evinced a gradual movement from a conception of autonomy based on *independence* to a conception based on *inter-independence*, and ultimately towards a conception based on *interdependence*.

B. Autonomy of the State

In church-state relations there are two dimensions to the concern about institutional autonomy. A highly integrated relationship threatens not just the independence of the church, but also creates the possibility of domination of the state by a church.

Concern for the autonomy of the state can be seen in a variety of contexts, including cases involving various forms of religious expression or teaching of religious viewpoints in public schools, cases involving religious expression in the public sphere outside of schools, cases concerning the permissibility of churches conducting functions usually associated with the state, and cases about the permissibility of state policies that converge with or reflect religious beliefs.

In each of these areas, the Supreme Court has vacillated between a conception of autonomy based upon the *independence* of church and state, which has exerted a particularly strong influence in the public school setting, and a conception of autonomy based on the *inter-independence* of church and state. In Europe, cases involving the autonomy of the state have for the most part reflected a conception of autonomy based on the *interdependence* of church and state.

1. Religious expression in public schools

If autonomy requires *independence* of church and state, then religious expression in public schools would be prohibited. If autonomy is based on *interdependence*, then a high degree of religious expression in public schools would be permitted, at least of

avored religious views. A view of autonomy based on *inter-independence* would be sensitive to concerns about the independence of the state and so religious expression in public schools will be limited, especially when there is concern that a particular religious viewpoint is exerting a dominant force. On the other hand, some religious expression would be tolerated in view of countervailing concerns such as the burdens of exclusion and the requirements of mutual respect.

United States: Religion in public schools has been a source of tremendous controversy in the United States, and the Supreme Court's concern for the autonomy of the state is perhaps more evident in this context than in any other group of cases. Compared with other contexts where state autonomy is an issue, a conception of autonomy based on the *independence* of church and state is much more prevalent in public schools than in other settings. To some extent this is understandable, since public education is of particular importance to maintaining and preserving the autonomy of the state. Because public schools are subject to a high degree of local control, the threat posed by churches to state autonomy is unusually high, since in a particular school district it is much more likely than on a larger political stage that one religion might be dominant. As a result, public school settings are perhaps the single place where the Supreme Court of the United States has had the greatest concern about religious expression. Additionally, the Supreme Court has evinced a high degree of concern for the autonomy interests of children in the public school setting. Young children are viewed as particularly vulnerable and impressionable, and the Court has expressed concern that their autonomy may be compromised by allowing high levels of sectarian religious expression.

Europe: In Europe, by contrast, a much higher degree of religious expression and teaching is permissible in public schools. As discussed earlier, under the jurisprudence of the European Convention, a state can subsidize religious education in public schools, and can pay for certain types of religious instruction in either state-sponsored or religiously sponsored schools. As Professor Evans explains, "The concern of the drafters of the Convention was not (compared with the framers of the United States Constitution) to keep the State out of religion, including religious education, but rather to ensure that the State was not subject to financial demands

that it did not wish to meet.”²⁴⁰ The European Court has, however, set some parameters on religious speech in schools. For example, in *Kjeldsen, Busk Madsen and Pedersen v. Denmark*,²⁴¹ although the court rejected parents’ complaint that an integrated sex education curriculum violated their right to choose the religious and moral education of their children, the court stated that the State “must take care that information or knowledge included in this curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents’ religious and philosophical convictions.”²⁴²

I will survey three areas of concern about religious speech in public schools in the U.S. and Europe: (a) cases involving release time (the practice of excusing students from secular school activities to receive religious instruction); (b) cases involving mandatory Bible reading, prohibitions on the teaching of evolution, and requirements for posting the Ten Commandments; and (c) cases involving access to public school facilities by private groups that are religious in nature.

a. Release time from public schools. One early dispute concerning the constitutional limits upon the interaction of church and state in public schools involved “release time,” the practice of excusing students from class to receive religious instruction. If the autonomy of church and state requires complete *independence*, then release time during the school day would violate the Establishment Clause, regardless of the particulars involved. In contrast, if the autonomy of church and state is based on the *interdependence* of church and state, then religious instruction in the schools would be permissible and the formalities of release time would not be needed. If the relationship between church and state is based on a conception of autonomy that emphasizes *inter-independence*, attention would focus on the particular context and implications of the different types of release time programs.

United States: The approach taken by the Supreme Court in the release time cases reflects sensitivity to the *inter-independence* of

240. EVANS, FREEDOM OF RELIGION, *supra* note 3, at 89.

241. 23 Eur. Ct. H.R. (ser. A) 26, para. 53 (1976), <http://hudoc.echr.coe.int>.

242. *Id.*

church and state. In *Illinois ex rel. McCollum v. Board of Education*,²⁴³ the Supreme Court struck down a release time program that allowed public school students to be dismissed from their secular instruction for a period of time to receive optional religious instruction on school premises. Emphasizing the independence of church and state, the Court stated that “[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.”²⁴⁴ The Court also emphasized the important individual autonomy concerns at stake, declaring that neither the federal government nor a state “can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion.”²⁴⁵ In a concurring opinion, Justice Frankfurter defended an even more strongly separationist vision of the Establishment Clause, especially in the public school setting.

Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual’s church and home, indoctrination in the faith of his choice.²⁴⁶

Justice Frankfurter concluded, “If nowhere else, in the relation between Church and State, ‘good fences make good neighbors.’”²⁴⁷

Based upon the strong separationist rhetoric in *McCollum*, one might have thought that any release time program would violate the Establishment Clause. A few years later, however, in *Zorach v. Clauson*,²⁴⁸ the Supreme Court allowed a release time program in

243. 333 U.S. 203 (1948).

244. *Id.* at 212.

245. *Id.* at 210 (internal quotation marks omitted) (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947)).

246. *Id.* at 216–17 (Frankfurter, J., concurring). Justice Frankfurter states, “In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart.” *Id.* at 231.

247. *Id.* at 232.

248. 343 U.S. 306 (1952).

which religious instruction took place off school property.²⁴⁹ In *Zorach* the Court retreated from the ideal of stark separation.²⁵⁰ Writing for the majority, Justice Douglas said, “The First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other.”²⁵¹ The Court noted that the release time program in *Zorach* involved neither the expenditure of public funds nor the use of public school classrooms and concluded that there is no system of coercion to get public school students into religious classrooms.²⁵²

249. Some years later, in *School District v. Ball*, 473 U.S. 373 (1985), *overruled by* *Agostini v. Felton*, 521 U.S. 203 (1997), the Supreme Court explained the different outcomes in *McCollum* and *Zorach* as follows:

The difference in symbolic impact helps to explain the difference between the cases.

The symbolic connection of church and state in the *McCollum* program presented the students with a graphic symbol of the ‘concert or union or dependency’ of church and state. This very symbolic union was conspicuously absent in the *Zorach* program.

Ball, 473 U.S. at 391 (citation omitted). By focusing on symbolic “concert or union or dependency,” the Court focused on the institutional autonomy of both church and state.

250. The retreat is accompanied, however, by a denial that a retreat is being made. The majority opinion in *Zorach* states,

There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the ‘free exercise’ of religion and an ‘establishment’ of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute.

Zorach, 343 U.S. at 312.

251. *Id.* at 306. That, the Court states, is

the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; ‘so help me God’ in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: ‘God save the United States and this Honorable Court.’

Id. at 312–13.

252. *Id.* at 308–11.

1217]

The Autonomy of Church and State

When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.²⁵³

In the release time cases, the stage is set for much of the debate between separation and accommodation over the next fifty years in the U.S. Much of the rhetoric in favor of a strict independence of church and state can be traced to *McCullum*, and much of the rhetoric calling for an accommodation of religion in public life can be traced to *Zorach*.

Forbidding release time on school property but permitting it off school property might appear to be a distinction without a difference, but such a division is quite sensitive to the concerns of *inter-independence* and the different implications of the programs for state autonomy. On the one hand, the independence of churches from the state and of the state from churches is one of the primary ideals the Establishment Clause was meant to protect. On the other hand, the Court identifies a number of undesirable implications of a conception of autonomy that rests upon an ideal of stark separation. The legitimate threat to the autonomy of the state that exists when children receive religious instruction in public schools during the school day is significantly ameliorated when the instruction takes place off school property and without the expenditure of public funds. The possibility of “concert,” “union,” or “dependence” of church and state, and the risk of “coercion” is less when religious instruction takes place off school premises. A small degree of cooperation with religion and encouragement of religious instruction is seen to be consistent with the relational dimension of church autonomy, and also consistent with state autonomy.

Europe: In Europe, the state is permitted to sponsor religious and devotional exercises in public schools, so the issue of release time does not arise. Students do have a right to opt out of religious instruction, but the European Court has been quite insensitive to the

253. *Id.* at 313–14.

subtle coercive pressures that can exist in such situations. In *C.J., J.J., and E.J. v. Poland*, the Commission denied admission of applicants' claims that discrimination that resulted from a student's decision not to participate in religious instruction did not constitute a violation of the student's Article 9 rights.²⁵⁴ The decision was made in spite of the pressure that both students and teachers put on the student to attend and evidence that she was ostracized until she finally conceded. The European approach to these issues rests upon a conception of autonomy based on *interdependence*, which permits a high degree of cooperation and mutual support of church and state.

b. Requiring Bible reading, prohibiting teaching evolution, and posting of the Ten Commandments in public schools. Another controversial set of issues involving the interactions of church and state in public schools has been various state and local laws that attempt to inject religious instruction or viewpoints into the official school day, by requiring Bible reading, forbidding the teaching of evolution (or permitting it only if it is accompanied by teaching of creation science), or requiring the posting of the Ten Commandments in public school classrooms.²⁵⁵

Autonomy based upon *independence* would forbid such infusions of religion into public schools, whereas autonomy based upon *interdependence* would probably permit such efforts to include religious speech of favored religions in public schools. Autonomy based upon *inter-independence* would take a highly contextualized approach to analyzing whether the required religious expression in question threatens the ability of the school to conduct its educational mission, or whether the requirements represent an effort by a particular religious viewpoint to dominate or dictate the content of public education. The key question is whether the religious expression poses a threat to the independence of the state, or of individual school children.

United States: In the United States, cases involving required Bible reading, forbidding the teaching of evolution or requiring the teaching of creation science, and requiring schools to post copies of the Ten Commandments are examples of efforts by a particular

254. 84-A Eur. Comm'n H.R. Dec. & Rep. 46 (1996), <http://hudoc.echr.coe.int>.

255. Another example is school prayer, which I discuss in detail below. *See infra* Part VI.A.

religious viewpoint to infuse the public school curriculum with teachings that reflect particular religious ideology or tenets. The independence of the state is undermined when it is used as a vehicle for conveying the doctrinal views of particular religious groups. Thus, it is not surprising that these cases have elicited strong separationist responses from the Supreme Court.

For example, in *Abington Township v. Schempp*, which held that requiring Bible reading in public schools violates the Establishment Clause, the Court stated that the purpose of the Establishment Clause was not merely to outlaw the official establishment of a single sect, “[i]t was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.”²⁵⁶ In a concurring opinion, Justice Douglas surveyed several ways in which an establishment of religion could be achieved.

The church and state can be one; the church may control the state or the state may control the church; or the relationship may take one of several possible forms of a working arrangement between the two bodies. . . . The vice of all such arrangements under the Establishment Clause is that the state is lending its assistance to a church’s efforts to gain and keep adherents. Under the First Amendment it is strictly a matter for the individual and his church as to what church he will belong to and how much support, in the way of belief, time, activity or money, he will give to it.²⁵⁷

The key to the autonomy of church and state is freedom from the control or domination of one institution by the other. Justice Brennan strikes a similar chord of concern for the autonomy of church and state in his concurring opinion in *Abington*.

What Virginia had long practiced, and what Madison, Jefferson and others fought to end, was the extension of civil government’s support to religion in a manner which made the two in some degree interdependent, and thus threatened the freedom of each. The purpose of the Establishment Clause was to assure that the

256. *Abington Township v. Schempp*, 374 U.S. 203, 217 (1963) (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 31–32 (1947)).

257. *Id.* at 227–28 (Douglas, J., concurring).

national legislature would not exert its power in the service of any purely religious end.²⁵⁸

A similar concern for the autonomy of the state from the injection of sectarian doctrines into public education is evident in the cases involving the teaching of evolution. In *Epperson v. Arkansas*, the Supreme Court held that a state statute that made it unlawful for public school teachers to teach evolution is unconstitutional.²⁵⁹ Writing for the majority, Justice Fortas stated that the statute violates the Establishment Clause because it “selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine.”²⁶⁰ The Court voiced similar concerns about the autonomy of the state from the imposition of religious viewpoints in *Edwards v. Aguillard*, in which the Court held that a state law forbidding the teaching of evolution unless accompanied by instruction in creation science violates the Establishment Clause.²⁶¹ The Court concluded that “[t]he preeminent purpose of the Louisiana Legislature was clearly to advance the religious viewpoint that a supernatural being created humankind.”²⁶² According to the Court, the autonomy of the state is jeopardized when schools become tools for teaching religious doctrine, and the state’s autonomy is arguably jeopardized to a greater degree when religious viewpoints are used to censor or restrict what may or may not be taught in public schools.

Similarly, in *Stone v. Graham*, in which the Supreme Court struck down a statute requiring the posting of the Ten Commandments in public school classrooms, the Court was

258. *Id.* at 234 (Brennan, J., concurring) (quoting *McGowan v. Maryland*, 366 U.S. 420, 465 (1961)). Justice Brennan suggests that rather than focusing on whether Jefferson or Madison would have found a particular religious exercise to be permissible, “[a] more fruitful inquiry . . . is whether the practices here challenged threaten those consequences which the Framers deeply feared; whether, in short, they tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent.” *Id.* at 236.

259. 393 U.S. 97 (1968).

260. *Id.* at 103. The Court states,

In the present case, there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man. No suggestion has been made that Arkansas’ law may be justified by considerations of state policy other than the religious views of some of its citizens.

Id. at 107.

261. 482 U.S. 578 (1987).

262. *Id.* at 591.

1217]

The Autonomy of Church and State

concerned about efforts of one religious viewpoint to dominate or dictate classroom content.²⁶³ In striking down the statute, the Court held that it had no secular purpose, “and no legislative recitation of a supposed secular purpose can blind us to that fact.”²⁶⁴ The Court said,

Posting of religious texts on the wall serves no [appropriate] educational function. If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.²⁶⁵

In cases involving efforts to promote a particular religious viewpoint in public schools, the Supreme Court has responded by vigorously rejecting such efforts. In doing so, the Court has based its reasons, sometimes explicitly and sometimes implicitly, upon a conception of autonomy that reflects the concerns of *independence*.

Europe: I have not been able to locate any cases decided by the European Court concerning challenges to the permissibility of Bible reading, teaching evolution, or posting the Ten Commandments in public schools. This is not surprising, since concern about such practices reflects a conception of autonomy that is concerned primarily with *independence*, whereas the European approach in such cases rests upon a view of church-state relations reflecting *interdependence*.

c. Use of public school facilities for religious clubs. A third set of public school cases has involved claims for equal access by religious clubs who want to use school facilities for religious instruction or worship on the same basis as other student clubs. Autonomy based on *independence* would suggest that such access should not be allowed, whereas autonomy based on *interdependence* would find the inclusion of religious groups unobjectionable. A conception of autonomy based on the idea of *inter-independence* would be concerned not only with the independence of the state, but also the

263. 449 U.S. 39 (1980).

