Boston College Law Review

Volume 44
Issue 4 *The Impact Of Clergy Sexual Misconduct Litigation On Religious Liberty*

Article 9

7-1-2003

Constitutional Limits on the Liability of Churches for Negligent Supervision and Breach of Fiduciary Duty

John H. Mansfield

CONSTITUTIONAL LIMITS ON THE LIABILITY OF CHURCHES FOR NEGLIGENT SUPERVISION AND BREACH OF FIDUCIARY DUTY

JOHN H. MANSFIELD*

Abstract: In the many suits against churches during the past several years for alleged misbehavior of clergy, a wide variety of tort theories have been put forward as possible bases for recovery. Among these are breach of fiduciary duty owed to church members, negligence in hiring, supervision and retention of clergy, intentional or negligent infliction of mental distress and vicarious liability for torts committed by individual clergy. This Article explores possible federal constitutional barriers to these tort actions, focusing mostly on the torts of negligent supervision and breach of fiduciary duty.

INTRODUCTION

In the many suits against churches during the past several years for alleged misbehavior of clergy, a wide variety of tort theories have been put forward as possible bases for recovery. Among these are breach of fiduciary duty owed to church members, negligence in hiring, supervision and retention of clergy, intentional or negligent infliction of mental distress and vicarious liability for torts committed by individual clergy.[1] In the present Article, I explore possible federal constitutional barriers to these tort actions, focusing mostly on the torts of negligent supervision and breach of fiduciary duty.

I. GOVERNMENT MAY NOT ANSWER RELIGIOUS QUESTIONS

The first principle that must be accepted as established is that the outcome of a tort suit against a church may not be based upon a gov-

* John H. Watson, Jr. Professor of Law, Harvard Law School.

[1] *See* Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219 (2000) (reviewing many of the important cases); *see also* Malicki v. Doe, 814 So. 2d 347, 351 n.2, 358 n.10 (Fla. 2002); James T. O'Reilly & JoAnn M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues*, 7 ST. THOMAS L. REV. 31, 38–59 (1994).

ernmental answer—whether given by a legislature, administrative official, court or jury—to a religious question. This principle was established in *United States v. Ballard* over fifty years ago, and finds its basis in both the Free Exercise Clause and the Establishment Clause of the First Amendment.[2] For an agency of the state to make a finding of fact on a religious question would tend to suppress other answers to that question and impair freedom in matters of religion. Of course, determining what constitutes a religious question within this prohibition is not a matter free from doubt. Is a religious question a question whose answer depends upon faith rather than reason? Is a religious question one that pertains to the existence of a spiritual, transcendent or absolute reality?[3] In the *Ballard* case, a prosecution for mail fraud, some of the defendants' representations clearly were about spiritual matters, but others hovered about the border between the celestial and the terrestrial.[4] For present purposes, we need not enter into this problem, nor need we attempt to answer the question: if government may not base its activities upon assertions about spiritual realities, upon what basis may they rest?

The constitutional prohibition against answering religious questions does not end with forbidding findings of fact that require faith or that pertain to the spiritual or transcendent. It also forbids findings regarding temporal realities that make reference to spiritual realities. The U.S. Supreme Court has held that the Constitution prohibits the government from determining what someone thought or intended in regard to a religious matter. Thus the government is forbidden from determining that the settlor of a trust or a party to a contract had a certain idea or intention in regard to a religious matter, even though the fact that he had such an idea or intention is a fact of this world.[5] This prohibition was set forth clearly by the Supreme Court in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Church* and in *Jones v. Wolf*.[6] Both cases involved disputes within churches about doctrine and polity, which ultimately affected rights to church property.[7] The Court held that in deciding who owned and had the right to control

---

[2] U.S. CONST. amend. I; 322 U.S. 78, 86–87 (1944).

[3] *See* United States v. Seeger, 380 U.S. 163, 173–85 (1965) (discussing the meaning of religion in provision for exemption of conscientious objectors in selective service law).

[4] 322 U.S. at 79–81.

