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CONSTITUTIONAL PROTECTION FOR CHURCH AUTONOMY: A PRACTITIONER'S VIEW

MARK E. CHOPKO[1]

In the fifth chapter of Matthew's Gospel, Jesus warns Christians about allowing their disputes with their brothers and sisters to take precedence over their lives in faith. Jesus enjoins them to seek peaceful resolution of their disputes, so as not to jeopardize their abilities to be full members of the worshiping community. In the eighteenth chapter of Matthew, the warning about disputes in the community is made more strongly as Jesus urges His followers to seek fraternal correction instead of litigation to resolve their differences. Where informal correction does not work, the parties are advised to take the matter to the Church and allow the Church the opportunity to mediate the dispute. If the person in the wrong refuses to accept the resolution proposed by the Church, that person is to be given one of the worst possible penalties; that person is to be treated as a tax collector. In chapter 6 of Paul's first letter to the Corinthians, Paul sternly asks why believers would allow their disputes to be adjudicated by the pagans? In verse 5, Paul says "I say this to shame you. Can it be that there is not one among you wise enough to be able to settle a case between brothers?"

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[1] Mr. Chopko is the General Counsel of the United States Catholic Conference, Washington, D.C., an organization through which he represents the national interests of the Roman Catholic Bishops of the United States of America. Appropriate citation to relevant common law authority is given throughout the paper. Citation form is in the style of the most accepted USA protocol: Volume number – Legal Reporter Series – Page number – (Court [if not the highest body in the jurisdiction or not obvious] & Year).

As if this were not enough, the Code of Canon Law promulgated in 1917 included a rule against Catholics suing their Bishops in civil courts over a Bishop's official actions without express permission from the Holy See.[2] This provision of the Code of Canon Law was removed when the Code was repromulgated in 1983. I arrived in 1984, as a litigation attorney in the Bishops' Conference. In my time, I have seen a tremendous increase in litigation involving Catholics against the Catholic Church – its dioceses, bishops, and institutions. Every religious community (Catholic, Protestant, Jewish, Muslim, Buddhist, etc.) in the United States reports a huge increase in the number of lawsuits filed against them by unhappy members of that faith community. Truly we live in litigious times in a litigious Society. Litigation is how we show our displeasure.

At the same time we have witnessed a dramatic rise in the role and size of governmental activities throughout the industrialized world. It is a hallmark of modern industrial society that the central government has increasingly taken on a role in providing the basic services that, at other times in human history, were provided almost exclusively by churches.[3] The increasing size of Government also meant it became more pervasive and invasive in daily life, with an increase in the number of regulatory and administrative contacts between the institutions of government and all other institutions, including churches. Regulatory conflict not only increased but became more vociferous. Litigation, sometimes initiated by churches, resulted.[4] Churches themselves struggled with how to protect their own sense of identity against the increasingly large and invasive government bureaucracies.

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2 Canon 120 of the 1917 Code of Canon Law in the Roman Catholic Church provided a "privilege of the forum" for all clerics. That privilege included the right of Bishops to be free of litigation over their ecclesiastical actions in the secular courts by Catholics unless they first obtained the permission of the Apostolic See. Violations of this privilege were to be punished with a suitable penalty including, in appropriate cases, excommunication. Canon 2341 (Code of Canon Law 1917).

3 For example, during the formative years of the United States, religious organizations performed most social services of significance. There were no free public schools. Education was for the most part in the hands of the churches. William Bower, Church and State in Education 23-24 (1944). Similarly, from a system of private alms giving, there has always been a distinctively religious character to the public benefit systems in communities. Mostly because of the nature of society and the size of government, especially after World War II, the secular political system began to encroach upon the social domain of the churches, especially churches which were unpopular.

4 United States v. Lee, 455 U.S. 252 (1982), was one the of the series of regulatory battles fought by the Amish churches with the taxing authorities. Unfortunately, the taxing authorities almost always won these battles.

As used in this paper, "church autonomy" in general means the right of religious communities (hierarchical, connectional, and congregational) to decide upon and administer their own internal religious affairs without interference by the institutions of government. In the United States, it is a protection of both personal religious liberty and institutional separation from the government. By forming religious faith communities, individuals have given personal religious liberty a corporate expression. The autonomy principles discussed here apply first and foremost to the institution, the faith community. Reasonable regulation is expected in U.S. society. Where government action threatens to invade religious precincts, however, the autonomy principles also restrain that action.

In general, my experience in the United States is that church autonomy cases consist of two categories of disputes. The first is a conflict among believers seeking to litigate the terms and conditions of, or adjudicate some dispute arising out of, their service to or membership in a religious body. In these cases, the action is undertaken either by clerics (including deacons, elders, lay ministers, seminarians) or by otherwise faithful members, specifically to contest a matter related to the religious affairs of the religious body.[5] The second is the use of governmental power to attempt to dictate a secular result usually because of the perceived failure of ecclesiastical actions. These cases are generally brought either by nonmembers or by the government itself against the churches. If the conflicts did not involve a religious body, the cases would be adjudicated on entirely different bases. Certainly, in both situations the courts are used as an element of governmental power. However, the principles and results in individual cases are more predicable in the first kind of situation than in the second. In general, believers have been unsuccessful adjudicating disputes that are related to some aspect of their membership in religious bodies. In cases brought by the government or non-members, results vary with the status of the person bringing the claim and the nature of the action complained of.

In this discussion, I refer to litigation against a "faith community". By using this term I attempt to be broadly inclusive. For definition purposes, this community includes the core religious worship institution and its ministers. Under the line of legal authority outlined here, that community will also include auxiliary institutions: primary and secondary schools, religious

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[5] Here, I wish to be strictly limited in expressing "terms and conditions of membership". I refer only to aspects of religious teaching, practice, or organization. A Catholic would be able to sue a Catholic hospital for medical malpractice, just as any injured person could. However, neither a Catholic nor an atheist would be able to sue a Catholic hospital to compel the performance of abortions forbidden under Church teaching.

charitable entities, religious colleges and universities, and hospitals. The closer the structure is to the performance of a core religious function, or the more the person involved in the dispute performs ministry (regardless of institution as long as it is religiously affiliated), the more likely that the constitutional autonomy principles outlined here will apply.[6]

In this paper I will evaluate the basis for autonomy claims under federal constitutional law,[7] and show the particular uses of the autonomy doctrine (an illustration of the general principles and application of those principles to specific cases), and some examples of individual cases. In the last section of the paper, I will offer reflections on the ways in which this situation can be improved.