264. *Id.* at 41–42; see also J. David Smith, Jr., *Stone v. Graham: A Fragile Defense of Individual Religious Autonomy*, 69 Ky. L.J. 392 (1981).

265. *Stone*, 449 U.S. at 42.

demands of mutual respect and the possibility that exclusion might reflect hostility rather than neutrality.

United States: In a series of cases involving equal access claims by religious groups, the Court has evidenced sensitivity for the *independence* of the state but, at the same time, has been sensitive to the autonomy consequences for religious groups if they are excluded from forums that are generally open. In this area, the Court has, for the most part, reflected a view of autonomy sensitive to the concerns of *inter-independence*, taking a position that autonomy does not require religion to be separated from the state, but rather requiring equal treatment with respect to religious and nonreligious groups or clubs seeking access to school facilities.

The Supreme Court has used equality, rather than autonomy, as the principal rationale for permitting certain forms of student-sponsored religious speech on school property. In *Widmar v. Vincent*,²⁶⁶ the Supreme Court focused on First Amendment free-speech rights in holding that a university's policy of denying access to religious groups to conduct meetings in facilities generally available to other student groups was an unconstitutional violation of the fundamental principle that a state regulation of speech should be content neutral. The Court reached a similar result in *Board of Education v. Mergens*,²⁶⁷ in which the Court held that a high school that makes its facilities generally available to student clubs cannot specifically refuse access to a religious club. In a similar vein, the Court held in *Lamb's Chapel v. Center Moriches Union Free School District*²⁶⁸ that a religious group could show religious films on public school property after school hours, and in *Rosenberger v. University of Virginia*,²⁶⁹ the Court held that a public university could not discriminate in withholding funds from a school newspaper with a religious viewpoint.

These cases represent a significant departure from a model of autonomy based on a wall of separation between church and state. From a strict separationist viewpoint, religious groups should be excluded from public schools and universities. Instead, the Court asserts that the state risks greater "entanglement" with religion by

266. 454 U.S. 263 (1981).

267. 496 U.S. 226 (1990).

268. 508 U.S. 384 (1993).

269. 515 U.S. 819 (1995).

attempting to exclude all religious speech and religious worship from forums that are generally available to everyone.²⁷⁰ In *Widmar*, the Court noted that “an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices” and endorsed the court of appeals’ conclusion in the case that “such a policy ‘would no more commit the University . . . to religious goals’ than it is ‘now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance,’ or any other group eligible to use its facilities.”²⁷¹ In a similar vein, in *Mergens*, the Court held that extending the equal access policy to secondary schools likewise did not violate the Establishment Clause.²⁷² In *Mergens* the Court states that an equal access policy does not have the principal effect of advancing religion.²⁷³ Thus, the independence of the state is not jeopardized by the policy. To the contrary, “the message is one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion.”²⁷⁴ In recognizing that some forms of separation of church and state would represent hostility rather than neutrality, the Court appears to acknowledge that autonomy is not always facilitated by complete *independence*, but rather rests on the *inter-independence* of church and state.

Europe: I have not been able to locate any cases decided by the European Court concerning challenges to the permissibility of granting religiously affiliated student organizations access to school facilities. This is to be expected, given the *interdependence* perspective prevalent in Europe.

2. *Religious expression outside of schools*

Controversies involving religious expression in the public domain also arise outside the public school context. Two prominent areas of controversy have involved legislative prayer and the display of religious artifacts on public property. As with religion in public schools, a model of autonomy based on complete *independence*

270. See *Widmar*, 454 U.S. at 272 n.11.

271. *Id.* at 274 (quoting *Chess v. Widmar*, 635 F.2d 1310, 1317 (8th Cir. 1980)).

272. 496 U.S. at 248–49.

273. *Id.* at 249–50.

274. *Id.* at 248.

would forbid all religious expression in the public square. A model of autonomy based on *interdependence* would permit religious expression by favored religious voices. A model of autonomy based on *inter-independence* would be sensitive to the implications of exclusion versus inclusion, as well as the possible interference with the independence of either religion or the state by a particular type of religious expression.

United States: The Supreme Court has demonstrated concern for the independence of the state by placing restrictions on religious expression on state property outside of the school context, although the Court has been somewhat more willing to allow religious expression outside the school context. Although autonomy conceived as requiring *independence* is very influential, a conception based on *inter-independence* also asserts itself. For example, in contrast to the Court's rulings on prayer in schools, in *Marsh v. Chambers*,²⁷⁵ the Supreme Court ruled that a state could hire a minister to deliver official prayers at the beginning of legislative meetings. Remarkably, in evaluating the constitutionality of legislative prayer, the Supreme Court ignored the *Lemon* test altogether, conducting instead an analysis of the longstanding historical precedent of allowing legislative prayer.²⁷⁶

At times the line drawn by the Supreme Court between permissible and impermissible religious expression appears—to put it charitably—somewhat strained. For example, in *County of Allegheny v. ACLU*,²⁷⁷ the Court ruled against the display of a crèche in a country courthouse. However, it reached the opposite conclusion in *Lynch v. Donnelly*,²⁷⁸ when the display in question contained a menorah, a Santa Claus house, reindeer, and a Christmas tree as well as a crèche.

Unpopular or dissenting speech that might have a religious component has also been given protection. In *Bristol Square Review and Advisory Board v. Pinette*,²⁷⁹ the Court held that the Establishment Clause was not violated by a Ku Klux Klan display of

275. 463 U.S. 783 (1983).

276. *See id.* at 786 (“The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country.”).

277. 492 U.S. 573 (1989).

278. 465 U.S. 668 (1984).

279. 515 U.S. 753 (1995).

an unattended cross on state property that constituted a public forum, equally accessible to all community groups.

Europe: I have not been able to locate any cases in which the European Court or Commission have expressed concern for the autonomy of the state in nonschool settings.

3. *Church conduct of state functions*

A model of autonomy based on *independence* would forbid churches from performing state functions. A model of autonomy based on *interdependence* would permit churches to perform a wide variety of functions that might be thought to fall within the state's domain. A model of autonomy based on *inter-independence* would make a context-sensitive inquiry into the implications for state and church independence of allowing churches to perform particular state functions, as well as the implications for each institution of disallowing such activities.

United States: Concern for state *independence* is evident in the Supreme Court's reluctance to let churches exercise powers that are normally reserved for the state. For example, in *Larkin v. Grendel's Den, Inc.*,²⁸⁰ the Supreme Court struck down a state statute that gave schools and churches power to prevent the issuance of liquor licenses for premises within a 500-foot radius of church or school property. Evidencing similar concern for state autonomy, in *Board of Education v. Grumet*,²⁸¹ the Court struck down a school districting plan that created a school district along the boundaries of an exclusively Hasidic Jewish community, on the grounds that the state had relinquished control over public education to a religious community.

Europe: The European Court, in contrast, has been quite willing to allow churches to perform state functions and to receive state funding for conducting functions such as keeping records of births and deaths, providing welfare services, performing marriages and funerals, and maintaining cemeteries. The court has allowed mandatory taxes that apply to members as well as nonmembers of a Church performing such functions. Professor Evans explains, "The individual may be forced to pay this tax even though he or she is

280. 459 U.S. 116 (1982).

281. 512 U.S. 687 (1994); see Thomas C. Berg, *Slouching Towards Secularism: A Comment on Kiryas Joel School District v. Grumet*, 44 EMORY L.J. 433 (1995).

strongly opposed to the relationship between the State and Church that these ‘secular functions’ imply.”²⁸² Allowing church performance of state functions reflects a view of autonomy based on *interdependence*.

4. *State laws and policies that converge with religious beliefs*

None of the conceptions of autonomy outlined above would prohibit all state laws and policies that reflect or correlate with religious beliefs, but each conception of autonomy would adopt a different approach toward assessing when laws that reflect religious beliefs are permissible. Autonomy conceived as requiring *independence* of church and state would be most skeptical of convergence, and might question state practices such as Sunday-closing laws, or even policies that close public facilities on religious holidays, such as Christmas or Easter. Autonomy based on a conception of *interdependence* of church and state would be unlikely to find problematic clear causal connections between religious beliefs and state laws, even concerning controversial and morally charged issues such as abortion and divorce. A conception of autonomy based on *inter-independence* would be skeptical of laws and policies that reflect religious viewpoints, especially when there are no (or very weak) independent nonreligious bases for such policies and laws.

United States: For the most part, the Supreme Court has adopted a view consistent with a conception of autonomy based on the *inter-independence* of church and state. In the Court’s view, state autonomy does not demand that laws consistent with religious belief be deemed unconstitutional. The Supreme Court has been willing to tolerate government policies that coincide with religious beliefs of a particular religion, provided there is a legitimate secular purpose for the regulation and the effect is not primarily to endorse a particular religion. For example, in *Harris v. McRae*,²⁸³ the Supreme Court upheld federal regulations that forbade the use of federal funds for performing abortions under the Medicaid program, noting that “the fact that the funding restrictions . . . may coincide with the religious tenets of the Roman Catholic Church does not, without more,

282. EVANS, FREEDOM OF RELIGION, *supra* note 3, at 82 (citing Kustannus Oy Vapaa Ajattelijä AB and others v. Finland, 85-A Eur. Comm’n H.R. Dec. & Rep. 29 (1996), 22 E.H.R.R. CD 69 (1996) (Westlaw)).

283. 448 U.S. 297 (1980).

contravene the Establishment Clause.”²⁸⁴ In *McGowan v. Maryland*,²⁸⁵ the Supreme Court upheld Sunday-closing laws on the grounds that while such laws were originally motivated by religious beliefs, their contemporary purpose was to afford a uniform day of rest for citizens. On the other hand, in *Wallace v. Jaffree*,²⁸⁶ the Supreme Court struck down a law providing for a mandatory moment of silence in public schools, on the grounds that there was no plausible secular rationale for the law.

Europe: The European Court’s jurisprudence in this area has reflected a conception of autonomy based on the *interdependence* of church and state. Under Article 9, one of the grounds upon which a state may restrict a manifestation of religious belief is for the protection of morals. As Professor Evans notes, “One complex question that arises in this area is whether a general law based on moral conceptions that are part of the morality of the dominant religion, but not of some minority religions, is a justifiable infringement on freedom of religion or belief.”²⁸⁷ Such an issue arose in *Johnston v. Ireland*,²⁸⁸ in which the Commission held that no issue arose under Article 9 with respect to a Protestant who claimed his religious freedom was abridged by an Irish law that reflected the Catholic Church’s prohibitions concerning divorce.²⁸⁹

5. Summary of state autonomy issues

Figure 2 summarizes the issues involving the autonomy of the state.

284. *Id.* at 319–20.

285. 366 U.S. 420 (1961); *see also* *Braunfeld v. Brown*, 366 U.S. 599 (1961) (rejecting claims of Jewish merchants that Sunday-closing laws violated their free exercise rights), *overruled in part by* *Sherbert v. Verner*, 374 U.S. 398 (1963).

286. 472 U.S. 38 (1985).

287. EVANS, FREEDOM OF RELIGION, *supra* note 3, at 159.

288. 112 Eur. Ct. H.R. (ser. A) (1986), 8 E.H.R.R. CD 214 (1986) (Westlaw).

289. The Commission held that the case did not even raise an Article 9 issue, since Article 12, dealing with the freedom to marry and have a family, was the *lex specialis* of the Convention relating to marriage. *Id.* Professor Evans notes that “[t]he case has been criticized for its focus on the right of the State to set out marriage and divorce regulations, without looking at whether such regulation, while not a limit on the right to marry, was an improper restriction on freedom of religion.” EVANS, FREEDOM OF RELIGION, *supra* note 3, at 160.

Figure 2
Institutional Autonomy: Autonomy of the State

Issue	United States	Conception of Autonomy	Europe	Conception of Autonomy
Religious expression in public schools	trend towards less religious expression permitted during school	movement from <i>inter-independence</i> to <i>independence</i>	permitted	<i>interdependence</i>
Release time	prohibited on site; permitted off school property	<i>inter-independence</i>	permitted	<i>interdependence</i>
Bible reading, evolution, Ten Commandments	prohibited	<i>independence</i>	permitted	<i>interdependence</i>
Use of school facilities by religious clubs	permitted, based upon neutrality	<i>inter-independence</i>	permitted	<i>interdependence</i>
Religious expression in the public domain	more permitted than in schools; trend towards exclusion	movement from <i>inter-independence</i> to <i>independence</i>	permitted	<i>interdependence</i>
Church conduct of state functions	very limited	<i>independence</i> , but to some extent <i>inter-independence</i>	permitted	<i>interdependence</i>
Laws and policies that mirror religious beliefs	permitted, but subject to heightened scrutiny	<i>inter-independence</i>	permitted	<i>interdependence</i>

In cases involving the autonomy of the state, the jurisprudence of the United States Supreme Court and the European Court of Human Rights are based on very different conceptions of autonomy. U.S. cases involve a struggle between a conception of autonomy based on a categorical *independence* of church and state and a conception of autonomy based on *inter-independence*. In Europe, a conception of autonomy based on *interdependence* has prevailed, with a much greater institutional engagement and cooperation between the state and favored churches or religious viewpoints.

As noted above, the Establishment Clause was based in large part on a concern for the autonomy of the state. Today it is easy to lose sight of that fact, because the state has grown so large and powerful. Thus, it would be easy to overlook the large number of contexts in which concern for the autonomy of the state remains an animating concern in cases involving the relationship between church and state. Although American society is much more secular and pluralistic than it was two hundred years ago, concerns for the autonomy of the state arise in a surprisingly large number of situations.

V. INDIVIDUAL AUTONOMY

We have seen that in cases involving institutional autonomy, the jurisprudence of the Supreme Court and the jurisprudence of the European Court are informed by very different conceptions of autonomy. This may come as little surprise, since this difference could be attributable to the fact that the U.S. Constitution includes not only a free exercise provision, but also prohibits an establishment of religion. The European Convention, in contrast, provides for freedom of religion or belief, but does not prohibit the existence of a state church and does not have an equivalent of the Establishment Clause.

In cases involving individual religious liberty, in contrast, we might expect greater convergence in the approaches and outcomes in the United States and Europe. After all, Article 9 of the European Convention contains a clear guarantee of religious liberty that is much more explicit and detailed than the Free Exercise Clause and would appear to guarantee at least as broad a protection of religious freedom as exists in the United States. Thus, while we might expect that cases involving institutional autonomy, which are more likely to be categorized in the United States as Establishment Clause cases, are likely to have different outcomes, we might expect that cases involving individual religious freedom will have similar outcomes in the United States and Europe.

Such an expectation is not, for the most part, borne out by the cases. In cases involving the freedom of religion or belief of individuals, we see that the same conceptions of autonomy are prevalent. U.S. free exercise jurisprudence (at least until quite recently) has exhibited quite a high degree of concern for a conception of individual autonomy based on the idea of *independence*. In contrast, cases decided under the European

Convention have reflected a view of autonomy based on the idea of *interdependence*, exhibit a higher degree of deference to state goals and can more often be described as paternalistic. Because its jurisprudence often reflects a view of autonomy based on *interdependence*, the European Courts do not see individual autonomy being infringed when the state directly supports, or interferes with, church affairs.

