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Introduction

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Introduction

*Kevin J Worthen**

We are pleased that so many distinguished scholars convened at Brigham Young University's J. Reuben Clark Law School in 2004 to discuss the important topic of church autonomy, and we are even more pleased to publish the fruits of that conference in this and the following issue of the Brigham Young University Law Review. Church autonomy is a topic that lies at the sometimes controversial intersection of the Free Exercise and Establishment Clauses of the First Amendment.¹ On the one hand, religion and organized churches provide considerable benefits to society.² Throughout history, few entities have had more influence in developing in individuals many of the characteristics that are essential to any stable society: honesty, integrity, obedience, loyalty, and concern for others.³ On the other hand, history is replete with examples in which religious devotion, taken to an extreme, has led people to act in ways that are not only destabilizing to society but also inimical to human rights.⁴

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1. U.S. CONST. amend. I; *see also* *Locke v. Davey*, 124 S. Ct. 1307, 1311 (2004) (“These two Clauses, the Establishment Clause and the Free Exercise Clause, are frequently in tension. Yet we have long said that ‘there is room for play in the joints’ between them. In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.” (citations omitted)).

2. *See, e.g.*, Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 17 (arguing that churches provide an important mechanism “by which the citizens in a liberal polity learn to transcend their individual interests and opinions and . . . develop civic responsibility.”).

3. Brett G. Scharffs, *The Autonomy of Church and State*, 2004 BYU L. REV. 1217, 1229 n.24; *see* *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970) (upholding specific religious benefits because of the good works churches perform for constituents and their communities); *see also* The Heritage Foundation, *Issues 04: The Candidate’s Briefing Room*, at <http://www.heritage.org/research/features/issues2004/religion.cfm> (last visited Oct. 19, 2004) (claiming that research shows that “regular religious practice” has individual and societal benefits, including “health, learning, economic well-being, self-control, self-esteem, and empathy” and that “[i]t reduces the incidence of social pathologies”).

4. *See* Steven G. Gey, *Unity of the Graveyard and the Attack on Constitutional Secularism*, 2004 BYU L. REV. 1005, 1027 n.65; Scharffs, *supra* note 3, at 1229 n.24; *see, e.g.*, *Everson v. Bd. of Educ.*, 330 U.S. 1, 9–11 (1947) (detailing the religious persecutions that

History also seems to teach that churches need some space—some autonomy—in order to create the kinds of deep ties with their members that allow positive character development to take place.⁵ Governmental efforts to control church organizations may not only interfere with that development, they may also unduly infringe on basic human rights.⁶ History thus teaches that there must be some balance, some accommodation, between church and state.⁷ Where to strike that balance is a complex and difficult issue, as demonstrated by the papers presented at the conference.

Autonomy seems an appropriate term on which to center the discussion of accommodation. It is a term that denotes independence and freedom from outside interference.⁸ Though not as definitive in that regard as the term sovereignty, autonomy is a term often used when referring to nation-states or other governmental organizations

occurred in colonial America immediately prior to the drafting of the First Amendment, including the forced payment of taxes to support church establishments, the jailing of Quakers, and the persecution of Catholics).

5. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 210–12 (1972) (detailing the ways that secondary education conflicts with Amish values of “informal learning-through-doing; a life of ‘goodness,’ rather than a life of intellect . . . community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society,” before holding that a compulsory school-attendance law violated Amish parents’ rights under the Free Exercise Clause).

6. *See, e.g.*, Banjul Charter on Human and People’s Rights, June 27, 1981, art. 8, 21 I.L.M. 59 (“Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.”); American Convention on Human Rights, Nov. 22, 1969, arts. 12 & 13, 9 I.L.M. 673 (“Everyone has the right to freedom of conscience and religion. . . . No one shall be subject to restrictions that might impair his freedom to maintain or change his religion or beliefs.”); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 11, 1950, art. 9, 312 U.N.T.S. 221 (as amended) (“Everyone has the right to freedom of thought, conscience and religion Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”); *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR, 3d Sess., art. 18, U.N. Doc. A/Res/217 (1948) (“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”).