I. LEGAL BASIS FOR CONSTITUTIONAL AUTONOMY CLAIMS.

The legal framework for the arguments that religious institutions make about church autonomy is the text of the First Amendment to the United States Constitution. The Religion Clauses of the First Amendment provide "Congress shall make no law respecting an Establishment of Religion, or prohibiting the Free Exercise thereof...". In this deceptively simple, 16-word text, the framers of the Constitution intended complementary protections through two clauses of a fundamental human right. This human right goes to the deepest stirring of the human imagination, that causes it to ask the most fundamental but yet the most eternal of all questions: Who am I? Why am I here? Where am I going? What shall I do along the way?[8] In my view as a practitioner and as a student of constitutional law, the Free Exercise Clause and the Establishment Clause were intended to work together to protect

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6 For example, a minister in an inter-religious social action project was held barred from litigating the economic decision of the three sponsoring religious bodies to terminate the program, on the grounds that this work was religiously motivated and that he, as a minister, was "called" to perform it (for hire). Bell v. Presbyterian Church, et al, 126 F.3d 328 (4th Cir. 1997).

7 Besides the United States federal Constitution, each of the 50 States has a Constitution that offers varying protections for religious claims. Some state constitutions offer greater, and some lesser, protections than the federal constitution. Because the variations are so wide, I have refrained from evaluating those sources of law. Every practitioner would consult them in the preparation of a case. Similarly, some statutes allow an exemption for religious entities as an accommodation to religious practices and an avoidance of potential constitutional difficulties. The main federal antidiscrimination statute has such provisions. 42 U.S.C. §§ 2000e-1(a), 2000e-2(e). Corp. of the Presiding Bishop v. Amos, 483 U.S. 327 (1987).

8 Wisconsin v. Yoder, 406 U.S. 205, 214 (1972).

religious liberty and preserve the institutional autonomy of both governmental and religious entities. I do not find it particularly useful to speak about "the separation of church and state" but rather to speak more comprehensively and sensitively about the need to protect authentic religious beliefs and exercises against governmental encroachment, and vice versa.

As I have explained elsewhere,[9] I categorize the relationships between Religion and Government as follows. Certain matters in human life belong only to Religion, and are none of the business of government. These matters would include the freedom to preach, practice, and proselytize. They would include the freedom to organize and operate a religious community institutionally separate from other secular or religious organizations in that society. Likewise, they would include the freedom for the liturgical, worship, and ritual life of that faith community. Religion enjoys the freedom, in my opinion, to select who ministers to that community in accord with its doctrine, free of interference by the government. All of these matters, at a minimum, belong only and exclusively to religion. It is no business of the state.

At the same time there are governmental interests that belong only to Government and not to religion. These would include, at a minimum, matters affecting the common defense and security. The particular mechanics of civil governance, in terms of actual decision making authority, must rest with the government and not with religion.[10] The goal of a religious practitioner in dealing with church autonomy claims is really an exercise in defining and defending the religious interests from governmental interference.[11]

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9 *Mark E. Chopko*, "Intentional Values and the Public Interest – A Plea for Consistency in Church/State Relations", 39 DePaul L. Rev. 1143, 1162-75 (1990). A summary of my views for the prior colloquium was posted at <www.acad.cua.edu/law/destro/eur>.

10 In Larkin v. Grendel's Den, 459 U.S. 116, 121-22 (1982), the Cambridge Massachusetts community gave churches veto authority over liquor licenses in the neighborhoods. The Supreme Court found that delegation of governmental decision making power to religious organizations violated the Establishment Clause of the First Amendment. That is precisely the kind of governmental authority that I refer to.

11 In the Catholic tradition, The Pastoral Constitution on the Church in the Modern World, 76 (1965), advises that the Church "is not identified in any way with the political community nor bound to any political system. She is at once a sign and safeguard of the transcendent character of the human person". This means that the ministry of the Church is exclusively religious in both origin and purpose. The Church has no special political charism. That ministry has as its primary purpose the building up of the kingdom of God through protecting human dignity, promoting

There are also other interests, where most conflict between Religion and Government occurs. These interests are legitimately thought of as being accomplished by both Religion and Government. These areas are in education, healthcare, public welfare, and charity. Most of the contemporary Church State conflict in the United States occurs in dividing the responsibility for these "shared interests" in a way that is legitimate under our constitutional framework but yet promotes effective collaboration which benefits the human community and builds up the common good. For purposes of dealing with church autonomy claims, however, religious organizations that engage in activities where the government has an interest must expect freedom to operate but subject to "reasonable" regulations. For example, religiously affiliated hospitals, and social service agencies all may operate freely in the United States, but under governmental regulations for the protection of the public's health and welfare. Even the must fundamental freedom in American society, the freedom of an individual family to educate their own children, is purchased at the price of government regulations which may dictate the scope and direction of the educational program of the schools selected.[12]

The practical question posited by church autonomy claims is an issue of remedy. All of the discussion about church autonomy presumes that some person has an injury which that person would lay at the feet of a religious institution. The issue for the practitioner is – where is the remedy, in the church or in the civil court? The resolution of this claim requires a careful consideration of a particular aspect of the general constitutional law described above. This law flows from the concept of institutional autonomy which I have described as the separation of genuinely independent religious interests from the power and encroachment of the government, usually the courts.

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human rights, cultivating the unity of the human family, and contributing a sense of meaning to human activity. See *Bryan Hehir*, "Responsibilities and Temptations of Power: A Catholic View", VIII J. Law & Religion 155, 158 (1990).

[12] Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925). Developing the history of this line of constitutional inquiry, one may consult the following sources. Walz v. Tax Commission, 397 U.S. 664 (1970), and the opinions of individual Justicies in cases such as the following. Abington Twp.. v. Schempp, 374 U.S. 203, 230 et seq .(1963) (Justice Brennan concurring, discussing the need to discover the boundaries of the civil government and religion, so as to avoid the interdependence of these otherwise independent institutions) and Wallace v. Jaffree, 472 U.S. 38, 91 et seq. (1985) (Justice Rehnquist dissenting, explaining the "legislative history" of the Establishment Clause through the debates over its drafting and ratification). See also *Chopko*, 39 DePaul L. Rev. at 1162-75, supra.