I will briefly survey six categories of cases that raise religious freedom issues involving the autonomy of the individual: (a) whether a state can impose oaths and religious requirements for office; (b) whether there is a right to conscientious objection; (c) whether an individual has a right not to work on his or her Sabbath; (d) whether there is a right to religious education; (e) the scope of the right to proselytize; and (f) whether and upon what grounds an individual may receive an exemption from a generally applicable law that burdens his or her religion or belief.

A. *Oaths and Religious Requirements for Office*

A conception of autonomy based on *independence* of church and state would prohibit all oaths and religious requirements for public office. A conception of autonomy based on *interdependence*, in contrast, would allow oaths and religious requirements for public office. A conception based on *inter-independence* would be very suspicious of such requirements, although it would be more likely than a view based on *independence* to tolerate a practice of taking oaths that are religious in nature if nonreligious variations are permissible or if such oaths are not mandatory.

United States: Religious oaths are specifically prohibited by the U.S. Constitution.²⁹⁰ In 1961, in *Torcaso v. Watkins*,²⁹¹ the Supreme Court invalidated a requirement that candidates for public office profess a belief in God. In *McDaniel v. Paty*,²⁹² the Court ruled that a Tennessee state constitutional requirement that certain public officials could not be “minister[s] of the Gospel, or priest[s] of any denomination whatsoever”²⁹³ was unconstitutional. Thus, religion

290. U.S. CONST. art. VI, cl. 3 (“[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”).

291. 367 U.S. 488 (1961).

292. 435 U.S. 618 (1978).

293. *Id.* at 620 (citing TENN. CONST. art. VIII, § 1 (1796)).

may not be used as either a requirement or as the basis for excluding someone from holding public office. These holdings reflect a view of autonomy based on the *independence* of church and state. On the other hand, oaths that invoke God are permitted for those taking public office or giving evidence in a legal proceeding, but exceptions are available for those who object to making such an oath.²⁹⁴ This reflects a view of autonomy that does not require stark *independence* of church and state, but rather one that envisions a degree of *inter-independence*.

Europe: In *Buscarini v. San Marino*,²⁹⁵ the European Court ruled that the requirement of taking a religious oath to hold political office may be an impermissible limitation on the manifestation of religion. The court, quoting the Commission, stated that “it would be contradictory to make the exercise of a mandate intended to represent different views of society within Parliament subject to a prior declaration of commitment to a particular set of beliefs,” thus making the requirement of the religious oath unnecessary in a democratic society.²⁹⁶ However, in *Kalac v. Turkey*,²⁹⁷ the Court, reversing a Commission decision, held that Article 9 was not violated when a military judge was dismissed from his job because he belonged to a fundamentalist Islamic group, even though there was no evidence that his religion was interfering with his performance of

294. “In response to pressures from atheists and other religious objectors, courts in recent years have gone beyond traditional oaths and affirmations and have allowed other alternative formulations such as ‘declarations’ or ‘promises’ to tell the truth.” Jonathan Belcher, Note, *Religion-Plus-Speech: The Constitutionality of Juror Oaths and Affirmations Under the First Amendment*, 34 WM. & MARY L. REV. 287, 289 (1992). For example, the Fifth Circuit Court of Appeals held the following:

[W]hen a judge is confronted with a prospective juror’s refusal, on grounds of constitutionally protected beliefs, to swear or affirm to answer voir dire questions truthfully, the judge should either allow the person to withdraw from jury duty without penalty or allow the prospective juror an alternative that requires him or her to make some form of serious public commitment to answer truthfully that does not transgress the prospect’s sincerely held beliefs.

Soc’y of Separationists, Inc. v. Herman, 939 F.2d 1207, 1219 (5th Cir. 1991).

295. App. No. 24645/94 (Eur. Ct. H.R.), 30 E.H.R.R. 208 (2000) (Westlaw) (invalidating a requirement that members of parliament swear an oath “on the Gospels” on the grounds that this “required them to swear allegiance to a particular religion”).

296. *Id.* at 221.

297. 41 Eur. Ct. H.R. (ser. A) 1199 (1997-IV), 27 E.H.R.R. 552 (1997) (Westlaw).

his role as a military judge.²⁹⁸ In *Kalac*, religious status was viewed to be a permissible basis for disqualifying someone from certain types of public office. These holdings exhibit a degree of concern for individual religious independence, but are broadly consistent with a view of autonomy based on a conception of *interdependence*.

B. Conscientious Objection

A constitutional guarantee of the right of conscientious objection would be unlikely under any of the three conceptions of autonomy. If autonomy is based on the *independence* of church and state, we would expect the state to disallow conscientious objection on the grounds that matters of self defense and national security fall squarely within the sphere of the state, and religious preferences and convictions are irrelevant to a determination of whether an individual is obliged to serve in the military. Stark *independence* would view religious conviction as irrelevant to a determination of civic obligation. A conception of autonomy based on *inter-independence* might be more willing to accept or accommodate conscientious objectors, since religion is not seen as being totally separate from and unconnected with the concerns of the state. Nevertheless, the parameters of conscientious objection will likely be carefully circumscribed and would be set by the state with an eye towards protecting the state's ability to defend itself and its interests. A conception of autonomy based on *interdependence* would not be likely to guarantee rights of conscientious objection, unless a religion favored by the state had a strong doctrinal basis for guaranteeing conscientious objection. For basic reasons of self-preservation, it seems unlikely that a state would ally itself with a church that is strongly passivist, or one that asserts a robust guarantee of each individual's right to assert a claim of conscientious objection.

United States: While the United States recognizes conscientious objection, it receives statutory rather than constitutional protection.

298. Professor Evans notes that this case seems to fall into the category of *forum internum*, or religious beliefs that are to receive absolute protection, but the Court in reversing the Commission's finding that his dismissal constituted a breach of Article 9

used such a narrow definition of freedom of religion or belief that it is difficult to see how any but the most totalitarian State could breach it. Thus, in most cases, the State can make it unpleasant or burdensome to hold a religion or belief without actually intruding on the *forum internum*.

EVANS, FREEDOM OF RELIGION, *supra* note 3, at 78-79.

Conscientious objectors have been the beneficiaries of a long history of legislative recognition reaching back as early as 1661 in the Massachusetts Bay Colony²⁹⁹ and continuing to the present day by federal statute. The United States Code permits a conscientious objector to avoid combat service if his opposition is based on “religious training and belief.”³⁰⁰

Scholars disagree on whether a free exercise right to conscientious objection exists, but it seems fairly unlikely the Supreme Court would recognize a free exercise exemption for three reasons.³⁰¹ First, while the Court has never squarely addressed the question, there is dictum indicating that there is no such constitutional right.³⁰² Second, the Court has granted a high degree of deference to Congress and the military on matters of national

299. CONSCIENCE IN AMERICA: A DOCUMENTARY HISTORY OF CONSCIENTIOUS OBJECTION IN AMERICA, 1757–1967, at 17 (Lillian Schillissel ed., 1968).

300. 50 U.S.C. app. § 456(j) (2000).

301. The basic framework of the arguments presented in this paragraph can be found in Spencer E. Davis, Jr., Comment, *Constitutional Right or Legislative Grace? The Status of Conscientious Objection Exemptions*, 19 FLA. ST. U. L. REV. 191 (1991).

302. In *United States v. Macintosh*, 283 U.S. 605 (1931), the Court stated:

The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him. . . . The privilege of the . . . conscientious objector to avoid bearing arms comes not from the Constitution but from the acts of Congress. That body may grant or withhold the exemption as in its wisdom it sees fit; and if it be withheld, the . . . conscientious objector cannot successfully assert the privilege. No other conclusion is compatible with the well-nigh limitless extent of the war powers.

Id. at 623–24.

Several years later, in *Hamilton v. Regents of the University of California*, 293 U.S. 245 (1934), the Supreme Court quoted that language approvingly. *Id.* at 264. Neither case dealt directly with conscientious objectors nor free exercise claims (*Macintosh* concerned an alien’s refusal to comply with naturalization requirements, while *Hamilton* dealt with the unwillingness of religiously sensitive students to attend a university-mandated class on military science and tactics) but they have given rise to the assumption that “[i]t is well settled that ‘exemption from military service is a matter of legislative grace and not a matter of right.’” *Korte v. United States*, 260 F.2d 633, 635 (9th Cir. 1958). Beyond the dicta in *Macintosh* and *Hamilton*, the Court came closest to squarely addressing a conscientious objector’s free exercise claim in *Gillette v. United States*, 401 U.S. 437 (1971), but in that case the petitioner was a selective (opposed to a particular war) as opposed to a general (opposed to fighting in all wars) conscientious objector, and the Court’s free exercise analysis was extremely cursory. Nevertheless, the Court’s rejection of a selective conscientious objector’s free exercise claim in that case is also probably indicative of the Court’s attitude towards general conscientious objector claims as well.

defense and security.³⁰³ The third reason to suspect that the Court would not recognize a constitutional exemption from military service on religious liberty grounds is the Court's relatively recent decision in *Oregon v. Smith*,³⁰⁴ which eliminated requiring strict scrutiny of generally applicable laws that burden religion. In sum, while conscientious objection receives statutory recognition in the United States, it is unlikely that there is a constitutional right to an exemption from military service. Statutory rather than constitutional protection of conscientious objection is consistent with a view of autonomy based on *inter-independence* of church and state.

Europe: There is no right to conscientious objection under the European Convention, and it is left to individual states to provide, or to choose not to provide, exemptions from military service for conscientious objectors. As early as 1966, and consistently since, the Commission has held that there is no right under Article 9 that covers conscientious objectors.³⁰⁵ This holding was based on Article 4 of the Convention, which prohibits slavery or forced or compulsory labor, but which specifically creates an exception in cases of "conscientious objectors in countries where they are recognized."³⁰⁶ The Commission emphasized that because Article 4 contemplated that countries might not recognize conscientious objectors, there could be no obligation for countries to recognize them.³⁰⁷

Nevertheless, a sea change may be afoot. A more liberal approach to conscientious objector claims appears to be evident from two

303. See Davis, *supra* note 301, at 205–06; C. Thomas Dienes, *When the First Amendment Is Not Preferred: The Military and Other Special Contexts*, 56 U. CIN. L. REV. 779 (1987). "[J]udicial deference to . . . congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981). This deference means the Court does not probe constitutional challenges in the military context with the same level of scrutiny. *Id.* at 70–71 (citing numerous representative cases); Dienes, *supra*. Military interests simply carry more weight in any balancing analysis than do governmental interests in most other areas. Any petitioner fighting for recognition of a constitutional right to conscientious objection will have to overcome this barrier.

304. 494 U.S. 872 (1990).

305. *Grandrath v. Federal Republic of Germany*, 10 Y.B. Eur. Conv. on H.R. 626 (1966), <http://hudoc.echr.coe.int>; *N v. Sweden*, App. No. 10410/83, 40 Eur. Comm'n H.R. Dec. & Rep. 203 (1984), <http://hudoc.echr.coe.int> (upholding the practice of allowing exemptions from military service only to Jehovah's Witnesses).

306. *Id.* (citing European Convention, art. 4(3)(c)).

307. *Id.*

recent cases. In *Tsirlis and Kouloumpas v. Greece*,³⁰⁸ the European Court held that while ministers do not have a right to conscientious objection, lengthy imprisonment of Jehovah's Witness ministers violated their Article 9 rights, since under the law providing exemption for members of a "known religion," Orthodox ministers had no difficulty obtaining exemptions. In an unreported case, *Thlimmenos v. Greece*,³⁰⁹ the European Court held that a Jehovah's Witness who passed a public exam to become an accountant, but was denied entry into the profession based upon a criminal conviction for refusing to serve in the armed forces, had his Article 9 rights violated since there was no option of substitute service available at the time of his conviction for a serious criminal offense. These recent decisions reflect a higher degree of concern for individual equality and autonomy rights, perhaps signaling some movement away from a conception of autonomy based on *interdependence* to a conception based on *inter-independence*.

C. Sabbath Work

A conception of autonomy based on *independence* would probably not permit Sunday-closing laws (since such laws use state power to further religious ends), but might recognize a right to have one's work schedule structured to accommodate Sabbath-day observance.³¹⁰ In contrast, autonomy based on *interdependence* would likely allow Sunday-closing laws and would also allow laws that protect religious adherents from Sabbath work. These protections and guarantees, however, while likely protecting preferred churches and their adherents, would not necessarily afford similar protections to religious believers who do not observe the same Sabbath day as the preferred churches. Autonomy based on *inter-independence* would be suspicious of Sunday-closing laws,

308. 35 Eur. Ct. H.R. (ser. A) (1997-III), 25 E.H.R.R. 198 (1998) (Westlaw).

309. App. No. 34369/97 (Eur. Comm'n H.R. Dec. 4, 1998), 31 Eur. H.R. Rep. 15 (2001).

310. As noted above in the discussion of religious-based claims for an exemption from generally applicable laws, while it might seem that *independence* would require a broad recognition of claimed exemptions, if the sphere of religious life is limited to "belief" and the sphere of government oversight is said to encompass everything that includes "action," then *independence* will be viewed as requiring very little recognition of claims for an exemption from generally applicable laws, including the claims of Sabbatarians for an exemption from requirements to work on their Sabbath day.

although if such laws had a credible secular basis, and if such laws had an appropriate set of exemptions and exceptions, they might be permitted. Autonomy based on *inter-independence* might also recognize that the state's failure to accommodate Sabbath-day work preferences imposes a burden on individual religious freedom, and state policies that burden religious observance might be subject to heightened judicial scrutiny.

United States: In 1961, in *Braunfeld v. Brown*,³¹¹ the Supreme Court held that the free exercise rights of Jewish merchants were not violated by Sunday-closing laws, although the Court suggested that the state could enact an exemption from such laws for merchants whose religious beliefs required them to close on another day.³¹² This case represents one of the few early instances in which a conception of autonomy based on *interdependence* seems to underlie the Supreme Court's analysis. In *Braunfeld*, the Court upheld a state law that was intended to protect and further the interests of a majority religious viewpoint, finding reciprocal benefits to the state for providing this preference and protection, while being dismissive of the burdens that such a law placed upon adherents to another Sabbath day.³¹³

A few years later, the Supreme Court modified its approach to laws that burden religious freedom by subjecting such laws to heightened scrutiny. In *Sherbert v. Verner*,³¹⁴ the Court held that a Seventh-Day Adventist who was denied unemployment

311. 366 U.S. 599 (1961).

312. However, in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), the Supreme Court invalidated an effort to follow such an approach, striking down a statute providing Sabbath observers with an absolute and unqualified right not to work on their chosen Sabbath.

313. *Braunfeld*, 366 U.S. at 599, 605 (“[T]he statute at bar does not make unlawful any religious practices of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive.”) The court also asserts that the legislation “imposes only an indirect burden on the exercise of religion.” *Id.* at 606. The Court further states:

If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.

Id. at 607.

314. 374 U.S. 398 (1963).

compensation because she refused to work on Saturday was entitled to receive unemployment benefits because the denial of benefits constituted a “substantial infringement”³¹⁵ or “coercive effect on her religious beliefs.”³¹⁶ In so holding, the Court exhibited a high degree of concern for the autonomy of religious believers whose religious convictions put them at odds with state law. If a petitioner could demonstrate that a law created a “substantial burden” on his religious liberty rights, then the state was required to show that the burden was justified by a “compelling state interest” and that the government’s program was the “least restrictive means” to vindicate that interest.³¹⁷ In *Sherbert*, the Court held that the state failed to prove either a compelling state interest (the Court rejected the argument that the law prevented spurious claims by “claimants feigning religious objections to Saturday work”)³¹⁸ or that the law was the least restrictive means for combating such alleged abuses. Following *Sherbert*, in *Hobbie v. Unemployment Appeals Commission*,³¹⁹ the Court declared unconstitutional a denial of unemployment benefits to an employee who refused to work on Saturdays after converting to the Seventh-Day Adventist Church. In 1989, in *Frazee v. Illinois Department of Employment Security*,³²⁰ the Court required the State of Illinois to provide unemployment benefits to a man who refused to work on Sunday because it was the “Lord’s day,” even though the petitioner who said he was a Christian did not claim membership in a particular religious group.

