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Church Autonomy Doctrine and the First Amendment: Striking the Right Balance between Church and State Interests

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1 Introduction

2 If “religion is a matter which lies solely between Man & his God,”¹ then there would be
3 no need for the courts to interpret the meaning of the religion clauses of the First Amendment
4 which says that, “Congress shall make no law respecting an establishment of religion, nor
5 inhibiting the free exercise thereof”² because religion would be confined to the realm of beliefs
6 only. However, religion is not just a set of unexpressed beliefs; there is a communal element to
7 it.³ Believers gather at churches, synagogues, mosques and temples to celebrate and express their
8 religious beliefs together in the form of prayer, worship services, and other rituals and practices.
9 When believers gather together in a faith community, they also make certain decisions about
10 issues such as the structure and governance of their church, where to gather, who will lead them,
11 and who can join them. Religious belief is absolutely protected under the Constitution, however
12 religiously motivated conduct does not enjoy the same the absolute protection of religious beliefs
13 because conduct affects others.⁴ “However, simply recognizing the distinction between belief
14 and conduct, as the Court did in its earliest free exercise cases, begs the question of what conduct
15 is protected. The Supreme Court has ‘rejected the idea that religiously grounded conduct is
16 always outside the protection of the Free Exercise Clause.’ The protection of conduct is, of
17 course, essential to the religious adherent since a religious faith not expressed in conduct would
18 be regarded as inauthentic in many religious traditions.”⁵ It is the communal and conduct
19 elements of religion that makes the regulation of religious conduct an issue for the courts. When

¹ Letter from Thomas Jefferson to Messrs. Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, a committee of the Danbury Baptist association in the state of Connecticut (Jan. 1, 1802), in Daniel L. Dreisbach, *Sowing Useful Truths and Principles: The Danbury Baptists, Thomas Jefferson, and the Wall of Separation*, 39 J. Church & St. 455, (1997).

² U.S. CONST. amend. I.

³ Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1389 (1981).

⁴ *Cantwell v. Conn.*, 310 U.S. 296 (U.S. 1940).

⁵ Mark E. Chopko & Michael F. Moses, *Freedom to be a Church: Confronting Challenges to the Right of Church Autonomy*, 3 Geo. J.L. & Pub. Pol’y 387, 399 (2005).

1 the government tries to regulate or intervene in the decision making of religious groups, the issue
2 of church autonomy arises.

3 Church autonomy is the right of churches to be free from government interference when
4 handling its internal affairs which include matters such as defining church governance, structure
5 and institutional identity.⁶ The concept of church autonomy dates back to the time of the
6 founding fathers. Thomas Jefferson and James Madison gave clues as to the purpose of church
7 autonomy around the time that the Constitution was adopted. Jefferson wrote in his 1802 letter
8 to the Danbury Baptists that, “[man] owes account to none other for his faith or his worship,”⁷
9 including the state. James Madison wrote, “the Religion then of every man must be left to the
10 conviction and conscience of every man; and it is the right of every man to exercise it as these
11 may dictate.”⁸ This right to exercise religion in compliance with one’s conscience is protected
12 by the First Amendment and reflects one aspect of church autonomy that protects the relationship
13 between the church and its members.⁹

14 Church autonomy is a right derived from the First Amendment. Church autonomy is
15 rooted in specific constitutional guarantees--freedom from establishment, free exercise,
16 freedom of speech --and in the right of association implicit in these explicit guarantees.
17 The First Amendment reflects a promise that a church may be distinctive; that a church
18 may be different from secular entities and other churches; that the government may not
19 impose upon a church criteria that define it; that a church may, free of government
20 intrusion and interference, exercise and enjoy those characteristics that make it what it is-
21 -in short, a promise that churches can be churches.¹⁰
22

⁶ Laycock, *supra* note 3, at 1389.

⁷ Letter from Thomas Jefferson to Messrs. Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, a committee of the Danbury Baptist association in the state of Connecticut (Jan. 1, 1802), in Daniel L. Dreisbach, *Sowing Useful Truths and Principles: The Danbury Baptists, Thomas Jefferson, and the Wall of Separation*, 39 J. Church & St. 455, (1997).

⁸ Matthew L. Harris & Thomas S. Kidd, *The Founding Fathers and the Debate Over Religion in Revolutionary America A History in Documents*, 62 (2012).

⁹ Laycock, *supra* note 3, at 1403.

¹⁰ Chopko, *supra* note 5, at 410.

1 Church autonomy implicates both the Free Exercise clause and the Establishment clause.
2 “The doctrine is rooted in both of the religion clauses, protecting a church's freedom to regulate
3 its own internal affairs by prohibiting civil court review of internal church disputes involving
4 matters of faith, doctrine, church governance, and polity.”¹¹ “The essence of church autonomy is
5 that the... church should be run by duly constituted [church] authorities and not by legislators,
6 administrative agencies, labor unions, disgruntled lay people, or other actors lacking authority
7 under church law.”¹² Church autonomy is also rooted in case law that “affirms the fundamental
8 right of churches to decide for themselves, free from state interference, matters of church
9 government as well as those of faith and doctrine.”¹³

10 This paper will argue that church autonomy is a doctrine that must be protected through
11 the balancing of the church’s interest in autonomy and the state’s interest in interfering in those
12 autonomous activities. Part I of this paper will discuss the general principles of the idea of
13 church autonomy and trace its development through relevant case law in three major areas of law
14 including property, labor and tort. Part IA will describe the development of different approaches
15 used by the courts in order to resolve church property disputes without infringing on the
16 autonomy of churches and avoiding entanglement between the civil courts and churches on the
17 basis of religious doctrinal interpretation. Part IB will discuss church autonomy in the labor
18 relations context and examine how courts treat religious employers. Part IC will talk about the
19 area of tort law and church autonomy. Part II will discuss the views of two First Amendment
20 scholars on the issue of church autonomy. Part IIA will introduce the general theory of church

¹¹ *McKelvey v. Pierce*, 173 N.J. 26, (N.J.2002).

¹² Douglas Laycock, *The Things that are not Caesar's: Religious Organizations as a Check on the Authoritarian Pretensions of the State: Church Autonomy Revisited*, 7 Geo. J.L. & Pub. Pol'y 253, 254.

¹³ *McKelvey v. Pierce*, 173 N.J. 26, (N.J.2002).