In the words of the United States Supreme Court, the government knows neither orthodoxy nor heresy. That is the role of religion. In *United States v. Ballard,*[13] Reverend Ballard was indicted for the use of mail for fraudulent purposes. The lower court refused to submit the truthfulness of his religious beliefs to the jury for decision, as Rev. Ballard requested. The United States Supreme Court decided that was the correct resolution of the question. In the words of the Court:[14]

> Men may believe what they cannot prove. They may not be put to the proof of their religious doctrine or beliefs.... Many take their Gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury, charged with the duty of determining whether those teachings contained false representations.

Because the role of answering religious questions is, under our constitutional system, exclusively the realm of religion and not the government, the courts have enforced a rule of deference to religious organizations.

After the American Civil War, the Presbyterian community was torn on questions of race relations. A Church decision settling the matter was not always accepted and the Presbyterian Church attempted to recover property from dissident churches refusing to accept racial integration. Those dissident churches sought secular remedies to resist the Church. In deferring to the decision of the Presbyterian Church on the matter, in *Watson v. Jones,*[15] the Supreme Court described a religious community as one essentially bound together by the mutual and voluntary consent of the group of believers. Because this consent was voluntarily obtained and enforced, it could not be tested, whenever disputes arose, in the civil courts. Rather, persons bound by this consent would be found to have voluntarily submitted further to the highest decision of the religious bodies. Religious organizations may organize and operate, and preach and teach without interference from the government. The remedy, if any, on these questions would lie exclusively with religion and not in the civil courts.[16] The barrier to governmental encroachment includes those that are enacted as part of affirmative

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13 322 U.S. 78 (1944); see also West Virginia v. Barnette, 319 U.S. 624 (1943).

14 322 U.S. at 86-87.

15 80 U.S. 679 (1871).

16 This statement, of course, begs the question whether a member of the faith community has the right to enforce a Church remedy on these questions. I think not. In the words of one of our courts, those members of the faith community who are offended by a decision of a religious body have the freedom, in this society, to leave the religious community and find another one better suited to their philosophy. See Struemph v. McAuliffe, 661 S.W.2d 559, 563-64 (Mo. App.1983), cert. denied, 467 U.S. 1216 (1984).

legislation as well as those urged in individual case litigation.[17] It guarantees the freedom of religious organizations to define their own polity and organization,[18] selection of clergy,[19] the control of real property in hierarchical churches,[20] and indeed, "the very process of inquiry".[21]

For completeness, it should also be noted that there is an exception to the rule of deference in cases involving the construction of deeds, contracts, or trust documents of congregational churches (those not within an ecclesiastical governing structure). The Supreme Court in *Jones v. Wolf*,[22] decided that, where a court could resolve a disputed question within such a church by reviewing the documents related to corporate structure, real property, business transactions, and similar matters (without reference to the internal practices or doctrine of the church), such judicial review would not violate the Constitution. This doctrine, called "neutral principles", is sometimes applied erroneously where a court believes it can resolve a dispute regardless of the doctrinal implications for the church. A practitioner, therefore, must not only pay attention to constitutional principle but also, because one cannot predict how a court will act, assure that all title and corporate documents can be clearly understood by judges to lead to the proper result under church doctrine.

For example, the results are not always clear when religious questions creep into the resolution of corporate issues. A synagogue owned and operated a cemetery as a separate corporation, on account of land use, regulation, and liability concerns. The bylaws of the cemetery corporation provided that all five board members must be members in good standing of the synagogue. A dispute occurred in the synagogue over a question of doctrine. A numerical majority of the synagogues believed in View A; a minority in View B. At

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17 Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952) (act of legislature to bar religious groups in Communist USSR from ownership of property, rejected), Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960) (same result, ownership contested through litigation).

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

19 Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929).

20 Presbyterian Church v. Mary Blue Hull Memorial Church, 393 U.S. 440 (1969).

21 National Labor Relations Board v. Catholic Archbishop of Chicago, 440 U.S. 490, 502 (1979). In that case, the labor authority was asked to intervene between the teachers and the religious schools of the Chicago Archdiocese. The United States Supreme Court construed the underlying legislation as not requiring union certification, in those circumstances, reasoning that the very process of inquiry by which a labor board would evaluate the facts and circumstances and settle disputes would inevitably involve the resolution of questions that, under the U.S. Constitution, were denied to government authorities.

22 443 U.S. 595 (1979).

the same time, the board of the cemetery corporation divided 3 to 2 with the congregational minority (View B) here being the board majority. The constant quarreling and fighting from the mother community has spilled over into the cemetery corporation meetings. Under the bylaws, a trustee may be removed by majority vote. The three trustees (View B) voted to exclude the two (View A) and the matter moved to the civil courts.

The two excluded trustees proffered the purpose clause of the corporate bylaws which says that the trustees must be members in good standing of the synagogue. They argued that, because the three refused to accept the majority rule in the synagogue, they are no longer members in good standing and, therefore, are themselves disqualified to hold office and vote. Urging a rule of "deference", the two asked the reviewing court to set aside their expulsion and, in fact, expel the three "dissidents". The court, however, applied "neutral principles" and, reading the plain language of the statutes and bylaws, gave effect to the language of the bylaw on removal of trustees. It avoided the question of who is qualified to serve as a trustee, holding that is a "religious" question.[23]

As a practitioner, I argue that both the Free Exercise Clause and the Establishment Clause support the concept of constitutional "church autonomy". The Free Exercise Clause prohibits governmental interference with religious activities. Although the United States Supreme Court has undermined substantially the degree of protection for religious rights against generally applicable neutral laws, in so doing, the Court cited with approval the line of cases discussed above protecting church autonomy.[24] Likewise, changes in the Supreme Court's interpretation of the Establishment Clause has not undermined the protection available to religion in the autonomy line of cases. In *Lemon v. Kurtzman,*[25] the Supreme Court was concerned about the "prohibited primary effect of inhibiting religion". The use of uniquely religious word "precincts", in describing the concern originally in *Lemon* is, in my view, indicative that religion must be protected against governmental

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[23] Beth Hamedrosh Cemetery Association v. Levy, 923 S.W.2d 439 (Mo.App. 1996).

[24] Employment Division v. Smith, 494 U.S. 872, 877 (1990). Under Smith, strict scrutiny could also be triggered by a system of individualized exemptions, which is the essence of modern litigation, shifting of the facts and circumstances in order to distinguish one situation from others. 494 U.S. at 884. Likewise, under Smith, strict scrutiny is triggered by making an argument based on "hybrid" rights, that is an argument based on religion plus one other right deserving of protection such as free speech, association, or fair process. 494 U.S. at 881. See also Thomas v. Anchorage Equal Rights Commission, 165 F.3d 692 (9th Cir. 1999) (applying a "colorable basis" test for religious claims), vacated on procedural issue, 220 F.3d 1134 (2000).