These outcomes are consistent with a conception of autonomy based on the *inter-independence* of church and state. One of the strategies that will often be adopted under a conception of *inter-independence* is heightened scrutiny, where under the autonomy interests of individuals (Is there a substantial burden placed on religious observance?) will be weighed against the autonomy interests of the state (Is there a compelling state interest and is the state policy narrowly tailored to accomplish that interest?). In *Oregon v. Smith*,³²¹ decided a year after *Frazee*, the Court signaled a sharp

315. *Id.* at 406.

316. *Id.* at 404.

317. *Id.* at 402–10.

318. *Id.* at 407.

319. 480 U.S. 136 (1987).

320. 489 U.S. 829 (1989).

321. 494 U.S. 872 (1990).

retreat from subjecting facially neutral laws to heightened scrutiny when the autonomy interests of religious adherents are burdened by such laws. In *Smith*, the Supreme Court held that neutrally applicable laws that burden religion are not subject to heightened scrutiny, implicitly adopting a conception of autonomy based upon the *interdependence* of church and state.³²²

In these cases, we see the Supreme Court taking positions that rely on shifting conceptions of autonomy. In *Braunfeld*, the Court relies on a conception of autonomy based on *interdependence*. The Court sees a high degree of integration and cooperation between the goals of the state and those of a preferred religious group, and the Court is very deferential to state action that has a negative impact on the religious liberty of individuals who do not belong to that group. In *Sherbert* and *Frazee*, the Court reflects a greater sensitivity to burdens that facially neutral laws may place on religious observance and subjects such situations to heightened scrutiny, reflecting a conception of autonomy based on *inter-independence*. In *Smith*, the Court abandons heightened scrutiny and returns to a conception of autonomy based on the *interdependence* of church and state, with the state being trusted to adequately protect religious rights and interests. State action is presumed to protect religious freedom unless it overtly discriminates against a religious group.

Europe: The European Court's stance on Sabbath-day work has not been fully tested. In *Konttinen v. Finland*,³²³ the issue of Sabbath work was raised by the applicant Konttinen, who worked for the State Railway for several years before becoming a member of the Seventh-Day Adventist Church. As part of his new religious conversion, Konttinen was required to "refrain from working on the Sabbath (Saturday) which starts at sunset on Friday."³²⁴ At certain times of year, based upon the time of sundown, Konttinen left work early to avoid working on the Sabbath day. Despite informing his employer of his religious convictions and his need to leave early on

322. *Id.* at 882–89. One might think that the Supreme Court in *Smith* relies upon a conception of autonomy that reflects *independence*, since churches are not given special treatment. Such an interpretation of *independence*, however, is possible only if the wall of separation is moved very far into the realm of religious practice. If religious practice is isolated and marginalized sufficiently a government can always claim that it leaves religion alone within its very constricted sphere.

323. App. No. 24949/94 (Eur. Comm'n H.R. Dec. 3, 1996), <http://hudoc.echr.coe.int>.

324. *Id.*

occasion, Konttinen was dismissed by the Railway for leaving work early.³²⁵ The Commission ruled that because the applicant was a civil servant of the State Railway, he had an obligation to his employer to observe the rules governing his work hours. The Commission also found that Konttinen was not dismissed because of his religious beliefs but rather because of his failure to comply with his specified work hours.³²⁶ The Commission also emphasized that the applicant's dismissal was not a violation of his right to freedom of religion because the applicant was free to relinquish his post.³²⁷ Thus, to date the European Court has not exhibited a high degree of concern for individual religious needs in cases involving Sabbath-day work, and the limited jurisprudence in this area seems to reflect a conception of autonomy based on *interdependence*.

D. The Right to Religious Education

A conception of autonomy based on *independence* might not recognize the right of parents to send their children to church-sponsored schools, since education could be viewed as a secular function of the state. Even if there is a right to receive religious education, autonomy based on *independence* would forbid the state from providing funding and other support for religious schools. In contrast, a conception of autonomy based on *interdependence* would recognize the right of parents to send their children to church-sponsored schools, at least to schools sponsored by preferred churches. Autonomy based on *interdependence* would also permit the state to provide financial and other forms of direct aid to schools sponsored by preferred churches. A conception of autonomy based on *inter-independence* would be sensitive to the implications for the state, for churches, and for children of being sent to religious schools. While the autonomy interests of parents, children and churches might weigh in favor of guaranteeing a right to attend church-sponsored schools, direct financial aid to church-sponsored schools would not be allowed, since this would jeopardize the independence of church and state. In addition, the state's autonomy interests will weigh in favor of giving the state a voice in the content and character of the education provided.

325. *Id.*

326. *Id.*

327. *Id.*

United States: In the United States, parents have a constitutional right to send their children to parochial schools,³²⁸ but private schools may not receive direct state aid.³²⁹ In a highly anticipated decision handed down in the summer of 2002, the Supreme Court upheld a voucher program that allows parents to use vouchers to send their children to parochial schools.³³⁰ In cases involving parochial schools, the Supreme Court has exhibited a trend from a view of autonomy based on *independence* to a view of autonomy that reflects the assumptions of *inter-independence*. Indeed, if the recent voucher case is a precursor of things to come, the Supreme Court may be poised to allow programs that indirectly provide significant quantities of financial benefits to churches, which would mark a significant move in the direction of a conception of autonomy based on the assumptions of *interdependence*. Recently, the Supreme Court decided *Locke v. Davey*,³³¹ which dealt with a provision in the Washington State Constitution that prohibited a student from using a particular state scholarship program in pursuit of a degree in theology. In considering the case, the Supreme Court held that a state may provide scholarship funds to a student in pursuit of a degree in theology without violating the Establishment Clause, but a state was not obligated to make those funds available by the Free Exercise Clause.³³² Such an approach is indicative of *inter-independence*; the state may provide funding if it chooses, and even under the Washington plan, the scholarships may be used by students attending religious schools without pursuing a degree in theology. However, it is also sensitive of the concerns of *independence* by not requiring that the states use taxpayer funds to support religious ministry. The sort of balancing evident in *Davey* is suggestive of an *inter-independence* approach.

Europe: In Europe, parents have the right to send their children to church-sponsored schools. Additionally, under the European Convention states can subsidize religious schools or pay for certain types of religious education in public or religious schools, although minority religions have no basis to claim a right to state funding for

328. See *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

329. See *Norwood v. Harrison*, 413 U.S. 455 (1973).

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

331. 124 S. Ct. 1307 (2004).

332. *Id.* at 1311.

their schools.³³³ Parents are quite limited in their ability to insulate children from types of teaching in public schools that they find objectionable from a religious point of view.³³⁴ Even the ability to receive an exemption from religious instruction is limited.³³⁵ These outcomes reflect a view of autonomy based on the *interdependence* of church and state.

E. *The Right to Proselyte*

A conception of autonomy based upon *independence* would provide a broad guarantee of the right to engage in proselyting activities and other forms of religious persuasion. A conception of autonomy based upon *interdependence* would provide protection for public dissemination of preferred religious viewpoints, although equal access would not necessarily be guaranteed to less favored religious groups. *Inter-independence* would provide broad protection for religious persuasion, but some narrow limitations might be allowed that would not be permitted by a view of autonomy based upon *independence*, particularly when the autonomy interests of other individuals or of the state were significantly compromised by such activities.

United States: In a series of cases decided in the 1940s, *Cantwell v. Connecticut*,³³⁶ *Murdock v. Pennsylvania*,³³⁷ and *Follett v. McCormick*,³³⁸

333. See EVANS, FREEDOM OF RELIGION, *supra* note 3, at 89 (citing cases).

334. Kjeldsen, Busk Madsen and Pedersen v. Denmark, 23 Eur. Ct. H.R. (ser. A) 26, para. 53 (1982), <http://hudoc.echr.coe.int>. In *Kjeldsen*, the court held that Denmark could impose integrated sexual education curriculum over parents' religious objections, although it "must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions."

335. Angeleni v. Sweden, 51 Eur. Comm'n H.R. Dec. & Rep. 41 (1986), 10 Eur. H.R. Rep. CD 123, 125-26 (1988) (Westlaw) (denying an exemption from religious instruction to an atheist on grounds that Sweden had entered a reservation to Article 2 of the First Protocol stating that exemptions from teachings in Christianity could be granted only to "children of another faith than the Swedish Church in respect of whom satisfactory religious instruction had been arranged").

336. 310 U.S. 296 (1940) (reversing the conviction of a Jehovah's Witness convicted under a statute forbidding solicitation without a license). While the *Cantwell* Court invoked the belief/action distinction, and reiterated that actions may be regulated for "the protection of society," it stated that such regulation must not "unduly infringe" upon religious practice. *Id.* at 296, 304.

337. 319 U.S. 105 (1943) (striking down a license tax imposed on door-to-door proselytizers).

the Supreme Court struck down license and occupation taxes imposed on Jehovah's Witnesses who sold religious reading materials through door-to-door proselytizing. In the summer of 2002, in another case involving the Jehovah's Witnesses, the Supreme Court held that a city regulation requiring religious door-to-door solicitors to receive a state license violated their free exercise rights.³³⁹ The Supreme Court's decisions in this area reflect a conception of autonomy based upon *independence*.

Europe: The first case in which the European Court held that there had been a violation of the right to freedom of religion and belief was *Kokkinakis v. Greece*,³⁴⁰ which involved a Jehovah's Witness convicted of violating the Greek law prohibiting proselytism.³⁴¹ Minos Kokkinakis was convicted of proselytism after he went to the house of the local Greek Orthodox cantor and told his wife about the Jehovah's Witnesses. While the cantor's wife was not persuaded by Mr. Kokkinakis' appeals and did not even remember much about the conversation, which she said had not affected her religious beliefs, and even though there was no evidence that she was particularly naïve or vulnerable, Mr. Kokkinakis was convicted of improper proselytism, and his conviction was upheld in a series of appeals through the Greek courts. The European Court ruled that the Greek law violated Article 9 on the grounds that the law was an unnecessary limitation on Mr. Kokkinakis's right to manifest his religious beliefs.

This holding reflects a view of autonomy based upon *inter-independence*. The court did not hold that Mr. Kokkinakis's proselyting activities were absolutely protected by Article 9(1), which states that everyone has the "freedom to change his religion or belief."³⁴² Such a holding would have reflected a view of autonomy

338. 321 U.S. 573 (1944) (reversing a conviction for selling religious tracts door-to-door without a license).

339. Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton, 536 U.S. 150 (2002).

340. 260-A Eur. Ct. H.R. (ser. A) (1993), 17 E.H.R.R. 397 (1994) (Westlaw).

341. The Greek law in question defined proselytism as:

in particular, any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion (*eterodoxos*), with the aim of undermining those beliefs, either by any kind of inducement or promise of an inducement or moral support or material assistance, or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naivety.

Id. at 404.

342. European Convention, *supra* note 72, art. 9, para. 1.

based upon *independence*. Instead, the Court held that the case involved an impermissible limitation on the ability of Mr. Kokkinakis to manifest his religion and belief because the limitation was not “necessary in a democratic society.”³⁴³ The Court noted that “the Greek courts established the applicant’s liability by merely reproducing the wording of section 4 [of the governing Greek law] and did not sufficiently specify in what way the accused had [violated the law].”³⁴⁴ Thus, it was not “shown that the applicant’s conviction was justified in the circumstances of the case by a pressing social need.”³⁴⁵ In *Kokkinakis*, the European Court balanced the state’s autonomy interests in protecting public safety, order, health, and morals on the one hand against Mr. Kokkinakis’s autonomy interests in manifesting his religious beliefs, and the balance was found to weigh in favor of Mr. Kokkinakis. This type of balancing analysis is what one would expect from a conception of autonomy based upon *inter-independence*.

The *Kokkinakis* case, however, brought to the fore strong differences of opinion in the European Court about the scope of the freedoms protected by Article 9, including the right to change one’s religion. Judge Martens, in a concurring opinion, noted that under the Convention, freedom of religion is an “absolute” value and stated that the Convention “leaves no room whatsoever for interference by the State” in freedom to have or change religions.³⁴⁶

343. *Kokkinakis*, 260-A Eur. Ct. H.R. (ser. A) (1993).

344. *Id.*

345. *Id.*

346. *Id.* at 436. Judge Martens goes on to note that teaching is explicitly protected in the Convention, and that such teaching may “shade off into proselytizing” and cause some conflict with the rights of others to maintain their beliefs.

In principle, however, it is not within the province of the State to interfere in this ‘conflict’ between proselytizer and proselytized. First, because—since respect for human dignity and human freedom implies that the State is bound to accept that in principle everybody is capable of determining his fate in the way that he deems best—there is no justification for the State to use its power ‘to protect’ the proselytized (it may be otherwise in very special situations in which the State has a particular duty of care but such situations fall outside the present issue). Secondly, because even the ‘public order’ argument cannot justify use of coercive State power in a field where tolerance demands that ‘free argument and debate’ should be decisive. And thirdly, because under the Convention all religions and beliefs should, as far as the State is concerned, be equal.

Id. at 436–37. The dissenting opinion of Judge Martens, which goes beyond what the majority of the Court was willing to hold, evidences a real concern for the independence-based autonomy of the individual that is mostly missing in European Court cases.

Judge Martens would have placed Mr. Kokkinakis's activities within Article 9(1)'s sphere of absolute protection, which would reflect a conception of autonomy requiring a high degree of *independence* between the state and individuals' decisions with respect to religious belief and association. The Greek member of the panel, Judge Valticos, in a dissenting opinion, expressed a broad willingness to permit the suppression of the evangelical efforts of Mr. Kokkinakis.³⁴⁷ He described Mr. Kokkinakis' activities as a "rape of the belief of others" and concluded that his behavior did not constitute a manifestation of religion or belief.³⁴⁸ This view reflects a particularly strong take on the *interdependence* of church and state, where the interests of a favored church are seen as being highly integrated with the state's interest. Thus, in the set of opinions in the *Kokkinakis* case we see all three conceptions of autonomy reflected in the respective opinions of the majority, concurring, and dissenting judges.

A few years later, in *Larissis v. Greece*,³⁴⁹ the European Court upheld limitations on proselytizing activities of military superiors of their subordinates. According to Professor Evans, "In this case, the Court was willing to accept that any attempt at proselytism by senior officers was an abuse of power, despite the arguments in the dissenting judgment of Judge Van Dijk, who considered this absolute approach to be disproportionate."³⁵⁰ Although the outcome

347. *Id.* at 429–32 (Valticos, J., dissenting).

