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FIVE MODELS OF CHURCH AUTONOMY:

AN HISTORICAL LOOK AT RELIGIOUS LIBERTY UNDER THE UNITED STATES CONSTITUTION

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I. INTRODUCTION

Church autonomy law in the United States is largely determined by the Supreme Court's interpretation of the First Amendment to the United States Constitution which declares that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof". Despite the simplicity of the statement, the Supreme Court's interpretation of this provision has been notoriously confusing and in an almost constant state of change. One particular problem has been the Court's failure to articulate a theory of religious liberty and apply that theory in a consistent manner. In the two hundred years since its adoption, the Constitution's treatment of religious liberty has varied widely from total deference towards state regulation, to special protection for religiously motivated conduct, to its current general requirement of equal treatment. Church autonomy in particular has ebbed and flowed as the Supreme Court has adopted different positions regarding the existence and scope of religious freedom in the face of generally applicable tort and property law.

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Despite the shifting positions of the US Supreme Court, however, the legal protection of religious liberty in general and church autonomy in particular has moved through fairly identifiable phases. These phases themselves represent alternative approaches or models of religious liberty and the derivative protection of church autonomy. I therefore propose to briefly sketch the five main models of religious liberty, explain how church autonomy principles might flow from such models, and then explain how each of these models has been law in the United States at different times since the adoption of the U.S. Constitution in 1787.[1] This approach presumes that church autonomy cannot be considered apart from an overall approach to religion and the law. Accordingly, I will argue that one reason for the confusing state of religious liberty jurisprudence in the United States is due to the Court's failure to identify which model is embraced by the Constitution. Finally, by using models as a descriptive tool, I hope to avoid limiting the discussion to the peculiarities of the United States Constitution. A models-based analysis can be used to analyze any legal regime's approach to the issue of church autonomy.

II. MODELS OF RELIGIOUS LIBERTY

The models I describe below follow a continuum from government favoritism to government hostility. Although certain aspects of the models overlap, and although the government may embrace some aspects of more than one model at any given time, the models are analytically distinct and provide a helpful road map to the discussion of religious liberty and church autonomy. The five models I identify are 1) religious establishment (religion is true), 2) religious freedom (religion is valuable), 3) equal protection (religion is neutral), 4) nonestablishment (religion is private), and 5) secular establishment (religion is dangerous). Below is a brief description of each model. In the following sections, I shall discuss how each model impacts questions of church autonomy, and trace the historical use of that model in the United States.

Religious Establishment (religion is true). Under this model, government regulates on the basis of religious truth. Churches are not autonomous but

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[1] Drawing the line where one model ends and another begins is, at some level, arbitrary. The same is true for distinguishing one historical period from another. Moreover, any given decision by the Supreme Court necessarily reflects (if only implicitly) a prioritizing and reconciliation of competing constitutional norms. Nevertheless, the Court's jurisprudence has been distinct enough to allow for some generalizations regarding where the law has been and where it might be going.

are subject to state regulation directed towards the end of encouraging true, and discouraging false religion. Particular religions or political views may be suppressed due to their threat to particular religious ideals.

Religious Freedom (religion is valuable). Under the religious freedom model, religion is treated as a valuable aspect of society. Accordingly, government acts in a manner that maximizes religious freedom. An important aspect of this model is the presumption that religiously motivated conduct is immune from laws significantly burdening religious exercise absent a sufficiently compelling justification.

Equal Protection (religion is neutral). Government should not use religion or religious belief as criteria for action or inaction. Discriminatory treatment of religion (either for or against) is prohibited, but not government actions that incidentally burden or benefit religion. To the extent that religious exercise shares secular aspects of other preferred rights,[2] religious expression or conduct would receive the same heightened protection.

Nonestablishment (religion is private). Nonestablishment presumes that the government should minimize actions that incidentally benefit, or positively influence, religious participation or belief. Unlike the equal protection model, under nonestablishment the government avoids incidentally benefiting religion along with analogous secular activity. Thus, religion is presumptively subject to generally applicable laws and presumptively excluded from otherwise generally available government benefit programs.