[5] Jones v. Wolf, 443 U.S. 595, 602–06 (1979); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Church, 393 U.S. 440, 445–52 (1969).

[6] *Wolf*, 443 U.S. at 602–06; *Blue Hull*, 393 U.S. at 445–52.

[7] *Wolf*, 443 U.S. at 597; *Blue Hull*, 393 U.S. at 441–43.

the property, courts could not determine the nature of a religious idea—such as what was meant by Presbyterianism.[8] The reason for this prohibition is not the inability of a court to answer such a question, but the fear that if it does give an answer, no matter how careful it may be in assessing all the evidence, its answer is likely to be influenced or thought to be influenced by its own views about a particular religion or religion in general, or by secular considerations.[9] One can appreciate that if a court interprets a very general provision, such as "they shall enjoy the property so long as they are faithful to the teachings of Vatican II," these fears would not be groundless. At the same time, if a court is asked to determine the meaning and purpose of a nonreligious organization—the Odd Fellows for instance—there is no constitutional bar to the court doing its best to answer the question on the basis of available evidence. At least there is no restraint coming from the religion clauses of the First Amendment. It is only when the question posed pertains to religion, so that the answer may be influenced by religious ideas or religious ideas may be overridden by secular ideas, that the First Amendment forbids courts from answering. Even though a court's answer may not be an expression of faith, if it would touch upon a matter that is the object of faith for the parties and others, the Supreme Court has held that the First Amendment requires courts to steer clear of the question.[10]

A consequence of the *Blue Hull-Wolf* prohibition is that when a case presents a religious question, there must be a special rule for disposing of the case. The religious question must be set aside and the dispute somehow decided upon another ground. The irony of the situation is that although the *Blue Hull-Wolf* prohibition protects religious freedom in the sense of excluding government ideas about what is desirable, it creates a special difficulty for the implementation of private plans relating to religion by depriving them of a certain kind of government assistance in their fulfillment. In the case of the Odd Fellows, by contrast, courts plunge ahead and do their best to decide, for instance, which of two warring factions are the true Odd Fellows as determined by the intentions of the founders. This consequence must always leave a lingering doubt as to the correctness of the *Blue Hull-Wolf* prohibition.

---

[8] *See Wolf*, 443 U.S. at 602–05; *Blue Hull*, 393 U.S. at 445–47, 449–50.

[9] *See Wolf*, 443 U.S. at 602–05; *Blue Hull*, 393 U.S. at 449–50.

[10] *See Wolf*, 443 U.S. at 602–05; *Blue Hull*, 393 U.S. at 445–47, 449–50.

As applied in the context of tort actions against churches, the *Blue Hull-Wolf* prohibition means that liability may not be based upon a court's interpretation of the church's own law, customs or traditions. If it were the case—which it very rarely would be—that there is no doubt that there was a violation of church law—perhaps a church official with undoubted and final authority has so declared it—then the *Blue Hull-Wolf* principle might not apply. But another question would be presented: assuming that a nonreligious organization may be held liable in tort for a violation of its own rules, itself a matter of doubt, would the religion clauses of the Constitution permit the same approach to be taken towards a religious organization?

There are more subtle inhibitions on church liability in tort flowing from the prohibition against a court answering religious questions. For instance, in the case of a breach of a fiduciary duty claimed to be owed to a church member—the breach perhaps consisting in a failure to supervise clergy or to respond in a particular way to a church member's complaint of abuse—the existence of such a relationship between the church and the member that would give rise to a duty to act or to act in a particular way may not be based upon an interpretation of the church's laws, structures or traditions. Even to describe the parties as church and member is to invoke a relationship grounded in church law, and so ultimately to determine the content of a religious idea. Likewise, a duty not to be negligent in supervision, even if the standard of care is entirely a creation of secular law and not based upon church law, may not be imposed on the basis of a finding of a relationship that is a creation of church law, such as the relationship between bishop and priest or between bishop and parishioner.[11] To base liability on the existence of such relationships would violate the *Blue Hull-Wolf* prohibition. The dangers the Supreme Court thought it saw in allowing courts to interpret religious terms in