[25] 403 U.S. 602, 620 (1971).

action. The Court reaffirmed its concern about governmental conduct that could inhibit religion especially if government could become, in the Court's words, "excessively entangled" in religious matters in 1997 in *Agostini v. Felton*.[26]

II. USES OF THE CONSTITUTIONAL AUTONOMY DOCTRINE.

The application of these general legal principles is guided by a very simple question, the first question asked of any American law student on the first day of legal studies – who is suing whom for what? In applying the autonomy doctrine, it is the job of the practitioner to evaluate the litigants and their relationships to the faith community, evaluate the claim to ascertain the nature of the action complained of, and make a faithful application of the relevant law. As stated above, the practitioner in this area is defining what is within the confines of religion and protecting that religious matter against the encroachment of the government. For example, focusing on the "who" aspect of the question, one needs to explore the status of the person filing the suit within the faith community. If the person is a cleric (including someone in ministry or preparing for ministry) or a member of the faith community suing the faith community, different prohibitive rules would apply, than if the person were a bystander. In the United States, clergy often sue their sponsoring religious communities for all sorts of disputes arising out of the conduct of their ministry including salary, pension, and references. Likewise, members occasionally sue the faith community for matters arising out of their own personal experience within the community. These questions may include questions of church discipline, the possession and allocation of property, or even allegations of undue influence on account of religious doctrine. These matters will be explored at greater length in the next section of the paper.[27]

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[26] 117 S. Ct. 1997, 2015 (1997). It has long been the law in the United States that one of the principal objectives of the establishment clause is to prevent "as far as possible, the intrusion of either [religion or government] into the precincts of the other". Lemon v. Kurtzman, 402 U.S. at 614.

[27] I would not include cases filed by members based upon accidental injury. In those circumstances, the application of normal tort principles would allow recovery if the member could show that the faith community somehow had a duty to maintain the premises or other property in such a way to avoid injury caused to the member. Except for unincorporated churches where members are barred from suing the association (a rule of imputed liability in the law of associations, secular and religious), litigation of tort claims unrelated to the conduct or operations of religious institutions do not involve the autonomy principle. Occasionally, however, when a

Where the person suing the faith community is the government seeking to enforce its regulations (such as a ban against discrimination in hiring, as one example), there may be constitutional defenses available under the autonomy doctrine. Similarly, where a bystander's suit against a faith community premises liability on the application of religious doctrine to him, that claim (or perhaps the entire case) may be barred. In this latter group of cases, the result would depend on whether the action complained of was inside or outside the scope of some religious duty or action, or was entirely secular.

As one analyzes and evaluates the claim, it is the burden of the practitioner clearly to articulate the facts and circumstances on which the claim (or the proffered defense) will rest. If special religious functions are involved in either the description of the claim or the nature of the defense that must be interposed, application of the autonomy line of cases may be appropriate. Moreover, if the evaluation of the case by a court would impose some special burden as the case moves forward, for example, by establishing a standard of care based exclusively on religious notions or requiring the evaluation of religious doctrine or choice, the autonomy doctrine might control. As Professor Robert Destro has indicated, vague and generalized claims of right are more difficult to prove and easier to attack.[28] In my view, it works both ways: general defenses are easier for the courts to reject. Practitioners must carefully evaluate the facts and circumstances and bear the burden of demonstrating why some exemption from the rules would control in these circumstances. The full explication of how this theory works in practice is beyond the scope of this presentation but would be a useful subject for further evaluation and discussion.

III. SOME SPECIFIC KINDS OF CASES AND RESULTS

1. CLERGY SUING THE FAITH COMMUNITY

The general rule is that those considered clergy or ministers within the faith community (a definition that will vary according to religious doctrine and the nature of the faith community) may not litigate the terms and conditions of their ministry or adjudicate alleged failures within the religious

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litigant attempts to place liability on a part of a religious institution unrelated to the tortious practice, the principle will be used. See notes 37-39, infra.

[28] *Robert Destro*, "Developments in Liability Theories and Defenses", 37 Catholic Lawyer 83 (1996).

community in a civil court.[29] The general prohibition against clergy litigating with their faith communities extends to all forms and variety of claims. This bar would include contract claims based on allegations that the faith community had defaulted on obligations for salary or other benefits.[30] The same would be true of pension claims which are, under U.S. law, variations of contract claims.[31] The same would be true if tort or discrimination claims were filed by ministers complaining about various alleged injuries arising out of their relationship to their church body. Most commonly these claims relate to being subjected to a disciplinary process (characterized as intentional infliction of emotional distress), or the failure to obtain desired references (characterized as defamation).[32] When clergy file lawsuits alleging discriminatory treatment in violation of federal or state civil rights laws, the religious bodies claim the protection of a particular application of the autonomy principle known as the "ministry exception". The leading example of these cases is *McClure v. Salvation Army*,[33] and the exception is sometimes also known as the *McClure* rule.

Not every clergy-related claim is rejected, and when that happens I think the courts are in error. A number of courts have also found case specific exceptions sometimes creating a "neutral principles" review for contract or tort claims involving clerics. The principal examples are in the areas of defamation[34], invasion of privacy,[35] and occasionally state antidiscrimination

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29 Gonzalez v. Archbishop of Manila, supra.

30 Green v. United Pentecostal Church, 899 S.W.2d 28 (Tex. App. 1995); McElroy v. Guilfoyle, 589 A.2d 1082 (N.J. Super. 1990) (Secular contract remedies barred, in lieu of existing church-related remedies in church courts).

31 Kaufmann v. Sheehan, 707 F.2d 355 (8th Cir. 1983); Basich v. Board of Pension, 540 N.W.2d 82 (Minn. App. 1995), cert. denied, 519 U.S. 810 (1996).

