AN EXTENDED ESSAY ON CHURCH AUTONOMY AND THE FIRST AMENDMENT

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The doctrine of church autonomy[1] is distinct from the two more familiar lines of cases decided under the Establishment Clause and Free Exercise Clause, respectively. Routine Establishment Clause disputes such as those over religious preferences,[2] government funding for

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[1] The term "church autonomy" was first used by law professor Paul G. Kauper in *Church Autonomy and the First Amendment: The Presbyterian Church Case*, 1969 SUP. CT. REV. 347 (1969). However, the concept of church autonomy was pointedly recognized as being lodged in the Court's First Amendment jurisprudence as early as Mark DeWolfe Howe, *Foreward: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91 (1953). Professor Howe's essay remarks on the Court's recent decision in *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952).

In lieu of church autonomy, some courts use the term "ecclesiastical abstention." But "abstention" suggests that the doctrine is discretionary. It is not. When it applies, church autonomy doctrine is a requirement of the First Amendment.

[2] *See, e.g.*, Estate of Thornton v. Caldor, Inc., 474 U.S. 703 (1985) (statute granting to private-sector employees the unyielding right to have Sabbath accommodated was religious preference violative of Establishment Clause). On the

religious entities,[3] and government-sponsored religious symbols[4] are now resolved by a series of rules (not standards) followed over the last two decades by the High Court.[5] Stand-alone Free Exercise Clause cases are resolved by first sorting those complaints charging that the government has intentionally imposed a burden on a claimant's religious beliefs or practices (they get *Lukumi*-like[6] struct scrutiny) from complaints over laws that impose a religious burden only as a consequence of neutral and generally applicable legislation (they get a pass under *Employment Division v. Smith*,[7] as narrowed by *Fulton v. City of Philadelphia*[8]). The threshold task of sorting the *Lukumi* sheep from the *Smith* goats often presages whether the claim prevails on the merits. In contrast, church autonomy has its own exclusive line of precedent running from *Watson v. Jones*[9] through *Kedroff v. St. Nicholas Cathedral*[10]—where the doctrine was first recognized as having First Amendment stature—and culminating with renewed vigor for religious institutional autonomy in the Supreme Court's unanimous decision of *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.[11]

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other hand, a religious exemption does not violate the Establishment Clause. *See* Corp. of Presiding Bishop v. Amos, 483 U.S. 327 (1987) (holding that religious employer exemption to civil rights law did not violate the Establishment Clause).

[3] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (state school voucher plan available to schools, including religious schools, did not violate the Establishment Clause).

[4] *See, e.g.*, American Legion v. American Humanist Assoc., 139 S. Ct. 2067 (2019) (plurality opinion, in part) (high visibility World War I memorial featuring a 40-foot high Latin cross that was maintained by a state did not violate Establishment Clause). Religious symbols are upheld if religiously inclusive when first commissioned and the message does not disparage any faith.

[5] The earlier period in which courts applied a three-prong standard is long dormant. *Cf.* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (Establishment Clause violated if law's purpose is religious, its substantial effect is to advance religion, or it resulted in excessive entanglement with religion).

[6] *See* Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993) (holding that city ordinances that were gerrymandered to discriminate against church's ritual sacrifice of animals violated Free Exercise Clause).

[7] 494 U.S. 872 (1990) (holding that generally applicable legislation, neutral as to religion, that has a disparate impact on the religious practices of some does not state a claim under Free Exercise Clause).

[8] 141 S. Ct. 1868 (2021) (holding that a municipality may not terminate its foster-care services contract with a social service provider on the ground that provider declines, for reasons of religious belief, to certify same-sex couples as foster parents). The contract had a clause prohibiting discrimination on the basis of sexual orientation. It also had a provision permitting individualized exceptions for good cause, yet the city had not exercised its discretion to accommodate the provider's religious beliefs. *Fulton* thus made it clear that a generally applicable law cannot include exemptions or exceptions for secular reasons while denying them for religious reasons. To make an accommodation for some but not for a religious belief or practice is to devalue religion. When the Court gets to applying strict scrutiny, every free-exercise claim becomes an as-applied case. Here the municipality was unable to show any substantial reason not to exempt this particular religious service provider, thus relief was ordered.

[9] 80 U.S. (13 Wall.) 679 (1872). There were disputes over the ownership of church property decided by the Supreme Court long before *Watson*, but they were decided on bases other than the First Amendment and church autonomy. These very early cases are collected at Michael W. McConnell, *The Supreme Court's Earliest Church-State Cases: Windows on Religious-Cultural-Political Conflict in the Early Republic*, 37 TULSA L. REV. 7 (2013).

[10] 344 U.S. 94.

[11] 565 U.S. 171 (2012).

Stated differently, for some time now—but, one might say, hidden in plain sight—there have been not two, but three different sorts of religious-freedom cases decided under the Religion Clauses of the First Amendment. That explains why the *Smith* case, which is in the Free Exercise Clause line of cases, was said by the Court to be inapplicable in *Hosanna-Tabor*, a church autonomy case.[12] This sidestepping of *Smith* by the *Hosanna-Tabor* Court initially puzzled a lot of legal scholars—and admittedly the Court did not at first explain the distinction well.[13] But now that commentators have tumbled to the fact that there are three lines of cases that cover the range of First Amendment religious-freedom claims, the threshold task of bringing to bear the correct line of precedent is becoming routine. That the two Religion Clauses[14] have given rise to three distinct lines of constitutional precedent is, of course, evidence of far deeper goings on. And this essay will turn very shortly to the juridical and historical rationales that underlie these distinctions.

The church autonomy line of precedent consists of only a dozen Supreme Court cases decided upon plenary review.[15] The line is topped by the Court's 2012 decision in *Hosanna-*

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[12] *Id.* at 189-90.

[13] Speaking for the *Hosanna-Tabor* Court, Chief Justice Roberts wrote:

> [A] church's selection of its ministers is unlike an individual's ingestion of peyote [as in *Employment Division v. Smith*]. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself. See [*Smith*, 494 U.S.] at 877 (distinguishing the government's regulation of "physical acts" from its "lend[ing] its power to one or the other side in controversies over religious authority or dogma").

565 U.S. at 190. Accordingly, there is a subject-matter class of cases to which the rule in *Smith* does not apply. The Court characterized the firing of a teacher in *Hosanna-Tabor* as an "internal church decision," meaning a decision of self-governance, while characterizing the ingestion of peyote in *Smith* as an "outward physical act." It follows that the firing of the teacher regulated by the Americans with Disability Act was not an "outward physical act" but an "internal church decision." Contrasting "outward physical acts" with "internal decisions" was unhelpful and soon abandoned.

[14] U.S. CONST., AMEND. 1, begins "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This is one clause with two participial phrases ("respecting an entablement" and "prohibiting the free exercise"). Nevertheless, the longstanding convention is to refer to them as clauses rather than phrases.

[15] In chronological order, the Supreme Court's principal church autonomy cases are: *Watson*, 80 U.S. 679 (involving control over church property disputed by factions within a church); Bouldin v. Alexander, 82 U.S. (15 Wall.) 131, 139-40 (1872) (involving an attempted takeover of a church by rogue elements); Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1 (1929) (involving the authority to appoint or remove a church minister); *Kedroff*, 344 U.S. 94 (involving a governmental attempt to alter the polity of a church); Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960) (per curiam) (involving a governmental attempt to alter the polity of a church); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Church, 393 U.S. 440 (1969) (involving control over church property disputed by factions within a church); Maryland & Va. Churches of God v. Church at Sharpsburg, 396 U.S. 367 (1970) (per curiam) (involving control over church property disputed by factions within a church); Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) (involving the authority to appoint or remove a church minister and to reorganize the church polity); Jones v. Wolf, 443 U.S. 595 (1979) (involving control over church property disputed

Tabor, the importance of which cannot be overstated. The Court's newest pronouncement on church autonomy in *Our Lady of Guadalupe School v. Morrissey-Berru* is a reaffirmation and clarification (some say a modest expansion) of who is a minister for purposes of the "ministerial exception," a defense available in civil rights antidiscrimination litigation.[16] There is this third line of Religion Clause precedent because the doctrine of church autonomy is about something different from a personal right to religious liberty, the right more typically secured by the Free Exercise Clause that shifts to the government the burden of strict-scrutiny balancing. In contrast, the church autonomy doctrine is positioned by the Court to rest on both the Establishment Clause and the Free Exercise Clause.[17] It is not a personal right rooted in an individual's religious beliefs, but a zone of protection for an entity's internal governance that is attendant to the organization's religious character. Importantly, once the elements of the ministerial exception are shown by the church or other religious organization to be present, the lawsuit is at an end; there is no plaintiff's rejoinder.[18] The doctrine thus affords the church a defense in the nature of a categorical immunity—something like a government-free zone.[19]

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by factions within a church); Thomas v. Review Board, 450 U.S. 707 (1981) (involving the rule prohibiting civil authorities from taking up religious questions); *Hosanna-Tabor*, 565 U.S. 171 (involving application of the ministerial exception); Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049 (2020) (involving application of the ministerial exception).

There are additional cases rooted in church autonomy doctrine, but the Court attributed the result to a basis different than the First Amendment. *See, e.g.*, Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867) (holding that priest cannot be deprived of ability to perform ecclesial duties because of failure to take exculpatory oath following Civil War); Rector of Holy Trinity Church v. U.S., 143 U.S. 457 (1892) (refusing to apply to clergy legislation by Congress forbidding aliens to come to U.S. for employment); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) (adopting rule of construction that presumes religious organizations are exempt from congressional regulatory statutes that would otherwise entangle government in matters of internal religious governance).

[16] 140 S. Ct. 2049. On what *Our Lady* adds to *Hosanna-Tabor*, see Helen M. Alvaré, *Church Autonomy After* Our Lady of Guadalupe School*: Too Broad? Or Broad As It Needs To Be?* 25 TEX. REV. L. & POLITICS 319 (2021).

[17] *Hosanna-Tabor*, 565 U.S. at 184 ("The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."); *id.* at 188-89 ("By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions."); *see also Our Lady*, 140 S. Ct. at 2060 ("State interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion.").

[18] *Hosanna-Tabor*, 565 U.S. at 196 ("When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us.").

[19] *Id*. at 194 ("The EEOC and Perich suggest that Hosanna-Tabor's asserted religious reason for firing Perich . . . was pretextual. That suggestion misses the point of the ministerial exception. The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister . . . is the church's alone.") (citations and footnote omitted).

The doctrine of church autonomy protects a relatively discrete field of internal operations performed by religious organizations—a field described in *Hosanna-Tabor* as matters pertaining to "the internal governance of the church."[20] But if this zone of government-free operations is relatively compact, these are functions that go to the very heart of a religious entity's ability to maintain control over the organization and command its destiny. Moreover, church autonomy is an exclusive space for such internal operations, be they characterized as religious or secular. It is for the church and similar religious entities to occupy this center of authority to the exclusion of other powers. In short, the doctrine of church autonomy is doing different work by a different means.

The scholarly literature on church autonomy is extensive,[21] with the number of articles on the subject nearly outstripping the number of cases of this type reported by the federal courts of appeal. While *Hosanna-Tabor* succinctly defined matters of church autonomy as those actions that involve the "internal governance" of a religious organization,[22] and *Kedroff* limited the operations to matters "strictly ecclesiastical,"[23] Part I of this article will show that the Supreme Court's church autonomy cases yield five protected areas for religious organizations. These are the formation of religious doctrine and its interpretation; the choice of ecclesiology and

[20] *Id.* at 188.

[21] For scholars generally supportive of church autonomy, see Richard W. Garnett & John M. Robinson, Hosanna-Tabor, *Religious Freedom, and the Constitutional Structure*, 2011–2012 CATO SUP. CT. REV. 307; Richard W. Garnett, *"The Freedom of the Church": (Towards) An Exposition, Translation, and Defense*, 21 J. OF CONTEMP. LEGAL ISS. 33 (2013); Douglas Laycock, Hosanna-Tabor *and the Ministerial Exception*, 35 HARV. J. L. & PUB. POL'Y 839 (2012); Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 HARV. J. L. & PUB. POL'Y 821 (2012); Marc O. DeGirolami, *The Two Separations in* THE CAMBRIDGE COMPANION TO THE FIRST AMENDMENT AND RELIGIOUS LIBERTY 396, 398-413 (Michael D. Breidenbach & Owen Anderson, eds. 2020); Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of* Hosanna-Tabor, 108 NW. U. L. REV. 1183 (2014); Steven D. Smith, *Freedom of Religion or Freedom of the Church?, in* LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE UNITED STATES 267 (Austin Sarat ed., 2012); Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 ST. JOHN'S J. LEGAL COMMENT 515 (2007); Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 NW. U. L. REV. COLLOQUY 175, 179 (2011); Michael P. Moreland, *Religious Free Exercise and Anti-Discrimination Law*, 70 ALB. L. REV. 1417 (2007). For a positive reception to the idea of church autonomy but with reservations, see Andrew Koppelman, *"Freedom of the Church" and the Authority of the State*, 21 J. OF CONTEMP. LEGAL ISS. 145 (2013); John D. Inazu, *The Freedom of the Church (New Revised Standard Version)*, 21 J. OF CONTEMP. LEGAL ISS. 335 (2013). For critics of church autonomy, see Richard C. Schragger & Micah Schwartzman, *Lost in Translation: A Dilemma for Freedom of the Church*, 21 J. OF CONTEMP. LEGAL ISS. 15 (2013); Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917 (2013); Frederick Mark Gedicks, *Dignity, History, and Religious-Group Rights*, 21 J. OF CONTEMP. LEGAL ISS. 273 (2013); Caroline Mala Corbin, *The Irony of* Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 106 NW. U. L. REV. 951 (2012); Leslie C. Griffin, *The Sins of* Hosanna-Tabor, 88 INDIANA L.J. 981 (2013).

[22] 565 U.S. at 188.

[23] 344 U.S. at 119.

organizational polity; the appointment, promotion, training, and removal of clergy, along with other religious functionaries and policy leaders; the admission and removal of members, including a determination of members and affiliates in good standing; and communication with insiders about the foregoing subjects and activities, because such communications are necessary to the enjoyment of the first four subject areas. As we shall see, claims are being made for church autonomy that are overly broad, and yet other forces are pressuring to unduly constrain the territory set aside by this rule of nonentanglement with the government.

Part II then identifies four types of legal claims and defenses that commonly arise in the course of litigation where the doctrine of church autonomy is implicated: the defense known as the "ministerial exception," first raised in employment antidiscrimination claims; the rule prohibiting the resolution of religious questions by civil authorities; the rules for resolving internecine disputes between two factions within a church or denomination; and defamation claims based on communications that arose out of ecclesiastical decisions and events.

The primary work of constitutional structure is keeping in right relationship centers of power, including church and state, in contrast to elevating particular personal rights. Part III takes up those features to church autonomy litigation that follow when the principle at work is structural, separating government and church, as opposed to rights-based. That can affect a surprising range of practices and procedures before a court reaches the merits, such as the necessity for the trial court to resolve a church-autonomy defense at the outset of a lawsuit, lest probing discovery and pre-trial motions themselves so entangle the church with civil judicial process as to generate a fresh invasion of the autonomy doctrine. Because structure cannot be waived, a church autonomy defense may be raised sui sponte.

Finally, Part IV surveys the relevant history from the American founding that speaks to constitutional originalism and the things about a church that are not Caesar's. In Western Civilization, there is a long and rich history of differentiating between the operations of church and those of empire (later "kingdom," and still later "state"), the threads of which can be traced all the way back to the 2nd century.[24] But as the Supreme Court observed first in *Hosanna-Tabor* and again in *Our Lady*, the binding historical backdrop to the First Amendment is the colonial and early national story of disestablishment. Revolutionary Americans broke away from the

[24] *See* ROBERT LOUIS WILKEN, LIBERTY IN THE THINGS OF GOD: THE CHRISTIAN ORIGINS OF RELIGIOUS FREEDOM 10-13 (2019).

ideas of Christendom that undergirded the Church of England, as headed by the Crown and established by Parliament,[25] and instead adopted the wholly novel principles that drove religious disestablishment as a means of disentangling the church from the corrupting hand of government in the newly forming states.

I. FIVE SUBJECT MATTERS PROTECTED BY THE CHURCH AUTONOMY DOCTRINE

A helpful way of thinking about church-state relations is to envision two different entities with a large territory of overlapping interests, but also with each having its own zone of exclusive authority. Alternatively, a federal circuit court of appeals has suggested that the concept of church autonomy is "best understood" as "marking a boundary between two separate polities, the secular and the religious."[26] These visual pictures raise the questions: What is the zone occupied by the church to exclusion of the civil authorities? Where is this boundary line that marks off the authority of the church to the exclusion of the state?

The Supreme Court has responded to these inquiries with general language, the most quoted being a passage from *Kedroff* recognizing that the First Amendment grants "a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[27] Similarly, *Milivojevich* recited that the First Amendment permits religious organizations "to establish their own rules and regulations for internal discipline and government" and that civil authorities must defer to the decisions of such organizations "on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law"; these same civil authorities are prohibited from delving into matters of "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them."[28] And *Hosanna-Tabor* recalled a passage in *Watson* which says that "whenever the questions of discipline, or of faith or ecclesiastical rule, custom or law" have been resolved by a church, the matter is closed and not to be relitigated by the civil authorities.[29] An equally general passage appeared in *Our Lady* in explanation of the unanimous result in *Hosanna-Tabor*: "The constitutional foundation for our holding was the

[25] *Our Lady*, 140 S. Ct. at 2061-62, 2065-66; *Hosanna-Tabor*, 565 U.S. at 182-85.
[26] Korte v. Sebelius, 735 F.3d 654, 677 (7th Cir. 2013).
[27] 344 U.S. at 116 (footnote omitted).
[28] 426 U.S. at 713, 714, 724.
[29] 565 U.S. at 185 (quoting *Watson*, 80 U.S. at 727).

general principle of church autonomy to which we have already referred: independence in matters of faith and doctrine and in closely linked matters of internal government."[30] Accordingly, the doctrine of church autonomy extends a zone of independence to those relatively few but "core" administrative practices and "key" personnel functions that go to the control and destiny of a religious entity.[31]

While this general language is a helpful starting point, more detail is needed to solve close disputes. From the full range of the High Court's case law, we know that church autonomy has been found to protect five areas of internal governance over which a religious organization is sovereign: (1) the determination and interpretation of religious doctrine;[32] (2) the determination of the organization's polity or governance structure, including its embodiment in canons and bylaws;[33] (3) the hiring, training, supervising, promoting, and removing of clergy, worship

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[30] *Our Lady*, 140 S. Ct. at 2061. Also commonly cited is Justice William Brennan's concurring opinion in *Corp. of Presiding Bishop v. Amos*, joined by Justice Thurgood Marshall, which delved into the church autonomy theme:

> [R]eligious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: "select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions." . . . For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself.