1 autonomy as proposed by Professor Douglas Laycock¹⁴ and Part IIB discusses the views of
2 Professor Marci Hamilton¹⁵ on church autonomy. Part III will compare the views of these two
3 scholars on the special issue of pedophilia in the church. Part IV will explain why Laycock's
4 general theory provides a better frame work for dealing with the issues concerning church
5 autonomy than Hamilton's scheme of legislative exemption.

6 **Part I – Church Autonomy in case law**

7 Several court decisions have confronted the issue of church autonomy in three main legal
8 contexts which are property, labor and tort. These cases illustrate the church autonomy problem
9 because courts have had to find a way to make decisions that do not to infringe on the free
10 exercise rights of churches while at the same time maintaining enough objectivity and distance
11 from religion so as not to raise Establishment clause concerns.

12 ***IA. Church Property Disputes***

13 The early cases involving disputes over church property illustrate the autonomy problem
14 through the approaches used by the courts in order to resolve those disputes. In 1969, the
15 Georgia state courts dealt with a church property dispute in *Presbyterian Church in United States*
16 *v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*¹⁶. The Presbyterian Church in the
17 United States, "an association of local Presbyterian churches governed by a hierarchical structure

¹⁴ Professor Laycock earned his B.A. from Michigan State University and his J.D. from the University of Chicago Law School. He has taught at several law schools including the University of Virginia Law School, Michigan Law School, University of Texas Law School, the University of Chicago. Professor Laycock is one of the nation's leading authorities on the law of remedies and also on the law of religious liberty.

¹⁵ Marci A. Hamilton is one of the United States' leading church/state scholars and holds the Paul R. Verkuil Chair in Public Law at the Benjamin N. Cardozo School of Law, Yeshiva University. She is the author of *Justice Denied: What America Must Do to Protect Its Children* (Cambridge University Press 2008) and *God vs. the Gavel: Religion and the Rule of Law* (Cambridge University Press 2005, 2007). She has been a columnist on constitutional issues for www.findlaw.com since 2000. She has been a visiting professor at Princeton University, New York University School of Law, Emory University School of Law, and the Princeton Theological Seminary. She was lead counsel for the City of Boerne, Texas, in *Boerne v. Flores*, 521 U.S. 507 (1997), before the Supreme Court in its seminal federalism and church/state case holding the Religious Freedom Restoration Act unconstitutional.

¹⁶ *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (U.S. 1969).

1 of tribunals which consists of, in ascending order, (1) the Church Session, composed of the
2 elders of the local church; (2) the Presbytery, composed of several churches in a geographical
3 area; (3) the Synod, generally composed of all Presbyteries within a State; and (4) the General
4 Assembly, the highest governing body”¹⁷ had a dispute with two local Presbyterian churches, the
5 Hull Memorial Presbyterian Church and Eastern Heights Presbyterian Church.¹⁸ The local
6 churches voted to separate from the general church and form an autonomous organization
7 because they believed that “certain actions and pronouncements of the general church were
8 violations of that organization's constitution and departures from the doctrine and practice in
9 force at the time of affiliation.”¹⁹ The Presbytery of Savannah, to which these churches belonged
10 in the hierarchical structure, formed an Administrative Commission to try to resolve the problem,
11 but the attempt was unsuccessful and as a result, the Commission took over the local church
12 property.²⁰ The local members did not appeal the Commission’s action to the higher church
13 bodies, the Synod of Georgia or the General Assembly, but they filed suit instead.²¹

14 The departure from doctrine standard, as articulated by Georgia law at the time, “implies
15 a trust of local church property for the benefit of the general church on the sole condition that the
16 general church adhere to its tenets of faith and practice existing at the time of affiliation by the
17 local churches.”²² The general church unsuccessfully raised the autonomy issue in a motion to
18 dismiss arguing that the “civil courts were without power to determine whether the general
19 church had departed from its tenets of faith and practice.”²³ The case went to the jury which was
20 instructed to “determine whether the actions of the general church amount to a fundamental or

¹⁷ *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. at 443.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. at 444.

1 substantial abandonment of the original tenets and doctrines of the [general church], so that the
2 new tenets and doctrines are utterly variant from the purposes for which the [general church] was
3 founded.”²⁴ The jury verdict went in favor of the local churches and the general church was
4 barred from interfering with the local church property.²⁵

5 This departure from doctrine approach presented an autonomy problem because courts
6 became involved in analyzing religious doctrine and belief and then in making a judgment about
7 who held true to those tenets.²⁶ Any judicial decision that begins to interpret beliefs is on
8 dangerous ground because these matters are at the heart of a church’s internal affairs and the idea
9 of autonomy is that churches should be free from government interference in those internal
10 matters of faith and doctrinal interpretation.²⁷

11 The Supreme Court feared the departure from doctrine standard “would lead to the total
12 subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal
13 to the secular courts and have them [sic] reversed. It is of the essence of these religious unions,
14 and of their right to establish tribunals for the decision of questions arising among themselves,
15 that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to
16 such appeals as the organism itself provides for.”²⁸

17 This Court suggested using the deference test instead which was first articulated in
18 *Watson v. Jones* decided in 1872. *Watson* was “before the application of the First Amendment to
19 the States but nonetheless informed by First Amendment considerations.”²⁹ *Watson* involved a
20 schism between the Walnut Street Presbyterian church and the larger Presbyterian church.³⁰ The

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 450.

²⁷ *Id.*

²⁸ *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 446.

²⁹ *Id.* at 445.

³⁰ *Watson v. Jones*, 80 U.S. 679 (U.S. 1872).

1 General Assembly, which is the national body of the Presbyterian Church, took a position to
2 oppose slavery.³¹ Watson was a member of the Walnut Street Church Session, which is the
3 governing body of a congregation, and had a proslavery view.³² However, the majority of the
4 members of the Walnut Street congregation were sympathetic to the antislavery view of the
5 General Assembly.³³ The General Assembly made a decision to drop Watson as an elder of the
6 church and subsequently brought suit to enjoin Watson and his supporters from taking
7 possession of the church property.³⁴

8 The Supreme Court used the deference test in order to resolve the dispute stating that,
9 “whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been
10 decided by the highest of these church judicatories to which the matter has been carried, the legal
11 tribunals must accept such decisions as final, and as binding on them, in their application to the
12 case before them.”³⁵ Given the hierarchical structure of the Presbyterian Church, once the larger
13 governing body, the General Assembly in this instance, had made the decision to drop Watson
14 from the roll the court must show deference to that decision. This deference test avoids the
15 entanglement problem that was present under the departure from doctrine standard.