7. *See, e.g.*, David M. Ackerman, *The Law of Church and State: Developments in the Supreme Court Since 1980*, in *THE LAW OF CHURCH AND STATE IN THE SUPREME COURT 1* (David M. Ackerman et al. eds., 2003).

8. WEBSTER’S INTERNATIONAL DICTIONARY 148 (3d ed. 1971) (defining autonomy as “the quality or state of being independent, free, and self-directing; individual or group freedom”); Scharffs, *supra* note 3, at 1248.

that claim ultimate power in society.⁹ Arguably, church and state have been the most powerful organizations throughout Western history,¹⁰ and their competing demands for the hearts of their members and citizens have often resulted in literal battles for ultimate autonomy.¹¹ In the United States, the battles have been less bloody but nonetheless passionate.¹²

In a sense, it is especially fitting that the conference convened on the campus of Brigham Young University, whose namesake evokes vivid memories of just such a struggle for autonomy in the history of its sponsoring institution, the Church of Jesus Christ of Latter-day Saints (the LDS Church).¹³ That experience can be summed up in a rough sense by two distinctive features of our campus that often attract the attention of first-time visitors: first, the Wasatch mountain range that dramatically rises just a mile east of campus; second, the pianos found in nearly every campus classroom, including those at the J. Reuben Clark Law School.

When Brigham Young led the early members of the LDS Church to these mountain valleys in 1847, most of these pioneers considered themselves outcasts from a society that, in their view, had unduly interfered with church autonomy.¹⁴ They fled the United States for

9. Scharffs, *supra* note 3, at 1246–47.

10. See Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1392.

11. One example of the struggle for religious autonomy is the series of conflicts between the Protestants and the Catholics in western Europe in the sixteenth and seventeenth centuries. See RONALD G. ASCH, *THE THIRTY YEARS WAR: THE HOLY ROMAN EMPIRE AND EUROPE*, 1618–48, at 9–46 (1997) (discussing the origins of these primarily religious conflicts).

12. Several prominent colonial religious pilgrims fought against the initial unification of church and state in Puritanical New England—including Anne Hutchinson, who was banished for her religious beliefs and fled the colony, and Roger Williams, who founded Rhode Island when he reviled the lack of “freedom from interference by civil authority” in Massachusetts. ANSON PHELPS STOKES & LEO PFEFFER, *CHURCH AND STATE IN THE UNITED STATES* 9–14 (1950).

13. Brigham Young was the second president of the LDS Church. After the martyrdom of Joseph Smith, the founder of the Church, Brigham Young led the body of the Church in the famous Mormon exodus to Utah. See, e.g., RICHARD N. OSTLING AND JOAN K. OSTLING, *MORMON AMERICA: THE POWER AND THE PROMISE* 38–55 (1999); see also *infra* notes 14–16 and accompanying text.

14. A tract published in 1839 sought to create sympathy for the LDS Church by reciting the manner in which one state had interfered with their religious freedom:

On the Fourth of July, 1838 . . . an address [was] delivered by Elder Rigdon, in which . . . we claimed and declared our constitutional rights, as American citizens, and manifested a determination to do our utmost endeavors, from that time forth, to resist all oppression, and to maintain our rights and freedom according to the

an area which, at that time, was actually part of Mexico.¹⁵ And for many of them, these mountains both literally and figuratively offered refuge from the rest of American society. These pioneers wanted nothing more than to be left alone—to be free from governmental and societal interference with their religious practices.¹⁶ A hymn in the LDS hymnal, *For the Strength of the Hills*, expresses how many of these early pioneers felt about these mountains.

For the strength of the hills we bless thee,
 Our God, our fathers' God;
 Thou hast made thy children mighty
 By the touch of the mountain sod.

holy principles of liberty, as guaranteed to every person by the constitution and laws of our government. . . . Soon after these things . . . [the governor of Missouri] actually presumed to give orders for the raising of several thousand volunteers from the middle counties of the state, to march against the Mormons, as he termed them. This force was soon on their march with the governor at their head; but when he had come near the upper country, he was officially notified that the Mormons were not in a state of insurrection, but were misrepresented by [those persecuting the LDS Church]. His excellency then disbanded his forces and sneaked back to Jefferson City to wait till the [persecutors] should drive the Mormons to some act which might be considered illegal, which would give him some pretext for driving them from the state.