348. Judge Valticos characterized the situation in the *Kokkinakis* case as follows:

Let us look now at the facts of the case. On the one hand, we have a militant Jehovah's Witness, a hardbitten adept of proselytism, a specialist in conversion, a martyr of the criminal courts whose earlier convictions have served only to harden him in his militancy, and, on the other hand, an ideal victim, a naïve woman, the wife of a cantor in the Orthodox Church (if he manages to convert her, what a triumph!). He swoops on her, trumpets that he has good news for her (the play on words is obvious, but no doubt not to her), manages to get himself let in and, as an experienced commercial traveler and cunning purveyor of the faith he wants to spread, expounds to her his intellectual wares cunningly wrapped up in a mantle of universal peace and radiant happiness. Who, indeed, would not like peace and happiness? But is this the mere exposition of Mr. Kokkinakis's beliefs or is it not rather an attempt to beguile the simple soul of the cantor's wife? Does the Convention afford its protection to such undertakings? Certainly not.

Id. at 430–31 (Valticos, J., dissenting).

349. 65 Eur. Ct. H.R. (ser. A) 363 (1998–V), 27 E.H.R.R. 329 (1999) (Lexis).

350. EVANS, FREEDOM OF RELIGION, *supra* note 3, at 145. Judge Van Dijk felt there should be a presumption of abuse in such cases but that it should be rebuttable. He decided that the presumption should have been rebutted in regard to

in *Larissis* is opposite of the outcome in *Kokkinakis*, the *Larissis* case also reflects a conception of autonomy based upon *inter-independence*. The European Court weighed the autonomy interests of the state against the autonomy interests of the individuals involved. In the military context, however, the autonomy interests of the state and of individuals are weighed differently than in the civilian context. In *Larissis*, the European Court justified limitations on proselyting based upon the state's autonomy interests of maintaining order and discipline, which in the military are particularly acute, and upon individual autonomy interests, which also have a different complexion in the military context, where subordinate military personnel might feel pressured or coerced to be positively responsive to the proselytizing activities of superior officers. The court notes that because of the hierarchical structure of the military, "what would in the civilian world be seen as an innocuous exchange of ideas which the recipient is free to accept or reject, may, within the confines of military life, be viewed as a form of harassment or the application of undue pressure in abuse of power."³⁵¹

F. *Exceptions to Generally Applicable Laws*

A conception of autonomy based upon *independence* would provide broad exceptions to generally applicable laws based upon religious belief, with possible limitations based only upon the serious threat that granting an exemption would pose to the autonomy of others or the autonomy of the state. A conception of autonomy based upon *interdependence* would not recognize exceptions to generally applicable laws, although laws that accommodate the religious beliefs and needs of adherents of preferred faiths would be expected. Autonomy based upon *inter-independence* would subject laws that placed burdens upon religious belief or practice to heightened scrutiny, examining carefully the effects upon the autonomy of other individuals and the state of failing to recognize an exemption.

one junior officer who claimed that he first approached the senior officers, that they never pressured him, and that he converted to the Pentecostal Church of his own free will.

Id. (citing *Larissis*, 65 Eur. Ct. H.R. (ser. A) 363 (1998-V) (Van Dijk, J., dissenting)).

351. *Larissis*, 65 Eur. Ct. H.R. (ser. A) 363, para. 51 (1998-V).

United States: Early U.S. free exercise jurisprudence was very skeptical about recognizing exemptions based upon religious conviction from generally applicable laws. For example, in *Reynolds v. United States*,³⁵² the Court rejected the argument of a Mormon who claimed that the Free Exercise Clause provided an exemption from laws prohibiting polygamy because the practice was mandated by church doctrine. The Court cited Jefferson's letter to the Danbury Baptist association that made a distinction between beliefs and actions and held that while religious beliefs receive absolute protection, religious actions are not protected when they are "in violation of social duties or subversive of good order."³⁵³ This outcome was consistent with a view of autonomy based upon the *inter-independence* of church and state, with the balance found weighing in favor of state autonomy,³⁵⁴ which appeared to be jeopardized by the practice of polygamy. Individual autonomy interests were discounted because they were limited to the sphere of belief and held inapplicable to the sphere of action.³⁵⁵

Beginning in the 1960s, the Supreme Court for a time adopted a different approach to free exercise claims for exemptions from generally applicable laws. Beginning in *Sherbert v. Verner*,³⁵⁶ a case involving a Seventh-Day Adventist who was denied unemployment compensation for refusing to work on Saturday, the Court subjected state action that placed a substantial burden on religion to

352. 98 U.S. 145 (1878). The Court also upheld Congress's right to seize the Church's property, calling the claim that polygamy is a religious belief that falls under the Free Exercise Clause "altogether a sophistical plea," and stating, "No doubt the Thugs of India imagined that their belief in the right of assassination was a religious belief; but their thinking so did not make it so." *Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1, 49 (1890); *see also* *Davis v. Beason*, 133 U.S. 333, 341-42 (1890) ("Bigamy and polygamy are crimes by the laws of all civilized and Christian countries," and "[t]o call their advocacy a tenet of religion is to offend the common sense of mankind.").

353. *Reynolds*, 98 U.S. at 164.

354. *Id.* at 166-67 ("So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. 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.").

355. This holding reflected strong Protestant assumptions about the centrality of belief in contrast with action to religious obligation, since upon a Protestant view salvation can be accomplished through proper belief alone. In other religious traditions, including Catholicism, protecting only belief and not action might not be sufficient to enable an adherent to do everything necessary to assure his or her salvation.

356. 374 U.S. 398 (1963).

heightened scrutiny if it placed a substantial burden on religion. This meant that the state was required to show that its actions were justified by a compelling state interest and that there was no less restrictive means for affecting that interest. In *Wisconsin v. Yoder*,³⁵⁷ this approach resulted in an exemption for Amish schoolchildren from state compulsory education beyond the eighth grade, and, in *Thomas v. Review Board*,³⁵⁸ it resulted in unemployment compensation for a Jehovah's Witness who quit his job because his religious convictions prevented him from participating in the production of war materials. These cases also reflect a view of autonomy based upon *inter-independence*, although the outcomes favored the autonomy interests of those seeking passive exemptions based upon religious beliefs.

In the 1980s, the Supreme Court became more reluctant to recognize exceptions to general and neutral laws based upon religious freedom claims.³⁵⁹ For example, in *Goldsboro Christian Schools, Inc. v. United States*,³⁶⁰ the Court rejected the free exercise claim of a school that refused admission to blacks based upon a reading of the Bible; in *Bob Jones University v. United States*,³⁶¹ the Court held that the state had a compelling interest in preventing racial discrimination and rejected the free exercise claim of a university that did not allow interracial dating or marriage; in *Goldman v. Weinberger*,³⁶² the Court upheld a military regulation that forbade the wearing of a yarmulke while on duty; in *Bowen v. Roy*,³⁶³ the Court denied an exemption for religiously motivated objections to the use of Social Security numbers in welfare programs; in *Lyng v. Northwest Indian Cemetery Protective Ass'n*,³⁶⁴ the Court allowed the U.S. Forest Service to build a road through a Native American burial ground in spite of the religious objections of three tribes that used the grounds for religious rituals; and in *Hernandez v.*

357. 406 U.S. 205 (1972).

358. 450 U.S. 707 (1981).

359. For a discussion of the Court's pattern of rejecting such claims, see Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410 (1990); see also Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989).

360. 454 U.S. 1121 (1981).

361. 461 U.S. 574 (1983).

362. 475 U.S. 503 (1986).

363. 476 U.S. 693 (1986).

364. 485 U.S. 439 (1988).

Commissioner,³⁶⁵ the Court rejected a claim by members of the Church of Scientology who argued their free exercise rights were violated when the Internal Revenue Service denied a tax deduction for their payments for “auditing” on the grounds that the payments did not represent a contribution but rather a quid pro quo exchange. Although religious exemptions were not permitted in these cases, the analysis was nevertheless based upon the *inter-independence* of church and state, with the Court usually subjecting laws burdening religious beliefs to heightened scrutiny. While these cases illustrate that heightened scrutiny does not guarantee that a religious claim will be vindicated, the cases weighed state autonomy claims against individual autonomy claims as one would expect from a conception of autonomy based upon *inter-independence*.

About a decade ago, the Supreme Court abandoned altogether its method of subjecting claims for an exemption from general and neutral laws to heightened scrutiny. In *Employment Division v. Smith*,³⁶⁶ the Court held that a law that burdens religion is constitutional as long as it is general and neutral. This standard is not entirely incapable of protecting religious liberty interests, as demonstrated a few years later in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,³⁶⁷ in which the Supreme Court held that ostensibly neutral laws setting standards governing animal slaughter violated the Free Exercise Clause because they had been drafted to apply only to the ritual sacrifice of animals by the Church of Lukumi. Nevertheless, the Court in *Smith* moved sharply toward a conception of autonomy based upon the *interdependence* of church and state.

In 1993, Congress passed the Religious Freedom Restoration Act (RFRA),³⁶⁸ designed to restore the compelling state interest test to free exercise jurisprudence. The Supreme Court, however, declared the RFRA unconstitutional in *City of Boerne v. Flores*³⁶⁹ and rejected the claim of a church seeking a free exercise exemption from a prohibition on enlarging its church, in contravention of a historic landmark preservation ordinance. Under the Supreme Court’s

365. 490 U.S. 680 (1989).

366. 494 U.S. 872 (1990).

367. 508 U.S. 520 (1993).

368. Pub. L. No. 103-141, § 2, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb).

369. 521 U.S. 507 (1997). The Court held that RFRA was unconstitutional because it exceeded Congress’s remedial authority under Section 5 of the Fourteenth Amendment.

current view, general and neutral laws that burden religion are permitted. Thus, concerning religion-based exemptions, the Supreme Court's jurisprudence has shifted from a view of autonomy based upon *inter-independence* to a view that reflects a conception of autonomy based upon *interdependence*.

Europe: According to Professor Evans, the Commission and the Court have adopted three different approaches for dealing with neutral and general laws that have the effect of burdening religious belief or observance. "The first approach is to hold that, as long as a law is genuinely neutral and applied in a nondiscriminatory manner, it cannot breach Article 9."³⁷⁰ A second approach "is to hold that restricting a person's freedom of religion under a general and neutral law could breach Article 9(1), but that this breach could be justified in appropriate circumstances under Article 9(2)."³⁷¹ A third approach, illustrated in cases involving conscientious objection to military service, is to deal with such issues by "specific reference to another article of the Convention."³⁷² I will focus here primarily upon the second approach, in which the limitations clause of Article 9(2) is invoked to determine whether a restriction on a "manifestation" of religious belief is permissible.

In deciding whether to grant an exception to a generally applicable law based upon freedom of religion or belief, the Commission and the court have developed a test which focuses upon whether a particular manifestation is necessary in order for someone to practice his or her religion (in which case an exemption is available), as opposed to situations in which the behavior in question is simply inspired by religious motives or beliefs (in which case an exemption is unavailable). This test was first articulated by the Commission in *Arrowsmith v. the United Kingdom*,³⁷³ a case involving the right of a pacifist to distribute leaflets to soldiers urging them to refuse a tour of duty. In *Arrowsmith*, the Commission

370. EVANS, FREEDOM OF RELIGION, *supra* note 3, at 169.

371. *Id.* For example, in *Seven Individuals v. Sweden*, 29 Eur. Comm'n H.R. Dec. & Rep. 104 (1982), 5 E.H.R.R. 147 (1983) (Westlaw), parents were unsuccessful in arguing for a religious exemption from a state law prohibiting corporal punishment based upon a biblically-based belief that corporal punishment of children was biblically mandated, on the grounds that a prohibition of corporal punishment was permitted by Section 9(2)'s limitation on manifestations of religious belief on the grounds of health and safety.

372. EVANS, FREEDOM OF RELIGION, *supra* note 3, at 169.

373. 19 Eur. Comm'n H.R. Dec. & Rep. 5 (1978), 3 E.H.R.R. 218 (1978) (Westlaw).

concluded that distributing leaflets did not constitute a “practice” of pacifism, but rather political opposition to a particular government policy.³⁷⁴

According to Professor Evans,

[t]here have been a large number of claims made in relation to general and neutral laws (such as laws on taxation, compulsory vaccination, pension schemes, and planning) on the basis that they interfere with religion or belief. In the vast majority of these cases, the Commission has utilized the *Arrowsmith* test to hold people claiming exemptions from such laws were merely influenced or motivated by religion or belief rather than practicing their religion or belief.³⁷⁵

For example, in *Khan v. United Kingdom*,³⁷⁶ the Commission upheld the criminal conviction of a twenty-one-year-old man who was married in an Islamic ceremony to a fourteen-year-old girl against her parents’ wishes. Under Islamic law, a girl is permitted to marry without the consent of her parents at age twelve, whereas under British law the age is eighteen. In dismissing his complaint that his conviction for abducting the girl violated his rights of religious freedom, the Commission reasoned that his actions did not constitute a manifestation of religious belief because while Islamic law permitted marriage at an earlier age than British law, it did not require it.³⁷⁷

On other occasions, the Commission seems to distort the necessity test in order to reach outcomes that are deferential to state actions that burden religious expression. In *Karaduman v. Turkey*,³⁷⁸ a Muslim woman who declined to remove her headscarf for an identity photograph was refused the right to graduate from a university. Departing from the approach outlined in the *Arrowsmith* case, the Commission did not focus, as one might expect, upon whether wearing the headscarf was necessary under Islam. Rather, the Commission focused on the taking of the photograph, stating that “[t]he purpose of the photograph affixed to a degree certificate

374. *Id.* at 228–30.

375. EVANS, FREEDOM OF RELIGION, *supra* note 3, at 116.

376. 48 Eur. Comm’n H.R. Dec. & Rep. 253 (1986), <http://hudoc.echr.coe.int>.

377. *Id.*

378. 74 Eur. Comm’n H.R. Dec. & Rep. 93 (1993), <http://hudoc.echr.coe.int>.

is to identify the person concerned. It cannot be used by the person to manifest his religious belief.”³⁷⁹

One difficulty that arises under *Arrowsmith*'s necessity test is that the Commission and the court are put in the position of determining whether a particular action is required by one's religion or belief, or whether an action is merely motivated by one's religion or belief. In practice, this has resulted in the Commission and the court being dismissive of petitioners' claims about whether an action is required by their religious beliefs.³⁸⁰ A second difficulty under the *Arrowsmith* approach is that it may be more difficult to establish necessity for petitioners who base their claims on beliefs or religions that are nonhierarchical, or when petitioners' beliefs depart from those of their church.³⁸¹ A final difficulty that arises is that despite a general law's ostensibly neutral language, a law may actually be targeted at limiting particular religious practices, either as the law is written, or as it is enforced.³⁸²

379. *Id.* at 109. Evans notes that,

While the decision was ultimately made on other grounds, the Commission indicated that the refusal of the University to allow Miss Karaduman to wear a headscarf in her photograph was probably not a restriction on her right to manifest her religion. . . . The normal, *Arrowsmith* approach to this question would have been to question whether the wearing of the headscarf and refusing to remove it for a photograph was required by Islam. The shift of emphasis away from the issue of religious apparel, which seemed to be at the heart of the application, and on to the taking of the photograph, suggests a level of conceptual confusion within the Commission as to the appropriate way to apply the *Arrowsmith* case.

EVANS, FREEDOM OF RELIGION, *supra* note 3, at 118.