32 Higgins v. Maher, 258 Cal. Rptr. 757 (Cal. App. 1989), cert. denied, 493 U.S. 1080 (1990); Hutchinson v. Thomas, 798 F.2d 392 (6th Cir. 1986). To the same effect is the treatment of sexual harassment claims filed by ministers against their churches. Because of the ministry relationships involved, the courts have been reluctant to offer a remedy in these cases. Himaka v. Buddhist Churches, 917 F. Supp. 698 (N.D. Cal. 1995). The same would be true for sex discrimination claims generally when filed by ministry employees against their religious employers, such as where the employee is a faculty member on a Canon Law faculty and the institution is a church-related university. Equal Employment Opportunity Commission v. Catholic University of America, 83 F.3d 455 (D.C. Cir. 1996).

33 460 F.2d 553 (5th Cir.), cert. denied, 409 U.S. 896 (1972).

34 Marshall v. Munro, 845 P.2d 424 (Alaska 1993) (providing a claim to litigate an alleged truthful but uncomplimentary reference).

35 Alberts v. Devine, 479 N.E.2d 113 (Mass.), cert. denied, 474 U.S. 1013 (1985) (use of medical information to make assessment for new assignment constitutes violation of medical privacy).

rules. There was even an example of a court allowing a federal sexual harassment claim by a seminarian against his religious superiors.[36] In many of these cases, the constitutional argument, in my opinion, had not been adequately made at an early stage in the litigation. There are also occasional cases where clerics have exhausted ecclesiastical remedies but a local church refuses to follow the decision of church courts. In at least one case, a cleric enforced an ecclesiastical judgment in the civil courts.[37]

2. A FAITHFUL MEMBER AGAINST THE FAITH COMMUNITY

Many of the complaints launched by members against their faith community involve quintessential religious questions. It would seem to be beyond question that those matters would lie outside the competence of the secular courts. Nonetheless, "hope springs eternal", and litigants persist. Under U.S. law, there is no right to enforce a religious duty.[38] There is no right to reformulate the ecclesiastical structure or polity to fit one's theory of the case.[39] Unless the denomination itself vests overall responsibility in some

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[36] That case, Bollard v. Society of Jesus, 196 F.3d 940 (9th Cir. 1999), has recently been settled. The religious community in the United states regards the case as inviting more litigation by ministers against their religious communities. A principal error is the assumption by the court that a process of seminary formation is "employment" for purposes of federal labor law. That error, among others, caused several judges on that court to write a strong protest. 211 F.3d 1331 (2000).

[37] Dobrota v. Free Serbian Orthodox Church, 952 P.2d 1190 (Ariz. App. 1998). On balance, however, the better rule is the one articulated by the California Court of Appeals in a case involving a University Chaplain and a Christian university in March 1999:

"It matters not whether such an employment decision is based on doctrine or economics. It is irrelevant whether the action involves hiring, firing or discipline or simply changes the terms and conditions of the employment. The rule is about as absolute as a rule of law can be: The First Amendment guarantees to a religious institution the right to decide matters affecting its ministers' employment, free from the scrutiny and second-guessing of the civil courts."

Schmoll v. Chapman University, 83 Cal. Rptr.2d 426, 427 (Cal. App. 1999).

[38] Catholic Bishop of San Diego v. Superior Court, 15 Cal.Rptr.2d 399(Cal.App. 1996); O'Connor v. Diocese of Honolulu, 885 P.2d 361(Haw. 1994); Cherepski v. Walker, 913 S.W. 2d 761 (Ark. 1996).

[39] Roman Catholic Archbishop v. Superior Court, 15 Cal.App.3d 405, 93 Cal. Rptr. 338 (1971)(rejecting alter ego). In that case, a purchaser of a St. Bernard dog from a Swiss abbey sued the Roman Catholic Archbishop of San Francisco as the "alter ego" of the Abbey, alleging that all Catholic institutions were related through the allegedly monolithic Catholic Church. A trial court ruled in his favor. However, on appeal, the California courts got it right: Catholic institutions are ecclesiastically and

church-wide body for the matter in question, there is generally no right to insist that the entire faith community answer for the misadventures of a few.[40] Finally, there is no clergy malpractice claim recognized under U.S. law. Alleging that a cleric acted as "an unreasonable minister" to establish malpractice liability is another attempt to involve the civil courts in adjudicating by religious standards. Does one compare Rabbis with Rabbis? Does one compare Priests with Ministers? These kinds of questions are denied answers in the civil courts.[41]

In other kinds of claims generally alleging violations of the otherwise applicable secular law, the courts give remedies or not depending on the status of the person within the faith community and the nature of the claim. When a non-ordained person in fact exercises ministry, the courts have been willing to defer to church decision making.[42] When the person, for example, a lay or religious employee, is not engaged in ministry, the ordinary civil remedies may not constitutionally be denied them by the courts in response to their faith communities.[43] Similarly, whether a person has a cause of

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civilly separate from each other.

40 Compare Olson v. Magnuson, 457 N.W. 2d 394 (Minn. App. 1990) (national entity reserved decision to itself), with Eckler v. General Council of the Assemblies of God, 784 S.W. 2d 935 (Tex. App. 1990) (local body retains decision making authority under church doctrine). Accord. N.H. v. Presbyterian Church-USA, 1999 Okla. 88, 998 P.2d 592. Only one case has ever found the entire church wide body potentially liable for a problem and that is a case which, in my opinion, is wrongly decided and contrary to the all of the other authority. Barr v. United Methodist Church, 153 Cal. Rptr. 322 (Cal. App. 1979). To insist that a faith community bear responsibility contrary to its own religious doctrine is a constitutional affront and a violation of the autonomy principle.

41 *Mark E. Chopko*, "Ascending Liability of Religious Entities for the Actions of Other", 17 Am.J. Trial Adv. 289, 335 (1993); F.G. v. MacDonell, 696 A. 2d 697 (N.J. 1997); Schmidt v. Bishop, 779 F. Supp. 321, 326-27 (S.D.N.Y. 1991); Dausch v. Rykse, 52 F. 3d 1425 (7th Cir. 1994).

42 Starkman v. Evans, 18 F. Supp.2d 630 (E.D. La. 1998), affirmed, 198 F.3d 173 (5th Cir. 1999) (rejecting disabilities claim for director of music ministry*);* Clapper v. Chesapeake Conf., 1998 WL 904528 (4th Cir. 1998) (rejecting age and race discrimination claims for religious school teacher).