PARLEY P. PRATT, HISTORY OF THE LATE PERSECUTION INFLICTED BY THE STATE OF MISSOURI UPON THE MORMONS 26–30 (Dawson & Bates, 1839), *reprinted in* LDS COLLECTOR'S LIBRARY '97 (Infobases, Inc. CD-ROM, 1996).

15. The territory in which the early LDS pioneers settled did not become part of the United States until the end of the Mexican War in 1848. However, by the time the pioneers left for Utah, many considered it a foregone conclusion that the United States would acquire the California territory, including Utah. REPRODUCTION OF HUBERT HOWE BANCROFT'S HISTORY OF UTAH, 1540–1886, at 239 (1982); *see also* THOMAS G. ALEXANDER, UTAH, THE RIGHT PLACE: THE OFFICIAL CENTENNIAL HISTORY 92 (1996). The LDS Church continued to struggle with issues involving the government after the western expansion of the United States. A sermon at the time noted that “[the Church Members are] not ignorant of the exertions which has [sic] been made throughout the Union to secure the enactment of . . . proscriptive measures, nor [are they] ignorant of the intent of leading politicians . . . to forge chains with which to bind us, while depriving us of our liberties.” Moses Thatcher, Discourse Delivered at the Saturday Afternoon Session of the Annual Conference of the Church (Apr. 7, 1883), *in* 24 JOURNAL OF DISCOURSES 110, 110–11 (photo. reprint 1956) (1884).

16. An early LDS Church leader described his feelings as follows:

Well, then, I feel to thank God that we are here; I feel to bless him for every foot of desert country that intervenes between this and our enemies. There is not a foot of barren soil between us and them but for it I feel to thank God. I regard it as a bulwark of strength to protect the infant kingdom of God while it should gather to itself strength, that it might exist in the midst of the nations of the earth.

Amasa Lyman, The Saints' Blessings—Divine Protection, Etc., Discourse Delivered in the Tabernacle (Oct. 18, 1857), *in* 5 JOURNAL OF DISCOURSES, *supra* note 15, at 345.

Thou hast led thy chosen Israel
To freedom's last abode;
For the strength of the hills we bless thee,
Our God, our fathers' God.

Thou hast led us here in safety
Where the mountain bulwark stands
As the guardian of the loved ones
Thou has brought from many lands.
For the rock and for the river,
The valley's fertile sod,
For the strength of the hills we bless thee,
Our God, our fathers' God.¹⁷

These verses—still sung in LDS worship services today—bring us to the second unique feature of Brigham Young University, the pianos in every classroom. Student groups use the university's classrooms (and the pianos) for worship services every Sunday. Because both the church and society in general are in such different positions than they were when the early pioneers arrived in these valleys, the reference to mountain bulwarks has a somewhat different meaning for the students who sing the hymn today. These students are not part of a small group of pioneer outcasts seeking physical protection and autonomy, but members of a large university, sponsored by a worldwide church with approximately twelve million members, only fourteen percent of whom reside in Utah, and less than fifty percent of whom live in the United States.¹⁸ The students singing these verses no longer need physical bulwarks—like the mountains praised in the hymn—to protect their religious autonomy. Yet they sing with equal fervor their gratitude for those intangible bulwarks that have been raised to give both church and state the independence to act for good within our society.

17. Felicia P. Hemans, *For the Strength of the Hills*, in *HYMNS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS* 35 (1985) (second and fourth verse omitted).

18. The Church of Jesus Christ of Latter-day Saints, *Key Facts and Figures*, at <http://www.lds.org/newsroom/page/0,15606,4034-1---10-168,00.html> (last visited Oct. 19, 2004). In fact, many of the students who are from these valleys have left their mountain homes to help the Church reach out to the world by serving people in almost every country. The Church of Jesus Christ of Latter-day Saints, *The Missionary Program*, at <http://www.lds.org/newsroom/page/0,15606,4037-1---6-168,00.html> (last visited Oct. 19, 2004).

Thus, it is a pleasure for us to host at the base of this mountain bulwark a conference addressing the legal safeguards protecting church autonomy in modern society.

1093]

Introduction