483 U.S. at 341-42 (quoting Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389 (1981)).

[31] 140 S. Ct. at 2055 ("core"); *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring) ("key").

[32] *See Church at Sharpsburg*, 396 U.S. at 368 (holding that courts cannot adjudicate doctrinal disputes); *Presbyterian Church*, 393 U.S. at 449-51 (refusing to follow a rule that discourages changes in doctrine); *Watson*, 80 U.S. at 725-33 (rejecting implied-trust rule because of its departure-from-doctrine inquiry); *see also Thomas*, 450 U.S. at 715-16 (holding that courts are not arbiters of scriptural interpretation); Order of St. Benedict v. Steinhauser, 234 U.S. 640, 647-51 (1914) (finding that religious practices concerning vow of poverty and communal ownership of property are not violative of individual liberty and will be enforced by the courts).

Care must be exercised to not confuse the *determination* or *interpretation* of doctrine, which are covered by church autonomy, with the *application* of doctrine. All manner of activities and expressions could sincerely be said to be an application of one's understanding of his religious doctrine, but that does not make them a matter of church autonomy. The application of doctrine, rather, is a matter to be addressed as a straightforward claim under the Free Exercise Clause. The Texas Supreme Court recently confused the determination of doctrine with its application in *In re Diocese of Lubbock*. 624 S.W.3d 506 (Tex. 2021), petition for cert. filed, 2021 WL 4173594 (U.S. Sept. 13, 2021) (No. 21-398). In that case—a claim for defamation—the court mistakenly regarded as a protected determination of doctrine a diocese's decision about releasing to the public a list of clerics credibly accused of having abused a minor. This decision, however, is best understood as a practical application of doctrine, not a determination of doctrine, and thus not protected by the doctrine of church autonomy.

[33] *See Milivojevich*, 426 U.S. at 708-24 (civil courts may not probe into church polity); *Presbyterian Church*, 393 U.S. at 451 (civil courts may not interpret and weigh church doctrine); *Kreshik*, 363 U.S. at 191 (First Amendment prevents judiciary, as well as legislature, from interfering in ecclesiastical governance of Russian Orthodox Church); *Kedroff*, 344 U.S. at 119 (same); Shepard v. Barkley, 247 U.S. 1, 2 (1918) (aff'd mem.) (courts may not interfere with merger of two Presbyterian denominations).

leaders, and other employees with explicitly religious functions as well as policy leaders;[34] (4) the determination of who is admitted to and expelled from membership, as well as which members and affiliates are in good standing;[35] and (5) internal communications of the religious organization pertaining to the full enjoyment of the prior four subjects.

Bryce v. Episcopal Church in the Diocese of Colorado, is illustrative of the fifth item concerning internal communications that are instrumental to the enjoyment of the prior four categories.[36] In *Bryce*, an Episcopalian church was sued by the youth minister and her domestic partner. Local church authorities had discovered that the youth minister was in a homosexual relationship. She was promptly transferred to duties that did not entail contact with youth and she was told she would be dismissed at the end of the year. At follow-on church meetings, the same authorities communicated to parents of the youth that the youth minister's same-sex relationship was the reason for her reassignment. The minister and her partner were present at and participated in these meetings. Among the various legal claims later brought by the couple was sexual harassment based on the exposure of their same-sex relationship during the meetings. The trial and circuit courts held that the church's internal communications were protected by church autonomy.[37] The youth minister herself—as an employee of the defendant—was subject to the third category of church autonomy: the ministerial exception. But the youth minister's partner, though not employed by the church, was also subject to the general doctrine of church autonomy,

[34] *See Our Lady*, 140 S. Ct. at 2062; *Hosanna-Tabor*, 565 U.S. at 190-95; *Milivojevich*, 426 U.S. at 708-20 (civil courts may not probe into defrocking of cleric); *Kedroff*, 344 U.S. at 116 (courts may not probe into clerical appointments); *Gonzalez*, 280 U.S. at 16 (declining to intervene on behalf of petitioner who sought order directing archbishop to appoint petitioner to ecclesiastical office). *See also Catholic Bishop*, 440 U.S. at 501-04 (refusal by Court to force collective bargaining on parochial school because of interference with relationship between church superiors and lay teachers); Rector of Holy Trinity Church v. United States, 143 U.S. 457, 472 (1892) (refusing to apply generally applicable law preventing employment of aliens to church's clerical appointment); *Cummings*, 71 U.S. 277 (unconstitutional to prevent priest from assuming his ecclesiastical position because of refusal to take loyalty oath).

[35] *See Bouldin*, 82 U.S. at 139-40 ("This is not a question of membership of the church, nor of the rights of members as such. It may be conceded that we have no power to revise or question ordinary acts of church discipline, or of excision from membership. . . . [W]e cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off."); *Watson*, 80 U.S. at 733 (court has no jurisdiction over church discipline or the conformity of church members to the standard of morals required of them). *See also Order of St. Benedict*, 234 U.S. at 647-51 (so long as individual voluntarily joined a religious group and is free to leave at any time, religious liberty is not violated and members are bound to prior rules consensually entered into, such as vow of poverty and communal ownership of property). The subject of autonomy does not include the "discipline" of members, which could be quite far reaching. But this point and the next do include the confidential communication to other members concerning the discipline or expulsion of a member.

[36] 289 F.3d 648 (10th Cir. 2002).

[37] *Id.* at 657-59.

but under the fifth category which safeguards internal communications. The communications were relevant to the governance of the church in order to explain to the church members and parents the reason for the abrupt reassignment of the youth minister to whom some of the children had become attached. The claim by the minister's partner was also dismissed because her complaint of sexual harassment was derivative of the protected employment decision to dismiss the youth minister.[38]

Legal counsel to religious organizations sometimes try to shoehorn a case into a category where it does not belong. Illustrative is an argument made in a brief amici curia filed in support of a petition for writ of certiorari in *Roman Catholic Diocese of Albany v. Lacewell*.[39] The question presented in *Lacewell* concerns New York legislation requiring employers to provide health care benefits to employees that includes coverage for elective abortions. Naturally enough, pro-life religious organizations object to compliance with the law as violating their right to free exercise of religion. Plaintiffs certainly appear to meet the threshold of stating a prima facie claim for relief under the Free Exercise Clause. However, amici argued that the New York abortion mandate violates church autonomy.[40] This is not so. The New York legislation does not itself seek to regulate a religious organization's internal governance as the U.S. Supreme Court uses that term. True, the state law certainly imposes a substantial burden on such an organization's application of its religious doctrine concerning the unborn, but it does not determine or interpret that doctrine. A straightforward free-exercise claim is altogether different from a church autonomy claim.[41] The danger of overreach by legal counsel for the church, or in

[38] *Id.* at 658-59, 658 n.2.

[39] Petition for cert. filed, 2021 WL 1670283 (U.S. Apr. 23, 2021) (No. 20-1501), brief docketed May 7, 2021, *available at* https://www.supremecourt.gov/DocketPDF/20/20-1501/176496/20210423144447105_Roman%20Catholic%20Diocese%20of%20Albany%20v.%20Lacewell%20-%20Cert%20Petition.pdf.

[40] Brief of Church of Jesus Christ of Latter-day Saints et al., *Lacewell*, No. 20-1501 (filed May 26, 2021), *available at* https://www.supremecourt.gov/DocketPDF/20/20-1501/180185/20210526121754439_20-1501acTheChurchOfJesusChristOfLatter-DaySaints.pdf. On November 1, 2021, the Supreme Court granted the petition for certiorari, vacated the opinion below, and remanded with directions to reconsider the case in light of its decision in *Fulton*. Order List (11/01/2021) (supremecourt.gov). *Fulton* is a free exercise case not a church autonomy case, so this disposition is entirely consistent with the discussion in the text.

[41] This is why cases like *Jimmy Swaggart Ministries v. Calif. Bd. of Equalization*, 493 U.S. 378 (1990) and *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985) are distinguishable from cases involving the church autonomy doctrine. Church autonomy extends to the formation and revision of doctrine, but not the application or practice of doctrine. The argument that a wage and hour law or a use tax imposes a substantial burden on a religious organization is to be taken up as a straightforward claim under the Free Exercise Clause. That was done in both *Jimmy Swaggart* and *Alamo Foundation*, albeit the claims were ultimately unsuccessful.

this instances the amici, the civil courts might not just reject the argument but might overshoot and unduly narrow the doctrine of church autonomy.

II. In What Sorts of Disputes Is Church Autonomy Applicable?

What are the common patterns of disputes or the sorts of factual settings where church autonomy has often been implicated? As the case law has unfolded, the doctrine of church autonomy has been frequently invoked in four dispute patterns: (1) a plaintiff sues a religious entity for employment discrimination (or a related common-law claim), and the entity invokes the ministerial exception to block the lawsuit; (2) a lawsuit raises questions that concern the validity, meaning, or importance of religious assertions or disputes, and civil authorities refuse to take up those questions; (3) a disagreement between two factions within a church or denomination is brought before the civil authorities, who then defer to the determination by the highest ecclesial judicatory; and (4) a party sues for defamation based on communications that arose out of a matter of internal governance, and the defendant pleads church autonomy as a defense. As to the third pattern, in lieu of deferring to the proper ecclesial judicatory, the Supreme Court has permitted states the alternative of adopting a rule of decision characterized as "neutral principles of law." Resort to this alternative, however, has been permitted by the Supreme Court only in cases where the two factions have abandoned attempts at resolving their underlying doctrinal differences and decided to go their separate ways, thus the only matter that remains for civil resolution via "neutral principles" is who gets legal title to the church property.

Although most church autonomy cases fall into one of these four patterns, this list is not a closed set. Occasionally there are matters outside these patterns where church autonomy is still applicable. For example, the principles behind the ministerial exception have been found applicable where the disputing parties lack an employment relationship.[42] The exemption was also found to apply when a state university sought to control the moral qualifications of the leaders of student religious organizations on its campus.[43] And on occasion, courts have declined

[42] *See, e.g.*, *Bryce*, 289 F.3d at 657-59 (holding that in a lawsuit where there were two plaintiffs and one was not an employee of the church, the church autonomy defense was still applicable to the nonemployee).
[43] *See, e.g.*, InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ., 2021 WL 1387787 (E.D. Mich. Apr. 13, 2021) (overturning university regulation barring student religious organizations from having statement of faith and morality code requirements for student leaders).

to entertain a lawsuit asserting a right to attain or hold an uncompensated ecclesiastical appointment.[44]

A. *The Ministerial Exception*

The "ministerial exception" is an affirmative defense in the nature of a categorical immunity enjoyed by churches and similar religious entities that prevents them from being sued by employees whose job description includes religious functions.[45] The term ministerial exception is widely acknowledged to be a misnomer,[46] but the courts and commentators have yet to settle on a more apt label.[47] For example, the ministerial exception applies to more than just claims brought by clergy, members of a religious order, and other ecclesiastics. Rather, it applies to any executive leader or worship leader of a religious organization, and to any employee of a religious organization with duties some of which are explicitly religious in function.[48] Furthermore, "minister" is largely a Protestant term. Catholic and Orthodox Christians generally do not use the term, nor do Jews, Muslims, and others.[49]

The ministerial exception is a defense to more than just claims by employees of churches and other houses of worship. The defense extends to entities that engage in explicitly religious

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[44] *See, e.g.*, Chavis v. Roe, 93 N.J. 103, 459 A.2d 674 (1983) (involving a claim for damages by a deacon and his wife being defrocked and removed from his post, apparently over a dispute with the pastor; after expressing some doubt as to whether one's status as a deacon entailed a loss for which there could be a remedy, the court dismissed citing First Amendment concerns).

[45] *Hosanna-Tabor*, 565 U.S. at 195 n.4 (concluding that the ministerial exception is an affirmative defense). For more discussion on church autonomy as an affirmative defense, see *infra* notes 213-26 and accompanying text.

[46] *Our Lady*, 140 S. Ct. at 2064; *Hosanna-Tabor*, 565 U.S. at 198-99 (Alito, J., concurring).

[47] One suggestion is to start referring to the "ministerial exception" as "church autonomy" because the exception is a sub-application of that doctrine. Without any confusion or loss in meaning, Justice Alito did that on one occasion in *Our Lady*, 140 S. Ct. at 2061.

[48] *Id.* at 2064 ("[T]he exception should include 'any employee who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or *teacher of its faith*.'") (quoting *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring)). *Our Lady* and *Hosanna-Tabor* involved religious elementary school teachers as ministers. Other cases have found to satisfy the definition of ministers a religious school principal, *Rehfield v. Diocese of Joliet*, 2021 IL 125656 (2021); a church minister of music, *EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795 (4th Cir. 2000); an archdiocese's communications manager, *Alicea-Hernandez v. Archdiocese of Chicago*, 2002 WL 598517 (N.D. Ill. Apr. 18, 2002); and the chair of the religion department and campus chaplain at a Catholic college, *Simon v. Saint Dominic Acad*., 2021 WL 1660851 (D.N.J. Apr. 28, 2021). *See also* Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc., 2021 WL 3669050 (S.D. Ind. Aug. 11, 2021) (guidance counselor and member of faculty administrative team at Catholic high school found to meet the definition of minister); EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996) (Catholic University faculty member in the canon law department is minister); EEOC v. Sw. Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981) (faculty and administrators at a seminary are ministers). *Cf.* DeWeese-Boyd v. Gordon College, 163 N.E.3d 1000 (Mass. 2021) (member of faculty teaching social work at Christian college is not a minister for purposes of ministerial exception), petition for cert. filed, 2021 WL 3406193 (U.S. Aug. 3, 2021) (No. 21-145). *See generally* Christopher Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1 (2011) (collecting cases).

[49] *Our Lady*, 140 S. Ct. at 2063-64; *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring).

activities similar or related to those of a church, such as K-12 religious schools that seek to transmit the faith to the next generation.[50] It makes less sense, however, to allow the defense by an entity that is marginally religious or that is religious in origin but that over time has largely secularized.[51] Simply put, the doctrine seeks to preserve the sovereignty of religious organizations that at least partly and genuinely engage in explicitly religious activities such as prayer, worship, observing sacraments, proselytizing, teaching religion, spiritual formation, or otherwise deepening or expanding the faith. That means entities that fall outside the scope of worship, teaching, propagating the faith, and so on ought not to be able to rely on the immunity.[52]

But how is a civil magistrate to determine that an employer is truly religious so as to benefit from the ministerial exception without violating the rule against civil authorities taking up questions about what is or is not central or important to a religion?[53] The manner by which this is worked out consistent with the First Amendment is illustrated by a recent administrative labor-law ruling. For reasons of church autonomy, lay faculty at a religious college are not permitted to organize a labor union under the National Labor Relations Act.[54] Prior case law had recognized collective bargaining rights for lay faculty unless a college was deemed "substantially religious in character."[55] That put the National Labor Relations Board in the position of making exacting inquiries into the curriculum, faculty tasks, and faith tenor of the student culture on campus, and then probing the religious importance the college puts on these matters. However, judging the degree of religiosity concerning matters of campus life would be unconstitutionally

[50] In addition to churches and K-12 religious schools, courts have applied the ministerial exception to a religious university and a seminary. *See Catholic Univ. of America*, 83 F.3d 455; *Sw. Baptist Theological Seminary*, 651 F.2d 277. In concept, there is no reason the exception would not be applicable to a religious charity and religious health care provider. *See* Hollins v. Methodist Healthcare, Inc., 474 F.3d 223 (6th Cir. 2007) (church-related hospital). In all instances, however, the employer has to meet the definition of a religious organization that has not secularized, and the employee concerned has to meet the definition of a minister.

[51] *See* NLRB v. St. Louis Christian Home, 663 F.2d 60 (8th Cir. 1981) (upholding NLRB jurisdiction because home organized as religious but over the years had secularized); Fike v. United Methodist Children's Home, 547 F. Supp. 286 (E.D. Va. 1982), *aff'd on other grounds*, 709 F.2d 284 (4th Cir. 1983) (children's home that had abandoned its religious purpose lost benefit of ministerial exception).

[52] This is somewhat akin to what is done with the religious employer exemption in § 702(a) of Title VII of the Civil Rights Act of 1964. If challenged, the employer needs to convince a court that it is sufficiently religious to invoke the exemption. *See* Spencer v. World Vision, Inc., 633 F.3d 723, 724 (9th Cir. 2011) (per curiam) (developing an approach for determining who is a seriously religious organization and thus able to invoke the religious employer exemption in Title VII); LeBoon v. Lancaster Jewish Community Center, 503 F.3d 217, 226-29 (3d Cir. 2007) (same).

[53] The rule against civil authorities taking up religious disputes is discussed *infra* Part II.B.

[54] *See* Bethany College and Thomas Jorsch and Lisa Guinn, 369 NLRB 1 (No. 98, June 10, 2020).

[55] *Id*. at 2-3.

entangling.[56] To avoid transgressing the rule against civil authorities resolving religious questions, the NLRB's new three-part inquiry looks only to whether a college: (1) was formed as a nonprofit religious corporation or similar entity; (2) currently holds itself out to the public as religious; and (3) is affiliated with a church, denomination, or a defined body of creedal or religious teachings.[57] These three findings are mere factual inquiries about a religious institution (i.e., its objective characteristics) and thus can be noted by civil authorities without entangling the state in internal religious disputes.

The ministerial exception was first recognized in the early 1970s by the federal courts of appeal in claims brought by clerics alleging employment discrimination by their churches.[58] Because there was no split in the circuits, the U.S. Supreme Court did not get around to affirming the ministerial exception until decades later in *Hosanna-Tabor*.[59] In that case, the Court ultimately determined that an elementary school teacher was a minister for purposes of the exception. However, before taking up that question, Chief Justice John Roberts—writing for the Court—had to distinguish *Employment Division v. Smith*.[60] In *Smith*, the state of Oregon had listed peyote, a hallucinogenic, as one of several controlled substances and criminalized its use. The plaintiffs in *Smith* were Native Americans who had been employed as counselors at a private drug rehabilitation center.[61] They were fired for illegal drug use after supervisors learned they ingested peyote as part of a religious ceremony. They were later denied unemployment compensation by the state because they were dismissed for cause. The *Smith* Court held that the Free Exercise Clause was not implicated where Oregon enacted a generally applicable drug law that was neutral as to religion, even though the law happened to burden the religious use of peyote.