16 The deference test, however, presented problems of its own. In application, it tended to
17 favor churches with a hierarchical structure, like the Presbyterian church, over congregational
18 type churches, which recognized no higher governing by above the local congregation.³⁶ “The
19 hierarchical church is less vulnerable to judicial intrusion by virtue of the fact that it has its own

³¹ Michael W. McConnell, John H. Garvey & Thomas C. Berg, *Religion & the Constitution* 296 (2nd ed. 2006).

³² McConnell, *supra* note 32, at 296.

³³ McConnell, *supra* note 32, at 296.

³⁴ McConnell, *supra* note 32, at 296.

³⁵ *Watson v. Jones* 80 U.S. at 727.

³⁶ Paul Kauper, *Church Autonomy and the First Amendment: The Presbyterian Church Cases*, 1969 Sup. Ct. Rev. 347, 355.

1 general law, procedure and organs for the authoritative resolution of internal disputes.”³⁷ On the
2 other hand, in the case of a church with a congregational polity, with the result that the local
3 congregation is autonomous and subject to majority rule, the danger of manipulation by a
4 shifting and impermanent temporal majority so as to cause a deviation from established doctrine
5 and usage is greater and consequently invites greater judicial surveillance.”³⁸ Under the
6 deference test, the property would go to the majority not necessarily those who held true to the
7 beliefs of the church, which has the potential for abuse at the congregational level.

8 After the Supreme Court invalidated Georgia’s departure from doctrine analysis, the state
9 opted for the neutral principles approach to resolving church property disputes in *Jones v. Wolf*.³⁹
10 Jones involved a schism in the Vineville Presbyterian Church of Macon, Georgia, but unlike the
11 previous cases, this was a dispute among two factions of a single local congregation; it was not a
12 dispute between the general church and the local church.⁴⁰ The two factions were members of
13 the Vineville church who wanted to separate from the Presbyterian Church United States and the
14 majority of those who did not.⁴¹ “Although the minority remained on the church rolls for three
15 years, they ceased to participate in the affairs of the Vineville church and conducted their
16 religious activities elsewhere. In response to the schism within the Vineville congregation, the
17 Augusta-Macon Presbytery appointed a commission to investigate the dispute and, if possible, to
18 resolve it. The commission eventually issued a written ruling declaring that the minority faction
19 constituted “the true congregation of Vineville Presbyterian Church,” and withdrawing from the
20 majority faction “all authority to exercise office derived from the [PCUS].”⁴² In choosing to

³⁷ Kauper, *supra* note 36, at 355.

³⁸ Kauper, *supra* note 36, at 355

³⁹ *Jones v. Wolf* 43 U.S. 595 (U.S. 1979).

⁴⁰ *Id.* at 598.

⁴¹ *Id.*

⁴² *Id.*

1 apply the neutral principles approach, the courts looked at title, deeds, relevant statutes, as well
2 as the articles of incorporation, constitution and canons of the church in order to resolve the
3 property problem.⁴³ An analysis of the deed revealed that it conveyed the property to the local
4 church, the state statutes dealing with implied trusts and the corporate charter of the Vineville
5 church did not indicate that the general church had any interest in the property, and the
6 provisions of the constitution of the general church, the Book of Church Order, concerning the
7 ownership and control of property also did not contain any language of trust in favor of the
8 general church.⁴⁴ The Georgia court held that legal title rested with the local congregation which
9 was represented by the majority faction which had retained use of the property.⁴⁵

10 The Supreme Court wrote that “the primary advantages of the neutral-principles approach
11 are that it is completely secular in operation, and yet flexible enough to accommodate all forms
12 of religious organization and polity. The method relies exclusively on objective, well-established
13 concepts of trust and property law familiar to lawyers and judges. It thereby promises to free
14 civil courts completely from entanglement in questions of religious doctrine, polity, and
15 practice.”⁴⁶

16 ***IB. Church Labor Relations Issues***

17 The second major context where the courts have had to deal with church autonomy is the
18 labor relations cases. Churches generally hire employees like priests⁴⁷ or ministers⁴⁸,
19 musicians⁴⁹ and secretaries⁵⁰ in order to carry out certain functions within the church. However,
20 religious activity is not confined to the four walls of the sanctuary; churches are also involved in

⁴³ *Jones v. Wolf*, 43 U.S. 595 (U.S. 1979).

⁴⁴ *Id.* at 603.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *E.g., Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (U.S. 1976).

⁴⁸ *E.g., Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648 (10th Cir. Colo. 2002).

⁴⁹ *E.g., Walker v. First Orthodox Presbyterian Church*, 22 Fair Empl. Prac. Cas. 762 (Cal. Super. Ct 1980).

⁵⁰ *E.g., Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F.Supp. 1363 (S.D.N.Y 1975).

1 other activities that spread their message and mission throughout the world. They build schools
2 for the formal education of children, they run other institutions like gyms⁵¹ with programs for
3 young people and hospitals to care for the sick. These activities require the hiring of employees
4 to perform the services being offered to the community by the religious body. This is when the
5 autonomy problem arises in the context of labor relations and employment.

6 The major issue in the employment context has been the development of the ministerial
7 exception for religious employers. Title VII of the 1965 Civil Rights Act “prohibits employment
8 discrimination on the basis of race, color, religion, sex and national origin.”⁵² However, Section
9 702 provides an exemption for religious employers, allowing them to discriminate on the basis of
10 religion only stating that, “this subchapter shall not apply to... a religious corporation,
11 association, educational institution, or society with respect to the employment of individuals of a
12 particular religion to perform work connected with the carrying on by such corporation,
13 association, educational institution, or society of its activities.”⁵³ The rationale behind this
14 exemption is based on the right of church autonomy because the ability to choose employees is
15 an “important part of internal church governance and can be essential to the well-being of a
16 church, for perpetuation of a church's existence may depend upon those whom it selects to
17 preach its values, teach its message, and interpret its doctrines both to its own membership and to
18 the world at large.”⁵⁴

19 In deciding whether the ministerial exception applies to a certain situation, the courts must
20 determine the answer to the important threshold question, who or what is a minister? The most

⁵¹ *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (U.S. 1987).

⁵² 42 U.S.C.S §2000e.

⁵³ 42 U.S.C.S §2000e-1(a).

⁵⁴ *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648 (10th Cir. Colo. 2002).