380. *See, e.g.*, *Valsamis v. Greece*, 2 Eur. Ct. H.R. (ser. A) 2312 (1996-VI), 24 E.H.R.R. 294 (1996) (Westlaw); *Efstathiou v. Greece*, 27 Eur. Ct. H.R. (ser. A) 2347 (1996), E.C.H.R. 24095/94 (Lexis) (upholding the suspension from school of Jehovah's Witness children who refused to participate in a Greek National Day parade on the grounds that doing so violated their pacifist beliefs, stating that the Court saw nothing in the parade that could offend petitioners' religious convictions, and discounting evidence from petitioners that participating in such a parade conflicted with their religion); *cf. D. v. France*, 35 Eur. Comm'n H.R. Dec. & Rep. 199, 202 (1983), <http://hudoc.echr.coe.int> (relying upon expert evidence in State court from religious leaders to support the conclusion that certain action was not a necessary manifestation of religious belief); *cf. also* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

381. *See* EVANS, FREEDOM OF RELIGION, *supra* note 3, at 122–23.

382. *See, e.g.*, *Manoussakis and others v. Greece*, 17 Eur. Ct. H.R. (ser. A) 1347 (1996–IV), 23 E.H.R.R. 387 (1996) (Westlaw) (planning laws regarding places of worship used to discriminate against some religious groups); *Kokkinakis v. Greece*, 260-A Eur. Ct. H.R. (ser. A) (1993), 17 E.H.R.R. 397 (1994) (Westlaw) (law against improper proselytism used only against members of unpopular religious groups); *Tsavachidis v. Greece*, App. No. 28802/95

The *Arrowsmith* necessity test looks like a paradigmatic balancing test that would be expected from a conception of autonomy based upon *inter-independence*, but in practice the European Court has weighed state interests so heavily that the jurisprudence seems to reflect a conception of autonomy based upon the *interdependence* of church and state.

G. Summary of Individual Autonomy Issues

Issues involving religion and individual autonomy are summarized in Figure 3.

(Eur. Comm'n H.R. Mar. 4, 1997), <http://hudoc.echr.coe.int> (state used general national security surveillance laws to target minority religious groups).

1217]

The Autonomy of Church and State

Figure 3
Individual Autonomy

Issue	United States	Conception of Autonomy	Europe	Conception of Autonomy
Oaths and requirements for office	prohibited	<i>independence</i> and <i>inter-independence</i>	limited	<i>inter-independence</i> or <i>interdependence</i>
Conscientious objection	permitted but probably no guaranteed	<i>inter-independence</i>	not recognized	<i>interdependence</i>
Sabbath work	historically subject to heightened scrutiny; less certain today	movement from <i>inter-independence</i> possibly toward <i>interdependence</i>	not recognized	<i>interdependence</i>
Right to religious education	recognized; indirect state funding permitted	movement from <i>inter-independence</i> toward <i>interdependence</i>	recognized; direct state aid permitted	<i>interdependence</i>
Right to proselyte	recognized	<i>independence</i>	recognized to some extent	<i>inter-independence</i>
Exceptions to generally applicable laws	previously subject to heightened scrutiny; now exceptions generally not available	movement from <i>inter-independence</i> toward <i>interdependence</i>	limited based upon necessity	<i>inter-independence</i> , bordering on <i>interdependence</i>

The story with respect to individual autonomy issues is more complex than that regarding institutional autonomy. In Europe, while a conception of autonomy based upon *interdependence* is still dominant, at least with respect to several issues including whether the state can require religious oaths and the availability of exceptions to generally applicable laws based upon religious belief, the European Court has relied upon a conception of autonomy that reflects the concerns of *inter-independence*.

In the United States, the story is also more muddled. With respect to some of the most significant issues involving the

autonomy of individuals, the Supreme Court has moved sharply away from a conception of autonomy based upon *independence*, or even *inter-independence*, toward a conception of autonomy based upon *interdependence*. There are two areas where this movement is most evident. The first involves the right to religious education, where the Court has moved from the view that there is a right to religious education to a view that the state can indirectly provide large amounts of funding to support religious education. This would seem to rest upon a significant discounting of the core Establishment Clause concern that financial appropriations from the state to churches jeopardize both the autonomy of churches and the autonomy of the state. The second area involves the availability of exemptions from generally applicable laws based upon religious grounds. With the *Smith* decision, the Supreme Court has moved away from subjecting claims for a free exercise-based exemption from generally applicable laws to heightened scrutiny, as suggested by a conception of autonomy based upon *inter-independence*, toward presuming that such burdens are permissible as long as they are based upon laws that are neutral and general. These developments represent significant movement in the direction of a conception of autonomy based upon *interdependence* that, while influential in Europe, has for the most part not been influential in the United States, due to fears that it runs counter to the core Establishment Clause concerns about independence of church and state.

VI. IMPLICATIONS OF THESE CONCEPTIONS IN AREAS OF DISPUTE

Parts IV and V addressed the implications of the three conceptions of autonomy on a number of issues involving institutional and individual autonomy. I also discussed the approaches taken to these issues by the Supreme Court and the European Court of Human Rights and the conceptions of autonomy that underlie these outcomes. In this Part, I will discuss five significant current controversies in the United States involving the interactions of church and state and consider how each of the three conceptions of autonomy addresses these issues. These highly charged issues include school prayer, the use of educational vouchers at religious schools, charitable choice, public displays of the Ten

Commandments, and the constitutionality of the words “under God” in the Pledge of Allegiance.³⁸³

A. Prayer in Public Schools

Daily classroom prayer raises significant issues for the autonomy of the state as well as of individual children. As noted above,³⁸⁴ the centrality of public education to the state’s mission, the possibility of religious domination, and the vulnerability of children combine to make public schools a particularly interesting context to consider the implications of different conceptions of autonomy for church-state and religious liberty issues. This is in part due to the importance of public schools in the state’s mission of educating children and inculcating in the rising generation a set of attitudes and attributes that will be conducive to good citizenship. Additionally, public schools are a place where the state is particularly vulnerable to the influence or even domination by a particular religious group, since even in a large and religiously pluralistic society such as the United States, many particular locales are very religiously homogeneous. The possibility of one religious perspective dominating is heightened when the religious convictions of individual teachers are taken into account, and because for the most part there is very little oversight or supervision of what takes place within individual classrooms. Given the age and impressionability of young children, autonomy concerns about the individual children also loom large in primary and secondary school classrooms.

In contrast, it might seem that graduation prayer would present much less of a threat to the autonomy of the state. Adult supervision and oversight of the school’s practice is assured, the possibility of ensuring that a broad spectrum of religious viewpoints are represented in invocations and benedictions is much easier, and the solemn and ceremonial nature of the occasion might seem to make prayer an appropriate component of the proceedings. Graduation

383. My discussion of the Pledge of Allegiance issue is somewhat more detailed than my discussion of other issues because this issue was the subject of an important recent Supreme Court case, *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301 (2004), and remains unsettled, since the Supreme Court in *Newdow* dismissed the case for lack of standing and did not address the merits of the case. In addition, I believe the Pledge issue is an area where the value of focusing upon autonomy and competing conceptions of autonomy is a promising way to break the doctrinal logjam that surrounds establishment and free exercise issues.

384. *See supra* Part IV.B.1.

prayer would also seem to pose less of a threat to the religious autonomy of children, since a large number of adults are present and aware of what is taking place, and since the possibility of indoctrination through daily repetition of a particular viewpoint does not exist.

From the perspective of *independence*, both daily classroom prayer and graduation prayer would be prohibited, since each would represent an intrusion of religion into the public sphere. From the perspective of *interdependence*, both daily classroom prayer and graduation prayer would be unproblematic, since approved prayer would be viewed as supportive of the purposes and roles of both church and state. In addition, *interdependence* might not object to preferences being granted to one or a small number of select churches in deciding whom to invite to offer prayers.

From the perspective of *inter-independence*, however, daily classroom prayer and graduation prayer might be treated differently, since each has different implications for the autonomy of the state and of individuals present in classrooms and at graduation ceremonies. *Inter-independence* would focus upon the context and the specific implications for the independence of the state, of churches, and of individuals. Rather than entirely excluding prayer from ceremonial occasions such as public school graduation (as an *independence* model would dictate), or including only prayers of a religious majority (as an *interdependence* model might allow), an understanding of autonomy based upon *inter-independence* would recognize the importance of independence, of inclusion, of mutual respect, of commitment to a discourse of public reason and justification, and of empowerment of all members of the political community. Rather than striving completely to exclude religion from public life, or seeking a lowest common denominator that is designed to offend no one (and probably succeeds in offending nearly everyone), such a vision would encourage each of us to listen with reverence and respect to the prayers of others with religious backgrounds and faith traditions to which we do not belong. A vision of autonomy based upon inclusion would replace a vision of autonomy based upon separation.

The Supreme Court's case law on the subject of school prayer has not been sensitive to such possible distinctions but has hewn a separationist course based upon a conception of autonomy requiring

independence of church and state. In 1962, in *Engel v. Vitale*,³⁸⁵ the Supreme Court held that a state-composed prayer read aloud in public school classes violates the Establishment Clause. A year later, in *School District of Abington Township v. Schempp*,³⁸⁶ the Court held that daily Bible reading and daily recitation of the Lord's Prayer violates the Establishment and Free Exercise Clauses. And two decades later in *Wallace v. Jaffree*,³⁸⁷ the Court held that a state law authorizing a moment of silence at the beginning of the school day in public schools violates the Establishment Clause. These cases all reflect a conception of autonomy based upon *independence* of church and state. From these cases it was clear that daily classroom religious observances violated the Establishment Clause. What remained unclear was whether prayer on occasions such as school graduation or at sporting events was permissible or impermissible.

The Court answered the question regarding graduation prayer in 1992, in *Lee v. Weisman*,³⁸⁸ holding that a nonsectarian prayer offered by a Rabbi at a middle-school graduation ceremony violated the Establishment Clause because it was impermissibly coercive. The Court reasoned that “[s]tate officials direct the performance of a formal religious exercise at [the] graduation ceremonies,” and students’ “attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.”³⁸⁹ The emphasis on the coercive nature of the state action illustrates the Court’s underlying autonomy concerns. In a subsequent case, the Supreme Court held that student-sponsored prayer at a high school football game also violated the Establishment Clause.³⁹⁰ The outcome in these cases reflects a conception of autonomy based upon the *independence* of church and state.

B. *Vouchers and Other Forms of Indirect Aid to Churches*

One very controversial issue over the past several decades involving the relationship of church and state has centered on

385. 370 U.S. 421 (1962).

386. 374 U.S. 203 (1963).

387. 472 U.S. 38 (1985).

388. 505 U.S. 577 (1992).

389. *Id.* at 586.

390. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

whether parents should be able to utilize education vouchers to send their children to schools sponsored by or affiliated with a church, or that reflect a particular religious viewpoint. An extensive literature has been written assessing the advantages and disadvantages of voucher programs and the constitutionality of including religiously affiliated schools in such programs.³⁹¹ In 2002, the Supreme Court held in *Zelman v. Simmons-Harris* that religiously affiliated schools could be included in a city voucher program.³⁹² The key to the Supreme Court's analysis was the concept of neutrality and the fact that the vouchers were issued to parents who in turn decided whether or not to use the vouchers at religiously affiliated schools.³⁹³ While the Court acknowledged that in Cleveland ninety-six percent of vouchers would be used to send children to religiously affiliated schools, that seventy-six percent of the religiously affiliated schools participating in the program are affiliated with the Catholic Church, and that this would constitute a significant indirect benefit to religion, vouchers were permitted.³⁹⁴ As noted above, in 2004, the Supreme Court decided that a student studying for religious ordination can be excluded from a state-funded scholarship program.³⁹⁵

Autonomy based upon *independence* of church and state would not allow religiously affiliated schools to participate in voucher programs, since indirect as well as direct benefits to schools would be prohibited. While certain very general benefits, such as police and fire protection, and inclusion in public utilities, are not prohibited under *independence*, programs that result in public funds ending up

391. See, e.g., Allen M. Brabender, *The Crumbling Wall and Free Competition: Formula for Success in America's Schools*, 79 N.D. L. REV. 11 (2003); Suzanne Hansen, *School Vouchers: The Answer to a Failing Public School System*, 23 HAMLINE J. PUB. L. & POL'Y 73 (2001); Mark V. Tushnet, *Vouchers After Zelman*, 2002 SUP. CT. REV. 1 (2002).

392. 536 U.S. 639 (2002). The Court reasoned that the government aid program was neutral with respect to religions because the funding was dispersed to the parents who then directed the funds to religious schools in accordance with their private choice: "The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." *Id.* at 652.

393. For a critique of the concept of neutrality in religion clause jurisprudence, see Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the 'No Endorsement' Test*, 86 MICH. L. REV. 266 (1987).

394. *Zelman*, 536 U.S. at 681.

395. See *Locke v. Davey*, 540 U.S. 712 (2004), *overruling* 299 F.3d 748 (9th Cir. 2002).

1217]

The Autonomy of Church and State

in the hands of church-sponsored institutions would be prohibited. Autonomy based upon *interdependence* would allow public funding of religiously affiliated schools, both indirectly and directly. In Europe, where a model of autonomy based upon *interdependence* prevails, the European Convention does not prohibit a broad array of types of state aid to religious schools.

Autonomy based upon *inter-independence* would be very skeptical of indirect aid to religiously affiliated schools, since financial aid affects the core autonomy value of independence. From the perspective of *inter-independence*, indirect aid to parochial schools would be critically evaluated based not upon the principal of neutrality or whether parents served as an intervening mechanism, but based upon the possible effects such aid would have upon the independence of the state, the independence of churches and church-sponsored schools, and individual autonomy. A variety of threats to the independence of both institutions might militate against including parochial schools in such programs. For the state, if a large percentage of voucher recipients opt for religiously affiliated schools, this might have a negative impact upon the state's ability to conduct the core public function of educating children and inculcating in children the attitudes and attributes deemed desirable for good citizenship. Poorly performing public schools, in particular, might be further incapacitated or killed by a reduction in funding. The state's autonomy could also be undermined if a particular religious constituency wielded sufficient political power to enact voucher programs that resulted in significant financial resources being channeled to one or a few religions. For churches, their autonomy could be seriously undermined if they become dependent upon state largess, in which case they may become vulnerable to demands upon the curriculum and teaching that conflict with or even directly contradict religious tenets.

On the voucher issue, the Supreme Court has not only eschewed a conception of autonomy based upon *independence*, it has also been quite dismissive of the core autonomy concerns raised by a conception based upon *inter-independence*. In allowing religiously affiliated schools to participate in state-funded programs, and in allowing a large percentage of available funds to be channeled to a small number of religious groups, the Court has moved towards a conception of autonomy based upon *interdependence*.

C. *Charitable Choice*

Many of the same issues that come up in the voucher context are mirrored in the charitable-choice context. Excluding religiously affiliated service providers from participation in social service programs would seem to violate the principle of neutrality. On the other hand, allowing religiously affiliated organizations to receive direct state aid in furtherance, at least indirectly, of their religious mission raises significant concerns for both the autonomy of the state and of the religious groups.

A conception of autonomy based upon the *independence* of church and state would not allow religiously affiliated groups to receive direct or indirect funding to participate in social service programs. A conception of autonomy based upon *interdependence* would welcome such cooperation and integration of efforts to address serious social ills. A conception of autonomy based upon *inter-independence* would analyze the issue based upon the principles of independence, inclusion, mutual respect, and empowerment.