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[56] Colo. Christian Univ. v. Weaver, 534 F.3d 1245, 1265 (10th Cir. 2008) (ruling that "pervasively religious" test was unconstitutionally entangling); *see* Mitchell v. Helms, 530 U.S. 739, 828 (2000) (plurality op.) (statutory exemption unconstitutionally requires state officials to go illicitly "trolling through a person's or institution's religious beliefs").

[57] *Bethany College*, 369 NLRB at 3-4.

[58] The first federal court of appeals to recognize—as well as name—the ministerial exception was *McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972). *See Hosanna-Tabor*, 565 U.S. at 188 n.2 (briefly tracing development of ministerial exception in lower courts).

[59] *Hosanna-Tabor*, 565 U.S. at 188.

[60] 494 U.S. 872. *Smith*'s "generally applicable" test was recently narrowed in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868. *See supra* note 8 and accompanying text. But *Fulton* does not alter the way *Hosanna-Tabor* distinguished the *Smith* line of free-exercise cases and therefore not applicable to a church autonomy case like *Hosanna-Tabor*.

[61] *Smith*, 494 U.S. at 874.

Chief Justice Roberts admitted that the Americans with Disability Act (ADA) was a neutral law of general applicability that happened to have an adverse effect on the Lutheran school's personnel decisions.[62] But he then drew a distinction: "The present case, in contrast [to *Smith*], concerns government interference with an internal church decision that affects the faith and mission of the church itself."[63] A civil court rendering a judgment in such a case would be commanding a church to employ a minister—just like the behavior of a state with an established church. Thus, there is a class of cases to which the rule in *Smith* does not apply: those involving decisions within a church's sphere of internal governance. The Court's putting aside *Smith* as inapplicable confirms that church autonomy doctrine gives rise to a third line of cases separate from the line involving personal religious rights protected by the Free Exercise Clause, as well as separate from the Establishment Clause lines of precedent that challenge religious preferences or government funding of faith-related organizations.[64]

A peyote sacrament is obviously an important religious practice, and the *Smith* plaintiffs suffered a material burden on a Native American religious observance that was unrelieved because of the interpretation of the Free Exercise Clause in *Smith*. But the purpose of church autonomy is not to lift personal religious burdens as such. If it were, then *Hosanna-Tabor* would have been directly at odds with *Smith* and thereby overruled it. That did not happen. Rather, *Hosanna-Tabor* distinguished *Smith*. *Hosanna-Tabor* was about the government's intrusion into the zone of internal governance of the religious school—a church autonomy case. Moreover, these protected acts of internal self-governance need not be religiously motivated. As the *Hosanna-Tabor* Court observed, "[t]he purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason."[65] Rather, the purpose of church autonomy is to set aside the five subject matters that comprise the zone of internal governance and keep them autonomous from civil government. *Our Lady* presented the same issue. The teachers pointed out that they were not being dismissed for religious reasons. But with the defense of church autonomy, it made no difference that the reasons were secular, as the Court pointed out with this illustration:

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[62] *Hosanna-Tabor*, 565 U.S. at 189-90.
[63] *Id*. at 190.
[64] *See supra* notes 3-11 and accompanying text.
[65] 565 U.S. at 194.

> Think of the quintessential case where a church wants to dismiss the minister for poor performance. The church's objection in that situation is not that the minister has gone over to some other faith but simply that the minister is failing to perform essential functions in a satisfactory manner.[66]

What matters is not religious injury as such, but that the actions of the employer fall within one of the five autonomous subject matters.

The difference in the nature of the injury that flows from rights-based claims as opposed to structural claims can be seen by contrasting the Supreme Court's Free Exercise Clause cases with its Establishment Clause decisions. The Free Exercise Clause is rights-based, and thus the only injury it can remedy is a religious injury. In contrast, the Establishment Clause is structural, separating two centers of authority, and the court in maintaining this church-state structure will redress both religious and nonreligious injuries. Examples of the latter are economic harm in the form of increased labor costs or loss of a liquor license,[67] loss of academic freedom,[68] and freedom of thought for atheists.[69] Because the doctrine of church autonomy, like the Establishment Clause, is structural, it should come as no surprise that the doctrine gives redress for both religious and secular injuries. In *Hosanna-Tabor*, immunity from liability for employment discrimination and retaliation was a form of shielding from interference with internal governance.

In *Hosanna-Tabor*, the Equal Employment Opportunity Commission—which intervened on behalf of the teacher—claimed that there was no ministerial exception because the First Amendment did not require one. All that was required, argued the EEOC, was that the

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[66] 141 S. Ct. at 2068.

[67] *See* Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) (upholding claim of department store against labor law); Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) (upholding claim of tavern seeking issuance of a liquor license); *cf.* McGowan v. Maryland, 366 U.S. 420, 430-31 (1961) (permitting claim of economic harm by retail stores to be free of Sunday-closing law, but ultimately ruling against the stores on the merits); Two Guys from Harrison Allentown, Inc. v. McGinley, 366 U.S. 582 (1961) (same).

[68] *See* Edwards v. Aguillard, 482 U.S. 578 (1987) (striking down a state law that required teaching of creation in public school science classes if evolution is taught); Epperson v. Arkansas, 393 U.S. 97 (1968) (striking down a state prohibition on teaching evolution in public school science classes).

[69] *See* Torcaso v. Watkins, 367 U.S. 488 (1961). In *Torcaso*, an atheist who otherwise qualified for a public office refused to take a required oath that professed belief in God. The Court held the oath requirement violative of the First Amendment without specifying either religion clause. If an individual objects to the oath out of a religious belief that forbids taking oaths, then he has a valid claim under the Free Exercise Clause. As an atheist, however, the claimant in *Torcaso* did not suffer a *religious* injury as he professed to have no religious beliefs. Nevertheless, for a state to mandate taking of the oath would be a violation of the Establishment Clause as to all office seekers, including atheists, because confession of belief in a deity is a subject that remains in the realm of religion.

government be formally neutral with respect to religion and religious organizations. That was the case here, said the EEOC, because the ADA treats religious organizations just like every other employer when it comes to discrimination on the basis of disability. The agency argued that the same was true of federal and state civil rights statutes prohibiting discrimination with respect to other protected classes. The EEOC allowed that religious organizations had freedom of expressive association, but so did labor unions and service clubs, and they were still subject to the ADA.[70] Equality was the only requirement, argued the EEOC. The nondiscrimination statutes could be blind to religion and religious organizations and still not violate the First Amendment. Accordingly, while Congress could choose to accommodate religion when enacting legislation, maintained the EEOC, the First Amendment did not require it to do so.

The Court reacted to the EEOC's argument for a religion-blind Constitution by calling it "remarkable," "untenable," and "hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations."[71] The text of the First Amendment recognizes the status of organized religion as more than a mere voluntary association vested with the aggregate rights of its individual members. Church autonomy doctrine recognizes that a properly conceived structuring of church and state is to the benefit of both.[72] Accordingly, the *Hosanna-Tabor* Court regarded the ministerial exception as a defense in the nature of an immunity.[73]

Downstream of *Hosanna-Tabor*, a good part of the litigation has focused on the scope of the definition of "minister" for purposes of the immunity. That was the situation in *Our Lady*,[74] where the High Court focused on ensuring that the ministerial exception not be woodenly

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[70] *Hosanna-Tabor*, 565 U.S. at 188-89.

[71] *Id.* The Court wrote:

> We find [the EEOC] position [on this point] untenable. The right to freedom of association is a right enjoyed by religious and secular groups alike. It follows under the EEOC's . . . view that the First Amendment analysis should be the same, whether the association in question is the Lutheran church, a labor union or a social club . . . . That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations. We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers.

Id. at 189.

[72] *See, e.g.*, McCollum v. Board of Educ., 333 U.S. 203, 212 (1948) ("[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."); Engel v. Vitale, 370 U.S. 421, 431 (1962) (The Establishment Clause's "first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion.").

[73] *Hosanna-Tabor*, 565 U.S. at 188-90, 195 n.4.

[74] 140 S. Ct. 2049.

defined. The Ninth Circuit in *Our Lady* had read narrowly the Supreme Court's holding in *Hosanna-Tabor* concerning who is a minister. *Hosanna-Tabor* had found that a fourth-grade teacher, Cheryl Perich, was a minister, and that for reasons of church autonomy her claim should be dismissed. By taking classes in theology, Perich had earned a lay religious title conferred by her denomination. She went on to hold herself out as a minister in recognition of her completed coursework and lay title, and she claimed an income tax advantage available only to ministers. Perich was not a local church officer, worship leader, or denominational executive, but on the whole her duties reflected a key role in transmitting the Lutheran faith to her students.[75]

When addressing the breadth of the ministerial exception, the Ninth Circuit in *Our Lady* had treated the facts leading to the determination that Perich was a minister as four requirements on a checklist.[76] The High Court reversed. Writing for a 7-2 majority, Justice Samuel Alito began by noting that the ministerial exception is a subpart of the "general principle of church autonomy" that relies on both the Establishment and Free Exercise Clauses.[77] The Court said:

> The independence of religious institutions in matters of faith and doctrine is closely linked to independence in what we have termed "matters of church government." . . . This does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission. And a component of this autonomy is the selection of the individuals who play certain key roles.
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> . . . Under this rule, courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions. . . . [A] wayward minister's preaching, teaching, and counseling could contradict the church's tenets and lead the congregation away from the faith. The ministerial exception was recognized to preserve a church's independent authority in such matters.[78]

The *Our Lady* Court went on to find that the two classroom teachers at Catholic elementary schools in California were ministers for purposes of the immunity. Their claims alleged employment discrimination on the basis of age and disability, respectively, when their annual

[75] *Hosanna-Tabor*, 565 U.S. at 191-94.
[76] 140 S. Ct. at 2066-67.
[77] *Id*. at 2060 (quoting *Hosanna-Tabor*, 565 U.S. at 186).
[78] *Id*. at 2060-61 (citations, internal quotations, and footnotes omitted).

employment contracts were not renewed. The nonrenewal was said by the schools to be based on poor performance and not acquiring new skills—what you might call "secular" reasons.[79] But the application of the ministerial exception did not hinge on the schools having a religious reason for severing the employment. This makes sense because what is protected by church autonomy doctrine is a sphere of "autonomy with respect to internal management decisions that are essential to the institution's central mission" (whether that decision be characterized as secular or religious), not a personal right of religious liberty vested in the employer.[80]

The Court admitted that it would have been easier to find that the elementary teachers were ministers if they had satisfied all of the four items that had been present in *Hosanna-Tabor*. But *Our Lady* held that none of those items was essential.[81] What matters are the actual job functions of the employee.[82] The two classroom teachers had duties that were explicitly religious. They taught classes in Catholic doctrine, led their students in classroom prayer and recitation of Christian creeds, accompanied the students to a weekly mass, and signed annual employment contracts that set forth the religious mission of the school and required that they pledge to do nothing to undermine it.[83] By the employment contract, the teachers "were also expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith."[84] Moreover, so long as some of their employment functions were explicitly religious, it did not matter how much clock time the religious functions comprise in the teacher's overall school day.[85] For example, the explicitly religious functions could have comprised only 10 percent of a 40-hour workweek. And the institutions here were K-12 religious schools, which are viewed by the church as integral to passing on the Catholic faith to the next generation.[86] When "a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow."[87]

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[79] *Id*. at 2058, 2059.
[80] *Id*. at 2060.
[81] *Id*. at 2062, 2063.
[82] *Id*. at 2064.
[83] *Id*. at 2056-60.
[84] *Id.* at 2066.
[85] *Hosanna-Tabor*, 565 U.S. at 193-94 (the question of who is a minister is not resolved by a stopwatch).
[86] *Our Lady*, 140 S. Ct. at 2065-66 (noting the importance of religious schools to Puritans, Jews, Muslims, Mormons, and Seventh-day Adventists).
[87] *Id*. at 2069.

When considering whether the ministerial exception applies, rather than inquiring whether the employee is a minister in the ordinary sense of that term (e.g., pastor, priest, rabbi, imam, and so on), the Court asks one of two questions: (1) At some point in the workweek, does the employee perform some explicitly religious function, as was the case in *Our Lady* and *Hosanna-Tabor*? (2) Does the employee hold a position of executive leadership or have a role in leading worship or ritual?[88] If the answer to either question is in the affirmative, then the immunity applies.

In the fact-finding necessary to determine if an employee meets the definition of a minister, the civil courts cannot get entangled in deciding whether certain employee tasks are religiously important or meaningful as opposed to religiously peripheral or minor.[89] Justice Alito, writing for the Court in *Our Lady*, made a point of warning that this sort of judicial entanglement in religious questions had long been unconstitutional.[90] Justice Clarence Thomas filed a concurring opinion, joined by Justice Neil Gorsuch, stating that the determination as to who is a minister ought to be unilaterally decided by the religious employer to avoid having courts delve into prohibited religious questions.[91] Justice Alito, for the Court, did not go that far. The determination remains a question for the civil courts. Nevertheless, the Court's approach was highly deferential to the two Catholic schools regarding the employers' view that some of the teachers' job functions were religious.[92] Justice Alito noted the explicitly religious functions of the teachers here: teaching the Catholic religion, leading students in prayer and devotionals, and

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[88] *Hosanna-Tabor*, 565 U.S. at 188, 196.
[89] *See infra* Part II.B.
[90] *Our Lady*, 140 S. Ct. at 2063 n.10.
[91] *Id*. at 2069-71 (Thomas. J., concurring, joined by Justice Gorsuch). Justice Thomas made the same argument in *Hosanna-Tabor*. 565 U.S. at 196-98 (Thomas, J., concurring). There are problems with Justice Thomas' suggestion. He would leave the question of who is a minister to be unilaterally determined by the defendant/employer. The lack of checks and balances invites exaggerated claims with respect to a dispositive defense. Even more fundamentally, church autonomy is ranked by the positive law as a categorical immunity higher than all other defenses. But it is nonetheless a rule subject to the positive law, not above the law.
[92] *Our Lady*, 140 S. Ct at 2066-69. There is no attempt in this article to catalogue all of the developing, sometimes contradictory, lower court cases as to who is found to be a "minister" for purposes of the defense. *See, e.g., Sw. Baptist Theological Seminary*, 651 F.2d 277, *cert. denied*, 456 U.S. 905 (1982) (finding faculty and administrators were "ministers" for purposes of the ministerial exception); *InterVarsity Christian Fellowship/USA*, 2021 WL 1387787 (state university cannot control the qualifications of leaders of campus religious student organization because they are "ministers" subject to the ministerial exception); *Simon*, 2021 WL 1660851 (citing ministerial exception as reason to dismiss claims for employment discrimination and whistleblowing brought by individual who was chair of religion department and campus chaplain at Catholic college); Maxon v. Fuller Theological Seminary, 2020 U.S. Dist. Lexis 202309 (C.D. Cal. Oct. 7, 2020) (on appeal to Ninth Circuit) (ministerial exception applies to dismissal of students who filed Title IX claim against seminary for wrongful dismissal on basis of sexual orientation).

attending mass with the students. These tasks, of course, are widely recognized to be explicitly religious practices for Christians. As to other religions, as well as other types of religious organizations besides churches (e.g., colleges, health clinics, and welfare providers), Justice Alito appealed to religious employers to make it clear in advance (perhaps in an employment contract or employee handbook) which employees perform what the employer considers to be explicitly religious functions:

> In a country with the religious diversity of the United States, judges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition. A religious institution's explanation of the role of such employees in the life of the religion in question is important.[93]

The conundrum over who ultimately decides who is a minister is, as noted by Justice Thomas, not entirely resolved by the Court's opinion in *Our Lady*.

Looking for ways to circumvent *Hosanna-Tabor* and *Our Lady*, counsel for plaintiffs have sought to distinguish claims of discrimination in hiring, promotion, and dismissal from claims of hostile or harassing conditions of employment.[94] Plaintiffs have also resorted to filing claims arising out of the employment relationship that sound in tort or breach of contract.[95] For the most part, claims based on these theories have also been dismissed for reasons of church autonomy.[96] Occasionally added to these unsuccessful common-law actions are a count under a

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[93] *Our Lady*, 140 S. Ct. at 2066.

[94] *See* Demkovich v. Saint Andrew the Apostle Par., Calumet City, 3 F.4th 968 (7th Cir. 2021) (en banc) (holding that the ministerial exception does apply to employment discrimination claim alleging hostile work environment or sexual harassment); Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238 (10th Cir. 2010) (same); Middleton v. United Church of Christ Bd., 2021 WL 5447040 (6th Cir. 2021) (same). A contrary result was reached in *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004).

[95] *But see* Sumner v. Simpson Univ., 27 Cal. App. 5th 577 (2018) (holding that claims for torts brought against seminary for dismissal of individual who was dean and member of the faculty were not subject to ministerial exception, but not claims for breach of contract). The dean and member of the faculty was properly regarded as a minister for purposes of the ministerial exception and the Christian college properly regarded as a religious entity. The breach of contract claim was said to entail the litigation of only secular questions. But with defense of church autonomy, the secularity of the tort and contract issues makes no difference. *See supra* notes 70-80, and *infra* notes 193-94, 203-04 and accompanying text. If the subject matter of the dispute falls within one of the five zones of what the Supreme Court has identified as "internal governance," then the claim is barred. Here, the dismissal of the dean of a seminary falls within the subject area of the terms and conditions of the employment of a minister and should be prohibited. And the elements of the torts were part and parcel of the alleged discrimination.

[96] *See, e.g.*, Bell v. Presbyterian Church (U.S.A.), 126 F.3d 328 (4th Cir. 1997) (dismissing action by pastor who sued denomination, by which he was not employed, alleging state law tort claims for, among other things, tortious interference and intentional infliction of emotional distress); Hutchison v. Thomas, 789 F.2d 392 (6th Cir. 1986) (rejecting "neutral principles of law" exception to church autonomy doctrine as applied to state law tort claims,

state whistleblower statute, also unsuccessful.[97] The dismissals are proper.[98] What ought to matter concerning the applicability of the ministerial exception is not legal counsel for plaintiffs selecting just the right civil writ to pursue an employment grievance—be it the law of torts, contracts, property, or implied trust. That sort of 19th century, writ-bound thinking has long been abandoned in the law of pleading and preclusion, and it has no place in the First Amendment. As a defense of constitutional scope, church autonomy necessarily bars these tort and contract suits if proving the elements of the prima facie claim (or various expected defenses) would give rise to questions that intrude into the employer's internal governance, including the determination of doctrine or polity, the prudent supervision of ministers, the dismissal of members and affiliates, or internal communications about these matters.