1 obvious answer is those who have become official members of the clergy by having been
2 ordained as ministers and priests by the church.

3 In *Serbian Eastern Orthodox Diocese v. Milivojevich*, the lower court had ordered the
4 reinstatement of a defrocked bishop holding that the church had not followed its own constitution
5 and laws.⁵⁵ However, the Supreme Court reversed because the decisions to suspend and defrock
6 the bishop were made by the “religious bodies in whose sole discretion the authority to make
7 those ecclesiastical decisions was vested”⁵⁶ and the “church autonomy doctrine prohibits civil
8 court review of internal church disputes involving matters of faith, doctrine, church governance,
9 and polity.”⁵⁷ In *Milivojevich*, the Court held that the church autonomy doctrine “applies with
10 equal force to church disputes over church polity and church administration.”⁵⁸ The practical
11 implication of a reinstatement of a clergy person whom the church has already fired is that an
12 unwanted leader would be put back on the pulpit and back in power over the people of the
13 congregation as a result of a judicial decision rather than a church decision.⁵⁹ This cuts right to
14 the heart of what the church autonomy doctrine seeks to protect, the right of religious
15 organizations “to establish their own rules and regulations for internal discipline and
16 government.” as well as the right to choose its own leaders.⁶⁰

17 The Tenth Circuit applied the ministerial exception in *Bryce v. Episcopal Church* when St.
18 Aidan's Episcopal Church fired its youth minister Lee Ann Bryce.⁶¹ Although Bryce was not
19 technically an ordained minister, her duties included leading “the youth group in a variety of
20 activities, including weekly meetings, service projects, recreational activities, social events, visits

⁵⁵ *Id.* at 719.

⁵⁶ *Id.*

⁵⁷ *Id.* at 655.

⁵⁸ *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (U.S. 1976).

⁵⁹ Laycock, *supra* note 13, at 271-272.

⁶⁰ Chopko, *supra* note 5, at 409.

⁶¹ *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d at 651.

1 to other churches, and prayer. In addition, Bryce served as an assistant music minister and as a
2 liaison between the youth and other parish ministries.”⁶² While she was employed at the church,
3 Bryce married her homosexual partner, an ordained minister, in a civil commitment ceremony.⁶³
4 Bryce was later terminated as Youth Minister because she was violating Episcopal doctrine.⁶⁴

5 Episcopal doctrine on homosexuality is articulated in the Lambeth Resolution, which is
6 the result of a conference of bishops from the worldwide Anglican communions held every
7 ten years in Lambeth, England. The 1998 Lambeth Resolution provides that ‘this conference
8 . . . in view of the teaching of Scripture, upholds faithfulness in marriage between a man and
9 a woman in lifelong union, and believes that abstinence is right for those who are not called
10 to marriage.’ The resolution also ‘rejects homosexual practice as incompatible with
11 Scripture, [but] calls on all our people to minister pastorally and sensitively to all irrespective
12 of sexual orientation and to condemn irrational fear of homosexuals.’ The resolution further
13 provides that the conference “cannot advise the legitimizing or blessing of same-sex unions,
14 nor the ordination of those involved in such unions.”⁶⁵

15
16 The court dismissed all the claims against the church, finding that they were precluded by the
17 church autonomy doctrine of the First Amendment because the church articulated doctrinal
18 reasons as basis for firing Bryce.⁶⁶

19 *Milivojevich* and *Bryce* dealt with the category of ordained and non-ordained church leaders
20 but the constitutional protection extends beyond the selection of clergy to other internal church
21 matters. The Fifth Circuit held that a sex discrimination suit by a Salvation Army officer
22 involved “matters of church administration and government and thus purely of ecclesiastical
23 cognizance and the act would violate Free exercise clause if applied.”⁶⁷ In *EEOC v. Catholic*
24 *University*, the courts applied the ministerial exception to a professor who was part of Catholic’s
25 Canon law department which was the “sole entity in the United States empowered by the Vatican

⁶² *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d at 651.

⁶³ *Id.*

⁶⁴ *Id.* at 652.

⁶⁵ *Id.*

⁶⁶ *Id.* at 653.

⁶⁷ *McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972).

1 to confer ecclesiastical degrees in canon law⁶⁸ and “members of the Canon Law Faculty perform
2 the vital function of instructing those who will in turn interpret, implement, and teach the law
3 governing the Roman Catholic Church and the administration of its sacraments. Although Sister
4 McDonough is not a priest, she is a member of a religious order who sought a tenured
5 professorship in a field that is of fundamental importance to the spiritual mission of her Church.
6 That the Canonical Statutes reserve in the Vatican a veto over appointments to tenured positions
7 in the Canon Law Faculty confirms our understanding of their pastoral and spiritual
8 significance.”⁶⁹

9 In *NLRB v. Catholic Bishop* the National Labor Relations Board sought to exercise its
10 jurisdiction over religious schools but the Supreme Court held that absent a clear intention by
11 Congress for the National Labor Relations Act to apply to religious schools, the Act is
12 unconstitutional as applied to them.⁷⁰ While the Supreme Court affirmed on these statutory
13 grounds, the bigger constitutional question in this case regarded the idea that collective
14 bargaining would interfere with ecclesiastical control of church institutions, which raised the
15 church autonomy issue.⁷¹

16 Courts have held that the faculty at a seminary were ministers and applied the rule that the
17 church-minister relationship is exempt from regulation.⁷² Some courts have said that positions
18 have to be “close to the heart of church administration”⁷³ or that there must be a doctrinal reason
19 for the discrimination rather than discrimination itself.⁷⁴ Instances where the ministerial
20 exception would not be applicable include positions at religious institutions that involve clerical

⁶⁸ *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 464 (D.C. Cir. 1996).

⁶⁹ *Id.* at 464.

⁷⁰ *NLRB v. Catholic Bishop*, 440 U.S. 490 (U.S. 1979).

⁷¹ Laycock, *supra* note 3, at 1374.

⁷² *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 282-285 (5th Cir. 1981).

⁷³ *Whitney v. Greater N.Y. Corp. of Seventh-day Adventists*, 401 F. Supp. 1363 (S.D.N.Y. 1975).

⁷⁴ *Whitney and Ritter v. Mount St. Mary's College*, 495 F.Supp 724, 729-730 (D. Md. 1980).