D. *Public Displays of the Ten Commandments*

In August of 2001, the Chief Justice of the Alabama Supreme Court, Judge Roy Moore, placed a 5200-pound statue of the Ten Commandments in the rotunda of the Alabama State Judicial Building³⁹⁶ and later refused to obey an injunction from the U.S. District Court for the Middle District of Alabama to remove it.³⁹⁷ As a result of Judge Moore's actions, a highly publicized controversy erupted over whether the public display violated the Establishment Clause.³⁹⁸ On one side of the debate, Judge Moore and his supporters argued that "[t]he real purpose of the First Amendment was and is to protect the states' and their citizenry's rights to

396. See Americans United for Separation of Church and State, Ten Commandments Display in Alabama Judicial Building Violates Constitution, Say Civil Liberties Groups (Oct. 30, 2001), at http://www.au.org/site/News2?abbr=pr&page=NewsArticle&id=6008&security=1002&news_iv_ctrl=1384.

397. See William H. Pryor, *Christian Duty and the Rule of Law*, 34 CUMB. L. REV. 1, 1 (2003) (citing *Glassroth v. Moore*, 278 F. Supp. 2d 1272 (M.D. Ala. 2003) (final judgment and injunction)).

398. Judge Moore's prominent supporters felt so strongly about the issue that "they surrounded the State Judicial Building in hopes of preventing the removal of the monument . . . compar[ing] their struggle with that of the civil rights movement led by Dr. Martin Luther King, Jr." *Id.* at 2.

acknowledge God according to the dictates of their own conscience.”³⁹⁹ Others argued that a strict separation between church and state prohibits a religious display in a public building, especially one that favors a particular religion.⁴⁰⁰ Before Judge Moore placed the statue in the rotunda, he had already sparked an earlier controversy by displaying the Ten Commandments in his courtroom and inviting local clergy to open court sessions with prayer.⁴⁰¹ Responding to public reaction following Moore’s original actions, Governor Fob James even “vowed to call out the militia to defend the Commandments if necessary.”⁴⁰² Moore was eventually removed from office for his defiance.

A conception of autonomy based upon *independence* would prohibit all religious displays on public property, including the Ten Commandments. A conception of autonomy based upon *interdependence* would permit religious displays on public property and would not demand equal treatment of minority religious viewpoints. Some religious viewpoints could be included and others excluded, based upon the state’s assessment of whether the display was desirable or not. A conception based upon *inter-independence* would focus upon the impact of the display on the autonomy of the state and of religion, based upon the principles of independence, inclusion, mutual respect, and empowerment.

Jurisprudence based upon *inter-independence* might result in nuanced differences between situations that might appear similar. For example, in the case of a state supreme court justice who is aggressively trying to make a political statement about the supremacy

399. See Hon. Roy S. Moore, *Religion in the Public Square*, 29 CUMB. L. REV. 347, 349 (1998). Moore’s supporters justified disobeying the federal court injunction because they were under a higher “legal and moral duty to acknowledge God.” Pryor, *supra* note 397, at 2.

400. One commentator noted:

If we do yield to a system such as Moore’s, we quickly are relegated to a system in which the Christian majority determines what type of prayers or documents will be posted, the result of which is a continuation and enlargement of Christian privilege. Moore’s idea that it is coercion to require Christian majority silence is mistaken. Requiring the majority, and everyone for that matter, to be silent in regards to religion in public settings is simply the removal of a privilege unsupported by any right.

Joseph R. Duncan, Jr., *Privilege, Invisibility, and Religion: A Critique of the Privilege That Christianity Has Enjoyed in the United States*, 54 ALA. L. REV. 617, 633 (2003).

401. See *id.* at 630.

402. See Jonathan P. Brose, *In Birmingham They Love the Governor: Why the Fourteenth Amendment Does Not Incorporate the Establishment Clause*, 24 OHIO N.U. L. REV. 1, 1 (1998).

of God's law over the Constitution—and the idea that judges consider themselves to be subject to a law higher (one that is not democratic) than the Constitution, which could reasonably be interpreted as an effort to communicate to dissenters and those of minority faiths that they are not equal before the law—by placing a large monument conspicuously in a state courthouse, such a display might be deemed unconstitutional based upon the effect it has on the independence of the state from the undue influence of a particular religious viewpoint.⁴⁰³

On the other hand, a relatively inconspicuous Ten Commandments monument in a public park or other place where state judicial or legislative authority is less omnipresent might be permitted. Allowing such a monument would not necessarily create a public forum in which all “religious” expressions, no matter how odious and harmful, must be allowed. The Supreme Court will have an opportunity to address a comparable situation in *Van Orden v. Perry*,⁴⁰⁴ in which it will consider whether a monument displaying the Ten Commandments on the state capitol's grounds violates the First Amendment. The monument, according to the district court and Fifth Circuit decisions, is one of many monuments on the grounds displaying the secular and religious history of the state. It might be the type of situation in which the Supreme Court might conclude, “a reasonable viewer would not see this display either as a State endorsement of the Commandment's religious message or as excluding those who would not subscribe to its religious statements.”⁴⁰⁵

If a view of autonomy based upon *inter-independence* were adopted, a complete elimination of religion from public life is not required, as would be demanded by a view of autonomy based upon total *independence* of church and state. Indeed, complete content neutrality might not be required under *inter-independence*, either. Rather, religious monuments and other forms of religious expression in public life would be assessed based upon the effect they have upon

403. The Supreme Court will be taking up a similar issue when it decides *ACLU v. McCreary County*, 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 2004 U.S. LEXIS 6693 (Oct. 12, 2004). In *McCreary*, the Sixth Circuit held that the Ten Commandments had been posted in the courthouses not for a secular purpose, or as part of some historical display, but to promote a particular religious belief. *Id.* at 449.

404. 2004 U.S. LEXIS 6691 (Oct. 12, 2004).

405. *Van Orden v. Perry*, 351 F.3d 173, 181 (5th Cir. 2003).

the independence of the state and the independence of churches and of individuals. If a type of religious expression jeopardizes or threatens the independence of the state, then that would be a ground for excluding it. If excluding a type of religious expression jeopardizes or threatens the independence of churches or their ability to be reasonably included and accommodated in public life, then that would be a ground for including such an expression. If the autonomy of speakers is unduly thwarted by excluding a type of religious expression, then that would be a ground for including it. If the autonomy of unwilling listeners is unduly thwarted by including a type of religious expression, that would be a ground for excluding it. Of course, some of these considerations will push and pull in different directions, and reasonable people will disagree about where lines should be drawn. But the likelihood of reaching appropriate answers in such disputes is enhanced if we are focusing upon the right questions.

E. The Pledge of Allegiance

In 1954, at the height of the cold war, Congress amended the text of the Pledge of Allegiance to add the words “under God.”⁴⁰⁶ In a response to a perceived threat of the spread of communism, Congress intended “the inclusion of God in our pledge . . . [to] further acknowledge the dependence of our people and our Government upon the moral directions of the Creator.”⁴⁰⁷ Including a reference to God in the Pledge of Allegiance would also “serve to deny the atheistic and materialistic concepts of communism.”⁴⁰⁸ Congress indicated that the phrase “under God” was not intended to promote the establishment of religion, emphasizing that “[a] distinction must be made between the existence of a religion as an institution and a belief in the sovereignty of God.”⁴⁰⁹ A Supreme Court decision cited in the congressional reports was used to support

406. The revised Pledge of Allegiance now reads, “I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.” 4 U.S.C. § 4 (2000).

407. H.R. REP. NO. 83-1693, at 2340 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2339.

408. *Id.*

409. *Id.*

the idea that a reference to God does not necessarily establish religion.⁴¹⁰

1. *The Newdow bombshell*

In June 2002, in *Newdow v. United States Congress*, a three-judge panel of the Ninth Circuit Court of Appeals held in a split decision that California's policy requiring the recitation of the Pledge of Allegiance in public school classrooms was a violation of the Establishment Clause because of the inclusion in the Pledge of the words "under God."⁴¹¹

Lawmakers on both sides of the aisle condemned the ruling as "outrageous," "nuts," and "stupid."⁴¹² In the immediate aftermath of the decision, "[t]he U.S. Senate was so incensed by the decision that it passed a resolution 99-0 'expressing support for the Pledge of Allegiance' and asking Senate counsel to 'seek to intervene in the case.'"⁴¹³ The House of Representatives passed a resolution 416-3 protesting the decision.⁴¹⁴ Republican House Speaker Dennis Hastert of Illinois opined, "Obviously, the liberal court in San Francisco has

410. The Court reasons that the First Amendment

[D]oes not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. . . . Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment.

Zorach v. Clauson, 343 U.S. 306, 312–13 (1952).

411. 292 F.3d 597 (9th Cir. 2002), *petitions for reh'g and petitions for reh'g en banc denied*, 321 F.3d 772 (2003). The Seventh Circuit Court of Appeals reached the opposite conclusion in a factually similar case. See *Sherman v. Consol. Sch. Dist.*, 980 F.2d 437 (7th Cir. 1992). For commentary on the correctness of the Ninth Circuit decision, see, for example, Peter Brandon Bayer, *Is Including "Under God" In the Pledge of Allegiance Lawful? An Impeccably Correct Ruling*, 11 NEV. L. 8 (2003) (defending the Ninth Circuit decision). *But see, e.g.*, Lisa Trinh, Note, *Newdow v. U.S. Congress: One Nation Indivisible*, 24 WHITTIER L. REV. 807 (2003) (arguing that contrary to the *Newdow* court's holding, the 1954 Act and the school district's policy should have passed scrutiny under the *Lemon* test).

412. *Lawmakers Blast Pledge Ruling*, June 27, 2002, at <http://archives.cnn.com/2002/LAW/06/26/pledge.allegiance/index.html?related>.

413. *Id.*

414. Jesse J. Holland, *U.S. Lawmakers Stand Up To Show Support for Pledge; House OKs Resolution Protesting Decision*, THE ASSOCIATED PRESS, June 28, 2002.

gotten this one wrong.”⁴¹⁵ Democratic Senate Majority Leader Thomas Daschle called the ruling, “just nuts.”⁴¹⁶

According to one news account, “[c]ritics of the decision were flabbergasted and warned that it calls into question the use of ‘In God We Trust’ on the nation’s currency, the public singing of patriotic songs like ‘God Bless America,’ even the use of the phrase ‘So help me God’ when judges are sworn into office.”⁴¹⁷ Other commentators focused attention on the source of the ruling, the Ninth Circuit Court of Appeals, which has a reputation for liberal activism and which has the highest rate of reversal by the Supreme Court of any of the circuits.⁴¹⁸

“Where’s a San Francisco earthquake when you really need one?” cracked the New York Post in a lead editorial titled “Left Coast Lunacy.” Even the New York Times, which editorialized that the circuit court decision was “well meaning,” dismissed the bombshell ruling saying it “trivializes” serious constitutional debates about the separation of church and state.⁴¹⁹

In the wake of the public furor, the author of the opinion, Judge Alfred Goodwin, stayed the panel’s ruling pending a review by the entire Ninth Circuit. In March 2003, the Ninth Circuit denied applications to review the case en banc and issued a modified opinion upholding the decision.⁴²⁰

415. See *Lawmakers Blast Pledge Ruling*, *supra* note 412.

416. *Flap After Court Rules Pledge of Allegiance Unconstitutional*, June 27, 2002, at <http://www.foxnews.com/story/0%2C2933%2C56310%2C00.html>.

417. *Id.*

418. Brad Knickerbocker, *One 9th Circuit Appeals Court, Under God*, CHRISTIAN SCI. MONITOR, at <http://www.csmonitor.com/2002/0808/p02s01-usju.html> (Aug. 8, 2002).

419. Josh Getlin, *In New York, It’s Outrage Followed by ‘Consider the Source,’* L.A. TIMES, June 28, 2002, at A20.

420. See *Newdow v. United States Congress*, 321 F.3d 772 (9th Cir. 2003) (denying petitions for rehearing and denying petitions for rehearing en banc). The Washington Post reported:

Over the public dissent of nine members, the 24-judge U.S. Court of Appeals for the 9th Circuit, based in San Francisco, rebuffed requests from the Bush administration and a California school district to have the court reconsider its decision last June. . . . The court did take one step back, however. Its original ruling not only barred schools from sponsoring the pledge but also struck down the 1954 federal law that officially added the words ‘Under God’ to the pledge—thus making the pledge itself unconstitutional. That was omitted from an ‘amended’ version of the court’s opinion issued yesterday.

Charles Lane, *Pledge of Allegiance Ruling Is Upheld*, WASH. POST, March 1, 2003, at A01.

2. *The Ninth Circuit's analysis*

While one can dispute whether the Ninth Circuit's decision was a correct interpretation of the Establishment Clause,⁴²¹ the panel and its defenders can claim that it represents a faithful, unremarkable application of what can only be described as the Supreme Court's confusing and chaotic doctrine in this area of the law.⁴²² As Professor Jamin Raskin said, "the case is going to have an explosive effect on public opinion but from the legal perspective, I think it's firmly rooted in the logic of prior cases."⁴²³ Indeed, the panel covers all bases by going to great lengths to analyze the case from every possible doctrinal perspective.

In a dissent from the denial of rehearing in banc, Judge O'Scannlain argues that the Ninth Circuit should have reheard the case en banc,

not because it was controversial, but because it was wrong, very wrong—wrong because reciting the Pledge of Allegiance is simply not 'a religious act' as the two-judge majority asserts, wrong as a matter of Supreme Court precedent properly understood, wrong because it set up a direct conflict with the law of another circuit, and wrong as a matter of common sense.

321 F.3d at 776–77 (O'Scannlain, J., dissenting). Judge O'Scannlain also characterizes the panel's work as "an exercise in judicial legerdemain which, not surprisingly, produced a public outcry across the nation." *Id.* at 776. Judge Reinhardt, who was a part of the original two-member majority in the *Newdow* case, writes an opinion concurring in the order to deny en banc review, in which he blasts Judge O'Scannlain's dissent on the grounds that it "reflects a serious misconception of fundamental constitutional principles and the proper role of the federal judiciary." 321 F.3d at 772 (Reinhardt, J., concurring in the order). According to Judge Reinhardt, "The dissent suggests that this court should be able to conclude that the panel's holding was erroneous by observing the 'public and political reaction' to its decision." *Id.* at 775. Judge Reinhardt states that "Article III judges are by constitutional design insulated from the political pressures governing members of the other two branches of government." *Id.* "When the federal judiciary is so firmly separated by constitutional structure from the direct influence of politics, we must not undermine that structure by allowing political pressures, polls, or 'focus groups' to influence our opinions, even indirectly." *Id.* at 776.

421. A number of interesting articles have been written about the constitutionality of the Pledge. *See, e.g.*, Steven G. Gey, "Under God," *The Pledge of Allegiance and Other Constitutional Trivia*, 81 N.C. L. REV. 1865 (2003); Abner S. Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451 (1995).

422. *See, e.g.*, Philip N. Yannella, *Stuck in the Web of Formalism: Why Reversing the Ninth Circuit's Ruling on the Pledge of Allegiance Won't Be So Easy*, 12 TEMP. POL. & CIV. RTS. L. REV. 79, 80 (2002) ("On its own terms, the opinion is a cogent and proper application of existing Supreme Court case law.").

423. Oliver Libaw, *Is the Pledge of Allegiance Religious? Supreme Court Likely to Have Final Say on First Amendment Issue*, at <http://abcnews.go.com/US/story?id=91507&page=1> (June 27, 2002).