Not every tort, contract, or whistleblower claim arising out of an employment relationship involving a religious employer will be barred by church autonomy.[99] Rather, the trial court should make findings concerning whether entertaining a common-law claim will invade one of the five protected subject matters that the Supreme Court has deemed out-of-bounds to civil authorities as a matter of internal governance.

B. *"The Law Knows No Heresy": The Rule Against Deciding Religious Questions*

Church autonomy doctrine has long entailed the rule that the judiciary must avoid issues that cause it to probe into the religious meaning of religious words, practices, or events,[100] and

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including defamation and intentional infliction of emotional distress, against the church in challenge to forced retirement); Kaufman v. Sheehan, 707 F.2d 355 (8th Cir. 1983) (holding that employment suit by priest filed under theory of breach of employment contract was subject to First Amendment ministerial exception); Erdman v. Chapel Hill Presbyterian Church, 286 P.3d 357 (Wash. 2012) (en banc) (rejecting "neutral principles of law" exception to church autonomy in state tort claim related to ministerial employment).

[97] *See Rehfield*, 2021 IL 125656 (dismissing whistleblower claim by former ministerial employee filed along with statutory civil rights counts alleging employment discrimination); *Simon*, 2021 WL 1660851 (citing ministerial exception as reason to dismiss claims for employment discrimination and whistleblowing brought by individual who was chair of religion department and campus chaplain at Catholic college).

[98] *See generally* Victor E. Schwartz & Christopher E. Appel, *The Church Immunity Doctrine: Where Tort Law Should Step Aside*, 80 U. CINN. L. REV. 431 (2011).

[99] *Our Lady*, 140 S. Ct. at 2060 ("That does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission."); *Hosanna-Tabor*, 565 U.S. at 196 ("Today we hold only that the ministerial exception bars [antidiscrimination civil rights suits.] We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise.").

[100] *See, e.g.,* Rosenberger v. Rector & Visitors of UVA, 515 U.S. 819, 843-44 (1995) (state university must avoid distinguishing between evangelism, on the one hand, and the expression of ideas merely approved by a given religion); Bob Jones University v. U.S. 461 U.S. 574, 604 n.30 (1983) (avoiding potentially entangling inquiry into religious practice); Widmar v. Vincent, 454 U.S. 263, 269-70 n.6, 272 n.11 (1981) (holding that inquiries into

that it must avoid making determinations concerning the centrality of a religious belief or practice to that religion.[101] Often referred to as the "religious question doctrine," the rule bars the judiciary—indeed all civil officials and authorities—from attempting to resolve disputes over the orthodoxy of what a person or organization professes, and from taking up any question as to the validity, meaning, or importance of a religious belief or practice. To the law it makes no difference if a religious liberty claimant is uncertain about or questioning her beliefs, if she is a new convert, or if she is not a part of any organized church or denomination.[102] As the Court pronounced in *Watson*, "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."[103] The purpose of the rule is to keep the government from picking sides concerning a religious matter—a purpose rooted in the Establishment Clause—as well as to not deter a person's free exercise of religion.

The most frequently cited case for the rule is *Thomas v. Review Board*.[104] In *Thomas*, a state sought to defeat a former employee's Free Exercise Clause claim challenging the government's denial of unemployment compensation. Thomas was laid off from a factory when he refused to work on parts for military tanks because he was a religious pacifist. By using the

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religious significance of words or events are to be avoided); *Thomas*, 450 U.S. at 715-16 (not within judicial function or competence to resolve religious differences); Gillette v. U.S., 401 U.S. 437, 450 (1971) (Congress permitted to accommodate "all war" but not "just war" pacifists because to broaden the exemption invites increased church-state entanglements and would render almost impossible the fair and uniform administration of selective service system); Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970) (courts should avoid entanglement that would follow should tax authorities evaluate the temporal worth of religious social welfare programs); Cantwell v. Connecticut, 310 U.S. 296, 305-07 (1940) (ruling that petty officials may not to be given discretion to determine what is a legitimate "religion" for purposes of issuing permit); *see also* Rusk v. Espinosa, 456 U.S. 951 (1982) (aff'd mem.) (striking down charitable solicitation ordinance that required government officials to distinguish between "spiritual" and secular purposes underlying solicitation by religious organizations).

[101] *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988) (rejecting free exercise test that "depend[s] on measuring the effects of a governmental action on a religious objector's spiritual development"); *Amos*, 483 U.S. at 336 (recognizing a problem when government attempts to divine which jobs are sufficiently related to the core of a religious organization so as to merit exemption from statutory duties is desirable); United States v. Lee, 455 U.S. 252, 257 (1982) (rejecting government's argument that free exercise claim does not lie unless "payment of social security taxes will . . . threaten the integrity of the Amish religious belief or observance"); *Smith*, 494 U.S. at 886-87 (same).

[102] *See* Frazee v. Illinois Dep't of Empl. Security, 489 U.S. 829 (1989) (state could not withhold unemployment compensation from Sabbath observer because he was not a member of any church).

[103] 80 U.S. at 728.

[104] 450 U.S. 707 (1981). For example, *Our Lady* relied on *Thomas*. *Our Lady*, 140 S. Ct. at 2063 n.10. It also relied on *Presbyterian Church*, where the Court said courts must avoid "resolving underlying controversies over religious doctrine," and that "First Amendment values are plainly jeopardized when . . . litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice." *Id.* at 2063 n.10 (citing *Presbyterian Church*, 393 U.S. at 449). It also relied on *Milivojevich*. *Id.* at 2063 n.10 (citing *Milivojevich*, 426 U.S. at 715 n.8) ("It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own.") (citation and internal quotation marks omitted).

testimony of a co-worker, who was also a longtime member of the same religion as Thomas, the state sought to show that Thomas, as a new convert, was misapplying the teachings of his church. The Supreme Court would have none of it, observing that Thomas "drew a line" concerning his beliefs that the state had to accept, lest the civil courts become "arbiters of scriptural interpretation."[105]

Thomas was a cause of action brought by an individual religious claimant rather than a lawsuit attempting to vindicate the autonomy of a church. Thus, it might seem odd to regard the precedent as a leading case for the application of church autonomy. The main underlying cause of action was about whether Thomas had a successful entitlement claim under the Free Exercise Clause, which the Court eventually held that he did. However, application of the church autonomy doctrine in *Thomas* arose out of an ancillary issue—whether the state's expert testimony went to a religious question the Court could not properly consider.

The prohibition on civil courts taking up religious issues or disputes frequently is an important reason for rejecting an argument raised by a party opposing a religious claimant. For example, in *Our Lady* the teachers in the Catholic elementary schools argued that they could not be ministers for purposes of the ministerial exception unless as a condition of employment they were required to be Catholic, like the sponsoring schools. The Court rejected the suggestion because civil judges cannot determine when an employee is a co-religionist with the employer. Is an Orthodox Jew a co-religionist with a Conservative Jewish employer? Is a Southern Baptist teacher seeking employment at a Primitive Baptist school applying to work for a co-religionist? For a civil magistrate to have the final say as to who is a co-religionist to the employer violates the ban on religious questions.[106] *Our Lady* further rejected the co-religionist criterion because a civil court would have no way of independently determining whether an employee remained in good standing with her church (thus still a co-religionist) without transgressing the rule against religious questions. Is a teacher who says she is Catholic to be regarded by a court as a Catholic in good standing when she attends mass only on Easter and Christmas and favors women's reproductive rights?[107]

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[105] 450 U.S. at 715, 716. Thomas was a Jehovah's Witness. He believed his religion prohibited him from working in a factory on the task of fabricating turrets for military tanks. *Id.* at 710.
[106] *Our Lady*, 140 S. Ct. at 2068-69 (quoting petitioners' reply brief).
[107] *Id*. at 2069.

The Court rejected a similar line of argument in *Burwell v. Hobby Lobby Stores, Inc.*,[108] where the government opposed application of the Religious Freedom Restoration Act[109] to the "contraceptive mandate" for employers subject to the Affordable Care Act. Government lawyers argued that the complicity in evil-doing claimed by Hobby Lobby as a result of the contraceptive mandate was too attenuated to constitute a substantial religious burden. The Court rejected the government's attenuation argument because a civil court would have no way of determining if the employer's claim of complicity in evil-doing was central or peripheral to the employer's religious faith without violating the rule prohibiting religious questions.[110]

In *NLRB v. Catholic Bishop of Chicago*,[111] the rule prohibiting religious questions helped to prevent a religious K-12 school from being subjected to mandatory collective bargaining under the National Labor Relations Act.[112] The Court painted a picture of church-state entanglements that could arise if ecclesiastical authorities operating a school were forced to answer to charges of unfair labor practices.[113] The specter was of a bishop or mother superior being harshly examined by an administrative law judge concerning his or her truthfulness when characterizing as religious the educational policy being challenged by the union representing lay teachers. This is another way of saying that government-supervised collective bargaining would frequently call for the administrative resolution of religious disputes. The NLRA had no statutory exemption for religious organizations, including religious schools. Yet by adopting a rule of statutory construction that presumes religious organizations are exempt from congressional regulatory statutes that would otherwise entangle the government in matters of internal religious governance, the Court held that the NLRA did not apply to these schools.[114] The result is best explained by the church autonomy doctrine.

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[108] 573 U.S. 682 (2014). *See* Alexander MacDonald, *Religious Schools, Collective Bargaining, & the Constitutional Legacy of* NLRB v. Catholic Bishop, 22 FEDERALIST SOC'Y REV. 134 (2021) (noting that while federal NLRB continues to not organize lay faculty at religious schools, some states have moved into the regulatory vacuum).
[109] 42 U.S.C. §§ 2000bb to 2000bb-4.
[110] *Hobby Lobby*, 573 U.S. at 729 n.37.
[111] 440 U.S. 490.
[112] 29 U.S.C. §§ 151 to 169.
[113] *Catholic Bishop*, 440 U.S. at 496, 498-99, 501-04.
[114] *Id*. at 504-07. *See also* Duquesne Univ. of the Holy Spirit v. NLRB, 947 F.3d 824 (D.C. Cir. 2020); Univ. of Great Falls v. NLRB, 278 F.3d 1335 (D.C. Cir. 2002). These cases are best understood as applications of the rule prohibiting civil authorities taking up religious questions.

Similarly, some tort claims against a church necessarily raise forbidden religious questions for resolution by the finder of fact, often a jury.[115] Perhaps the most novel line of tort claims to be impacted by church autonomy doctrine is the bitter struggle surrounding the theory of clergy malpractice. *Nally v. Grace Community Church of the Valley* concerned the relationship between a local church and one of its members.[116] For several years, Kenneth Nally regularly attended worship services at Grace Community Church, a nondenominational Protestant congregation, and was involved in additional midweek church activities. He willingly sought spiritual counseling by the pastoral staff that was provided at no cost. Kenneth had long suffered from depression, and in 1979, he committed suicide at the age of 24. The following year, his parents filed a wrongful death suit against the church and four members of the pastoral staff. The complaint alleged three theories of relief: clergy malpractice in pastoral counseling and teaching; negligence in the training of the pastoral staff to perform the spiritual counseling; and outrageous conduct in allegedly dissuading Kenneth from turning to his family and their Catholic upbringing to address his depression and suicidal tendencies. After protracted discovery and pretrial motions, the case was dismissed by the trial court citing uncontested facts that undermined central allegations in the parents' pleading, but also by relying on First Amendment safeguards for church operations. The California Court of Appeal, in a split decision, reversed and remanded for further discovery and trial.[117]

On remand and three weeks into a trial before a jury, the judge granted defendants' motion for a nonsuit on all three counts in the complaint.[118] The claims were dismissed for both factual and legal reasons, one prominent rationale being the defenses available under the First Amendment.[119] Nally's parents again appealed, and the Court of Appeal again reversed. It held that although the clergy malpractice count failed to state a cause of action separate from the negligence count, both legal theories could be construed as stating a cause of action for the

[115] For a collection of tort claims raising First Amendment defenses, including the defense of church autonomy, see Carl H. Esbeck, *Tort Claims Against Churches and Ecclesiastical Officers: The First Amendment Considerations*, 89 W.VA. L. REV. 1, 76-113 (1986).
[116] For a fuller account of the *Nally* litigation, see *id.* at 78-84.
[117] Nally v. Grace Cmty. Church of the Valley, 157 Cal. App. 3d 912 (1984). Following the Court of Appeal's decision, the defendants petitioned the California Supreme Court for review. Review was denied and the case remanded for further proceedings before the trial court, but the Court of Appeals' opinion was ordered depublished.
[118] Memo. op., No. NCC 18668-B (Cal. Super. Ct., Los Angeles County, May 1985). A nonsuit meant that the claim had no legal or factual basis.
[119] *Nally*, 157 Cal. App. 3d 912.

"negligent failure to prevent suicide" by the church's "non-therapist counselors." The First Amendment defenses were brushed aside.

On review by the California Supreme Court, it held that the trial court had correctly granted a nonsuit as to all three counts in the complaint.[120] The high court thought that neither the evidence adduced at trial nor well-established principles of tort law supported the Court of Appeal's reversal of the nonsuit. The holding was based on the facts and state tort law. Accordingly, the California Supreme Court said it need not address the First Amendment issues raised by the church and its four pastors. A final appeal to the U.S. Supreme Court was summarily turned away,[121] a result virtually assured because final disposition by the state supreme court was grounded in state law, not federal First Amendment issues.

At one level, the church and its pastoral staff were vindicated as the dispute ended entirely in their favor. But the basis for that resolution was not entirely satisfactory because the appellate courts lost an opportunity for a valuable teaching on the First Amendment. Nevertheless, the ten-year struggle in California widely exposed and deeply tainted the theory of clergy malpractice. As a consequence, when the theory was tried in other states, the courts rejected it—this time, for the right reason.[122] A claim for clergy malpractice assumes a uniform and regulated profession with objective, temporal standards of care against which an alleged failure of legal duty can be measured. That is not possible when the offices of clergy are as differentiated as those of rabbi, priest, pastor, and imam. Accordingly, the plaintiffs sought to have the law of torts impose a uniform standard of care on all clergy, as is the case with suits for medical, legal, and other types of malpractice. But for a common-law judge to impose a uniform standard of clerical practice is an obvious form of religious establishment—choosing one set of religious practices over others. The claim of ordinary negligence fares no better. In litigating the duty of due care or asking what constitutes "the reasonably prudent cleric," a civil court—often with a jury as fact finder—will find itself probing the spiritual duties of an ecclesiastical office

[120] Nally v. Grace Cmty. Church of the Valley, 763 P.2d 948 (1988).
[121] Nally v. Grace Cmty. Church of the Valley, 490 U.S. 1007 (1989).
[122] *See, e.g.*, Franco v. The Church of Jesus Christ of Latter-day Saints, 21 P.3d 198 (Utah 2001) (dismissing tort claims including clergy malpractice brought by parishioner and her parents against church for advice given by ecclesiastic); Langford v. Roman Catholic Diocese of Brooklyn, 271 App. Div. 2d 494, 705 N.Y.S.2d 661 (2000) (dismissing various tort claims brought by parishioner against priest and diocese for sexual relationship that occurred during counselling by priest); Bladen v. First Presbyterian Church of Sallisaw, 857 P.2d 789 (Okla. 1993) (dismissing tort claims including clergy malpractice brought against church by husband who had received marital counseling from his pastor who was at the time having affair with husband's wife).

and facing differing (sometimes conflicting) interpretations of scripture, doctrine, and religious tradition. This violates the prohibition on civil authorities resolving religious questions. Further, such findings—even assuming they can be established on a case-by-case basis—will yield a standard of care that varies from church to church. To avoid this conclusion, the plaintiffs in *Nally* sought to import secular standards from the profession of clinical licensed counselors. However, not only were these secular standards an alien imposition on the office of clerics attuned to providing spiritual advice, but the secular principles and methods could conflict with the church's teachings—a free exercise burden.

Over time, the rule prohibiting a state from resolving religious disputes has become identified with what judges and lawyers refer to when they caution the government against untoward "entanglements" between church and state. The same concept is behind the judicial praise offered for legislative or regulatory exemptions that thereby successfully avoid such entanglements. It was in *Walz v. Tax Commission of New York* that the Supreme Court first sang the virtues of avoiding entanglement between the institutions of church and state.[123] The *Walz* Court considered a property tax exemption for churches, which it not only found to be compatible with the Establishment Clause,[124] but praiseworthy because it avoided administrative entanglements otherwise present in the property appraisals, tax liens, and tax foreclosures that attend ad valorem statutes.[125] Just one year later, in *Lemon v. Kurtzman*, the Court fashioned a wholly new requirement that governments eschew "excessive entanglement" between church and state to avoid violating the Establishment Clause.[126] However, in a complex society, a certain level of regulatory interaction between church and state is inevitable, even desirable. For example, churches can hardly be exempt from building safety codes or most zoning restrictions. While the three-part *Lemon* test is now in disuse,[127] for a time there were cases where administrative entanglement alone—deemed to be excessive by some measure never

[123] 397 U.S. 664.
[124] The aspect of the property tax code that was challenged was a religious exemption, not a religious preference. For purposes of the Establishment Clause, statutory exemptions are regarded as the legislature choosing to leave religion unregulated even as its secular counterparts are regulated. And a state does not establish a religion by leaving it alone. *Id.* at 673.
[125] *Id.* at 674, 676.
[126] 403 U.S. at 612-13 ("excessive entanglement" elevated to a third prong of test for measuring Establishment Clause compliance).
[127] *See, e.g.*, Williams v. Kingdom Hall of Jehovah's Witnesses, 2021 UT 18 (2021) (noting that the U.S. Supreme Court no longer applies the *Lemon* test).

quantified—could lead to laws being deemed unconstitutional.[128] That unhappy state of affairs seems to have gotten sorted out, and excessive entanglement is no longer found to be a stand-alone violation of the Establishment Clause.[129] The idea that regulatory entanglements can independently implicate the Establishment Clause has now been narrowed and subsumed into the longstanding rule prohibiting courts from answering religious questions. And it is all to the better that the word "entanglement" has been repurposed in this way. Judges and lawyers can still refer to unconstitutional entanglements (dropping the adjective "excessive") as a descriptor for when a church-state boundary has been crossed, but it is now just a succinct way of describing a failure by civil officials to heed the rule against taking up religious questions.