---

[11] *See* Swanson v. Roman Catholic Bishop, 692 A.2d 441, 444 (Me. 1997) ("To determine the existence of an agency relationship based on actual authority, the trial court will most likely have to examine church doctrine . . . ."); Heroux v. Carpentier, No. C.A. PC 92-5807, 1998 WL 388298, at *9 (R.I. Super. Ct. Jan. 23, 1998) (determining whether relation between bishop and priest is sufficiently agent-like to give rise to duty of care would require consideration of church doctrine and policies); L.L.N. v. Clauder, 563 N.W.2d 434, 443–44 (Wis. 1997) (determining whether knowledge of one priest concerning behavior of another should be attributed to the diocese would require consideration of first priest's authority under church law, which is barred by First Amendment); Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 791 (Wis. 1995) (indicating that tort of negligent supervision cannot be asserted because it would require inquiry into church laws, policies and practices).

wills, deeds of trust, church constitutions or contracts also would be present if courts made determinations about relationships grounded in religious beliefs in deciding whether under tort law there was a duty to act or to act in a certain way.

By contrast, it may be possible, although difficult, to base tort liability upon facts identified as existing independently of any norms or relationships created by church law. For example, it may be possible to formulate a rule of civil liability that anyone who directs another to engage in an activity, if he knows or ought to know that the other will act on the direction, must supervise the other person so as to insure that in carrying out the direction, the other person does not inflict harm. The duty thus described may avoid reference to religious norms or relationships and so avoid violating the *Blue Hull-Wolf* prohibition.[12] This would mean, however, only that one had avoided that particular constitutional prohibition, not that all the requirements of the religion clauses had been met. In addition, of course, the lawmaker, whether legislature or court, may be unwilling to recognize such a general rule. If the duty is limited to religious organizations, there would in all likelihood be a violation of the Free Exercise Clause.[13]

Another situation in which the prohibition against answering religious questions may prevent imposing liability on churches involves respondeat superior. The difficulty is already intimated if the church is characterized as a principal, master or employer, and the cleric as an agent, servant or employee. The theory of respondeat superior is that if a certain relationship exists between one person and another, or between an organization and an individual, fairness requires that

---

[12] The duty suggested, however, must be carefully scrutinized to see if it does truly avoid reference to religious ideas. *See, e.g.*, C.J.C. v. Corp. of the Catholic Bishop, 985 P.2d 262, 275 (Wash. 1999) (finding that notice to church official of risk of sexual molestation of children created duty to protect, founded upon secular facts such as that church brought children into contact with molester under circumstances that provided peculiar opportunity for misconduct); Sanders v. Casa View Baptist Church, 134 F.3d 331, 337 (5th Cir. 1998) (finding that minister who held himself out as professional marriage counselor could be held liable not because of violation of standard of care defined by religious teachings, but because of violation of professional standard of care); *see also* Dausch v. Rykse, 52 F.3d 1425, 1433 (7th Cir. 1994) (Ripple, J., concurring in part and dissenting in part) (pastoral counseling contrasted with secular counseling and holding oneself out as providing services of psychological counselor). In the hypothetical in the text—one person directing another to engage in an activity—would evidentiary use of church law to show that a bishop knew or ought to have known that a priest would act on his direction violate the *Blue Hull-Wolf* prohibition?

[13] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533–38 (1993) (holding that "targeting" religion violates the Free Exercise Clause).

liability be imposed upon the first person or the organization for the wrongful acts of the other person. But the prohibition against answering religious questions forbids looking to church law or structure to see if such a relationship exists—whether the bishop retained certain powers, what duties were imposed upon the minister, what the scope of the minister's assignment was and so forth. Such issues of authority, power, duty and discretion, which are examined routinely in nonreligious cases, may not be inquired into when religious organizations are involved.[14] Here again, it may be possible, although difficult, to identify certain facts that exist independently of any consideration of church law—such as that *A* had given *B* directions and *B* acted upon them, the notions of giving directions and acting upon them being entirely secular ideas—as a basis for vicarious liability. But if there is unwillingness to adopt a rule of such scope, then the question would be presented whether it is constitutional to have a rule of respondeat superior specially tailored to religious organizations.