43 Smith v. Privette, 495 S.E.2d 395 (N.C. App. 1998) (sexual harassment claim allowed for church secretary);Welter v. Seton Hall Univ., 608 A.2d 206 (NJ 1992) (breach of contract claim allowed for religious sister against diocesan university where the sister was a computer science instructor and not a ministry employee). See Equal Employment Opportunity Commission (EEOC) v. Diocese of Raleigh, 48 F. Supp.2d 505, 512 (E.D.N.C. 1999)(rejecting claim brought by former director of music ministry), distinguished in Smith v. Raleigh District, United Methodist Church, 63 F. Supp.2d 694, 706 (E.D.N.C. 1999)(protecting non-ministry lay

action for an ecclesiastical discipline question is related to whether the person was a member (or not) of the religious community at the time the alleged action was to have been taken.[44] The status of the claimant, the nature of the claim, and the relative balance of equities seems to govern in this area of the law.

3. THE GOVERNMENT AGAINST THE FAITH COMMUNITY

Conflicts with government authority are unavoidable. Whether the religious community prevails on grounds of constitutional autonomy principles is speculative. There is no general pattern to the cases except that religious institutions generally lose confrontations with the state taxing authorities (even when they argue that some core religious function is being impeded).[45] Whether they prevail in conflict with antidiscrimination authorities turns on the factors evaluated above in "church member" cases.[46]

An area of particular conflict is in the area of land use and zoning regulation. As parts of the United States continue to expand, there are numerous clashes between churches attempting to grow with population and land use authorities attempting to limit growth through a number of devices including restrictions on hours of operation, size of buildings and parking, and, even,

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employees).

44 Guinn v. Collinsville Church of Christ, 775 P.2d 766 (Okla. 1989). There, an Evangelical Church disciplined members, condemning them from the pulpit for alleged sexual improprieties. The resulting defamation was not actionable during the time in which the plaintiff was a member of the church. The court reasoned that, by her consent to be a part of a religious community, she consented to the rules and the discipline of the community. However, once she left the faith community, as she was free to do, the court allowed a claim against the church for continuing to defame her. As the United States Supreme Court said in *Ballard* (supra), people may believe what they cannot see and they cannot be accountable for that. When people bind themselves to a faith community, the church autonomy principle would guard the faith community against the civil consequences to a person changing his or her mind. The same general principle is applicable in a related area of the law called "undue influence". In "undue influence" cases, usually a disgruntled former member seeks restitution of gifts made to their faith community which they now allege were induced by fraud. The cases divide based on whether the alleged fraud involves an act of faith (prohibited) or an objectively verifiable fact (permitted). Compare Re The Bible Speaks, 869 F.2d 628, 641-42 (1st Cir. 1989) (claim allowed); with Anderson v. Worldwide Church of God, 661 F. Supp. 1400 (D. Minn. 1987) (not allowed).

45 United States v. Lee, supra; Swaggert Ministries v. Board of Equalization, 493 U.S. 378 (1990).

46 See EEOC v. Catholic University, supra; McClure v. Salvation Army, supra.

in some places, on the numerical size of the congregation or the school. In other parts of the country, the need is for demolition and consolidation as the faith community loses population to the parts of the country that still continue to grow. The clash there results from the hope of secular historic preservation groups to avoid the loss of buildings that once were part of local heritage.[47] Many churches simply do not have the resources to maintain the buildings and for protracted litigation in these matters. In addition, the rule in *Employment Division v. Smith* means that generally applicable zoning laws are applied to the detriment of churches, because they are applied to all structures in the same way. Thus, even if a church can afford litigation, it might not prevail under the *Smith* rule.[48]

In the area of labor regulation, federal courts have adopted a rule narrowly construing the federal labor statutes so as to avoid a constitutional clash, as was the case in *N.L.R.B. v. Catholic Bishop of Chicago*, discussed above. The same result is not always obtained under state labor statutes, where the courts have tended to enforce state statutes with the hope that a clash on religious issues will not occur.[49] Occasionally, however, the courts recognize

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47 Churches generally do not prevail in these clashes on Free Exercise grounds. Keeler v. City of Cumberland, 940 F. Supp. 879 (D.Md. 1996), is instructive. There, a federal district court held the federal Religious Freedom Restoration Act (infra note 47) unconstitutional. On further consideration, the court held the refusal of the City to grant a demolition permit violated the Church's free exercise of religion. However, the court held that the remedy was money damages, not an injunction. The parties settled their differences and the building was demolished.

48 The Religious Freedom Restoration Act, 42 U.S.C. 2000bb, et seq. (1993), was passed to provide a statutory remedy guaranteeing strict judicial scrutiny for all cases involving a religious exercise claim. The Supreme Court declared that Act unconstitutional as it concerned the states in 1997. City of Bourne v. Flores, 117 S. Ct. 2157 (1997). The invalidation of the Act by the Supreme Court has deprived churches of a very useful tool in their fight against land use authorities. A particular example of the usefulness of this statute is the experience of the Western Presbyterian Church in Washington, DC. Before the passage of the Religious Freedom Restoration Act, that Church's proposal to run a soup kitchen for homeless persons was rejected and the Church lacked an adequate legal remedy. After the passage of this legislation, the Church renewed its claim and prevailed. Western Presbyterian Church v. Board of Zoning Adjustment, 862 F. Supp. 538 (D.D.C. 1994). The Bourne v. Flores challenge resulted from the denial of a permit for renovation of a Church in a historic district. In that case, however, the District Court declared the legislation unconstitutional, setting the stage for the Supreme Court's review. Recently (September 2000) a new federal Religious Land Use and Institutionalized Persons Act was passed that would directly affect these cases.

49 See Christ the King Regional School v. Culvert, 815 F.2d 219 (2d Cir. 1986), cert. denied, 484 U.S. 830 (1987); Hill-Murray Federation of Teachers v. Hill-Murray

free exercise rights of religious organizations to engage in discipline and other limitations on employees.[50]

4. "BYSTANDERS" AGAINST THE FAITH COMMUNITY

In this last group of cases, whether the constitutional defense is sustained turns on the nature of the claimed breach of duty more than any other factor. For the most part, these conflicts arise over questions of contracts and indebtedness between the religious community and those with whom it does business, and tort claims filed by those who are injured by the conduct of the religious organization or those who minister in its name.

Of the two areas, the area of contract and indebtedness is arguably easier. The faith community will be unable to deny the authority of its agents to contract where the agent is exercising a general corporate power of the institution or engaging in a business practice which is well established in that community. For example, when a Pastor of a Catholic parish hired a contractor to repair the roof of a church, the Archdiocese in which that Parish was located was not able to avoid its responsibility for accident insurance arguing that there was an ecclesiastical separation between the Archdiocese and Parish. The secular court applied the secular law. In fact, the Archdiocese had organized itself and all of its parishes into a single civil corporate entity.[51] Thus, the civil courts will follow the civil law and not, generally, honor arguments based on religious usage to avoid responsibility that would otherwise be plainly provided for under the secular rules. Churches are liable for their debts and business obligations following civil law.