The rule prohibiting religious questions does not forbid government authorities from inquiring into the *sincerity* of a party asserting a claim or defense of religious freedom.[130] As difficult as it can be to measure what is in the hearts of people with respect to their religious professions, requiring sincerity is a logical necessity. The Religion Clauses must not be allowed to become a refuge for fakers, frauds, and charlatans. That said, sincerity is rarely an issue in First Amendment claims. In most every case, the government tacitly concedes the claimant's sincerity, but then defends the suit on other grounds.

The scope of the religious question rule also leaves room for the government to make limited inquiries *about* a religion. At its most elemental level, this is the government simply taking notice that an entity identifies as Catholic rather than Protestant, or that an entity is a free-standing religious college rather than a subsidiary of a Protestant denomination. These are factual findings that merely take note of a given religion's beliefs or polity. For example, a civil magistrate, following the usual rules of evidence, can determine whether a Jewish community center or a Christian international disaster relief organization is a religious employer such that it qualifies for an exemption from federal employment antidiscrimination laws.[131] It is no invasion of church autonomy to ask an employer, claiming to be statutorily exempt because it is religious,

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[128] *Lemon* itself held that state programs to aid K-12 religious schools generated excessive entanglement between church and state in violation of the Establishment Clause. 403 U.S. at 617-18.

[129] *See, e.g.*, *American Legion*, 139 S. Ct. 2067, where only one of the seven Justices in the majority used the *Lemon* test.

[130] The leading case on sincerity as necessary to invoking a religious-freedom claim under the First Amendment is *United States v. Ballard*, 322 U.S. 78 (1944).

[131] *See, e.g., Spencer*, 633 F.3d at 724 (developing an approach for determining who is a religious organization and thus able to invoke the religious employer exemption in Title VII of the Civil Rights of 1964); *LeBoon*, 503 F.3d at 226-29 (same).

to demonstrate that it is organized under state law as a religious corporation, that it continues to hold itself out to the public as such, and that it presently engages in religious activities. Such findings of fact are permitted because they are inquiries *about* religion, not about the underlying religion's validity or the religious meaning or importance of its tenets and observances.

C. *Internecine Disputes, Including Litigation Implicating Only Title to Church Property*

The third type of frequently occurring litigation implicating the church autonomy doctrine is disputes between two factions within a religious organization as to which is the "true" church.[132] To begin, the civil courts cannot adjudicate which faction has departed from the "correct" doctrine or polity and thus should be denied the organization's property, for that is a prohibited religious question. This would seem to mean that any dispute over the use or ownership of church property must be left for resolution by the internal dispute resolution processes of the church. And it remains for the civil authorities to step back and defer to the final result of those internal processes.[133] That is indeed the general rule as dictated by church autonomy. In a church of hierarchical polity, the officials at the top are likely to prevail, as we see in the leading case of *Serbian Eastern Orthodox Diocese v. Milivojevich*.[134] In contrast, in a church body of congregational polity, the majority of local voting members will decide the matter in question.

In its line of cases involving internecine disputes, however, the Supreme Court has developed an alternative where state authorities resolve the conflict over title to the disputed property through state-fashioned "neutral principles of law." It bears special caution that resorting to a rule of neutral principles has been permitted only when the disputing factions have abandoned any attempt to remain together as a unified religious entity, leaving for civil

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[132] In the rare instance where church property has fallen into the possession of parties falsely representing themselves as officers of the church so as to obtain control of valuable property, a court may probe just far enough to prevent a fraudulent takeover. *See Bouldin*, 82 U.S. 131 (courts will not go behind stated reasons for excommunication of church trustees and members, but a court may determine if their ouster was truly an act of the church or a takeover by confederates claiming to have authority to act).

[133] While not common, there are instances where the internal polity of a hierarchical denomination is unclear on what is the ecclesial judicatory with final authority to resolve a given factional dispute. If the ecclesiastical procedures or canons are unclear on this point, a civil court cannot resolve the dispute without violating the rule against religious questions. In such a situation, Justice Brennan suggested that the court resort to neutral principles of law. *Church at Sharpsburg*, 396 U.S. at 369 and n.2 (Brennan, J., concurring). This only seems fair. The general church has nobody but itself to blame for its internal dispute resolution system not being deferred to by civil authorities. It holds the primary responsibility for clarifying its polity before such disputes arise. A similar result would seem to be called for if it is not even clear whether the general church is hierarchical.

[134] 426 U.S. 696.

resolution only the issue of which faction is to be awarded ownership of the church property. The Court has not overtly announced this limitation on the rule, but it is the most straightforward way to reconcile the High Court's cases—and it does the least damage to the doctrine of church autonomy. There will follow more discussion on why the neutral-principles alternative is permitted in these limited circumstances, but we begin with the general rule.

The first in this internecine dispute line of cases is *Watson v. Jones*.[135] The Supreme Court in *Watson* laid down the broad principles that apply when federal courts deal with disputes within a religious body that implicate doctrine, polity, oversight of ecclesiastics, or the discipline of members. To avoid transgressing church autonomy, civil magistrates defer to the dispute resolution reached by the church's highest judicatory:

> [W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.[136]

Watson was a post-Civil War case that involved a struggle in Kentucky between two factions of a local Presbyterian church for control of the church building. Title as set forth in the deed to the property was in the name of the trustees of the local church. However, the corporate charter of the local church "subjected both property and trustees alike to the operation of [the general church's] fundamental laws."[137] The general church or denomination was the Presbyterian Church of the United States. Its highest governing body was called the General Assembly. The internal operational rules governing the General Assembly stated that it possessed "the power of deciding in all controversies respecting doctrine and discipline."[138]

Following the Civil War, the General Assembly had ordered members of all local church bodies who believed in a divine basis for slavery to "repent and forsake these sins."[139] In Kentucky, a majority of local church members were willing to comply with the directive. A minority faction, however, dissented, and it deemed the directive of the Assembly a departure from the doctrine held at the time when the local church body first joined with the general

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[135] 80 U.S. 679.
[136] *Id.* at 727.
[137] *Id.* at 683.
[138] *Id.* at 682.
[139] *Id.* at 691.

church. The minority's legal theory was that the general church held an interest in the local real estate that was subject to an implied trust. Further, a condition of the trust was that the church adhere to its original doctrines. Any material departure by the general church meant a breach of the trust and thus forfeiture of its interest in the property. Accordingly, the minority faction claimed that the majority had relinquished any right to ownership of the property when the general church repudiated the original, proslavery doctrines. Because they were the "true church," members of the minority faction maintained, they should be awarded title to the local real estate.[140]

The Supreme Court began by rejecting the implied-trust theory—which originated in English law with its established Church of England[141]—because the departure-from-doctrine inquiry would require civil adjudication of a religious question. The *Watson* Court gave three reasons for why it did not have authority to pass judgment on that question: (1) civil judges are unschooled in religious doctrine and thereby not competent to resolve disputes concerning religious doctrine nor to properly interpret church documents and canon law;[142] (2) for the civil law to award the property to the faction adhering to original doctrine would entail the government taking sides in a religious dispute, thereby "establishing" one creedal position over another, while also inhibiting forces for reform in religious doctrine;[143] and (3) both clerics and lay members of a church have voluntarily joined the entire church, the general as well as the local body, thus giving implied consent to the polity of the entire church and its canonical administration of disputes.[144] These bases for church autonomy are rooted, said the Court, in the American governmental system that—unlike the English system—separates the institutions of church and state, thereby sharply limiting the involvement of civil courts in the governance of religious bodies.[145]

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[140] *Id*. at 691-94.
[141] *Id*. at 727-28.
[142] *Id*. at 729, 730, 732.
[143] *Id*. at 728, 730, 732.
[144] *Id*. at 729.
[145] *Id*. at 728-29, 730. The polity of the church in *Watson* was presbyterian, and the General Assembly had the final say as to some questions—including the doctrinal question that was at issue in the case. An episcopal polity is even less democratic, with the final say on most matters lying with the diocesan bishop. In contrast to these hierarchical forms of governance, there is the congregational polity where the central characteristic is autonomy in each local entity. In such a polity, a majority of the local members resolves disputes in accord with a set of bylaws, hence most differences can be settled democratically once a meeting is called, a quorum is present, and bona fide members cast their votes. Congregational churches often cooperate with a convention of likeminded local churches, but each local body retains it autonomy. While it can be modestly helpful to classify the polity of a denomination or convention as

The Supreme Court went on to hold that a local member's implied consent to be governed by the general church's polity and its officials is sufficient to protect that individual's free-exercise rights, so long as the member has the unilateral right to leave the church at any time.[146] Departing from a church, of course, means a cleric or church member leaving behind his or her work and ministry, both spiritual and material. But being willing to leave behind one's past works is what is impliedly consented to when one voluntarily joins both the church-wide units and a local congregation of a denomination.

Watson was followed by *Gonzalez v. Roman Catholic Archbishop*.[147] The issue in *Gonzalez* arose in the Philippines, a U.S. territory at the time, hence there was federal subject matter jurisdiction. A dispute arose in the Catholic Church over the authority to fill a clerical vacancy. The Supreme Court brushed aside a contrary result based on a rule found in the civil law and instead deferred to the church's power of appointment resting in the archbishop.

The *Watson* and *Gonzalez* principles were elevated to First Amendment stature in *Kedroff v. Saint Nicholas Cathedral*.[148] The Supreme Court in *Kedroff* struck down a New York statute that had recently been adopted to move control of domestic Russian Orthodox Churches from the central governing hierarchy located in the Soviet Union to the Diocese of North America. The state's felt need to transfer control of ecclesiastical authority was linked to the Marxist Revolution of 1917 and subsequent doubt concerning whether there was in the U.S.S.R. "a true central organization of the Russian Orthodox Church capable of functioning as the head of a free international religious body."[149] This was the height of the Cold War, and the state legislature believed that church officials in Moscow had been coopted by the Communist Party. Because the New York statute did more than just "permit the trustees of the Cathedral [in New York City] to use it for services consistent with the desires of the [local] members"—but transferring control over the denomination's North American churches by legislative fiat[150]—the Supreme Court held that the statute violated the "rule of separation between church and

episcopal, presbyterian, or congregational, it must be remembered that this typology is an approximation only. In a given case, there are any number of variations along a sliding scale of governance systems. And this is even more so once courts are confronted with religious polities outside of Christianity.

[146] *See Order of Saint Benedict*, 234 U.S. at 647-51.

[147] 280 U.S. 1.

[148] 344 U.S. 94.

[149] *Id.* at 106.

[150] *Id.* at 119.

state."[151]

The *Watson* Court had repudiated the English implied-trust rule and its departure-from-doctrine standard in 1872, but only as a matter of federal common law.[152] For well over half a century, a number of American states continued to follow the English implied-trust rule as a matter of their own common law. *Kedroff,* however, clearly foreshadowed the sweeping aside of the common law in those states still following the English rule.[153]

In *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Church*,[154] the Supreme Court confirmed that *Kedroff* had elevated the principles of church autonomy such that they are required by the First Amendment.[155] *Presbyterian Church* involved a doctrinal dispute between a general church and two of its local Georgia congregations. The congregations sought to leave the denomination and take with them the local property. The locals claimed that the general church had violated the organization's constitution and had departed from original doctrine with respect to biblical teaching on particular social issues.[156] At the time, Georgia still followed the implied-trust rule with its requisite fact-finding into alleged departures from doctrine. The rule required the state trial court to ask two religious questions: (1) What were the tenets of the general church at the time the local congregations first affiliated? (2) Had the general church departed substantially from one or more of these doctrines? On the basis of a jury finding that the general church had abandoned its original doctrines, the Georgia courts entered judgment awarding the property to the local congregations. On review, the U.S. Supreme Court again held that the First Amendment did not permit a departure-from-doctrine standard as a substantive rule of decision. The "American concept of the relationship between church and state,"[157] the Court said, "leaves the civil court *no* role in determining ecclesiastical questions in the process of resolving

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[151] *Id.* at 110.
[152] In *Watson,* the federal trial court had diversity jurisdiction. The rule of decision was based on federal common law rather than the First Amendment. This is because *Watson* was decided prior to *Erie R.R. Co. v. Tompkins,* 304 U.S. 64 (1938). In following the old rule of *Swift v. Tyson,* 41 U.S. (16 Pet.) 1 (1842), federal courts sitting in diversity could deviate from state substantive law. Moreover, the First Amendment Religion Clauses had not yet been applied to the states through the Fourteenth Amendment.
[153] Following *Kedroff,* the New York Court of Appeals sought to resolve the dispute in favor of the local-control faction. But in *Kreshik v. St. Nicholas Cathedral,* the Supreme Court summarily reversed. 363 U.S. 190. The High Court pointed out that a state court could no more disregard the First Amendment than could a state legislature.
[154] 393 U.S. 440.
[155] *Id.* at 447.
[156] *Id.* at 442 n.l.
[157] *Id.* at 445-46.

property disputes."[158] Justice William Brennan, writing for a unanimous Court, went on to observe in dicta another path forward other than *Watson*'s rule of judicial deference. He wrote that civil courts could resolve disputes that concerned title to church property provided they follow "neutral principles of law, developed for use in all property disputes" of this sort.[159] The opinion did not further define or elaborate on what those neutral principles of property law might be. Principles will vary state to state. But whatever the principles chosen, they could not displace the rule prohibiting a civil magistrate from taking up religious questions.

The invocation of neutral principles in *Presbyterian Church* unsettled a century of law with its genesis in *Watson*. For some, *Presbyterian Church* was even mistakenly understood as replacing altogether the rule of judicial deference. A year later, the Court granted plenary review in *Maryland & Va. Churches of God v. Church at Sharpsburg*, another case involving a dispute over title—and just over title—to local church property in a dispute between two local churches, on the one hand, and general church authorities on the other.[160] Once again, the local congregations sought to leave the denomination while retaining the local property. In an unsigned opinion, the Supreme Court approved of the Maryland courts applying state legislation

> governing the holding of property by religious corporations, upon language in the deeds conveying the properties in question to the local church corporations, upon the terms of the charters of the corporations, and upon provisions in the constitution of the General Eldership pertinent to the ownership and control of church property.[161]

This was the state's version of neutral principles, and the Supreme Court held it was an acceptable alternative for resolving the question via what Justice Brennan, concurring, termed the "formal title doctrine."[162] To be "neutral," the alternative to judicial deference had to be applicable to all property disputes of a like sort, be the organization secular or

[158] *Id.* at 447 (emphasis in original).
[159] *Id.* at 449.
[160] 396 U.S. 367.
[161] *Id*. at 367.
[162] *Id*. at 370 (Brennan, J., concurring).

religious. Church documents could be examined to a degree,[163] but only through a secular lens: "Only express conditions [in a church document] that may be effected without consideration of [religious] doctrine are civilly enforceable" by a civil magistrate.[164] At the very least, this is a sensitive task in which it is easy to err, a weakness in the neutral-principles approach.

There was a danger that the neutral-principles option briefly mentioned in *Presbyterian Church* and applied in *Church at Sharpsburg* would be overread to apply to all religious disputes, not just formal title disputes. Hence, the Supreme Court's ruling seven years later in *Serbian E. Orthodox Diocese v. Milivojevich*[165] was corrective, a return to the basics: the general rule was still judicial deference to internal church authorities, and neutral principles would be permitted only when the sole issue for civil resolution was title to the local property.

In *Milivojevich*, the Court—following the rule of judicial deference—rejected an Illinois bishop's lawsuit challenging a top-down reorganization of the American-Canadian Diocese of the Serbian Eastern Orthodox Church and his removal from office. The Supreme Court determined that the dispute over internal church administration and a clerical appointment were insulated from civil review under the First Amendment.[166] There was no dispute that the Serbian Eastern Orthodox Church was hierarchical and that the sole power to remove clerics rested with the ecclesiastical body in Belgrade, Yugoslavia, that already had decided the North American bishop's case.[167] Nor was there any question that the matters at issue were at heart a religious dispute.[168] Nevertheless, the state court had decided in favor of the defrocked bishop because, in its view, the church's adjudicatory procedures were applied in an arbitrary manner. On review, the Supreme Court rejected an "arbitrariness" exception to the judicial-deference rule when the question before the civil courts concerned church polity or supervision of a bishop.[169] To accept authority over such a subject is not "consistent with the

[163] *Id*. at 369 (Brennan, J., concurring) ("To permit civil courts to probe deeply enough into the allocation of power within a church so as to decide where religious law places control over the use of church property would violate the First Amendment in much the same manner as civil determination of religious doctrine.").
[164] *Id.* at 370 n.2 (Brennan, J., concurring).
[165] 426 U.S. 696 (1976).
[166] *Id.* at 709, 713, 720, 721.
[167] *Id.* at 715.
[168] *Id.* at 709.
[169] *Id.* at 712-13.

constitutional mandate [that] the civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law."[170] The civil courts may not even examine whether the church judicatory properly followed its own rules of procedure.[171]

Using reasoning similar to that in *Watson*, the *Milivojevich* Court explained that there are three practical bases for the First Amendment prohibition on civil court authority in church matters. First, civil courts cannot delve into ambiguities in canon law or church documents.[172] These matters are too sensitive to permit any civil probing because such inquiries may prove intrusive and entail the court taking sides in a religious dispute.[173] Second, civil judges have no training in canon law and theological interpretation and thus are not competent to judge such matters.[174] Third, the "[c]onstitutional concepts of due process, involving secular notions of 'fundamental fairness,'" cannot be borrowed from American civil law and grafted onto a church's polity to somehow modernize the rules followed by church judicatories.[175] The Supreme Court also reversed the state court's unraveling of the diocesan reorganization, holding that the Illinois court had impermissibly "delved into the various church constitutional provisions" relevant to "a matter of internal church government, an issue at the core of ecclesiastical affairs."[176] The enforcement of church documents, often unclear to a civil judge, cannot be accomplished "without engaging in a searching and therefore impermissible inquiry into church polity."[177]

In *Milivojevich*, there is no mention of neutral principles of law. Going forward, the disputing parties intended to remain as one church. So it appears that in such a circumstance, the rule of judicial deference is the only option. In contrast, in both *Presbyterian Church* and *Church at Sharpsburg*, going forward the disputing parties had no intention to remain as one

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[170] *Id.*
[171] *Id.* at 713.
[172] *Id.*
[173] Recall that in *Church at Sharpsburg*, the Court permitted the examination of a church constitution. 396 U.S. at 367-68. But the examination was limited to a reading of the document with a secular eye. And even such a limited reading was permitted only in a circumstance where neutral principles was a permitted option, namely, when the factions have forever parted ways and thus the legal question was solely resolution of title.
[174] *Id.* at 714 n.8.
[175] *Id.* at 714-15. *See also id.* at 712-13 (the finding that "the decisions of the Mother Church were 'arbitrary' was grounded upon an inquiry that persuaded the Illinois Supreme Court that the Mother Church had not followed its own laws and procedures," and that is an inquiry prohibited by the First Amendment).
[176] *Id.* at 721.
[177] *Id.* at 723.