II. Value to Be Attached to Religious Objectives

Let us suppose that in a case involving a charge of negligent supervision there is no violation of the *Blue Hull-Wolf* prohibition. Instead, the rule to be applied is something like the one suggested: whenever *A* gives directions to *B* and *B* is likely to act upon them, *A* has a duty to watch over *B* so as to protect others from harm from *B*'s activities. In an ordinary suit for negligent supervision, account would be taken of the importance of the benefit to be gained by maintaining a certain relationship between *A* and *B*: too close a supervision of *B* might thwart the purpose of the enterprise. A court or a jury would consider the benefit sought to be achieved and weigh it against the seriousness of the harm that could occur and the risk that that harm will occur if there is little supervision. In the case of a tort of negligent supervision by a religious organization, what consideration would be given to the religious benefits that the organization sought to achieve by structuring the relationship between *A* and *B* in the way it did?[15]

---

[14] *But see* Moses v. Diocese of Colo., 863 P.2d 310, 329–31 (Colo. 1993) (finding required relationship existed between diocese and priest, but that the priest's sexual conduct was not within the scope of employment); M.K. v. Archdiocese of Portland, Civ. No. 01-1544-AS, 2001 U.S. Dist. LEXIS 23625, at *11–12 (D. Or. Dec. 13, 2001) (magistrate recommendation) (finding it permissible to look to church law to determine priest's job description), *adopted and remanded by* 228 F. Supp. 2d 1168 (D. Or. 2002).

[15] *See* O'Reilly & Strasser, *supra* note 1, at 47 ("Beliefs in penance, admonition and reconciliation as a sacramental response to sin . . . .").

There are two possibilities. One is to attach no value to the benefit, precisely because it is a benefit only from a religious point of view. With no value attached to the benefit, the creation of any risk of the harm—for example, sexual molestation of minors—would not be justified. The very setting on foot of the religious enterprise would be tortious. The other possibility would be to attach a fixed value to the religious benefit sought to be achieved. This value would be determined by the benefit's religious character as such, rather than by its importance in the scheme of a particular religion, so as to avoid violating the *Blue Hull-Wolf* prohibition. It would be prohibited, for instance, to determine whether under the beliefs of a particular religion it was thought important not to inform third parties of allegations of misbehavior by clergy. The value attached to the religious benefit—valued simply because it was religious—would be derived from the Free Exercise Clause in the light of its underlying constitutional philosophy. Attaching more than a certain value to religious goals, in view of the risk of a particular harm deemed such from a secular point of view, might violate the Establishment Clause.[16]

III. Neutral and Generally Applicable Laws

It is necessary now to bring into consideration *Employment Division v. Smith*, the well-known peyote case that reinterpreted the Free Exercise Clause.[17] Only a few tort cases involving churches refer to *Smith* and almost none discuss it at any length. In some cases *Smith* is dismissed as not affecting the protection churches are suggested to have under constitutional principles shortly to be discussed, namely the right of church autonomy and the right not to have government excessively entangled with religion.[18] But the validity of these principles and their relation to *Smith* are not at all clear.

The Supreme Court, in *Smith*, held that the Free Exercise Clause does not prohibit the application of a neutral and generally applicable law to religiously motivated conduct, even though there is no

---

[16] *See* Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 18–20 (1989) (finding an exemption of religious publications from sales tax violated Establishment Clause); Estate of Thornton v. Caldor, 472 U.S. 703, 710–11 (1985) (finding that requiring employers to give each employee his or her Sabbath off violated Establishment Clause). *But see* Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 335–40 (1987) (finding the exemption of religious organizations from the prohibition of religious discrimination in employment did not violate Establishment Clause).

[17] 494 U.S. 872 (1990).