1 or secretarial functions.⁷⁵ From the cases, it is clear that the ministerial exception applies to
2 priests and clergy members, however, the extent of this exception and whether it applies to
3 teachers in religious schools remains unclear.

4 The Supreme Court is currently facing the question of whether “the ministerial exception...
5 which bars most employment-related lawsuits brought against religious organizations by
6 employees performing religious functions... applies to a teacher at a religious elementary school
7 who teaches the full secular curriculum, but also teaches daily religion classes, is a
8 commissioned minister, and regularly leads students in prayer and worship?”⁷⁶ The school’s
9 argument is that she is a minister because she teaches religion and the ministerial exception
10 should apply.⁷⁷ The teacher’s argument is that just because teaching religion is a part of her
11 duties, it should not be dispositive evidence that she is a minister.⁷⁸ The Supreme Court will
12 have to come up with a suitable way of determining who is a minister without becoming
13 excessively entangled in church internal affairs, which has been the struggle with balancing
14 church autonomy and state interests since the framing of the constitution.

15 The outcome of *Hosana* will depend on the Court’s willingness to give a broad interpretation
16 of the ministerial exception. There is little doubt that it applies to priests and ministers within the
17 church, but the connection to church autonomy becomes more attenuated once the activities
18 expand beyond the sanctuary. A holding that teachers in religious schools are ministers for the
19 purpose of the exception would impact a lot of employees. A holding that they are not ministers

⁷⁵ See, *EEOC v. Pac. Press Publ. Ass’n* 482 F. Supp. 1291 (N.D. Cal. 1979) *Whitney v. Greater N.Y. Corp. of Seventh-day Adventists*, 401 F. Supp. 1363 (S.D.N.Y. 1975).

⁷⁶ Brief for the Petitioner at 1, *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, No. 10-553 (U.S. June 13, 2011).

⁷⁷ Brief for the Petitioner at 2, *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, No. 10-553 (U.S. June 13, 2011).

⁷⁸ Brief in Opposition at 1, *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, No. 10-553 (U.S. January 26, 2011).

would then mean that every hiring and firing decision a religious school makes is subject to scrutiny and only those that are validly based on religious reason would not be reviewed.

IC. Tortuous Conduct of Religious Entities

The discussion on the tortuous behavior of religious entities is split into an insiders and outsiders distinction. Torts involving outsiders are different because generally those cases do not raise real First Amendment concerns; imposing liability on a church when there is a slip and fall accident on a sidewalk that it let deteriorate does not really have anything to do with religious belief or doctrine.⁷⁹ This kind of case would be a kin to the property cases using the neutral principles approach because the issue would be resolved by determining liability based on the common law principles of tort and the terms of the church's insurance policy.

Tort suits involving insiders generally have to do with actions that occur during church operations which necessarily implicate church autonomy concerns. Issues that arise in this area are in deciding on the standard of conduct that gives rise to liability and determining ascending liability within religious institutions.⁸⁰

The most common context in which these claims arise is in counseling situations. In *Nally v. Grace Community Church of the Valley*, Kenneth Nally committed suicide and his parents sued the church for malpractice, negligence, and intentional infliction of emotional distress claiming that the Pastor did not refer Kenneth to a professional for psychiatric or psychological help once his suicidal tendencies were noticed, that the church was negligent for not requiring counselors to have psychological training and that the church's teachings conflicted with Kenneth's Catholic upbringing which compounded his depression.⁸¹

⁷⁹ McConnell, *supra* note 32, at 327.

⁸⁰ McConnell, *supra* note 32, at 323.

⁸¹ *Nally v. Grace Community Church of the Valley*, 763 P.2d 948 (Cal. 1988).

1 The claims were dismissed in this particular case because “the legislature has exempted
2 the clergy from the licensing requirements applicable to marriage, family, child and domestic
3 counselors, and from the operation of statutes regulating psychologists. In so doing, the
4 Legislature has recognized that access to the clergy for counseling should be free from state
5 imposed counseling standards, and that the secular state is not equipped to ascertain the
6 competence of counseling when performed by those affiliated with religious organizations.”⁸²

7 However, the more general concern for these types of cases is that “even assuming that
8 workable standards of care could be established... difficulty arises in attempting to identify with
9 precision those to whom the duty should apply. Because of the differing theological views
10 espoused by the myriad of religions....and practice by church members, it would certainly be
11 impractical, and quite possibly unconstitutional, to impose a duty of care on pastoral counselors.
12 Such a duty would necessarily be intertwined with the religious philosophy of the particular
13 denomination or ecclesiastical teachings of the religious entity.”⁸³

14 This problem of becoming intertwined with religious philosophy is illustrated in
15 *Pleasant Glade Assembly of God v. Schubert*, where tort claims were asserted against the church
16 for the practice of laying hands on a person who was thought to be possessed.⁸⁴ The alleged
17 victim claims that she was being held down and restrained against her will, and that she suffered
18 bruises and psychological damage as result of the incident.⁸⁵ The autonomy problem arises
19 because in order to determine the liability of the church, the court would have to analyze the

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1 (Tex. 2008).

⁸⁵ *Id.*

1 practice of laying hands, which would get the courts entangled in religious beliefs about that
2 practice.⁸⁶

3 Tort claims brought by insiders are usually barred because insiders have chosen to
4 voluntarily associate themselves with the church. The voluntary association argument is that
5 when members choose to join the church, they impliedly submit to its rules and the decisions of
6 the hierarchy or governance structure it imposes.

7 **Part II – General Theories of Douglas Laycock and Marci Hamilton**

8 Professors Douglas Laycock and Marci Hamilton are two first amendment scholars who
9 have different views on the issue of church autonomy. Professor Laycock has been a staunch
10 supporter of religious liberty and the right of church autonomy.⁸⁷ Professor Hamilton has taken a
11 position that religious entities should be subject to the rule of law and generally applicable
12 standards unless they have been granted an exemption from a legislature.⁸⁸ While these two tend
13 to disagree on the value of religion, the effectiveness of the church autonomy doctrine and the
14 general scheme of how to handle problems that arise under church autonomy, they do agree that
15 the “essence of the problem is the balancing of harms”⁸⁹ but disagree yet again on how to strike
16 that balance. Their differing views are discussed below.

17 ***Part IIA. Douglas Laycock’s General Theory of Church Autonomy***

⁸⁶ *Id.*

⁸⁷ Professor Laycock has testified frequently before Congress and has argued many cases in the courts, including the U.S. Supreme Court. He recently co-edited a collection of essays, *Same-Sex Marriage and Religious Liberty*. He is Vice President of the American Law Institute, a Fellow of the American Academy of Arts & Sciences, and the 2009 winner of the National First Freedom Award from the Council on America's First Freedom.