church. That being so, the sole remaining issue for the civil courts to consider was formal title. In the mind of the Court, only then is neutral principles a workable option.[178]

The next and final case in this line of internecine contests is unlike *Milivojevich* but like *Presbyterian Church* and *Church at Sharpsburg*. In *Jones v. Wolf*, the Supreme Court again said that state courts may, in limited instances, devise neutral principles of law to adjudicate intrachurch disputes over formal title to property.[179] Courts may examine church charters, constitutions, deeds, and trust indentures to resolve property disputes using "objective, well-established concepts of trust and property law familiar to lawyers and judges."[180] Courts can look to state corporation and property laws. To a limited extent, they may even "examine certain religious documents, such as a church constitution, for language of trust in favor of the general church."[181] The method's advantage is that it sometimes "obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes . . . ."[182] It serves the state's interests in providing a forum for peaceful dispute resolution and quieting title to real property.[183] *Wolf* approved of neutral principles of law as a permissible alternative to judicial deference, but *Milivojevich* is still good law. So it would seem that *Wolf* is contingent on the sole dispute before the magistrate being formal title. In such cases, it is up to the high court in each state to choose which rule to follow: deference or neutral principles. But the Supreme Court added the following caution to courts when using neutral principles:

> [T]here may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property. In such a case, if the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative

[178] *See* Hutchison v. Thomas, 789 F.2d 392, 396 (6th Cir. 1986) (neutral-principles rule was "simply not applicable" to religious leadership dispute).
[179] 443 U.S. at 602-06. The *Wolf* Court made it clear that a neutral-principles approach is not mandated by the First Amendment. Rather, in intrachurch property disputes, the use of neutral principles is a *permissible* alternative to the judicial-deference rule. *Id.* at 602.
[180] *Id.* at 602-03.
[181] *Id.* at 604.
[182] *Id.* at 605.
[183] *Id.* at 602 ("The State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively.").

ecclesiastical body.[184]

Thus, in applying neutral principles the judge may examine church documents, if at all, only through a secular lens. The documents, if ambiguous or otherwise in need of interpretation, do not authorize the judge to resolve a religious question or dispute.[185]

When a church's polity is hierarchal and the dispute arises where the local church (or the majority faction thereof) wants to leave the general church, a rule of judicial deference will nearly always mean that the general church prevails in the dispute. And if the dispute is over title to property, the general church will likely be awarded title. The rule of deference postulates that this is fair because when the local members first joined the church, they impliedly consented to such top-down rule. In most instances, however, the local members gave the matter no thought. Further, it is the local members who typically donated the money to acquire the local property and maintain it down through the years. And it does not help the equities of the case that the officials governing the general church are often located in some other state, whereas the unhappy laity reside in the forum state and are pleading with their state officials to consider what is fair. A rule of neutral principles gives a state court the option to redefine fairness by requiring that title to local church property be treated in the same manner as title disputes to property held by other voluntary associations.

The downside to neutral principles is that there is a departure from the doctrine of church autonomy where a general church's hierarchical polity is ignored. But this downside is ameliorated somewhat because the general church administrators of hierarchical polity can arrange in advance the local church's documents so that the general church prevails if a dispute arises. Officials in the general church probably have greater legal sophistication, and they know from experience the sort of things that can go wrong. And it is at this early point in time when the relationship between general and local is most amiable and full of optimism for the future. Further, the Supreme Court has offered neutral principles as an option, rather than requiring it, so the high court in each state may choose to retain the rule of judicial deference across

[184] *Id.* at 604. *See also id.* at 602 ("the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes").

[185] *Id*. at 606-09. In *Wolf*, the Court approved the Georgia courts following neutral principles in the dispute between the local church and the general church. However, there was also a dispute between the local factions as to which was the "true local church." Accordingly, the case was remanded back to the state courts to say what neutral principles applied to the dispute between the two local factions. If the state courts presumed the majority of the local voting members were the "true local church," then they had to say how that presumption could be overcome, and to do so without posing religious questions.

all disputes. Finally, should a state retain the rule of judicial deference in all instances, disappointed members of a rebelling local church always retain their constitutional right of departure. True, in leaving their church, the disgruntled local members leave behind their past material contributions and affections connected to a particular building. But they have a constitutionally protected right to leave and start afresh a new church or join another fellowship across town more compatible with their spiritual beliefs.

As a deviation from church autonomy doctrine, a rule of neutral principles still remains questionable. The 5-4 split in *Wolf* is demonstrative. While the rule of neutral principles is supposed to be "neutral," most often it will favor the local church faction. That is the faction likely favored by state officials as they respond to petitions from their local constituents. Importantly, in all other types of internecine disputes the Court has resolved the matter by following a rule of judicial deference. There can be no resort to neutral principles in cases such as *Milivojevich, Kreshik, Kedroff,* and *Gonzalez* where the disputes are over doctrine or the selection of clerical leaders, as opposed to merely the monetary value of land and a building where worship takes place.[186]

A danger is that neutral principles can spill over into other areas and contaminate the law. We see this with the law of defamation. However, any doubt as to whether the U.S. Supreme Court would extend the neutral-principles option beyond property disputes between separating factions was resolved with its unanimous decision in *Hosanna-Tabor*. *Hosanna-Tabor* was about personnel, as was *Our Lady*. When the employer is a church, personnel is policy. There was not a single mention of neutral principles in *Hosanna-Tabor* or *Our Lady*, putting them at odds with any prospect of a wider use of neutral principles.

D. *Defamation Claims Against a Church or Its Officials*

The Court in *Our Lady* said the ministerial exception "does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission."[187] And in *Hosanna-Tabor*, Chief Justice Roberts wrote for the Court:

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[186] The neutral-principles approach is well-suited only to religions whose worship is not site-specific, which includes much of Christianity. It does not address difficulties that arise where the property in dispute is itself religiously significant, as is the case for many Native American religions with their sacred sites. This is another weakness in the neutral-principles option.

[187] 140 S. Ct. at 2060.

> Today we hold only that the ministerial exception bars [antidiscrimination civil rights claims]. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise.[188]

A number of such common-law claims have arisen, often brought by plaintiffs seeking to get around the ministerial exception. They urge judges to ask the wrong question: Can neutral principles apply? The results have been conflicting, but the confusion is entirely unnecessary. The proper question to determine whether church autonomy is a valid defense comes right out of *Hosanna-Tabor*: Is this a matter of internal governance? If so, we have a zone free of government interference. Again, the five subjects of internal governance are: (1) the determination of doctrine, including the validity, importance, or meaning of a religious question; (2) the determination of the organization's polity; (3) the hiring, training, promotion, or dismissal of clerics, ministers, and other religious functionaries and leaders; (4) the admission and dismissal of members, as well as a determination of whether their affiliation is in good standing; and (5) internal communications by church officials and members concerning the foregoing four subject matters. If the prosecution of a claim of defamation falls in one or more of these five zones, the action is categorically barred.

There are more than a few defamation cases in the lower state and federal courts that ask if the matter can be resolved by applying neutral principles.[189] This shows a fundamental misunderstanding of the doctrine of church autonomy. The Supreme Court has allowed neutral principles only in internecine disputes over church property, and only then when the sole disputed issue is formal title. The question to ask is whether a plaintiff can prove the elements of defamation without invading any of the five protected areas of internal governance, then church

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[188] 565 U.S. at 196.

[189] *See Diocese of Lubbock*, 624 S.W.3d at 526-35 (Boyd, J., dissenting) (collecting lower court cases applying neutral principles to adjudicate defamation claims against churches). Many of these collected cases permit a claim to proceed if the allegedly defamatory remark was made to the public and away from church property. These are the wrong parameters. The church autonomy defense applies if proving the elements of a defamation claim entangles the court in one or more of the five subject matters previously identified by the Supreme Court as matters of "internal governance." There is nothing more to the defense. True, in looking into whether proper care was taken to confine any communications about a disciplinary matter to those inside the church, it becomes relevant that the alleged tortious remark got released to the public. But this does not entail applying neutral principles of law as an alternative to the doctrine of church autonomy; this is a simple application of the fifth subject matter protected by the doctrine of church autonomy.

autonomy does not apply.[190] On the other hand, if proving the elements of the tort does invade one or more of the five subject areas protected by church autonomy then the claim is categorically barred. Borrowing the rubric of neutral principles from *Church at Sharpsburg* and *Wolf* will surely introduce error. Some of the cases in the lower courts have gotten this matter correct,[191] but others have missed the mark.[192]

In still other defamation cases, plaintiff's counsel points out that the allegedly libelous statement is on a wholly secular topic, not a religious topic.[193] Once again, this shows a fundamental misunderstanding of church autonomy. As noted in *Hosanna-Tabor*, church autonomy extends to a religious entity's entire zone of internal governance, to all matters strictly ecclesiastical, whether the act of governance is characterized as religious or secular. Church autonomy is a structural safeguard, not a right to be free from personal religious harm. It creates a government-free zone that no supposedly "neutral principle" can invade. In *Hosanna-Tabor*,

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[190] As an example of a defamation claim that did not transgress the doctrine of church autonomy, see *Ogle v. Hocker*, 279 Fed. App'x 391 (6th Cir. 2008). Ogle, an evangelist and ordained cleric in a Protestant denomination, brought claims of defamation and intentional infliction of emotional distress against Hocker, another ordained cleric in the same denomination. Hocker was the pastor of a local church in the denomination, but Ogle was not on the ministerial staff of that church or otherwise connected to it. The alleged torts arose from a Sunday sermon illustration and later one-on-one conversations by Hocker in which he accused Ogle of homosexual advances toward him when the two were on an overseas mission trip. Hocker raised the defense of church autonomy. The tort claims did not involve a determination of doctrine or polity, nor were the remarks part of the denomination's selection or supervision of Ogle as a cleric. There were disciplinary proceedings by the denomination against Ogle. However, Hocker's local church had no jurisdiction as to the disciplinary actions involving Ogle, thus the remarks in Hocker's sermon had no part in Ogle's discipline. Finally, the lawsuit was not based on a matter involving any internal communications by officials in the denomination in the course of the disciplinary proceeding involving the Ogle. Because a pursuit of the tort claims fell outside the five subject areas protected by church autonomy, the appeals court was right to deny Hocker's resort to the defense.

[191] *See, e.g.*, Ex parte Bole, 103 S.3d 40 (Ala. 2021) (statement during investigation into and removal of pastor); In re Alief Vietnamese All. Church, 576 S.W.3d 421 (Tex. App. 2019) (statement about deacon during internal dispute over governance); *Sumner*, 27 Cal. App. 5th 577 (statement during termination of dean of seminary who was regarded as "minister"); Orr v. Fourth Episcopal Dist. African Methodist Episcopal Church, 111 N.E.3d 181 (Ill. App. Ct. 2018) (statement during termination of minister); Pfeil v. St. Matthews Evangelical Lutheran Church, 877 N.W.2d 528 (Minn. 2016) (statement during church meeting to consider excommunication); Heard v. Johnson, 810 A.2d 871 (D.C. 2002) (statement during termination of pastor); Hiles v. Episcopal Diocese, 773 N.E.2d 929 (Mass. 2002) (statement during disciplinary proceeding against priest); Hadnot v. Shaw, 826 P.2d 978 (Okla. 1992) (statement during excommunication of two members); Hutchison v. Thomas, 789 F.2d 392 (6th Cir. 1986) (statement during disciplinary proceeding against pastor).

[192] *See, e.g.*, Galetti v. Reeve, 331 P.3d 997 (N.M. Ct. App. 2017) (statement during proceedings to terminate minister); Banks v. St. Matthew Baptist Church, 750 S.E.2d 605 (S.C. 2013) (statement by pastor during congregational meeting to remove three church trustees); Tubra v. Cooke, 225 P.3d 862 (Or. Ct. App. 2010) (statement during hearing over pastor's misconduct); Bowie v. Murphy, 624 S.E.2d 74 (Va. 2006) (statement during church meeting to remove deacon); Marshall v. Munro, 845 P.2d 424 (Alaska 1993) (statement by church official in letter of reference about former pastor seeking new employment).

[193] *See, e.g.*, *Sumner*, 27 Cal. App. 5th at 589, 593-94, 596 (statements by defendants during termination of the dean of a seminary).

the protected act of internal governance was to dismiss a teacher-minister for what would normally pass for secular reasons—namely, the school's retaliation for her invoking the Americans with Disability Act. Counsel for the EEOC misunderstood the nature of the doctrine of church autonomy when she told the Court that the school's religious defense was pretextual, that is, not really religious. The Court responded:

> That suggestion misses the point of the ministerial exception. The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minster to the faithful—a matter "strictly ecclesiastical," . . . —is the church's alone.[194]

Counsel for the church may have additional defenses to the claim of defamation—such as that the allegedly defamatory remark was true—which in turn may circle us back to the First Amendment problem of whether the alleged truth or falsehood of a defamatory remark is a prohibited religious question.

III. PRACTICE AND PROCEDURE TO PROPERLY ORDER THE TWO CENTERS OF AUTHORITY

The dichotomy between free-exercise rights and the doctrine of church autonomy has many parallels to the dichotomy between constitutional rights and constitutional structure, and these parallels illuminate the special procedures used in these cases that may otherwise be puzzling. For example, as a defense the doctrine of church cannot be waived. Another such special procedure is the initial limitation on discovery into the inner workings of a religious organization lest a civil court's entanglement with the entity's internal affairs via document demands, depositions, and the like generate a new violation of church autonomy. There is also the collateral order doctrine permitting an interlocutory appeal from a denial of a motion to dismiss or for summary judgment when a trial court rebuffs a ministerial exception defense. And when the matter before the court is a church autonomy case, there is no balancing against the government's interests. Rather, there is an immediate dismissal, and the case is at an end.

The need for these special procedures comes about because the doctrine of church autonomy involves a discrete zone of freedom for churches and other religious organizations. As such, church autonomy is a structural restraint on the government's power that creates breathing space for religious organizations to go about matters of internal governance, whether those

[194] 565 U.S. at 194-95.

governance decisions are religiously motivated or secular. This is a carveout of a distinct area of operations touching on doctrine, polity, and membership, as well as the selection, training, or removal of the ministers that carry out central religious functions.

A. *The Ministerial Exception: A Defense in the Nature of a Categorical Immunity*

As with most matters concerning church autonomy, the best place to start is with the Supreme Court's 2012 decision in *Hosanna-Tabor*. This was the Supreme Court's first church autonomy case since *Wolf* was decided in 1979, breaking a silence spanning a third of a century. As discussed earlier, *Hosanna-Tabor* involved a fourth-grade teacher who sued her employer, a church-related school, alleging retaliation for having asserted antidiscrimination rights under the ADA.[195] The school raised as a defense the ministerial exception. The exception recognizes that religious organizations have exclusive authority to select their own ministers—which necessarily entails not just initial hiring but also promotion, training, supervision, retention, and other terms and conditions of employment.[196] As a matter of First Amendment church autonomy, the ministerial exception overrides not just the ADA, but a number of venerable employment antidiscrimination statutes.[197]

The Supreme Court observed that:

> Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.[198]

The Court said that although "the interest of society in the enforcement of employment discrimination statutes is undoubtedly important . . . [,] so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission."[199] Accordingly, in a lawsuit that strikes at the ability of the church to determine its leaders and teachers, any balancing of interests between a vigorous eradication of employment

[195] 42 U.S.C. §§ 12101 *et seq.*
[196] *See Demkovich*, 3 F.4th 968 (holding that ministerial exception applied to claims of employment discrimination that alleged a hostile environment as a result of harassment during supervision).
[197] *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq.; The Equal Pay Act of 1963, 29 U.S.C. § 206(d); Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq.
[198] *Hosanna-Tabor*, 565 U.S. at 188.
[199] *Id.* at 196.

discrimination, on the one hand, and institutional freedom, on the other hand, is a balance already struck by the First Amendment on the side of church autonomy.[200]

Church autonomy cases have been relatively few on the Court's docket. But they are powerful because once it is determined that the doctrine applies, no rejoinder is permitted by the opposing party. That is, once it is determined that a lawsuit falls within one of the five subject matters of internal church governance, there is no follow-on judicial balancing. The case is at an end, and it remains only for a final judgment to be entered.[201] There is no balancing because there can be no legally sufficient governmental interest to justify interfering in the internal governance of a church. As the Court in *Hosanna-Tabor* intoned, the First Amendment has already struck the balance.[202] In this regard, the Court criticized the EEOC's rejoinder to the Court's case-ending conclusion that the ministerial exception applied. The EEOC asserted that the school's religious reason for firing Perich was pretextual.[203] "This suggestion misses the point of the ministerial exception," wrote the Chief Justice:

> The purpose of the [ministerial] exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter "strictly ecclesiastical," . . . is the church's alone.[204]

Lower courts applying *Hosanna-Tabor* have rightly interpreted the ministerial exception, not as a personal religious liberty but as a structural limitation on the government's actions.[205] These cases are in large part rooted in the Establishment Clause, the text of which bespeaks a structural negation of the government's delegated powers: "Congress shall make no law" about a discrete subject described as "an establishment of religion." In disestablishing a church, the state begins to separate and properly order relations between church and state. As Chief Justice

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[200] *Id*. ("When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us.").
[201] *Id.* at 194 ("Because Perich was a minister within the meaning of the exception, the First Amendment requires dismissal of this employment discrimination suit against her religious employer.").
[202] *Id*. at 196 ("When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us.").
[203] *Id.* at 194.
[204] *Id.* at 194-95 (internal citation omitted).
[205] *See* Lee v. Sixth Mount Zion Baptist Church of Pittsburgh, 903 F.3d 113, 118 n.4 (3d Cir. 2018) (recognizing that the ministerial exception is a structural restraint "rooted in constitutional limits on judicial authority"); Conlon v. InterVarsity Christian Fellowship, 777 F.3d 829, 836 (6th Cir. 2015) ("The ministerial exception is a structural limitation imposed on the government by the Religion Clauses.").