[18] *See infra* Part V.

compelling state interest to justify the law. In *Smith*, a prohibition against possessing peyote was applied to persons who had used it as part of a religious ceremony. In a subsequent case, however, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court made clear that if a law "targeted" religion for the imposition of a burden, it was not governed by the *Smith* rule.[19] In *Lukumi*, city ordinances prohibited the ritual killing of animals while permitting killing for a wide variety of secular purposes. But the meaning of *Lukumi* is not clear. For instance, is a rule "neutral and generally applicable" for *Smith* purposes if religiously motivated conduct is grouped with some secular activities for prohibition, but other secular activities are permitted? What would be the result in *Lukumi* if nearly all killing of animals was prohibited, including religious killing, but killing for purposes of science was permitted? What is in question here is the constitutionally permissible relative effect of government action on the positions of religion and secular values in society.

Negligence in supervision of a person to whom one has given directions might be proposed as a neutral law of general application within the meaning of *Smith*. But should it be so regarded if heed is paid to the policy that underlies *Smith*? Recall what was said earlier regarding the value to be attached to the objective sought to be achieved by *A* giving a task to *B* when the objective is religious.[20] If no value is attached to the religious objective, then religion probably has been "targeted" for a disadvantage in the *Lukumi* sense. If under the law of torts a fixed value is attached to a religious objective simply because it is religious, then the question is whether this value accords with the value that must be attached to the practice of religion by virtue of the Free Exercise and Establishment Clauses.

IV. Individualized Assessment

In *Employment Division v. Smith* the Supreme Court stated that its principle does not apply when there is "individualized governmental assessment of the reasons for the relevant conduct."[21] It was because of this exception that *Sherbert v. Verner*, a case involving a Seventh-day Adventist's right to unemployment compensation when she could not get a job because of a religious scruple against working on Saturday,

---

[19] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533–38 (1993).

[20] *See supra* Part II.

[21] 494 U.S. 872, 884 (1990).

was saved from overruling.[22] When a case falls within the category of "individualized assessment," there must be a compelling state interest to justify the imposition of a burden or the denial of a benefit, the requirement generally applicable under the Free Exercise Clause before *Smith*.[23] The idea behind this exception to the *Smith* rule—if it is an exception rather than simply an application of the "neutral and generally applicable" test—may be that when there is individualized assessment, either through the development of the common law or in the course of interpreting broad statutory language, official attitudes toward religion, for instance as a reason for not working, attitudes that do not accord with the Constitution's standard for the value that must be attached to the practice of religion, may creep in and determine outcomes. So, in such circumstances, in a somewhat awkward response to that danger, the requirement of a compelling state interest is retained.

A requirement of nonnegligence in supervision, assuming it passes the neutral and generally applicable test of *Smith*, would appear to be an excellent candidate for inclusion in the "individualized assessment" category. Its application is closer to deciding whether a person is unavailable for work without good cause—the question posed in *Sherbert*—than to deciding whether peyote has been possessed.[24] In an ordinary tort suit, as noted earlier, in deciding whether supervision was negligent, a number of factors would be considered: the seriousness of the harm threatened, the risk of that harm occurring, the importance of the good sought to be achieved by the enterprise and the likelihood that the achievement of that good would be threatened by requiring a particular kind of supervision. Characteristically, in the law of negligence, no great degree of certainty of law is ever achieved or even attempted. Under these conditions, the door would be wide open for an administrator or a court or a jury to attach no value to a religious objective or to attach a value that is less than that required by the religion clauses. Thus a finding of negligence could well conflict with the constitutional standard regarding the permissible

---

[22] *Id.*; Sherbert v. Verner, 374 U.S. 398 (1963). *Sherbert* presented a situation involving "individualized assessment" because in it administrators and courts were required to develop views concerning the reasons an individual might have for not working. *See id.* at 403–06.

[23] *See Smith*, 494 U.S. at 873, 884.

[24] *See* 374 U.S. at 399–402; Ayon v. Gourley, 47 F. Supp. 2d 1246, 1249 (D. Colo. 1998) (stating that a claim of negligent supervision requires a "more subjective judgment" than applying the prohibition in *Smith*).

relative effect of government action on the positions of religion and nonreligion. In addition, of course, there would always lurk the danger of a violation of the *Blue Hull-Wolf* prohibition, through a finding of negligent supervision based on the fact that the church had fallen below its own standard.