The *Newdow* panel begins by noting that, “[o]ver the last three decades, the Supreme Court has used three interrelated tests to analyze alleged violations of the Establishment Clause in the realm of public education.”⁴²⁴ The first approach is the three-prong test set forth in *Lemon v. Kurtzman*.⁴²⁵ The second approach is the “endorsement” test first articulated by Justice O’Connor in her concurring opinion in *Lynch v. Donnelly*⁴²⁶ and later adopted by a majority of the Court in *County of Allegheny v. ACLU*.⁴²⁷ The third approach is the “coercion” test first used by the Court in *Lee v. Weisman*.⁴²⁸

Rather than attempting to divine which approach the Supreme Court would adopt in analyzing the constitutionality of the Pledge of Allegiance, the panel considered each approach seriatim and concluded that the Pledge violates each of the three tests.⁴²⁹

a. The Lemon test. In order to survive scrutiny under the *Lemon* test, the challenged conduct or policy (1) must have a secular purpose, (2) must have a principal or primary effect that neither advances nor inhibits religion, and (3) must not foster an excessive entanglement with religion.⁴³⁰ If any prong of the *Lemon* test is not satisfied, the Establishment Clause is violated.

In assessing the purpose of the words “under God” in the Pledge, the Ninth Circuit focused on the 1954 Act, which added the words to the Pledge of Allegiance, and concluded that, “[h]istorically, the primary purpose of the 1954 Act was to advance religion, in conflict with the first prong of the *Lemon* test.”⁴³¹ While defendants argued that the pledge “as a whole” has a secular

424. *Newdow v. United States Congress*, 292 F.3d 597 (9th Cir. 2002).

425. 403 U.S. 602, 612–13 (1971).

426. 465 U.S. 668, 687–88 (1984) (O’Connor, J., concurring) (allowing a crèche to be included in a multifaceted public holiday display).

427. 492 U.S. 573, 616–21 (1989) (prohibiting the display of crèche at a country courthouse).

428. 505 U.S. 577, 599 (1992) (public school graduation prayer violates the Establishment Clause).

429. 292 F.3d at 597. “In its most recent school prayer case, the Supreme Court applied the *Lemon* test, the endorsement test, and the coercion test to strike down a school district’s policy of permitting student-led ‘invocations’ before high school football games.” *Id.* at 607 (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 310–16 (2000)). “We are free to apply any or all of the three tests, and to invalidate any measure that fails any one of them.” *Id.*

430. *Lemon*, 403 U.S. at 612–13.

431. 292 F.3d at 609.

purpose—i.e., “solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society”—the Ninth Circuit took the view that it must focus specifically upon the 1954 Act⁴³² and concluded that notwithstanding Congress’s statement that the inclusion of the words “under God” was not an establishment of religion, the purpose for including the words “under God” in the Pledge was entirely religious rather than secular, and thus a violation of the purpose prong of the *Lemon* test.⁴³³

b. Endorsement. In a concurring opinion in the 1984 *Lynch* case, which allowed a nativity scene to be included in a city’s Christmas display, Justice O’Connor wrote to suggest a “clarification” of Establishment Clause jurisprudence. She argued that the establishment clause

[P]rohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions. . . . The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.⁴³⁴

The Supreme Court later adopted this endorsement test in *County of Allegheny v. ACLU*, which prohibited the display of a crèche at a county courthouse.⁴³⁵

Applying the endorsement test, the Ninth Circuit concluded that, “[i]n the context of the Pledge, the statement that the United States is a nation ‘under God’ is an endorsement of religion. It is a

432. *Id.* at 610 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984)). The panel notes that in *Wallace v. Jaffree*, which struck down Alabama’s statute mandating a moment of silence “for meditation or voluntary prayer,” the Court did so not because the final version “as a whole” lacked a secular purpose, “but because the state legislature had amended the statute specifically and solely to add the words “or voluntary prayer.” *Id.* at 610 (citing *Wallace v. Jaffree*, 472 U.S. 38, 59–60 (1985)).

433. *Id.* at 610–11.

434. *Lynch*, 465 U.S. at 687–88 (O’Connor, J., concurring).

435. 492 U.S. 573 (1989).

1217]

The Autonomy of Church and State

profession of a religious belief, namely a belief in monotheism.”⁴³⁶ According to the Ninth Circuit, the Pledge “impermissibly takes a position with respect to the purely religious question of the existence and identity of God.”⁴³⁷ The school district’s practice of teacher-led recitation of the Pledge “amounts to state endorsement” of the ideals set forth in the Pledge, and even though students are not forced to participate in reciting the Pledge, “the school district is nonetheless conveying a message of state endorsement of a religious belief when it requires public school teachers to recite, and lead the recitation of, the current form of the Pledge.”⁴³⁸ Citing Justice O’Connor’s concurring opinion in *Lynch*, the Ninth Circuit concluded that the Pledge “is an impermissible government endorsement of religion because it sends a message to unbelievers ‘that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.’”⁴³⁹

c. Coercion. In *Lee v. Weisman*, the Supreme Court utilized a “coercion” test to find unconstitutional the practice of including invocations and benedictions in the form of “nonsectarian” prayers at public school graduation ceremonies.⁴⁴⁰ Rather than applying the *Lemon* test, the *Lee* Court stated that, “at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise to act in a way which ‘establishes a [state] religion or religious faith or tends to do so.’”⁴⁴¹ The Court then held in *Lee* that graduation prayer was unduly coercive in that it put impermissible pressure on students to participate in, or at least show respect during, the prayer.⁴⁴²

With respect to the Pledge, the Ninth Circuit concluded that the

436. 292 F.3d at 607.

437. *Id.* The panel goes on to say,

[a] profession that we are a nation ‘under God’ is identical, for Establishment Clause purposes, to a profession that we are a nation ‘under Jesus,’ a nation ‘under Vishnu,’ a nation ‘under Zeus,’ or a nation ‘under no god,’ because none of these professions can be neutral with respect to religion.

Id. at 607–08.

438. *Id.*

439. *Id.* (quoting *Lynch*, 465 U.S. at 688 (O’Connor, J., concurring)).

440. 505 U.S. 577, 599 (1992).

441. *Id.* at 587 (quoting *Lynch*, 465 U.S. at 678 (alteration in original)).

442. *Id.* at 593.

policy and the Act fail the coercion test. Just as in *Lee*, the policy and the Act place students in the untenable position of choosing between participating in an exercise with religious content or protesting. As the Court observed with respect to the graduation prayer in that case: “What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.”⁴⁴³

3. *Evaluating the Ninth Circuit’s analysis*

There are two primary ways to critically analyze the Ninth Circuit’s conclusions in *Newdow*. The first is to argue that the panel misapplied the Supreme Court’s Establishment Clause doctrine concerning the permissible interactions of church and state in public schools. The second is to argue that although the Ninth Circuit’s opinion is a faithful, or at least plausible, application of that doctrine, the doctrine itself is a misguided understanding of the Establishment Clause.

Judge O’Scannlain’s dissent from the Ninth Circuit’s decision to deny an en banc rehearing of the case adopts the former approach. He argues that in *Engel v. Vitale*,⁴⁴⁴ the “fountainhead of all school prayer cases,”⁴⁴⁵ the Supreme Court “drew an explicit distinction between patriotic invocations of God on the one hand, and prayer, an ‘unquestioned religious exercise,’ on the other.”⁴⁴⁶ After reviewing the Supreme Court’s school prayer cases,⁴⁴⁷ Judge O’Scannlain concludes that two fundamental principles may be derived. First, “[f]ormal religious observances are prohibited in public schools because of the danger that they may effect an

443. 292 F.3d at 608–09 (quoting *Lee*, 505 U.S. at 592).

444. 370 U.S. 421 (1962).

445. *Newdow v. United States Congress*, 321 F.3d 772, 781 (9th Cir. 2003) (O’Scannlain, J., dissenting from denial of petitions for rehearing and denial of petitions for rehearing en banc).

446. *Id.* at 779 (Judge O’Scannlain, dissenting).

447. *Lee*, 505 U.S. at 580 (striking down school-sponsored prayers at graduation as an “overt religious exercise”); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (striking down a moment of silence law on grounds that the legislature’s sole purpose in enacting the law was to “return prayer to the public schools”); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (striking down Bible reading and recitation of the Lord’s prayer in public schools, but saying nothing about the recitation of the pledge).

establishment of religion.”⁴⁴⁸ Second, “[o]nce it is established that the state is sanctioning a formal religious exercise, then the fact that the students are not *required* to participate in the formal devotional exercises does not prevent those exercises from being unconstitutional.”⁴⁴⁹ Judge O’Scannlain concludes that the Pledge does not trigger an Establishment Clause violation because it does not involve the state directing the performance of a “formal religious exercise.”⁴⁵⁰

Judge O’Scannlain’s argument is not without merit, and had it not dismissed the case on standing, it is possible that the Supreme Court might have followed his lead and concluded that the Pledge did not raise Establishment Clause issues because it is simply not a “formal religious exercise.” In order to do so, however, it would seem that the Supreme Court would have to ignore or finesse its own doctrinal approaches to Establishment Clause cases. From the perspective of the Supreme Court’s Establishment Clause doctrine, the Ninth Circuit’s arguments in *Newdow* appear to be quite strong.

The Ninth Circuit stretches to conclude that the Pledge violates the *Lemon* test, since it is by no means clear that the Pledge should not be considered in its entirety, rather than solely from the perspective of the 1954 Act’s inclusion of the words “under God,” in which case it would seem that the primary purpose and primary effect of the Pledge is patriotic rather than religious. But it is less clear that the Pledge is not coercive, at least in the very broad sense that the Supreme Court has used to find graduation prayer to be psychologically coercive. Most tellingly, if the concepts of “endorsement” and “neutrality” are the lodestars for Establishment Clause jurisprudence, then it is difficult to see how the Pledge can survive Establishment Clause scrutiny. It seems difficult to dispute that the insertion in 1954 of the words “under God” in the Pledge “endorses” religion or is at least not “neutral” with respect to religious belief. If neutrality and endorsement are the appropriate tests for Establishment Clause cases, then the Court may be required to sweep religion completely outside of public life.

448. 321 F.3d at 778.

449. *Id.* at 782.

450. *Id.*

4. *Autonomy*

A second approach to evaluating the Ninth Circuit's conclusion in *Newdow* is to analyze the case from the perspective of autonomy. If the Establishment Clause requires the *independence* of church and state, then the inclusion of the words "under God" in the Pledge of Allegiance violates the Establishment Clause. On the other hand, if religious liberty rests upon the *interdependence* of church and state, then opposition to "under God" in the Pledge would be nonsensical. *Inter-independence*, in contrast, would focus upon the effects that school-sponsored recitation of the Pledge of Allegiance has upon the autonomy of the state, the autonomy of churches, and the autonomy of individuals.

The Pledge, at least when viewed in its entirety and not just from the perspective of the 1954 addition of the words "under God," is primarily patriotic in nature, rather than religious. It is difficult to imagine how recitation of the Pledge could undermine the autonomy of the state. Rather, it facilitates the state's goal of inculcating unity and patriotism in its citizens. It is also difficult to imagine how recitation of the Pledge undermines the autonomy of churches, or of individuals (as long as they are not forced to participate).⁴⁵¹ Listening respectfully to views we may not share, including in government-sponsored speech, does not violate individual autonomy. If I am troubled by the inclusion of the words "under God" in the pledge, I can abstain from reciting it, or I can omit those words when I participate in reciting the Pledge. From the perspective of *inter-independence*, the Pledge case is not particularly difficult, since allowing the Pledge does not pose a serious threat to the independence of either the state or of churches, and the constitutional right to opt out of saying the Pledge provides adequate protection to dissenters.

451. See *W. Va. State Bd. Of Educ. v. Barnette*, 319 U.S. 624 (1943) (reversing *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940)) (holding that a state could compel public school students to participate in a flag salute). In *Gobitis*, the Court emphasized the state's autonomy interests in facilitating national cohesion. *Gobitis*, 310 U.S. at 595 ("We are dealing with an interest inferior to none in the hierarchy of legal values. National unity is the basis of national security."). On the other hand, in *Barnette*, the Court focused on whether compulsion can be used to achieve it. *Barnette*, 319 U.S. at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

VII. CONCLUSION

Finding an adequate doctrinal framework for analyzing and deciding cases involving the relationship between church and state and religious freedom claims has proven extremely difficult, both in the United States and in Europe. I have suggested that the primary concern underlying both the Establishment Clause and the Free Exercise Clause is autonomy—of the state, of churches, and of individuals. But the cases decided by the Supreme Court over the past fifty years in this area are difficult to reconcile into a coherent body of jurisprudence in large part because the Court has vacillated among different underlying conceptions of autonomy and different assumptions about what is required in order for individuals or institutions to exercise autonomy. Two conceptions of autonomy have vied for preeminence in the United States, one based upon the ideal of complete *independence* of church and state, having separation as its goal, and the other based upon the ideal of *inter-independence*, which tries to ascertain the proper manner in which the state can accommodate religion. The European Court of Human Rights has for the most part based its religious-freedom jurisprudence upon a different conception of autonomy, one that rests upon the *interdependence* of church and state.⁴⁵²

While differing assumptions about the conditions and requirements of autonomy underlie jurisprudence in this area, to date neither the Supreme Court nor the European Court has devoted significant critical attention to the question of which of the various competing conceptions of autonomy is really the best or most appropriate understanding of what autonomy is, and what the conditions are under which it can thrive. Both courts have been for the most part silent about which conception of autonomy does the best job of capturing the conditions that will facilitate the autonomy of church and state, and the religious autonomy of individuals.

452. In several important areas of the law, however, the Supreme Court has been influenced in recent years by a conception of autonomy based upon *interdependence*. These include allowing parochial schools to receive significant money from the state in voucher programs, and eliminating heightened scrutiny over free exercise claims for exemptions from generally applicable laws. Similarly, the European Court has not exclusively relied on the *interdependence* model of autonomy; for example, with respect to oaths and requirements for office, the right to proselytize, and exceptions to generally applicable laws, the Court has tended toward a conception of autonomy based on *inter-independence*.

In this Article, I have argued that an important step toward developing a coherent approach to the interpretation of the religion clauses of the First Amendment and the religious liberty provisions of the European Convention is to think critically about the conditions that should exist to enable the state, churches, and individuals to exercise autonomy. Autonomy provides a better framework than existing doctrinal approaches for the resolution of difficult and controversial issues that arise in this area of the law. If one of these three conceptions of autonomy, or perhaps a different conception of autonomy, provides the most compelling understanding of the meaning of autonomy and the conditions and types of relationships that are necessary for autonomy to flourish, that would provide invaluable guidance for analysis and deliberation in cases involving the proper interactions of church and state and cases involving individual freedom of religion or belief.

In order to effectively analyze issues involving religious liberty and the relationship of church and state, courts should engage in a three-step analytical process. First, a court should clearly identify the autonomy interests at stake in a particular case. Sometimes one autonomy interest will be predominately at issue, while at other times there will be more than one. Clearly identifying the autonomy interests and issues in a case will help define and refine what is at stake in a case. Second, the court should define and defend a conception of autonomy to be used in comparing and evaluating the autonomy interests at stake. Since the conception of autonomy that animates the court's analysis will largely dictate the outcome in a case, it is important that the court understands and explicitly defends the conception of autonomy that it believes to be correct. Third, the court should then assess how the autonomy interests at stake coupled with the particular conception of autonomy that is appropriate apply to the case at hand. For the most part, both the Supreme Court and the European Court have failed to do this. This largely accounts for the fragmented, inconsistent, and ultimately unsatisfying jurisprudence in this area, both in Europe and in the United States.