To the same effect is the general tort law. If religious organizations create unsafe conditions that cause accidents, the general tort rules would hold religious organizations accountable to the same extent as their secular cousins. At the same time, the courts have generally refused to extend

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High School, 487 N.W.2d 857 (Minn. 1992).

[50] See Miller v. Catholic Diocese of Great Falls, 728 P.2d 794 (Mont. 1986). The Montana Supreme Court decided that the Catholic Diocese had a right, protected by the Free Exercise Clause, to discharge an elementary school teacher for failure to maintain discipline, reasoning that discipline was essential to inculcate religious values.

[51] Roman Catholic Archbishop of San Francisco v. California Industrial Accident Commission, 194 Cal. 660, 230 P. 1 (1924). See also Crest Chimney Cleaning Company v. Ahi Ezer Congregation, 310 N.Y.S.2d 217 (N.Y. Civ. 1970) (holding a religious society responsible for a contract when the religious trustees delegated, by custom and usage, authority to its agent).

liability to religious organizations when a plaintiff alleges that some religious doctrine is itself inherently tortious or harmful.[52] Secular courts use secular rules and will not allow the litigation of claims targeting religious doctrine. This application of the autonomy principle was illustrated in the discussion about clergy malpractice, a theory which has been uniformly rejected by United States courts. In this regard, the defamation and fraud claims which were discussed above also divided on this principle. If the claims are themselves secular and can be resolved without resorting to an evaluation of religious doctrine, they may be allowed.[53] Otherwise a litigant would be barred from raising them.

In the area of sexual misconduct litigation, a matter in the last ten years which has resulted in hundreds of cases against all religious denominations, the courts have been reluctant, until recently, to embrace any notion of constitutional defenses. Most claims litigated ten years ago involved allegations based on traditional tort law. However, as litigation became more creative, so did churches' defensive efforts on constitutional grounds. For example, ten years ago, it was very common for litigants only to seek to place liability on religious organizations based on the alleged responsibility of the religious master (a church) for the behavior of the negligent servant (a cleric). Under common law, this liability is generally called respondeat superior liability. However, in the United States, an essential element for the imposition of this form of liability is that the servant must be acting within the scope and course of his engagement. No court has held that sexual misconduct by a cleric is within the course and scope of employment.[54]

General negligence claims targeting the supervisory or management behavior of religious organizations were more problematic. Here the cases have divided on the nature of the tort theory and how the claim was

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52 Remember my earlier example of the Catholic who sues a Catholic hospital for medical malpractice versus for compelling access to abortion services. The former would proceed under ordinary tort principles; the latter would be met with arguments based on the constitutional autonomy principle. See Murray v. International Society for Krishna Consciousness, 409 Mass. 842, 571 N.E.2d 340 (1991); Molko v. Unification Church, 46 Cal. 3d 1092, 762 P.2d 46 (1988). Likewise, the courts have not allowed punitive damages designed to punish religious organizations for holding, teaching, or applying religious doctrine. See Lundman v. McKown, 530 N.W.2d 807 (1995), cert. denied, 516 U.S. 1092 (1996).

53. See cases discussed supra at note 43.

54 Tichenor v. Archdiocese of New Orleans, 32 F.3d 953 (5th Cir. 1994). While the general rule in the United States does not permit such claims, one court has now redefined scope of duty to include "mixed motive" questions. Fearing v. Bucher, 977 P.2d 1163 (Oregon 1999). That decision does not represent the better view of U.S. law.

presented. Where the claim alleges that the minister was negligently called or selected for ministry (sometimes referred to in U.S. law as "negligent hiring"), the courts have recognized that such a "hiring" is a religious act and have denied liability in those circumstances on constitutional grounds.[55] However, where the alleged claim involves negligent supervision of clergy, that is, allowing clergy to continue to minister to a community notwithstanding knowledge of prior sexual improprieties, the courts have been less charitable. Depending on the jurisdiction, a constitutional defense may be recognized in whole or in part, or not at all, for negligent supervision claims.[56]

A growing area of liability for churches is the alleged breach of a fiduciary duty between the religious organization and an individual injured by the action of a minister. The cases generally provide that, in the absence of some special relationship between the individual and the community or the leadership, no fiduciary duty is possible. However, some courts have found a fiduciary duty notwithstanding constitutional objections that the creation of

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[55] See Byrd v. Faber, 565 N.E.2d 584 (Ohio 1991) (court requires particularized proof of wrongdoing to assure against unconstitutional scrutiny of church hiring); Doe v. Evans, 718 So.2d 286 (Fla. App 1998) (bars negligent selection or hiring claims on constitutional grounds), appeal pending in the Florida Supreme Court (argued December 7, 1999).

[56] The courts have divided three different ways over whether the constitution bars a negligent supervision claim on the grounds that it would require a court to evaluate a ministerial relationship with ecclesiastical authority. Some cases allow the claim. Jones v. Trane, 591 N.Y.S.2d 927 (N.Y. Sup. 1992). Other courts will not allow any litigation of a negligent supervision claim on constitutional grounds. Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780 (Wisc. 1995), cert. denied, 516 U.S. 1116 (1996). Other courts have adopted a more careful position in the middle refusing to allow generalized negligent supervision claims but allowing claims where it can be shown where church authorities in fact knew of the propensities of the cleric and intentionally placed that person in a situation where he or she could act out again. In my view, that rule strikes the proper balance. Gray v. Ward, 950 S.W.2d 232 (Mo. 1997); Gibson v. Brewer, 952 S.W.2d 239 (Mo. 1997). See also Heroux v. Carpentier, 1998 WL 388298 (R.I. Super. 1998).