Secular Establishment (religion is dangerous). Under this model, religion is treated as a problem which requires affirmative government regulation. Law under this model tends to minimize, suppress or otherwise influence citizens away from religious belief and conduct. Like the religious establishment model, government has power to regulate religious expression and conduct on the basis of the idea or belief expressed. All religion may be regulated or only those religions that are considered to be especially dangerous to secular political ideals.

III. MODELS OF DECISION MAKING

Choosing a model of religious liberty implies a "chooser". Thus, determining the appropriate model of religious liberty also requires determining what level of government controls the decision. For example,

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[2] Such as freedom of expression, press, personal privacy, or parental rights.

power to choose the model of religious liberty could be nationalized (decided by a national legislature or constitutional court) or decentralized (decided by state legislatures or local courts). Secondly, whether local or national, the decision may be placed in the hands of courts, left in the political realm to be decided by the majority or ruling party, or a combination of the two.[3]

IV. Models of Religious Liberty and the Implications for Church Autonomy

1. Model 1: Government Establishment

As outlined above, one approach to church autonomy is to grant political institutions the power to regulate religion on the basis of religious truth. Regulatory power may either be permitted or required as a matter of fundamental law. Under this model, the state regulates religion as religion, generally by publicly adopting a religious position as true or as representing the preferred belief of the people. Laws flowing from this model could coerce or restrict religious activity (for example, criminalizing public expression of dissenting religious beliefs) or utilize the taxing powers of the state to support the preferred religion. This model does not necessarily require the suppression of all religious dissent. For example, a state might coercively tax its citizens for the support of a particular church, while at the same time tolerating the exercise of dissenting religions in order to maintain social stability.[4] In general, however, churches would have no autonomy from the regulatory power of the state. The government would have an active and religious interest in church property disputes as well as the tort liability of churches and clergy. The government's involvement would not be limited to the secular aspects of the dispute, but would extend to the

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[3] The United States currently follows this kind of dual approach. Although the Constitution generally forbids official discrimination against religion, it often permits the legislature to exempt religion from otherwise generally applicable laws that significantly burden religious exercise.

[4] I distinguish non-regulatory expressions of religious aspiration in official speeches, documents or buildings from true establishments. These kinds of aspirational statements do not have the status of law and they do not affect the rights or responsibilities of churches. Put another way, even if a government includes religious statements on its coins (for example "In God We Trust"), this does not tell us the model of religious liberty enforced by the law (though it does eliminate some possibilities, as I will outline below).

purely religious aspects of the controversy. For example, in church property disputes, courts could award the property to the faction most loyal to the preferred doctrine. Instead of merely subjecting dissenting churches to private suits, the government may prohibit altogether any religion whose beliefs are thought to encourage conduct injurious to others or the interests of the state.[5]

2. MODEL 2: RELIGIOUS FREEDOM

Under the religious freedom model, the law grants religious activity (both expression and conduct) a preferred status[6] and pursues a policy of non-intervention and exemption from otherwise generally applicable laws whenever feasible. Although religious toleration may be one aspect of a government with a religious establishment, under the establishment model, free exercise exists only to the extent it does not conflict with the goal of promoting the favored religion. Under a religious freedom model, however, the preference for religion is based on secular considerations and not an embrace of religion as truth. For example, religious belief, whatever its form (and however contradictory its various expressions), may be considered an important aspect of the society's history or culture. Also, churches and religious organizations may be viewed as important "mediating structures" between the individual and the state.[7] Finally, a government might pursue a policy of non-intervention and non-regulation due to certain assumptions regarding the peculiar psychological harms that attend the coerced violation of religious scruples. Such a policy can be pursued without committing oneself to the truth of the religious scruple in question.

Like the establishment model, and unlike the equal protection model which follows, the religious freedom model treats religious activity as an especially important or valuable activity. Religion thus receives special legislative or constitutional deference not given to potentially analogous secular

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5 Theoretically, the law could regulate or restrict the exercise of particular religions for secular reasons. For example, the law could treat the promotion of certain beliefs as creating an intolerably high risk of conduct that may be proscribed on secular grounds. However, by assessing risk according to the content of religious belief, this approach falls under the religious establishment model. Indeed, religious establishments may themselves be based on secular considerations of social stability.