⁸⁸ Professor Hamilton has served as constitutional and federal law counsel in many important clergy sex abuse and religious land use cases in state and federal courts, and has testified before numerous state legislatures regarding elimination of the statutes of limitations for childhood sex abuse. She is frequently asked to advise Congress and state legislatures on the constitutionality of pending legislation and to consult in cases involving important constitutional issues.

⁸⁹ Douglas Laycock, *A Syllabus of Errors*, 108 Mich. L. Rev. 1169, 1172 (2006-2007) (reviewing Marci A. Hamilton, *God vs. The Gavel: Religion and the Rule of Law* (2005)).

1 Professor Douglas Laycock has proposed a three step theory of church autonomy in his
2 1981 article entitled *Towards a General Theory of the Religion Clauses: The Case of Church*
3 *Labor Relations and the Right to Church Autonomy*.⁹⁰ First, Laycock explains church autonomy
4 as a right derived from the free exercise clause of the First Amendment.⁹¹ Second, he says that
5 this right can only be infringed upon for sufficiently compelling government interests.⁹² Third,
6 there needs to be a balancing between the right to autonomy and the state's interest in regulating
7 religious activity.⁹³ This balancing can be achieved by looking at factors such as whether the
8 activity is within the internal or external sphere of the church, the religious intensity of the
9 regulated activity and the nature and extent of the interference by government.⁹⁴

10 Laycock defines church autonomy as the right of churches to be free from government
11 interference when managing their internal affairs and own institutions.⁹⁵ These internal affairs
12 include three basic rights protected by the free exercise clause which are the bare right to conduct
13 religious activities, the right to do these things autonomously and the right to conscientious
14 objection.⁹⁶ Laycock explains the bare right to conduct religious activities as the right to “build
15 churches and schools, conduct worship services, pray, proselytize, and teach moral values. This
16 is the exercise of religion in its most obvious sense.”⁹⁷ The right to do these things
17 autonomously means that churches and other religious communities have the right to set their
18 own standards by which they will “select their own leaders, define their own doctrines, resolve
19 their own disputes, and run their own institutions.”⁹⁸ The third right to conscientious objection

⁹⁰ Laycock, *supra* note 3, at 1373.

⁹¹ Laycock, *supra* note 3, at 1388.

⁹² Laycock, *supra* note 3, at 1374.

⁹³ Laycock, *supra* note 3, at 1374.

⁹⁴ Laycock, *supra* note 3, at 1388-1389.

⁹⁵ Laycock, *supra* note 3, at 1373.

⁹⁶ Laycock, *supra* note 3, at 1388-1389.

⁹⁷ Laycock, *supra* note 3, at 1388-1389.

⁹⁸ Laycock, *supra* note 3, at 1389.

1 refers to the right to object to government policy because “one way to exercise one’s religion is
2 to follow its moral dictates.”⁹⁹ Commonly associated with objection to the military draft,
3 conscientious objection can also include a believer’s objection doing certain things that violate
4 the moral dictates of his religion like working on the Sabbath.¹⁰⁰

5 Laycock supports a broad right of church autonomy because “any activity engaged in by
6 a church as a body is an exercise of religion,”¹⁰¹ and these activities should be protected from all
7 government interference that does not constitute a compelling interest.¹⁰² Although “a church’s
8 legitimate interest in autonomy has few natural limits... at some point that interest becomes
9 sufficiently attenuated, and the government’s interest in regulation sufficiently strong, that
10 neutral regulation for secular purposes becomes consistent with free exercise. This requires a
11 balancing test, but a balancing test tilted in favor of the constitutional right. The government’s
12 interest in regulation must compellingly outweigh the church’s interest in autonomy.”¹⁰³
13 Examples of such a compelling interest include matters involving children and bodily harm.
14 Other reasons like the protection of church employees are usually illegitimate and do not count.

15 The balance that must be struck between the competing interests of the state and the right
16 to church autonomy can be achieved by looking at the internal-external distinction that Laycock
17 makes. The internal sphere is virtually immune from the law and state interest in regulating
18 these internal affairs while the external sphere presents no free exercise problem with holding
19 churches responsible to outsiders under the ordinary rules of contract, property, and tort.

⁹⁹ Laycock, *supra* note 3, at 1389.

¹⁰⁰ *E.g., Sherbert v. Verner*, 374 U.S. 398 (U.S. 1963).

¹⁰¹ Laycock, *supra* note 3, at 1390.

¹⁰² Laycock, *supra* note 3, at 1390.

¹⁰³ Laycock, *supra* note 3, at 1402.

1 The internal sphere includes the relationship between the church itself and its members,
2 those who choose to voluntarily associate with it.¹⁰⁴ Since religious activity is voluntary in
3 nature and the Courts have repeatedly recognized that those who join the church give implied
4 consent to submit to its internal government.¹⁰⁵ This sphere also includes matters related to how
5 the church defines its structure, the criteria for hiring and firing ministers, and other matters
6 related to its mission and governance. The idea of Laycock's internal sphere is that what
7 happens between the church and its members, stays between the church and its members.

8 Examining the religious intensity of the regulated activity is looking to see how closely
9 the issue is to the religious beliefs and practice of the church. For example, the church's
10 "interest in conducting a worship service is clearly greater than its interest in organizing a trip to
11 a baseball game for the church men's club... all church labor relations are internal matters, but a
12 priest's job is more intensely religious than a janitor's."¹⁰⁶ These differences must be taken into
13 account if the validity of the regulation depends on balancing the state's interest against the
14 church's interest.¹⁰⁷ Contracts the church makes with outsiders are in the external sphere, but a
15 contract for the "purchase of communion wafers has more religious significance than the
16 purchase of mop buckets."¹⁰⁸ This religious intensity factor depends on the subject matter of the
17 free exercise clause, unlike the internal-external distinction which is important in any substantive
18 freedom that involves autonomy.¹⁰⁹

19 Under Laycock's general theory, issues related to property, labor and employment, tort
20 and any other area of law would be resolved by deciding whether it was within the internal

¹⁰⁴ Laycock, *supra* note 3, at 1403.

¹⁰⁵ Laycock, *supra* note 3, at 1403. n 233 (1981).