Assume that a claim of negligent supervision comes under the "individualized assessment" exception to *Smith*. Assume also that conduct has been identified as a basis for liability that avoids violating the *Blue Hull-Wolf* prohibition. These conditions might be satisfied either by a rule that applies to all who engage in specified conduct or by a rule specially crafted for religious organizations. In the latter case it may be that even though the rule involves special treatment for religion, it does not violate the fundamental norm of the religion clauses, which, as already stated, dictates the permissible relative effect of government action on the positions of religion and nonreligion. This is still not the end of difficulties, for under the "individualized assessment" exception to the *Smith* rule, religiously motivated conduct may not be prohibited or burdened unless there is a compelling reason for doing so. Whether there is a compelling reason requires consideration of the gravity of the harm threatened—compare sexual molestation of a minor with sexual relations between a minister and an adult member of the church who sought pastoral counseling—and the risk that the harm would occur. These factors must be weighed against the fixed value that the Constitution attaches to the fact that the kind of supervision the church provided, or the lack of supervision, was based upon religious belief.[25] The reason for the church's supervision or lack of supervision may be analogous to the Amish reason for not sending their children to school past the age of sixteen, a reason that was required to be honored under the Free Exercise Clause in *Wisconsin v. Yoder*.[26]

---

[25] It is difficult to understand what position the church could have taken in *Malicki v. Doe*, 814 So. 2d 347, 361 (Fla. 2002), to justify the court's statement that the church did not "claim that the reason they failed to exercise control over Malicki was because of sincerely held religious beliefs or practices."

[26] 406 U.S. 205, 219 (1972); *see also* Swanson v. Roman Catholic Bishop, 692 A.2d 441, 445 (Me. 1997) (finding that compelling state interests did not justify diocese's liability for negligent supervision of priest who became sexually involved with woman he was counseling); *cf.* Heard v. Johnson, 810 A.2d 871, 884–85 (D.C. 2002) (finding dismissed pastor's interest in reputation—in a suit against trustees of the church for defamation—was not compelling, but noting that the interest might be compelling in egregious circumstances).

V. Church Autonomy and Nonentanglement

So far I have spoken only of the prohibition laid down by the *Blue Hull-Wolf* rule against answering religious questions and the *Smith* rule regarding neutral and generally applicable laws, along with its exception for individualized assessments. But a number of other notions have been deployed by courts in measuring the constitutionality of tort claims of the sort I have been discussing—negligent supervision of clergy and breach of fiduciary duty—against the requirements of the religion clauses. One of these ideas has been expressed as a constitutional right of "church autonomy." In some instances, talk of a right of church autonomy has been simply a way of referring to the *Blue Hull-Wolf* prohibition.[27] In other cases, however, it is said or implied that the right of church autonomy is a distinct constitutional right and that it provides a bulwark against the *Smith* rule.[28] Thus it is suggested that the right of autonomy protects churches against government regulation even when regulation takes the form of a neutral rule of general applicability and the facts do not bring the case within any of the exceptions stated in *Employment Division v. Smith*, including the "individualized assessment" exception.[29] Some judicial statements of the right of church autonomy go so far as to suggest that it protects churches against regulation even though particular conduct was not religiously motivated, so long as the conduct took place within the context of a religious institution.[30] This claim of church autonomy is

---

[27] *E.g.*, McKelvey v. Pierce, 800 A.2d 840, 850–51 (N.J. 2002).

[28] *E.g.*, Bryce v. Episcopal Church, 289 F.3d 648, 655–56 (10th Cir. 2002); *see also* Combs v. Cent. Tex. Annual Conference, 173 F.3d 343, 349 (5th Cir. 1999) (rejecting an action for sex discrimination in ministerial appointment because of the Free Exercise right of the church to manage its own affairs).