6 For example, religious conduct is preferred (and protected) over mere recreational activity.

7 See *Mary Ann Glendon*, Law Communities, and the Religious Freedom Language of the Constitution, 60 Geo. Wash. L. Rev. 672 674 (1992). See also, *Mary Ann Glendon*, Structural Free Exercise, 90 Mich. Law. Rev. 477 (1991).

activities.[8] Although the model requires distinguishing religion from non-religion,[9] the distinction is made on secular considerations, not considerations of religious truth. For example, the law may apply standards to determine sincerity, or the law may limit protection to religions that have obtained a certain longevity or follow a certain organizational form.[10] Also, since (presumably) religious freedom would not be absolute, distinctions might be made regarding the degree of impact of upon religiously motivated conduct,[11] or the degree of state interest in regulating the secular effects of religious conduct.[12] Once again, however, the distinctions would be based on secular standards, and not the truth or falsity of belief.[13]

3. MODEL 3: EQUAL PROTECTION

Under the equal protection model, government avoids using religious status as a criteria for action or inaction. The government is thus neutral (or, better, agnostic) in regard to the value of religion in society. Religiously motivated conduct would be subject to all generally applicable laws, and the law would treat churches the same as analogous secular organizations. Intentional government discrimination would be prohibited. For example, religious individuals and organizations generally could not be excluded from

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8 One could view the outcome of such a balancing as promoting a kind of "neutral government effect", since the law seeks to minimize the effect of government regulation on religious conduct. See *Douglas Laycock*, Formal, Substantive, and Disaggregated Neutrality Toward Religion, 39 DePaul L. Rev. 993 (1990). In the end, however, this model is not neutral in regard to the value of religious exercise since analogous non-religious activity does not receive the same degree of protection.

9 And, to that extent, is arguably a form of established religion.

10 Although such standards may disproportionately affect certain religions, the effect would not be due to legal conclusions regarding the truth or falsity of a religious claim.

11 For example, the law might distinguish "significant" from "de minimis" burdens. Also, the law might grant churches different degrees of autonomy, depending on the church's relationship with the affected individual. For example, the law might distinguish clergy and doctrinally sensitive positions from those positions involving more secular duties in order to determine the degree of church immunity from generally applicable tort or anti-discrimination laws.

12 Law under a religious freedom model may distinguish state interests of the highest order (for example, protecting life and health) from lessor government interests (such as administrative convenience).

13 Treating religious beliefs as relevant (for example, in order to determine the degree of burden) is not the same thing as treating the religious belief as true.

government benefit programs on the basis of their religious practice or belief.

In terms of tort liability, the religious aspect of an activity neither enhances nor reduces liability of the individual or the organization. If analogous secular activity is treated as high risk and in need of special regulation or tort liability, religious activity would be treated the same way. For example, the law might impose secular standards on religious counseling due to the risk of psychological exploitation that accompanies either secular and religious counseling. Basing standards on the particular danger of a religious belief, however, would be prohibited.[14]

4. MODEL 4: NONESTABLISHMENT

This model minimizes both direct and indirect government support of religious exercise and belief. Like the equal protection model, nonestablishment prohibits coercing or restricting religious activity on the basis of religious belief. Also like the equal protection model, this approach does not grant religion preferred status under law – either in terms of deference to the decisions of church authorities or exemption from otherwise generally applicable tort and antidiscrimination laws.[15] However, where the equal protection model would allow the government to equally benefit analogous religious and secular activity, the nonestablishment model presumptively excludes religious activity and organizations from certain forms of government benefits if there is a risk of perceived government favoritism. By privatizing religion and avoiding appearances of favoritism, the nonestablishment model seeks to minimize the threat of social instability which may accompany government involvement with religion.

In many ways, nonestablishment is the reverse image of the religious freedom model. Both require the law to discriminate on the basis of religion, in this case in order to determine who can receive government benefits. Moreover, the nonestablishment model allows the government to support or subsidize secular activity even when that support has the effect of

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[14] In other words, this approach might have the effect of creating liability for "religious malpractice".