¹⁰⁶ Laycock, *supra* note 3, at 1409.

¹⁰⁷ Laycock, *supra* note 3, at 1409.

¹⁰⁸ Laycock, *supra* note 3, at 1410.

¹⁰⁹ Laycock, *supra* note 3, at 1410.

sphere or related to the church's internal affairs. If so, then the church autonomy doctrine would bar government interference unless a compelling reason was established to justify the interference.

Part IIB. Marci Hamilton's views on Church Autonomy

Professor Marci Hamilton is not a supporter of church autonomy doctrine and takes a different approach than Professor Laycock. She believes that "there is very strong reason to doubt the soundness of a doctrine that would protect churches from legal liability based on their need for self-determination. While their right to determination of their religious belief and orthodoxy cannot be dictated by the courts, their ability to engage in conduct that harms others cannot be so unencumbered by legal obligation."¹¹⁰ because "true religious liberty recognizes an absolute right to belief and, at the same time, society's necessary power to regulate religious conduct to serve the public good."¹¹¹ She recognizes that "religion simply cannot be denied"¹¹² but insists that "society is not duty bound by any constitutional right to let [religious entities] avoid duly enacted laws, especially where their actions can harm others. To say that religious liberty must encompass the right to harm others is to turn the First Amendment on its head."¹¹³ Hamilton proposes what she calls the no-harm principle which involves subjecting religious "entities to the rule of law – unless they can prove that exempting them will cause no harm to others."¹¹⁴ Therefore, "most laws should govern religious conduct, with the only exception being when the legislature has determined that immunizing religious conduct is consistent with public welfare, health, and safety."¹¹⁵ Under this scheme, there would be no presumption of a

¹¹⁰ Marci Hamilton, *The Waterloo for the So-Called Church Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-Up*, 29 Cardozo L. Rev. 225, 237 (2007).

¹¹¹ Marci Hamilton, *God vs. the Gavel: Religion and the Rule of Law* 8 (2005).

¹¹² Hamilton, *supra* note 111, at 5.

¹¹³ Hamilton, *supra* note 111, at 7.

¹¹⁴ Hamilton, *supra* note 111, at 5.

¹¹⁵ Hamilton, *supra* note 111, at 8.

1 right of church autonomy but rather religious entities would be placed on level footing with other
2 property owners, employers, and tortfeasors. It would be up to the legislatures to grant specific
3 categorical exemptions to the general laws once the case has been made supporting such an
4 exemption. Hamilton's system would require churches to prove themselves out of the general
5 laws through an exemption as opposed to Laycock's scheme that requires the government to
6 prove itself into the internal church affairs.

7 Hamilton says that, "some religious conduct deserves freedom and some requires
8 limitation" because despite its many virtues "a great deal of religious conduct is not
9 beneficial"¹¹⁶ and therefore the legislature has to balance the competing harms when deciding on
10 whether or not to grant an exception.¹¹⁷

11 **Part III – Comparison of Laycock and Hamilton on Church Autonomy**

12 While Laycock and Hamilton seem to disagree about the importance of church
13 autonomy, their writings on the subject reveal that they agree that the essence of the church
14 autonomy problem is to "balance competing harms"¹¹⁸ but they disagree on the analytical
15 framework that should be used to achieve that balance.¹¹⁹ Hamilton writes that "the legislator's
16 task is one of balancing the value of religious liberty over and against the harm to others if a
17 religious individual or institution is permitted to act contrary to the law."¹²⁰ Laycock also
18 suggests a balancing test in the third prong of his general theory, but he suggests "a balancing
19 test tilted in favor of the constitutional right"¹²¹ to church autonomy. Both Laycock and
20 Hamilton formulate analytical schemes that tilt the scales in favor of their respective positions.

¹¹⁶ Hamilton, *supra* note 111, at 5.

¹¹⁷ Laycock, *supra* note 89, at 1172.

¹¹⁸ Laycock, *supra* note 89, at 1172.

¹¹⁹ Laycock, *supra* note 89, at 1182.

¹²⁰ Hamilton, *supra* note 111, at 297.

¹²¹ Laycock, *supra* note 3, at 1390.

1 Laycock tilts the scales in favor of church autonomy by starting with a presumption of that right
2 while Hamilton takes away that little edge that Laycock gives churches by placing the burden of
3 proof on them to show that they should be treated differently and given the exemption.

4 Laycock and Hamilton also disagree on which branch of government possesses the
5 institutional competence to strike the balance they both suggest. Hamilton argues that the
6 legislature is the “only legitimate branch”¹²² to decide these matters because “they have at their
7 disposal the power to subpoena witnesses, to hold extensive hearings, to commission studies, and
8 to elicit the views of any expert. The legislative power to study the social welfare is so large that
9 members also have the power to reject the facts and theories presented to them. In contrast, no
10 court can ignore the facts of a case, if only to determine whether the party has standing, but a
11 legislature sets its own parameters for consideration.”¹²³ Laycock criticizes Hamilton’s faith in
12 legislatures as “incomprehensible because... legislators have exempted harmful religious
13 behavior that no judge would ever exempt under a generally applicable standard.”¹²⁴
14 Legislatures are also prone to the “pressure of the political process”¹²⁵ like making deals in the
15 “back halls”¹²⁶ due to the “unmanageable demands on legislators’ time.”¹²⁷ Laycock argues that
16 these defects are inherent in the legislative process¹²⁸ and instead, “judges can devote more time
17 and attention, have a more reliable fact-finding process, and are more likely to make a principled
18 judgment that takes both sides seriously.”¹²⁹

19 Regardless of which part of government grants the exception, Hamilton criticizes church
20 autonomy as a constitutional theory that “would permit churches to believe that they are beyond

¹²² Laycock, *supra* note 89, at 1173.

¹²³ Hamilton, *supra* note 111, at 297.

¹²⁴ Laycock, *supra* note 89, at 1173.

¹²⁵ Douglas Laycock, *God vs. the Gavel: A Brief Rejoinder*, 105 Mich. L. Rev. 1545, 1546 (2006-2007).

¹²⁶ Hamilton, *supra* note 111, at 300.

¹²⁷ Laycock, *supra* note 125, at 1546.

¹²⁸ Laycock, *supra* note 125, at 1546.

¹²⁹ Laycock, *supra* note 125, at 1546.