[29] In *Van Osdol v. Vogt*, a dismissed minister sued the church on the ground that her dismissal was in retaliation for her complaint of sexual abuse against a church official. 908 P.2d 1122, 1124 (Colo. 1996). The court held that the First Amendment barred entertaining the suit, distinguishing the dismissal of clergy from the type of situation involved in *Smith*. *Id.* at 1129–31. Applying an antidiscrimination law to churches "would require a judge to question the belief system of the church, to validate certain interpretations of religious doctrine over others, or to compel the church to accept certain ideas into their belief system." *Id.* at 1131.

[30] *See, e.g.*, *Combs*, 173 F.3d at 350; EEOC v. Catholic Univ., 83 F.3d 455, 464–65 (D.C. Cir. 1996); Schmoll v. Chapman Univ., 83 Cal. Rptr. 2d 426, 427, 430 (Ct. App. 1999); *McKelvey*, 800 A.2d at 850 (quoting NLRB v. Catholic Bishop, 440 U.S. 490, 502 (1979)); *see also* Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 341–46 (1987) (Brennan, J., joined by Marshall, J., concurring) (finding Establishment Clause was not violated by the exemption of nonprofit religious organizations from prohibition against religious discrimination in employment, even with respect to secular jobs, because of the importance of protecting church autonomy and avoiding entanglement).

sometimes expressed by stating that under the Constitution, civil courts lack jurisdiction over tort suits against churches.[31]

In other cases, a right not to have government "excessively entangled" with religion or religious institutions is named as the barrier against suits for negligent supervision and breach of fiduciary duty.[32] "Excessive entanglement" is a term usually associated with inquiries into determining the validity of programs of government aid to religiously-affiliated institutions under the Establishment Clause, but in some cases it has been invoked as an aspect of Free Exercise protection.[33] Sometimes government wished to provide protection for religion, and the Court has cited the avoidance of excessive entanglement as one reason for allowing the protection.[34] In other cases, the notion of excessive entanglement was invoked as the basis for a positive right, founded in either the Free Exercise Clause or the Establishment Clause, to be free from regulation even when government wished to impose it.[35]

The case of *NLRB v. Catholic Bishop* furnishes some support for a right of nonentanglement based on the Free Exercise Clause.[36] In that case, the National Labor Relations Board ("NLRB") asserted jurisdiction over labor relations between Catholic schools and their lay teachers.[37] The Supreme Court interpreted the statute involved, the National Labor Relations Act, not to confer jurisdiction on the NLRB because, as the Court said, if the statute were otherwise interpreted, a grave question of constitutionality under the religion clauses would be presented, especially because of entanglement of government with a religious institution.[38] The Court came very close to holding that if the statute conferred jurisdiction, it was unconstitutional.[39] The Court was particularly concerned with the danger that administrators would impose their own notions about religion in general or Catholicism in particular or, consciously or unconsciously, intrude secular values

---

[31] *E.g.*, Heroux v. Carpentier, No. C.A. PC 92-5807, 1998 WL 388298, at *1, 9 (R.I. Super. Ct. Jan. 23, 1998).

[32] *See, e.g.*, Franco v. Church of Jesus Christ of Latter-day Saints, 21 P.3d 198, 205 (Utah 2001).

[33] *E.g.*, Lemon v. Kurtzman, 403 U.S. 602, 615–25 (1971) (describing "excessive entanglement" under the Establishment Clause); Malicki v. Doe, 814 So. 2d 347, 357 (Fla. 2002) (describing "excessive entanglement" pursuant to Free Exercise protection).

[34] *E.g.*, *Amos*, 483 U.S. at 339; *see* Walz v. Tax Comm'n, 397 U.S. 664, 674–75 (1970).

[35] *E.g.*, *Catholic Univ.*, 83 F.3d at 465–67.

[36] *See generally Catholic Bishop*, 440 U.S. 490.

[37] *Id.* at 491.

[38] 29 U.S.C. §§ 151–169 (2003); *Catholic Bishop*, 440 U.S. at 499–501.