[15] Note that secular ideological organizations might receive special immunity from government interference in the case of property and personnel disputes under a legal regime that prohibits the government from establishing a particular ideological position. See generally *Kent Greenawalt*, Hands Off! Civil Court Involvement in Conflicts Over Religious Property, 98 Colum. L. Rev. 1843 (1998).

channeling people away from religion.[16] Finally, privatizing religion could be viewed as a symbol of official disapproval. Nonestablishment appears to treat religion like pornography under the U.S. Constitution – the activity is allowed, and perhaps even protected, but only as a matter of private choice. The activity is not treated as a public good, per se.[17] These disproportionate effects, however, are due to government attempts to distance itself from religion, not attempts to disfavor religion. Thus, just as the religious freedom model may incidentally increase religious activity, so the nonestablishment model may incidentally decrease religious activity.

5. MODEL 5: SECULAR ESTABLISHMENT

This approach views religion as a disfunctional aspect of the body politic. Whether due to assumptions regarding the rationality of religious believers, or the inherent destabilizing effect of religious arguments in the public square, this model goes beyond the privatizing model of nonestablishment and intentionally seeks to reduce the influence of religion in society.

In terms of church autonomy, this approach shares some aspects of equal protection and nonestablishment: all of these models prohibit religious favoritism. In cases involving church property disputes, the law would not defer to the decisions of church authorities, but instead would choose an approach that minimizes religious influence over the body politic. For example, a presumption in favor of a local church might minimize the influence of a church's governing body. As far as tort liability is concerned, secular establishment places religious activity in a disfavored (meaning high risk) category. For example, church counseling might be viewed as more dangerous than secular counseling and requiring both special regulation and tort remedies for aggrieved parishioners. The secular establishment model

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[16] A situation that arguably occurs when the government subsidizes secular public and private education, but not private religious education.

[17] Although one might argue that denying government benefits to religion is good for the "purity of religion", this is essentially a religious argument and not one that coherently can be relied upon under a nonestablishment model. A variation on this approach is to argue against including religious groups in government benefits program on the ground that such aid inevitably includes "strings" or secular conditions that the religious organization must meet in order to qualify for government aid. Once again, this is a kind of religious paternalism argument that cannot be reconciled with the principles of nonestablishment. Although such arguments are perfectly appropriate in the context of religious debate, and can be the basis for voting for or against a particular policy, the nonestablishment model requires that the law utilize (only) secular means to advance (only) secular goals.

also would minimize political activity by religious organizations and might exclude private religious activities and expression from otherwise generally available public forums.

The overall thrust of this approach is to minimize religion's influence in society by subjecting religion to rigorous regulation. Thus, as does every model except for the equal protection, this approach requires active government consideration of religion. Unlike religious freedom and nonestablishment, but like the religious establishment model, secular establishment bases regulation of religion on the content of religious belief. In fact, secular establishment is the flip side of religious establishment: both seek to coercively establish a particular view of the truth of religion.

V. MODELS OF RELIGIOUS LIBERTY IN AMERICAN CONSTITUTIONAL HISTORY

In 1789-91, the period in which the U.S. Constitution and Bill or Rights were adopted, most states followed the religious establishment model. Religious blasphemy was a criminal offense, taxes were authorized for the support of particular religions, and government offices were reserved to members of particular faiths.[18] The adoption of the First Amendment did not change this. Since only "Congress" was prevented from making laws respecting establishments or prohibiting the free exercise of religion, states remained free to regulate religion as they saw fit. In fact, the wording of the Establishment Clause actually protected state religious establishments from federal interference. Any attempt to interfere with state religious establishments would constitute a "law respecting an establishment of religion" forbidden by the establishment clause.[19]

At the federal level, although various government officials publicly expressed their support for some form of Christianity, others were unalterably opposed to government support of religion.[20] There appears to

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[18] See generally, *Leonard Levy*, The Establishment Clause (1994).