1 the reach of the law whenever the issue involves internal affairs or clergy.”¹³⁰ The ministerial
2 exception has acted as a shield for religious employers in cases brought by clergy in many
3 jurisdictions, which seems to have led them to “assume that any decision involving clergy might
4 be immune from secular regulation.”¹³¹

5 Hamilton criticizes Laycock’s theory by claiming that it “leaves tremendous room for
6 religious organizations to harm children without accountability”¹³² because while he concedes
7 contract, property and tort law, there is no similar concession for employment and criminal
8 law.¹³³ The two exceptions to autonomy when the issue is internal involves cases with young
9 children or bodily harm but that would leave out the many clergy abuse cases involving
10 adolescents and presumably sexual touching that does not result in bodily harm.¹³⁴ Hamilton
11 argues that “society should not have to pretend that religious organizations do not engage in
12 socially dangerous behaviors, and, therefore, suffer the harmful consequences of their unchecked
13 behaviors.”¹³⁵

14 Laycock’s response to Hamilton’s critique of his theory as related to the clergy abuse
15 cases is that they do not show the error or the church autonomy doctrine but rather “show the
16 error of an absolutist, over-extended application of the church autonomy doctrine... A church’s
17 autonomy interest in reassigning known sexual abusers of children is categorically insufficient to
18 justify the resulting harm to children. It matters little whether we explain the result by finding a
19 compelling interest in this category of cases or simply by saying that the whole category is
20 outside the scope of protection for church autonomy. What matters far more is the failure to

¹³⁰ Hamilton, *supra* note 110, at 230.

¹³¹ Hamilton, *supra* note 110, at 230

¹³² Hamilton, *supra* note 110, at 237.

¹³³ Hamilton, *supra* note 110, at 238.

¹³⁴ Hamilton, *supra* note 110, at 238.

¹³⁵ Hamilton, *supra* note 110, at 237-238

distinguish these cases from cases with much more attenuated theories of causation and much broader intrusions into the church's ability to select clergy.”¹³⁶

Laycock says that “the sexual abuse of children produces a much more serious harm than the typical employment dispute, that excluding known sexual abusers is a very narrow intrusion into the church's right to select its own clergy, and that no one can have a legal right to be a religious leader for anyone who does not accept his leadership.”¹³⁷

Part IV – Laycock’s Theory Strikes the Proper Balance between the right to church autonomy and the State interests

There are several reasons why Laycock’s version of church autonomy provides a better framework in which to analysis First Amendment concerns over Hamilton’s no-harm rule and legislative exemption scheme. First, it cannot be forgotten that the founding fathers intended churches to have some degree of protection from government interference because they regarded religion as a very private matter.¹³⁸ Laycock’s general theory articulates the right of church autonomy which respected that personal domain of religious belief but also specifies when the walls of that domain can be breached; this protects both the rights of churches to be autonomous as well as those who may be harmed by them, which addresses Hamilton’s concerns.

Secondly, in order to strike a comfortable balance between the competing interests of the church and the state, extreme views on church autonomy must be abandoned, so the balancing test is more appropriate because it stays away from absolutist positions of autonomy. Absolute autonomy is untenable because of the potential for abuse like the clergy sex abuse cases. No

¹³⁶ Laycock, *supra* note 13, at 277.

¹³⁷ Laycock, *supra* note 13, at 277-278

¹³⁸ Letter from Thomas Jefferson to Messrs. Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, a committee of the Danbury Baptist association in the state of Connecticut (Jan. 1, 1802), in Daniel L. Dreisbach, *Sowing Useful Truths and Principles: The Danbury Baptists, Thomas Jefferson, and the Wall of Separation*, 39 J. Church & St. 455, (1997).

1 autonomy is unacceptable because it burdens the free exercise of religion by others and takes
2 away a right based on the mere potential for abuse.

3 Laycock's theory also provides enough flexibility to deal with problems of church
4 autonomy that will arise in the future, the clergy abuse cases being a prime example. We should
5 strive to avoid having hard cases making bad law. The clergy sexual abuse cases are an example
6 of such hard cases. These cases should be handled like all the other sexual abuse cases where the
7 offenders are teachers, parents, camp counselors, and other adults not affiliated with the church.
8 The alleged pedophile priest should be prosecuted as an individual under the criminal laws,
9 punished and sentenced for his crimes accordingly. His occupation as a priest should not afford
10 him different treatment from others who have committed the same crimes. The individual's
11 culpability raises no constitutional issue based on religion.

12 However, to say that the abuse was "religiously motivated" as Professor Hamilton says,
13 is a gross mischaracterization of the issue. One would be hard pressed to find a written doctrine,
14 expressed belief or quote from the Bible that would show Christian approval of the sexual abuse
15 of children. The Bible actually says that, "It would be better for him that a millstone were
16 hanged about his neck, and he was cast into the sea, than that he should cause one of these little
17 ones to stumble."¹³⁹ If the abuse were more correctly categorized as outside the scope of the
18 priest's religious employment, then it would be conceptually easier to separate individual
19 liability from institutional liability¹⁴⁰ and church autonomy.

20 The responsibility of the church in these cases is different from the individual.
21 Specifically regarding the Catholic Church, the decisions of churches to move priests from one
22 parish to another, or decisions not to fire priests suspected of abuse are decisions made within the

¹³⁹ *Luke 17:2* (King James).

¹⁴⁰ *Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993).

1 hierarchical church structure and clearly fall within the internal sphere of church operation. As
2 Laycock acknowledges, protection of children in this context is a compelling reason to intrude
3 into that internal sphere, but that should not mean that the right of church autonomy goes out the
4 window. What it should mean is that access to the employment files of the accused priest should
5 be granted in order to make the case against the individual perpetrator. However, use of those
6 files to make a case against the church based on its employment decisions would be barred under
7 the church autonomy doctrine. Determination of the church's liability, if any, would require its
8 own inquiry and balancing test and cannot be based on decisions that were clearly within its
9 power to make.

10 Although the way that the sexual abuse cases were handled may not have been the "right"
11 way, the courts have demonstrated a willingness to pay deference to church decisions as has been
12 illustrated by the cases concerning church property disputes and the ministerial exception in
13 particular, and in the recognition of the right to church autonomy in general.

14 **Conclusion**

15 Church autonomy has been developed through case law for several decades and in many
16 different contexts. It has been catapulted into the forefront because of the clergy sex abuse cases
17 and has been closely scrutinized. Even scholars who disagree on the issue can at least agree that
18 a balance of church and state interest must be achieved.