[39] *See Catholic Bishop*, 440 U.S. at 504–07.

where religious beliefs were entitled to prevail.[40] *Catholic Bishop*, of course, is a pre-*Smith* case.[41]

The notion of excessive entanglement may turn out to be indistinguishable from the claimed right of church autonomy and, like it, extend a mantle of protection to religious institutions even against neutral laws of general applicability and even though there is no attempt by government to answer a religious question. A case invoking a broad notion of a church's right to exclude regulation involved a claim of discrimination on the ground of sex in a ministerial appointment.[42] Whether the ideas of church autonomy and nonentanglement can be limited to ministerial appointments and not extended to all aspects of church activity seems doubtful, for no reason presents itself why ministerial appointments should be singled out from other decisions made in pursuit of a religious mission, at least not without embracing a particular idea of what is important in religion. Some courts suggest that the right of church autonomy or nonentanglement is an absolute right, at least in regard to ministerial appointments, and that this right does not give way even in the face of a compelling state interest.[43] If the idea of ministerial appointment is confined to asserting that a person holds a particular ecclesiastical office or possesses a certain spiritual power, the suggestion may be unobjectionable. But if the idea of appointment goes beyond that and includes some identifiable secular facts, the suggestion is hard to accept. It is difficult to believe, for example, that the religion clauses prevent application to a church of a rule prohibiting putting a person who has been convicted of a sexual offense against a minor in contact with minors, even though such contact is permitted or even required by religious doctrine.

The seemingly indistinguishable ideas of church autonomy and nonentanglement may provide a barrier to suits based on claims of negligent supervision and breach of fiduciary duty.[44] But, as already

---

[40] *Id.* at 501–04.

[41] For an additional example, see *Rayburn v. Gen. Conference of Seventh-day Adventists*, where the court found that applying a prohibition against racial discrimination in employment to a church's pastoral position violated both religion clauses. 772 F.2d 1164, 1168–71 (4th Cir. 1985).

[42] *Combs*, 173 F.3d at 349; *see also Rayburn*, 772 F.2d at 1168–71.

[43] *See, e.g.*, *Vogt*, 908 P.2d at 1130–31.

[44] *See* Swanson v. Roman Catholic Bishop, 692 A.2d 441, 445 (Me. 1997) ("The imposition of secular duties and liability on the church as a 'principal' will infringe upon its right to determine the standards governing the relationship between the church, its bishop, and the parish priest.").

suggested, such tort claims may be more easily derailed by one of the principles earlier discussed, that a religious question may not be answered by government and that when a case involves "individualized assessment," a compelling state interest is required.[45] But governmental regulation can be imagined that may escape these other limitations and leave only the claimed right of church autonomy or nonentanglement. Consider, for instance, a statute that requires employers to report to civil authorities accusations of sexual abuse made against employees. Possibly the church and the minister can be identified as employer and employee by virtue of facts of a purely secular character. The rule is broadly applicable to all employers and does not call for any "individualized assessment." Under these circumstances, assuming *Smith* to be established law, only invocation of some notions such as church autonomy and nonentanglement can keep open the possibility of requiring a compelling state interest to justify the regulation, or in their more absolutist form, to sustain a claim of immunity even in the face of a compelling state interest.

[45] Would the tort of breach of fiduciary duty, if formulated as a duty of *A* to act to protect *B* if *A* caused *B* to trust him, a reasonable person in *A*'s position would have realized that *B* would trust him and *B* did in fact trust him, escape violation of the *Blue Hull-Wolf* prohibition if applied in a church context? In *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, a bishop was held to have violated a fiduciary duty to the plaintiff when the bishop had reason to know that a priest had molested one boy, but did nothing to protect other boys, including the plaintiff. 10 F. Supp. 2d 138 (D. Conn. 1998). The court thought the church had encouraged the plaintiff and his parents to view the bishop as an authority and to trust him and that they had trusted him. *Id.* at 148, 156. It seems unlikely that a legal definition can be attached to the term "trust" that does not require consideration of the meaning the parties attached to communications between them, which in the context of this case certainly were intended to be viewed from a religious perspective.