[19] See *Kurt T. Lash*, Power and the Subject of Religion, 59 Ohio St. L.J. 1069, 1100 (1998). See also *Akhil Reed Amar*, The Bill of Rights and the Fourteenth Amendment, 101 Yale L.J. 1193 (1992); *Daniel O. Conkle*, Toward a General Theory of the Establishment Clause, 82 Nw. U. L. Rev. 1113 (1988); *Edward S. Corwin*, The Supreme Court as National School Board, 14 Law & Contemp. Probs. 3 (1949); *Joseph M. Snee*, Religious Disestablishment and the Fourteenth Amendment, 1954 Wash. U. L.Q. 371.

[20] Compare *George Washington*, Proclamation: A National Thanksgiving (1789), reprinted in 5 The Founders' Constitution 94 (*Philip B. Kurland/Ralph Lerner* eds.,

have been a general consensus, however, that religion was a matter for state regulation: no federal laws were passed during this period which regulated religion on the basis of religious truth. Thus, even though most Presidents during this period issued religious proclamations, none of these acts had the effect of law. Moreover, even if most federal officials believed that religion was essential to the public good,[21] the common expectation was that individual state governments would play the central role in promoting and protecting Protestant Christianity.[22]

By the time the Fourteenth Amendment was adopted in 1868, most states had moved away from the establishment model. Although religion continued to be considered a valued activity deserving particular protection, by 1833 states no longer taxed their citizens for the support of particular churches, and by the 1840s most states had embarked on a decades-long process of disentangling religion and the common law.[23] The transition occurred to varying degrees and at a varying pace around the country.[24] Nevertheless, by the end of the nineteenth century, most state laws regulating religion as religion had disappeared. The exceptions included a few states which still limited public office holding to members of particular religions and public education which, by and large, promoted some form of Protestant Christianity, including prayer exercises and bible readings.

As states moved away from religious establishments, certain aspects of the religious freedom model began to emerge. During the Civil War, both the Union and Confederacy exempted religious pacifists from military service.[25] In one of the few religious freedom cases decided by the Supreme Court during this period, the Court ruled that state law must be interpreted to defer to the decisions of church authorities on matters involving religious doctrine. According to the Court, "the law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations . . . and to create tribunals for the decision of

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1987) with *James Madison*, Memorial and Remonstrance Against Religious Assessments (1785), *id.* at 82.

21 See *Kurt T. Lash*, The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment, 88 Nw. U.L. Rev. 1106 (1994) (discussing the perceived relationship between religious belief and democratic government in early nineteenth century America).

22 See *Kurt T. Lash*, Power and the Subject of Religion, 59 Ohio St. L.J. 1069 (1998).

23 For a discussion regarding this transformation, see Kurt T. Lash, The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle, 27 Ariz. St. L.J. 1085 (1995).

24 *Id.*

25 See *Kurt T. Lash*, The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment, 88 Nw. U.L. Rev. 1106, 1141 (1994).

controverted questions of faith within the association . . . is unquestioned".[26] Although this decision tracks a religious freedom model,[27] in Reynolds v. United States[28] the Court ruled that the Constitution did not protect religiously motivated polygamists from generally applicable laws. Much of the Court's decision in Reynolds was based upon the views of two historic figures who played a major role in the adoption of the Bill of Rights, James Madison and Thomas Jefferson.[29] The Court placed particular emphasis on Jefferson's letter to the Danbury Baptist Association in which Jefferson declared that the religion clauses had "[built] a wall of separation between church and state" and that man had "no right in opposition to social duties".[30] The rhetoric in Reynolds, as well as the holding, tracked the nonestablishment model, particularly in the Court's rejection of religious exemptions and its embrace of Jefferson's separationist views. However, it is difficult to reduce the Court's approach during this period to any one particular model. The Bill of Rights had not yet been applied to state action and the federal government did little regulating that implicated either religion clause of the First Amendment.[31] The Supreme Court thus had little opportunity to consider, much less adopt, a particular model of religious liberty.