Roberts wrote, "the Free Exercise Clause . . . protects a religious group's right to shape its own faith and mission" by controlling who are its ministers. A personal right of the church is burdened when the church is coerced to employ an unwanted minister. But "the Establishment Clause [also] prohibits government involvement in such ecclesiastical decisions."[206] Here enters the prohibition on the civil courts answering religious questions. The government acts beyond its limited, delegated powers when it transgresses on the prerogative of a church which alone should control the employment of its ministers. The Chief Justice gave examples of the English Crown interfering with the appointment of clergy in the established Church of England.[207] He wrote that the Establishment Clause was adopted in America over against the Church of England model and to flatly deny such power to our newly formed national government.[208]

There is a welcome absence of interest balancing in *Hosanna-Tabor*. Balancing tests are still valid under the Free Exercise Clause when religion is targeted[209] or discriminated against.[210] But that is not the case when the subject matter warrants the categorical protection of what Justice Alito in *Our Lady* called "religious autonomy."[211] In the latter instance, the First Amendment (understood against the backdrop of America's state-by-state disestablishments that broke with the Church of England model[212]) has determined that hiring, promoting, supervising, and dismissing ministers is a power reserved to the church alone—a power within the zone of internal governance denied to Caesar.

B. *Affirmative Defenses and Waivability*

With reference to the ministerial exception, footnote 4 in *Hosanna-Tabor* noted that the lower courts were divided over whether the exception is an affirmative defense or a matter that goes to the court's subject matter jurisdiction. The issue had not been briefed or argued by the parties, but amici had touched on it. Without any analysis, the Supreme Court said in the footnote that the ministerial exception was to be regarded as an affirmative defense.[213]

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[206] *Hosanna-Tabor*, 565 U.S. at 188-89.
[207] *Id.* at 182-85.
[208] *Id.* at 183-85.
[209] *Church of Lukumi*, 508 U.S. 520.
[210] *Fulton*, 141 S. Ct. 1868.
[211] *Hosanna-Tabor*, 565 U.S. at 198. Many have observed that "ministerial exception" is not an apt label for the rule. *See supra* note 46-49 and accompanying text. After *Our Lady*, "religious functionaries" would be a better term; but it omits the top administrators to which the rule also applies.
[212] *Our Lady*, 140 S. Ct. at 2061-62; *Hosanna-Tabor*, 565 U.S. at 183-85.
[213] *Hosanna-Tabo*r, 565 U.S. at 195 n.4.

One way to understand footnote 4 is that the Chief Justice was passing judgment on nothing more than a matter of civil pleading and practice. Hence, when there is a lawsuit that might implicate the ministerial exception, as with any affirmative defense it is the responsibility of the defendant to raise it in a pleading.[214] Because the allowance for amending a pleading is quite liberal,[215] a waiver for failure to timely plead the defense will rarely occur. In lieu of a responsive pleading, the defendant-church may initially raise the affirmative defense by a motion to dismiss for failure to state a claim.[216] If additional materials are submitted in support of the Rule 12(b)(6) motion to dismiss, it becomes a motion for summary judgment.[217]

The immediate difference as a result of the Court's ruling in footnote 4 is slight. In motions under Rule 12(b)(6), the defendant-church carries the burden of proof, whereas under Rule 12(b)(1), the plaintiff would have the burden of convincing the trial court that it has subject matter jurisdiction. As an evidentiary matter, this allocation of the burden of pleading makes sense. When the key issue is whether the plaintiff in an employment discrimination suit is a minister and works for an entity that is religious, much of the relevant information is in the hands of the church. Thus, the church reasonably may be allocated the initial burden of producing evidence. And should the evidence show that the plaintiff is a minister and works for an entity that is religious, then the First Amendment requires that the trial court enter summary judgment for the church and end the lawsuit. Any such judgment would be on the merits and grounded in the First Amendment, not a dismissal for lack of jurisdiction under Article III of the U.S. Constitution or the jurisdictional granting statutes in title 28 of the U.S. Code.[218] It follows that footnote 4 is not problematic if it is only about civil procedure. To be sure, sometimes buried in the interstices of civil pleading and practice are deeper matters of consequence.[219] But it overreads footnote 4 to make this one such instance.[220]

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[214] *See* Fed. R. Civ. P. 8(c).
[215] *See* Fed. R. Civ. P. 15(a)(2).
[216] *See* Fed. R. Civ. P. 12(b)(6). Because of the ruling in footnote 4, the defendant-church may not raise the ministerial exception by motion to dismiss for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1).
[217] *See* Fed. R. Civ. P. 12(d) and 56.
[218] It bears noting that nothing in the Federal Rules of Civil Procedure can expand or contract the subject matter jurisdiction of the federal courts. *See* Fed. R. Civ. P. 82.
[219] *See* Gregory A. Kalscheur, *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject-Matter Jurisdiction, and the Freedom of the Church*, 17 WM & MARY BILL OF RTS. J. 43 (2008). Professor Kalscheur comments favorably in regarding the church autonomy defense as structural. *Id*. at 63-68.
[220] *Cf*. Michael A. Helfand, *Religion's Footnote Four: Church Autonomy as Arbitration*, 97 MINN. L. REV. 1891 (2013).

A difficulty arises in that as a general matter an affirmative defense is waived if not timely raised by a defendant.[221] But the nature of the church autonomy doctrine is that it can never be waived. This is because church autonomy is not a personal right, but is structural in nature, keeping two centers of authority, church and state, in their right relationship. For government to avoid violating an individual right is a matter of constitutional duty owed to each person. On the other hand, for government to avoid exceeding a restraint imposed by the U.S. Constitution's structure is a duty owed to the entire body politic. Rights, because they are personal, can be waived by the rights holder, whereas structure, because it is there to benefit the entire body politic, cannot be waived by the named party defendant.

When constitutional structure delegates, separates, and limits governmental power, one happy but indirect consequence of fidelity to that prescribed structure is the preservation of individual liberty by avoiding concentrations of power. Church autonomy doctrine separates the power of government and the authority of organized religion. And when the government cannot invade a church's zone of autonomy, individuals and the organizations they form might experience a slight consequential increase in personal religious liberty. It is for this reason that the doctrine of church autonomy registers in both the proper structuring of church-state relations to protect the church with respect to its internal governance (the Establishment Clause), and also in the safeguarding of the free exercise of the church (the Free Exercise Clause).[222] We need not be puzzled that church autonomy is rooted in both Religion Clauses.

That church autonomy is nonwaivable can be consequential in multiple ways. For example, a government benefit cannot be conditioned on the beneficiary waiving its mastery over a matter of internal governance because the doctrine of church autonomy cannot be waived. Indeed, because it is structural, church autonomy cannot be waived even when done so knowingly and willingly by an intended beneficiary. A ready application, of course, is when the

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[221] *See* Fed. R. Civ. P. 8(c)(1).

[222] *Hosanna-Tabor*, 565 U.S. at 184 ("The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."); *id.* at 188-89 ("By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions."); *Our Lady*, 140 S. Ct. at 2060 ("State interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion.").

government attempts to attach "strings" to its funding programs. Such strings are ineffective when up against a church autonomy defense.

Notwithstanding footnote 4, the idea that church autonomy is "jurisdictional" goes all the way back to *Watson v. Jones*,[223] and the confusion of church autonomy being jurisdictional rather than structural carries forward in the Court's later cases.[224] While church autonomy is structural, subject matter jurisdiction is also a matter of constitutional structure. This is where the confusion may have started. But we now see that church autonomy is best understood as structural, and that clears up the confusion.

Watson is not cited in *Hosanna-Tabor* footnote 4, thus no one can claim that the Chief Justice was overruling the Court's discussion of jurisdiction in *Watson* and later cases. *Watson* was in federal court based on diversity jurisdiction, and the substantive law applied in the ruling was federal general common law per *Swift v. Tyson*.[225] When *Watson* referred to "jurisdiction," it was likely not jurisdiction in the sense of the judicial authority conferred by Article III, clause 2 of the U.S. Constitution. Rather, the reference to jurisdiction was in the sense that the federal government is one of limited, delegated powers, with the Religion Clauses negating any power in Congress to make a law that regulates a church with respect to matters of internal governance. As we have seen, that negation of power is structural with regard to church-government relations and thus cannot be waived.[226] True, when the Court decided *Watson*—a diversity case originating in Kentucky—the First Amendment did not apply to the states. But federal general common law was about applying the better rule to a diversity case in federal court, and the better rule was the one that acknowledged that the U.S. is a federalist republic of states with no established religion, a nation that recognizes the mutually beneficial separation between organized religion and government. That assessment was confirmed in *Kedroff* when the doctrine

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[223] 80 U.S. at 732-34 (holding that courts have no jurisdiction to decide ecclesiastical issues).

[224] *See Milivojevich*, 426 U.S. at 713-14 (holding that courts have no authority to decide ecclesiastical issues). The Court does not always use the word "jurisdiction" in its rationale, but its language of dismissal is easily read to carry the same meaning. *See Presbyterian Church*, 393 U.S. at 445-47 ("[It is] wholly inconsistent with the American concept of the relationship between church and state to permit civil courts to determine ecclesiastical questions," hence the First Amendment's "language leaves the civil courts *no* role in determining ecclesiastical questions in the process of resolving property disputes."); *Bouldin*, 82 U.S. at 139 ("This is not a question of membership of the church, nor of the rights of members as such. It may be conceded that we have no power to revise or question ordinary acts of church discipline, or of excision from membership.").

[225] *See supra* note 152 (explaining the rulings of *Erie* and *Swift*).

[226] Several courts have held that because the ministerial exception is structural, it cannot be waived. *See Conlon*, 777 F.3d at 836; *Sixth Mount Zion*, 903 F.3d at 118 n.4; Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1042 (7th Cir. 2006).

of church autonomy, via the First and Fourteenth Amendments, was explicitly applied to the states.[227] Because church autonomy is derived from both Religion Clauses, and aspects of those clauses are structural, church autonomy cannot be waived. This is what *Kedroff* accomplished, and *Hosanna-Tabor*'s footnote 4 did not reverse *Kedroff*.

C. *Limiting Discovery and Permitting Interlocutory Appeals*

NLRB v. Catholic Bishop of Chicago was the first occasion for the Supreme Court to note that the ministerial exception defense may call for limitations on civil discovery into the operations of a church or similar religious organization.[228] Facing the prospect of federal officers probing into allegations of unfair labor practices by religious officials at a primary and secondary Catholic school, the Justices warned, "It is not only the conclusions that may be reached . . . which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions."[229] Concurring in *Hosanna-Tabor*, Justices Alito and Elena Kagan explained that "the mere adjudication of [religious] questions would pose grave problems for religious autonomy."[230] The lower courts have followed suit. For example, in *Whole Woman's Health v. Smith*, a trial court's pretrial order compelling a faith-based crisis pregnancy center to respond to discovery was reversed on appeal in part because discovery would have revealed internal communications and otherwise interfered with the internal decision-making processes of the ministry.[231] An interlocutory appeal was allowed on the discovery issue because of the structural nature of the defense.[232] And while merits discovery should be delayed in such cases, discovery concerning the affirmative defense itself is proper (e.g., does plaintiff meet the definition of "minister"?). This is not to say that all merits discovery should be delayed in every church autonomy case. Rather, the purpose of the limitation is to keep the intrusion by civil discovery from generating a new invasion of the autonomy of the defendant religious organization. Accordingly, the scope of a Rule 26(c) protective order should pertain to the subject matters that concern the immunity: determinations of doctrine and polity; the

[227] *See supra* note 148-51 and accompanying text.
[228] 440 U.S. 490.
[229] *Id.* at 502. *See supra* notes 111-114 and accompanying text for additional discussion of *Catholic Bishop*.
[230] 565 U.S. at 205.
[231] 896 F.3d 362, 373-74 (5th Cir. 2018).
[232] *Id*. at 367-68, 373. *See* McCarthy v. Fuller, 714 F.3d 971, 976 (7th Cir. 2013) (interlocutory appeal allowed because harm from government intrusion irreparable).

admission and removal of members; the hiring, training, and removal of ministers and other church leaders; and internal communications about all of the foregoing.[233]

When a church has raised the ministerial exception by pleading or motion and the affirmative defense has been denied by the trial court, the structural nature of church autonomy calls for an interlocutory appeal. The requisites for interlocutory appeal under the collateral order doctrine are that permitting an immediate appeal will conclusively settle the disputed issue, the appeal would resolve an important issue separate from the merits, and the issue is effectively unreviewable if the case is allowed to proceed to final judgment.[234] If the trial court is mistaken in its ministerial exception ruling, to allow the case to continue to be prepared for trial and fully tried on the merits is to reoffend the First Amendment with new church-state entanglements, and to do so in a manner that can never be corrected on appeal. In other words, if discovery into the merits goes forward this time a new harm of invading the church's internal governance will be at the hands of the trial court. And once that new harm is incurred under the coercion of a discovery order, it cannot be redressed by the later payment of monetary damages (the court has absolute immunity) or otherwise undone by later equitable relief.[235] Thus, an interlocutory appeal should be allowed under the collateral order doctrine.

IV. TEXT, HISTORY, AND THE DOCTRINE OF CHURCH AUTONOMY

A. *Reading the First Amendment Text*

When the plain text is definitive, the courts need not resort to an interpretive rule, be it originalist or otherwise. The First Amendment reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Although it ends with a semicolon, the first clause would stand alone as a complete sentence. And while there is but one clause addressing religious freedom, there are two participial phrases ("respecting an establishment" and "prohibiting the free exercise") modifying the object ("no

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[233] *See* Peter J. Smith and Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 FORDHAM L. REV. 1847, 1876-78 (2018); *id.* at 1878 n.232 (collecting cases) [hereafter "Smith and Tuttle"]; Mark E. Chopko and Marissa Parker, *Still a Threshold Question: Refining the Ministerial Exception Past* Hosanna-Tabor, 10 FIRST AMEND. L. REV. 233, 293 (2012) [hereafter "Chopko and Parker"].
[234] Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949).
[235] *See* Smith and Tuttle at 1878-81; Chopko and Parker at 289-98.

law") of the verb ("shall make"). It is therefore entirely proper to think in terms of two separate disempowerments on the sentence's subject ("Congress"). This is not to say that the two restraints on power can never overlap. The government might transgress both participial phrases—much like a single law might violate a person's right to both free speech and due process. However, notwithstanding an occasional overlap, the nonestablishment restraint and the free-exercise restraint give rise to separate causes of action.

In closely observing the text, we see that the first participial phrase ("respecting an establishment") is different in nature from the amendment's rights-based participial phrases ("prohibiting the free exercise" and "abridging the freedom of speech, or of the press"). The latter two forbid "prohibiting" and "abridging" and thus restrain the government with respect to a person's free exercise or free expression. These two phrases can be understood to acknowledge that people have unalienable or natural rights to free exercise and free expression. They imply a moral autonomy inherent to each individual rights-holder that the government does not have the authority to easily overcome. On the other hand, the participial phrase "respecting an establishment" is not about acknowledging an intrinsic right because of one's humanity, but is a reference to a discrete subject matter ("an establishment of religion") that is being placed outside ("no law") of the government's authority. This difference in participial phrases bespeaks a difference in their function: acknowledging an intrinsic human right versus prohibiting the government's involvement in a discrete zone of activity.

As a matter of legal processes, a constitutional restraint on government involvement in a particular subject matter requires structure. The Establishment Clause operates like a structural distancing of two centers of authority: government and religion. Constitutional structure delegates, separates, and limits power. A happy consequence of well-maintained constitutional structure is the prevention of concentrations of power that can in turn lead to losses of personal liberty. In the text of the Establishment Clause, we have a separation of the authority of government and the authority of organized religion. All persons in a republic indirectly benefit when the government cannot exercise power respecting "an establishment of religion." An individual complainant cannot waive this separation of powers any more than she can waive a federal court's lack of subject matter jurisdiction (also a structural bar). Rather, the structural separation is there to benefit more than just the complainant before the court. This is much like the three-branch structuring we call "separation of powers"; the separation of the branches is

there not just for the benefit of an individual complainant, but for all persons subject to the Constitution.

Given the different natures of the Establishment Clause (structural) and the Free Exercise and Free Speech Clauses (rights-based), the modern Supreme Court is correct when it applies the Establishment Clause as a structural restraint that properly separates the two centers of authority we call church and government. Stated differently, the Court envisions the Establishment Clause as policing the boundary between church and government. It understands its judicial task as keeping governmental power from entering a zone the subject matter of which is defined as "an establishment of religion." This is for the mutual good of the two things separated, church and government.[236]

The separation should not be exaggerated. This is a separation of the institutions of religion from the institutions of the republic. While the institutions of church and government can be separated, religion and politics cannot. Such a disjunction would rob believers and the organizations they form of a freedom enjoyed by all others. Churches and other houses of worship appropriately speak to how their teachings bear on social and political issues, all consistent with their right to freedom of speech.[237]

Regarding the Establishment Clause as structural explains several features in the church autonomy case law.[238] For example, there are relaxed rules concerning standing to sue because in lawsuits over structure there are often no parties with individualized harm.[239] Further, in contrast to free-exercise claims that remedy only religious harms, the Establishment Clause provides a remedy for nonreligious harms such as economic damages and loss of academic freedom.[240] This also accounts for why federal courts sometimes frame the operation of the Establishment Clause as a limit on their subject matter jurisdiction.[241] Whereas free-exercise lawsuits seek to yield a

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[236] *See supra* note 72 and accompanying text.
[237] On the free speech right of clergy and churches to speak on political matters, see Justice Brennan's concurring opinion in *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (plurality opinion) (striking down law disqualifying clergy from holding public office).
[238] *See* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J. L. & POLITICS (UVA) 445 (2002).
[239] *Id.* at 456-58 (collecting cases where the Court has fashioned special rules of standing just for the Establishment Clause).
[240] *See Caldor*, 472 U.S. 703 (the harm done by an Establishment Clause violation is increased labor costs); *Epperson*, 393 U.S. 97 (the harm done by an Establishment Clause violation is loss of academic freedom). *See also supra* notes 67-69 and accompanying text.
[241] *See* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 42–51 (1998) (collecting cases where the Court dismissed for lack of subject matter jurisdiction).

personal right that is subject to strict scrutiny, a prima facie Establishment Clause claim is not subject to a balancing test that weighs governmental interests against a claimant's right. Either the Establishment Clause is violated or it is not—no balancing. This begins to explain why both the prohibition on courts answering religious questions and the ministerial exception are substantially rooted in the no-establishment principle, as befits rules that derive from church autonomy.

The plain text of the First Amendment takes us a long way toward explaining the reach and limits of the doctrine of church autonomy. But it can take us only so far. The text does not tell us what the founders meant by "an establishment of religion." *Hosanna-Tabor* and *Our Lady* teach us that this calls for a turn to history, in particular a rejection of the Church of England model at the time of America's founding.