Last May, there were three federal cases that potentially could have clarified the law in ways helpful to religious entities. The decisions of these courts in the summer and fall of 1999 either do not reach the constitutional issue or otherwise parse the underlying claim so narrowly as to expand the potential reach of new lawsuits. Martinelli v. Diocese of Bridgeport, 196 F.3d 409 (2d Cir. 1999) (rejects constitutional defense), Kelly v. Marcantonio, 187 F.3d 192 (1st Cir. 1999) (did not reach constitutional defense but opined that defense was not jurisdictional and refused to vacate decision adverse to diocese), and Ayon v. Gourley, 185 F.3d 873 (10th Cir. 1999)(Table), 1999 WL 516088.

the duty is contrary to religious doctrine or involves the courts in an interpretation of religious doctrine.[57] It would appear to be a prerequisite that the claimant maintaining such a claim be a member of the faith community. In fact, most of the claims now being litigated are filed by former members making allegations of misconduct that stretch back twenty or thirty years, when they were members of the faith community. The courts, however, do not make distinctions based on membership, but rather examine the nature and type of claim and the degree to which judicial analysis must evaluate a religious doctrine or connection. This is an area where constitutional principle and claimants' rights will continue to clash.[58]

III. PROBLEMS AND SUGGESTIONS

In my evaluation of the general body of controlling law and some specific case examples, I have highlighted three potential problems which may deserve more systematic consideration. The first is the education of judges.[59] The trial calendars in the United States are very busy. It is very easy for litigants to allege claims and recite, at least in their claim papers, the existence of some injury. Our busy trial courts are usually not the courts which would evaluate thoroughly the defenses of religious organizations based on constitutional autonomy principles. In these circumstances, the trial courts are more favorably disposed toward allowing the claimant to develop his or her case based on the facts, reserving to another day the opportunity for a careful evaluation of the law underlying the defense. By the time the

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[57] Compare Moses v. Diocese of Colorado, 863 P.2d 311 (Colo. 1993), cert. denied, 511 U.S. 1137 (1994), with Martinelli v. Diocese of Bridgeport, 10 F. Supp.2d 138 (D. Conn. 1998). Generally, the courts have been more wary recently of the consequences of finding such a cause of action. See Doe v. Evans, supra. I do not suggest that churches should be indifferent to the harms caused by ministers. I only mean to point out that there are constitutional limits on a court using the tort law to impose specific duties on a religious community that are inconsistent with its internal law and doctrine relating to structure, governance, and the supervision of clergy.

[58] Many of the principles discussed above, involving claims by members against the faith community, therefore, would be applicable here, including the proscription against denominational liability and clergy malpractice.

[59] Plainly one could also note the need to educate the governmental authorities about the needs of the religious communities. I see the greatest problem in the United States today not as religious persecution by government, but indifference by government. Effective judicial review and strong statutory remedies are sometimes the only medicine for a bureaucracy that sees religious autonomy claims as a blow to the inherent power of government. That is precisely the point.

trial courts address some of the substantive and preclusive defenses, both sides have already expended considerable time, energy, emotion, and resources. In my own experience, I have found that the appellate courts in the United States are more susceptible to arguments based on the existence of a legal defense. Judges must be made more aware of the rules under the Constitution to guard the rights of all persons, claimants and defendants.[60] The existence of a constitutional autonomy defense must be carefully and clearly explained so as to motivate the trial courts to a proper resolution.

The second problem is the education of advocates. These are hard cases. And "hard cases", as it is said in the famous legal maxim, "make bad law". As Professor Destro has added, "bad lawyering makes it worse". Advocates generally either overuse or underuse the constitutional text. In other words, some of the problems documented in the actual results of cases can be explained by the refusal of advocates to make timely constitutional objections during the formative stages of the litigation. This results in the court getting an incomplete picture of the implications of the claim and nature of the defenses at a stage in the litigation when it might have been possible to resolve the case without the need for long and expensive trial litigation. At the same time, there are advocates who see constitutional claims every time they review a document in a trial. In my opinion, harm to the cause of religion occurs in both circumstances. Advocates must learn to make more careful evaluations of the claims and defenses in litigation. They must be able to separate secular claims that might move forward from the religious claims that might be subjected to constitutional defenses. They must be able to show judges that they have not simply adopted an anti-claimant approach to the case but have endeavored to exercise care in separating the claims that should be tried from those that constitutionally cannot, making the court's task easier. Advocates must give attention, at a minimum, to determining how they will explain their case, through what testimony they will make their case, and how they will deal with conflicts based on a division of religious opinion.[61]

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[60] In Doe(s) v. Diocese of Dallas, the plaintiffs alleged that the Roman Catholic Church was a single monolithic entity, with the highest authority in the United States vested in the National Conference of Catholic Bishops. In trying to explain the constitutional limitations on the trial court's ability to adjudicate some of the issues in that case, the trial judge responded to our arguments that she would not allow a religious group to "hide behind the First Amendment". Hearing Transcript on Motion to Compel, p. 52 (October 26, 1994).

[61] I would argue that a division of religious opinion should not be permitted in a civil trial, any more than one would tolerate having a jury decide a religious question. However, that issue is beyond the scope of this paper.

Last, I believe that religious organizations have the obligation to educate the faith community. There are many potential divisions within the faith community. Any group of people struggling to know and to do the will of God on the most fundamental of human questions is a community that is bound to be tugged and pulled by the various forces that are inextricably part of human nature. Too often faith communities become divided over questions that do not have easy answers. Rather than seek opportunities for reconciliation and healing, too often the divisions themselves spill into the civil courts. That class of cases generally requires application of constitutional autonomy principles so as to preserve the right of religious communities to decide these cases free of government interference.

At the beginning of this paper, I raised the question involved in all autonomy litigation – where is the remedy, in the courts or in the church? Churches themselves must engage in more of what the New Testament writers call "fraternal correction and meditation". This means that churches must be places where reconciliation is genuinely possible. It will allow those hurt by the actions of others in the church to have an opportunity to have their grievances heard and resolved. It means that those who lead churches will recognize their obligations in justice to seek resolution apart from litigation. In turn, courts are likely to perceive the willingness of religious communities to mediate disputes among members as a positive sign. In my view courts would be more likely to defer to religious groups in those circumstances. This does not mean that every wrong will result in a payment of some money damages. Rather, it means that genuine hurt will be felt, healed, and reconciled within the confines of the community.

In the end, it is probably too much to hope that any of these problems will be addressed significantly in the short term. United States society is too fractured and diverse, and our churches mirror that reality in many respects. The promise of the framers of the Constitution, in the principle which we have discussed here called Constitutional Autonomy, is that churches will be given the opportunity first to seek to operate and regulate themselves without the interference of the government. In my practice, I often find that it is my professional obligation to seek to provide the free space for my religious clients to do right. Constitutional autonomy is another way of expressing that view.