The Court was forced to confront the issue when it nationalized religious liberty in the 1940s. In Cantwell v. Connecticut,[32] the Court ruled that the Free Exercise Clause of the First Amendment was applicable against the states by way of the Fourteenth Amendment.[33] In 1947, the Court added the Establishment Clause to the list of freedoms now protected against state action.[34] Once the First Amendment was read as binding state governments,

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26 Watson v. Jones, 80 U.S. 679, 728-29 (1872). The decision did not involve an interpretation of the United States Constitution, but rather "federal common law", meaning the proper approach of the federal courts when confronted with issues of state law.

27 The Court notes that religious bodies cannot be treated the same way as secular volunteer organizations without unduly interfering with the right to establish religious tribunals. *Id.* at 729.

28 98 U.S. 145 (1879).

29 *Id.* at 164.

30 *Id.*

31 Exceptions include the military draft and the Nineteenth Century prohibition of polygamy in the territories.

32 310 U.S. 296 (1940).

33 The Court ruled that the protections of the First Amendment had been "incorporated" into the Fourteenth Amendment's requirement that state's not deprive any person of "life, liberty or property without due process of law". U.S. Const. amend. XIV.

34 Everson v. Bd. of Ed., 330 U.S. 1 (1947).

countless state laws implicating religious exercise were now brought before the federal courts. The need for a national theory of religious liberty no longer could be avoided.

In its earliest post-incorporation decisions, the Court seemed to follow a religious freedom model. Its decisions valued religious exercise,[35] but prohibited government favoritism on the basis of religious truth.[36] Remnants of established religion in the public schools were invalidated (public school prayer and bible reading, for example[37]), and religiously motivated conduct was protected against generally applicable laws absent a compelling government interest.[38]

In the 1970s and early 1980s, however, the Court embarked on a dual theory approach to the religion clauses. Abandoning the effort to read the religion clauses as expressing different aspects of a common principle of religious liberty, the Court read the Free Exercise and Establishment Clauses to express wholly different, and at times contradictory, principles of religious liberty. In free exercise claims, religion was treated a peculiarly valuable and deserving of special government deference and protection.[39] In establishment claims, however, the Court followed a nonestablishment model in which religion was considered a private matter and the government was forbidden from providing religion equal benefits with analogous secular activity.[40]

The Court's attempt to follow two conflicting models at once resulted in two decades of confusing and contradictory opinions. For example, in free exercise cases, the government was required to specially exempt religious conduct from otherwise generally applicable law, unless the government

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35 Cantwell v. Ct., 310 U.S. 296 (1940) (protecting public religious expression); Zorach v. Clauson, 343 U.S. 306 (1952) (upholding program in which students were released from public schools to attend off-site religious instruction).

36 See McCollum v. Bd. of Ed., 333 U.S. 203 (1948)(striking down program in which public school students could choose to attend religious instruction classes on the grounds of the public schools).

37 Engle v. Vitale, 370 U.S. 421 (1962); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

38 Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).

39 See Wisconsin v. Yoder, 406 U.S. 205 (1972); Thomas v. Review Bd., 450 U.S. 707 (1981).

40 See Lemon v. Kurtzman, 403 U.S. 602 (1971); School District of Grand Rapids v. Ball, 473 U.S. 373 (1985). Some opinions by the Court seemed to imply that religion was peculiarly dangerous to public peace and stability. In its decisions denying educational funding to religious institutions, some members of the court portrayed religious education as manipulative to the point of brainwashing impressionable youth. Some justices argued that public policy debates which divided along religious lines were a danger to the proper functioning of a democratic state.

could forward a compelling reason for denying the exemption.[41] Additionally, even when not compelled to do so by the Constitution, legislatures could draft laws with special religious exemptions as long as the exemption lifted an identifiable burden from religious exercise without unduly impacting nonconsenting third parties.[42] This special deference for religion, however, conflicted with the Court's nonestablishment approach in Establishment Clause cases. Under the so-called "Lemon Test",[43] all government action must have a secular purpose, it may not have the primary effect of advancing religion, and it must not unduly entangle church and state.[44] Under this test, even if one could justify religious exemptions as furthering a secular interest, such exemptions clearly advantaged religion over analogous secular conduct. Thus, the Court's Establishment Clause jurisprudence appeared to forbid what its Free Exercise jurisprudence required.

As one might expect, church autonomy decisions during this period lacked a single coherent theory of religious liberty. In disputes over questions of religious polity, the Court followed a religious freedom which required judicial deference to church authorities.[45] Cases involving the control of church property, however, followed a nonestablishment model: although states were free to defer to the decisions of church authorities, the Constitution required only that courts avoid adjudicating questions of religious doctrine.[46] Thus, states could follow either the religious freedom model of deference to church authorities, or they could follow an equal protection model and apply the "neutral principles" of contract and property law.[47]

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41 Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972); Thomas v. Review Bd., 450 U.S. 707 (1981); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Frazee v. Dep't of Employment Security, 489 U.S. 829 (1989).

42 Church of Latter Day Saints v. Amos, 483 U.S. 327 (1987).

43 The test is named after the case in which it was announced. See Lemon v. Kurtzman, 403 U.S. 602 (1971).

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

45 See Serbian Eastern Orthodox Church v. Milivojevich, 426 U.S. 696 (1976).

46 Jones v. Wolf, 443 U.S. 595 (1979).

47 The "neutral principles" approach actually prohibits courts from considering documents and terms that would otherwise be relevant in a secular property dispute, or reading them as the parties intended they be read (which would presumably be the goal in a secular dispute). See *Kent Greenawalt*, Hands Off! Civil Court Involvement in Conflicts Over Religious Property, 98 Colum. L. Rev. 1843 (1998). For example, if the parties originally desired that secular terms in church documents be considered in light of religious doctrine, the Court's would be prevented from taking the same

Since 1990, the Court has begun to consolidate its religion clause jurisprudence around the single model of equal protection. In Employment Division v. Smith,[48] the court ruled that the Free Exercise Clause does not protect religious adherents from the burdens of generally applicable laws (exception in the narrowest of situations). Likewise, in a series of establishment cases, the Court has moved away from the nonestablishment model, and now reads the Establishment Clause as generally requiring nothing more than equal treatment.[49]

Under this equal protection model, it is generally permissible under both the Free Exercise and Establishment Clauses to treat religion as no different from analogous secular activity. However, the transition to an equal protection model is not complete; there remain aspects of the older dual-theory system. For example, even if not required to do so, legislatures retain some degree of power to exempt religiously motivated conduct from generally applicable laws.[50] Likewise (though this is less clear), there may be some room for political majorities to exclude religion from certain government benefits programs, again as a matter of political expediency, if not constitutional command.[51]

This turn towards the equal protection model may impact the way the Supreme Court approaches church autonomy cases in the future. Although the Court has not indicated that it will modify its decisions regarding church property disputes, related doctrines could be modified to reflect the equal protection model. For example, a number of lower federal courts had created a "ministerial exception" which exempted churches from nondiscrimination and wrongful termination suits brought by ministers and other persons holding doctrinally sensitive

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approach in determining which party should control the property. *Id.*

48 494 U.S. 872 (1990).

49 See Agostini v. Felton, 117 S. Ct. 1997 (1997); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986). When it comes to religious expression, equal treatment is required. See Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819 (1995).

50 This power, however, may be diminishing. Compare Church of Latter Day Saints v. Amos, 483 U.S. 327 (1987) (upholding statutory religious exemption from antidiscrimination law) with Kiryas Joel v. Grumet, 512 U.S. 687 (1994) (striking down attempt by legislature to provide a separate school district for a predominately religious community).

51 It is not yet settled whether the government may provide educational scholarships (or "vouchers") that parents may use to send their children to either secular public or private religious schools. See Jackson v. Benson, 578 N.W. 2d 602 (Wis. 1998), cert. denied, 67 U.S.L.W. 3170 (1998) (State Wisconsin Supreme Court upholding school voucher program that includes religious schools).

positions.[52] The courts reasoned that allowing suits of this kind to go forward would unduly interfere with free exercise rights of churches and their congregations. This, of course, is a religious freedom approach. However, since the Court now views religious freedom under the equal protection model, there may no longer be a constitutional justification for retaining the ministerial exception.[53] Although past Courts have been willing to maintain conflicting lines of case law, the current Court seems intent on consolidating and systematizing its approach to the religion clauses. If so, the ministerial exception may eventually be wholly displaced by the equal protection model.

VI. SUMMARY AND CONCLUSION

Failing to identify and rely on a model of religious liberty as an organizing principle for church autonomy risks the creation of contradictory and incoherent doctrine. One of the problems with religious liberty jurisprudence in the United States (at least in the past) was a failure of the Court to clearly articulate which model informed the protections of the First Amendment religion clauses. There is no a priori reason for choosing a particular model of religious liberty. The choice will depend on one's religious-political theory of government. For example, religious commitments may counsel the embrace of either a coercive establishment or religious toleration, depending on the nature the culture's beliefs. Also, cultures in which human rights are predicated on certain religious assumptions may find some form of religious establishment model appropriate. A commitment to political liberalism, on the other hand, might counsel the adoption of religious freedom, equal protection, or nonestablishment, depending on the evaluation of religion's effects on the body politic. Finally, society's in which religion is considered severely destabilizing may choose some form of the secular establishment model.

Of all the models, church autonomy appears to fare best under the religious freedom model. Under this approach, the law seeks to maximize religion's immunity from government regulation. Both religious and secular establishment models, on the other hand, seem antagonistic to the very idea of church autonomy. Although religious toleration might exist under either

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[52] See McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972); Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164 (1985).

[53] But see EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996) (distinguishing the Smith free exercise ruling from church autonomy cases).

the religious or secular establishment models, toleration would exist only at the discretion of the state. There would be no true autonomy. Finally, although to a lessor degree than under religious freedom, some form of religious autonomy can exists under either the equal protection or nonestablishment models. Neither model, for example, permits regulation of religion on the basis of religious belief.[54]

It may be possible to coherently mix the equal protection model with either (but not both) the religious freedom or nonestablishment models. For example, although the law may require that the government be no less favorable towards religion than that required by the equal protection model,[55] the law nevertheless may permit the government (perhaps through the political process) to adopt aspects of the religious freedom model.[56] Alternatively, the law may require that the government be no more favorable than that required by the equal protection model, but would permit the government to adopt aspects of the nonestablishment model.[57] Some models, however, cannot coherently be combined. For example, the law cannot coherently adopt the position that religion is of special value (religious freedom) and at the same time maintain that religion must be private (nonestablishment) or is especially dangerous (secular establishment).[58]

In this paper, I have not identified one particular model as the preferred approach to church autonomy. Again, choosing a model implicates much broader issues regarding the political and religious culture of a given society. Instead, I have identified and described different models of religious liberty in a effort to both critique law in the United States and broaden the discussion beyond the specific area of church autonomy. In the end, a coherent approach to religious liberty in general and church autonomy in particular requires identifying the model that best expresses the aspirations of the law and, in a democracy, the will of the people.[59]

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54 Thus, both models would seem to forbid resolving church property disputes on the basis of fidelity to religious doctrine.

55 Thus, forbidding intentional discrimination against religion.

56 For example, by permitting, but not requiring, the exemption of churches from otherwise generally applicable nondiscrimination laws.

57 For example, permitting but not requiring the exclusion of religious organizations from government benefits programs.

58 One cannot coherently mix these models. It is, of course, theoretically possible for the state to act incoherently.

59 The need for a unifying model of religious liberty is especially difficult in a regime where competing texts seem to call for different, and perhaps not complimentary, approaches to religious autonomy. For example, if a society's fundamental law calls for both "freedom of conscience" and "equal protection", government officials charged with interpreting the law must create some kind of hierarchy among potentially competing principles. The task in the United States has been especially

complicated by the adoption of a number of texts that potentially address the subject of religious liberty. The Religious Test Clause and the First Amendment religion clauses are obvious textual references. The Equal Protection Clause of the Fourteenth Amendment, however, can also be read as a religious liberty texts.