B. *History as a Backdrop to Church Autonomy*

Constantine converted to Christianity in 312 A.D. while commanding a Roman army in a complex series of civil wars. As Western Emperor, he joined in promulgating the Edict of Milan in 313 A.D., which legalized Christianity in the Roman Empire and restored property taken during persecution. By late in the 4th century, Christianity had slowly but surely become the official religion of the empire. While the resulting church and empire were organizationally distinct, they formed two aspects of a single whole that we now call Christendom. It was understood that these two centers of authority would, on the one hand, cooperate in upholding and defending the church and, on the other, cooperate in unifying citizens around a common creed thereby giving legitimacy to the empire.

In 1054 A.D., a dispute over polity ripened into a schism that severed the eastern church in Constantinople from the western church centered at Rome. Unlike the eastern rite, the church at Rome remained a coequal power, at times dominating monarchs and at times being dominated by them. The Papal Revolution of 1050-1080 was a series of reforms initiated under Pope Gregory VII that dealt with the independence of the church and moral conduct of the clergy.[242] The reforms are codified in two major documents: dictatus papae, which centralizes authority in the papacy, and the libertas ecclesiae papal bull, which is about the freedom of church from

[242] *See generally* BRIAN TIERNEY, THE CRISIS OF CHURCH AND STATE 1050–1300 (1988); HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (1983).

temporal rulers.[243] The reforms required clerical celibacy, did away with simony (the sale of ecclesiastical offices and sacred things), and denied civil authorities the power to appoint church officials. Going forward, the Roman Church wielded its control over sacraments to visit deprivations upon civil rulers, and those same rulers used their superior military power to force the church to conform to the wishes of the monarch. It is also fair to say that through all these back and forth struggles, the church preserved classical culture and nurtured the arts, as well as ameliorated the harshness of peasant life.

In 1517, the German priest Martin Luther is reputed to have nailed his 95 Theses to the door of Wittenberg's Castle Church. The resulting Reformation shattered the unity of Western Catholic Christianity. The conflagration that ensued lasted for over 130 years, a period that today we refer to as the "religious wars." But that is imposing a modern construct on the conflict. For the combatants, there was no pronounced demarcation between the civil and the religious. Rather, what unified the political core of each state was its religious worldview. An interim settlement was reached at the Peace of Augsburg in 1555, with the adoption of the simple, if crude, principle of cuios regio, eius religio (whose region, his religion). The Treaty of Westphalia in 1648, ending the Thirty Years' War, left Catholics in control of the continental south and Protestants established in the north. The horror and dissipation of the wars strengthened the hand of the secular rulers at the expense of the churches, and this was especially so in the case of Protestants because of their internal division and their greater dependence on the military protection of the princes.

The Westphalian settlement that emerged entailed sovereign nation-states with marked borders at which access could be controlled, an established church, and religious dissenters. Dissenters were often persecuted or driven into exile, in large measure because the presence of nonconformists within the political polity was thought to destabilize the state. The persecution was always at the hands of the state, but the churches were complicit. Growing abhorrence at the violence wrought by religious persecution, the stubbornness of dissenters even unto death, and the emerging influence of the Enlightenment caused the pattern to evolve yet again in the direction of sovereign states, established churches, and juridical toleration of nonconforming sects.

[243] BERMAN at 2, 88-115.

The English Reformation was different from that on the continent. It began with Henry VIII's desire to annul his marriage to Catherine whom he thought unable to bear him a male heir. When the Pope refused, Henry, with the complicity of Parliament, passed the 1534 Act of Supremacy establishing the Church of England with himself as its supreme head.[244] This set-in motion a long series of attempts to reclaim Great Britain for the Roman Church, which in turn worked to generate deep-seated anti-Catholicism among a majority of the English and Scots-Irish. This antipathy toward Catholics would later be carried overseas by those embarking for the British colonies in North America. During the century-and-a-half from Luther to the 1688-89 Glorious Revolution and coronation of William and Mary, England experienced a Calvinist Reformation under the child-king Edward VI, a Golden Age under Elizabeth I (who backed the Church of England to compel religious unity to in turn stabilize the Crown), a civil war between Anglo-Catholic royalists and Calvinist parliamentarians won by the latter, the Puritan Protectorate of Oliver Cromwell, Restoration under Charles II, and the forced abdication of his brother the Catholic James II in favor of the Dutch Protestant William of Orange. The 1689 British Act of Toleration was adopted at the time of the Glorious Revolution; it extended legal protection to non-Anglican Protestants (but not Catholics).

Such were the church-state relationships and tolerations brought to the British colonies in North America, in variations both strong and weak. Many of the ancestors of the American revolutionary generation had come to these shores to escape the religious persecution and tumult associated with these Old World events. In British America, the pressing religious dynamic was not Anglicanism versus Catholicism, but Anglicanism versus Congregationalism versus other Protestants. Yet Old World church-state establishments obtained in the New World early on except for the special cases of Rhode Island and, partly at least, the Quaker settlement of Pennsylvania.[245] Maryland was chartered in 1632 as a colony where Catholics were fully welcome and equal to Protestants, but the colony was taken over by force in 1689 by Anglican arms.[246]

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[244] *Id*. at 267, 269.
[245] *See* WILKEN, *supra* note 24, at 134-54.
[246] There were few Catholics in colonial America, and almost all were in the colony of Maryland. But even in Maryland, Catholics were a minority. *See* Michael D. Breidenbach, *Church and State in Maryland: Religious Liberty, Religious Tests, and Church Disestablishment* 309, *in* DISESTABLISHMENT AND RELIGIOUS DISSENT: CHURCH-STATE RELATIONS IN THE NEW AMERICAN STATES, 1776 – 1833 (Carl H. Esbeck & Jonathan J. Den Hartog eds. 2019).

The Church of England was an agency of the Crown and seen as projecting British policy into revolutionary America. American patriots (not the Tories) viewed the Church of England as tyrannical, which was also the view held by the Congregationalists, the established church in much of New England. American dissenters and Enlightenment statesmen went a step further and held the view that established churches of any denomination—in their willingness to do the bidding of the state in service of the state—had corrupted Christianity.[247] This is seen, for example, in James Madison's *Memorial and Remonstrance*,[248] as well as the writings of Baptist ministers Isaac Backus and John Leland.[249] The spiritual corruption was perceived as both external and internal. The external was the established church imposing burdens of conscience on nonconforming religions, and the internal was the government entangling itself in the operations of the established church. The solution, these dissenters and statemen maintained, was disestablishment. Disestablishment, or the deregulation of religion, would both liberate the church and enlighten governance by the new republican states.

The Court in *Hosanna-Tabor* did not even acknowledge—let alone rely on—the foregoing account of the events on the European continent, with the church's fluctuating bids for power over and independence from the government from Constantine through Gregory VII and eventually to the Westphalian states.[250] Instead, in the view of the Supreme Court, the proper historical backdrop for understanding the First Amendment's doctrine of church autonomy was nearer in time and closer to home. Under the guiding principle of originalism (although originalism was not expressly mentioned in *Hosanna-Tabor*), that meant looking to what motivated revolutionary Americans on this side of the Atlantic: war with Great Britain, including rejection of its Church of England model. The opinion's history begins in earnest with the English Reformation and the establishment of the Church of England in 1534,[251] moves forward

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[247] *See* Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831 (2009).

[248] The *Memorial and Remonstrance* is available in 8 THE PAPERS OF JAMES MADISON 295-306 (William T. Hutchinson & William M. E. Rachael eds. 1973). For example, Paragraph 7 of the *Memorial* asks what have been the fruits of religious establishment, and answers: "More or less in all places, pride and indolence in the Clergy, ignorance and servility in the laity, in both, superstition, bigotry and persecution." Paragraph 5 of the *Memorial* points out that the state inevitably will use the church as an "engine of Social Policy" to accomplish its political ends, which is an "unhallowed perversion of the means of salvation."

[249] *See* William G. McLoughlin, NEW ENGLAND DISSENT, 1630–1833: THE BAPTISTS AND THE SEPARATION OF CHURCH AND STATE, vol. 2 (1971).

[250] 565 U.S. at 182-85. Chief Justice Roberts did acknowledge that the Magna Carta of 1215 promised independence for the Church, but quickly acknowledged that the promise was not kept. *Id*. at 182.

[251] *Id*. at 182.

to the religious struggles in England and resulting immigration to these shores, then discusses the First Federal Congress and the adoption of the First Amendment,[252] and finally relates two incidents involving James Madison and his part in early applications of the Religion Clauses.[253] The legal principles on display in this historical account were then brought to bear on the case at bar concerning the entanglement of federal nondiscrimination law with the dismissal by a religious school of one of its teachers who had religious duties. Similarly, in *Our Lady* the High Court considered the 16th and 17th century English religious conflicts to have influenced British emigrants to seek religious freedom in the American colonies.[254] The Court also acknowledged that the Church of England's oppressive policies in colonies such as Maryland and New York were a prelude to the revolution here.[255]

The Supreme Court in *Hosanna-Tabor* and *Our Lady* showed no interest in the Papal Revolution of the 11th century out of which Catholic scholars derive freedom of the church (libertas ecclesiae). This deprives the Court of some distant principles to undergird the doctrine of church autonomy, but it also frees it from arguing that the Papal Revolution is a suitable undergirding for church autonomy as embedded in our late 18th century Constitution.

As noted above, James Madison played a central role in the history that was relied on in *Hosanna-Tabor*. Chief Justice Roberts noted the Virginia representative's central role in drafting the Religion Clauses in the First Federal Congress,[256] and he relied on two episodes involving Madison and early applications of those clauses. In the first, Madison as Secretary of State under Thomas Jefferson declined to involve the U.S. in the appointment of a Catholic bishop in the Louisiana Territory.[257] The second episode had Madison as President vetoing a bill to incorporate an Episcopal church in the District of Columbia. In Madison's veto message, he did

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[252] *Id.* at 183 ("It was against this background that the First Amendment was adopted. Familiar with life under the established Church of England, the founding generation sought to foreclose the possibility of a national church.").
[253] *Id.* at 184-85.
[254] As was common in the 18th century, American patriots blamed the Thirty Years' War on religion. More recent scholarship suggests that this belief was in error, or at least greatly oversimplified. *See, e.g.*, PETER H. WILSON, THE THIRTY YEARS' WAR: EUROPE'S TRAGEDY (2009) (challenging interpretations of the Thirty Years' War as primarily religious, Wilson explores the political, social, and economic forces that accompanied religious motivations behind the conflict, and he points out that battle lines often did not align with Protestant/Catholic divisions).
[255] 140 S. Ct. at 2061-62.
[256] *Hosanna-Tabor*, 565 U.S. at 184 (stating that the form of the no-establishment text then being considered addressed the fear that, "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform").
[257] *Id.* A full account of the episode appears in Kevin Pybas, *Disestablishment in the Louisiana and Missouri Territories* 273, 283-85, *in* DISESTABLISHMENT AND RELIGIOUS DISSENT: CHURCH-STATE RELATIONS IN THE NEW AMERICAN STATES, 1776 – 1833 (Carl H. Esbeck & Jonathan J. Den Hartog eds. 2019) [hereafter "Pybas"].

not say the bill was unconstitutional because incorporating a church created a prohibited establishment. Indeed, it was becoming common at the time for churches to incorporate under state corporation laws to ease the acquisition and transfer of real property, to limit liability, to allow lawsuits in the corporate name, and to secure corporate life in perpetuity. Rather, according to Madison, the particular corporate articles set out in the bill would have deeply entangled federal officers in the details of removal and appointment of clergy in this particular church, and that was its constitutional defect.[258]

There are additional episodes that buttress the interpretive point made by Chief Justice Roberts. For example, at a time when military hostilities had ceased with victory at Yorktown in October 1781 and the states still remained loosely united under the Articles of Confederation, a well-documented incident occurred that illustrates how profoundly relations between church and government had shifted in the minds of continental officials in America. At the beginning of the revolution, the Roman Catholic Church in British North America was under the governance of Thomas Talbot, Bishop of London. This proved difficult when the colonies declared their independence and the ensuing war dragged on for seven years. Contact with the church in London was cut off, making the consecration of priests, the confirmation of young parishioners, and other episcopal functions unavailable to the faithful in America. Upon the signing of the Treaty of Paris in 1783, Talbot declared that he no longer exercised ecclesial jurisdiction in the United States.[259]

In response to these difficulties, Catholics in Maryland and Pennsylvania gathered to devise a solution. The Rev. John Lewis had been appointed as vicar for the American churches by Talbot's predecessor. Because of Talbot's difficulty in communicating with America, Lewis had been exercising more supervisory authority. The American clergy were pleased with Lewis' oversight, and in June 1783, they drew up a petition to the Pope requesting that Lewis be made both Superior and Bishop over the Church in the United States. In the petition, The Rev. John Carroll of Maryland provides intriguing commentary on the American Catholic view of church-state relations under the Confederation:

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[258] *Hosanna-Tabor*, 565 U.S. at 184-85.

[259] 2 JOHN G. SHEA, LIFE AND TIMES OF THE MOST REV. JOHN CARROLL, BISHOP AND FIRST ARCHBISHOP OF BALTIMORE: EMBRACING THE HISTORY OF THE CATHOLIC CHURCH IN THE UNITED STATES, 1763-1815 204-18, 223-25 (1888).

> You are not ignorant that in these United States our religious system has undergone a revolution, if possible, more extraordinary than our political one. In all of them free toleration is allowed to Christians of every denomination; and particularly in the States of Pennsylvania, Delaware, Maryland, and Virginia, a communication of all civil rights, without distinction or diminution, is extended to those of our religion. This is a blessing and advantage which it is our duty to preserve and improve, with the utmost prudence, by demeaning ourselves on all occasions as subjects zealously attached to our government and avoiding to give any jealousies on account of any dependence on foreign jurisdictions more than that which is essential to our religion, an acknowledgment of the Pope's spiritual supremacy over the whole Christian world.[260]

Meanwhile, the Catholic clergy in France had plans of their own for the American Church. The Jesuits had flourished in America during the time of the London Bishop's oversight, Talbot having been friendly to that order. However, clergy aligned with the Bourbon monarchs had urged Pope Clement XIV to dissolve the Society of Jesus, and they succeeded. The French clergy now sought to undermine the influence of the Jesuits in the infant United States.[261] A plan, apparently originating with Barbe Marbois, the French Minister to the United States, received initial support from the Papal Nuncio in Paris. The Nuncio sent instructions to Marbois in Philadelphia, directing him to petition Congress for authority to appoint a Catholic bishop in the United States. That would have caused the new American Bishop to receive his instructions via church authorities in Paris. When Marbois sent the petition to Congress, he received an unexpected response, yet one that was revealing of American sentiments on relations between church and government. On May 11, 1784, the congressional journal records the following resolution:

> Resolved, That doctor [Benjamin] Franklin [U.S. Minister to France] be desired to notify to the apostolical nuncio at Versailles, that Congress will always be pleased to testify their respect to his sovereign and state; but that the subject of his application to doctor Franklin, being purely spiritual, it is without the jurisdiction

[260] *Id*. at 209.
[261] *Id.* at 210-18.

> and powers of Congress, who have no authority to permit or refuse it, these powers being reserved to the several states individually.[262]

Marbois' petition was the sort of Old World religious intrigue that Americans abjured. When the French intentions became public, American Catholics reacted quickly with communications to Rome to counter the power play and prevent French interference. Pope Pius VI ordered that John Carroll be appointed Superior for the American clergy with the intent of consecrating him bishop within the year. A decree dated June 9, 1784, announcing this decision was sent to the American Catholic Church. In this way, the first American Catholic bishopric was formed, with The Most Rev. Carroll as bishop answering directly to the Pope. The incident confirms that in the new United States, any ecclesiastical jurisdictional disputes were outside the authority of the government.[263]

The Louisiana Purchase of 1803 required early applications of the Religion Clauses. This vast land west of the Mississippi River held a French Catholic establishment which was later maintained by the Spanish. The new treaty and purchase agreement with France guaranteed the inhabitants their religious liberty—no small matter as the United States was perceived by the French inhabitants to be Protestant. The Catholic establishment in Louisiana quietly ceased to exist as the Spanish Crown no longer paid the priests and Spanish law no longer operated to support the church. For purposes of the incoming American federal administration, the land was divided into Orleans Territory, which would largely become the State of Louisiana, and the District of Louisiana (soon renamed the Missouri Territory), consisting of the rest of the purchase. In the spring of 1804, the governor of Orleans Territory wrote to Secretary of State Madison to inform him that local federal authorities had shut the doors of a Catholic parish church "in response to a conflict between two priests concerning who was the rightful leader of the congregation."[264] Although the territorial governor was clearly pleased with his manner of

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[262] 27 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789 at 368 (May 11, 1784).

[263] Although this incident preceded the adoption of the 1787 Constitution and ratification of the First Amendment, it is significant that this way of thinking about the church as a separate authority from the state was already present, and it should inform how we read the later legal text. *See* WILLIAM LEE MILLER, THE BUSINESS OF MAY NEXT: JAMES MADISON & THE FOUNDING 105-110 (1992). *See id.* at 108-09 ("Usually now our American disengaging of church from state is found to rest in the First Amendment, but one may find it already in a negative way in the silence of the rest of the Constitution.").

[264] Pybas at 281.

handling the dispute, President Jefferson, who learned about it from Madison, was not.[265] In a July 5, 1804, letter to Madison, Jefferson wrote:

> [I]t was an error in our officer to shut the doors of the church. . . . The priests must settle their differences in their own way, provided they commit no breach of the peace. . . . On our principles all church-discipline is voluntary; and never to be enforced by the public authority.[266]

Jefferson's warning to not get involved in matters of church polity nor the supervision and discipline of clergy, was passed from Madison back down to the territorial governor. Only a year went by before the governor had an opportunity to put to use Jefferson's legal principle. In the summer of 1805, the governor became aware of a Spanish priest serving the Church of St. Louis in New Orleans. The priest was at odds with his superior, who as the Acting Vicar General was concerned that the priest might have retained his loyalties to Spain. The renegade priest was ordered removed by the vicar from his appointment to the Church of St. Louis. But the parish congregation resisted and allowed the priest to continue to conduct worship services. The vicar reported his dilemma to the territorial governor, an act characteristic of a state-established church. However, chastened by his earlier mishandling of religious affairs to the disappointment of Jefferson, the territorial governor did not get involved in the religious dispute. The governor did, however, ask for an interview with the wayward priest to enquire into possible sedition.[267]

Some of the inhabitants of this former French territory had cause to be concerned for the security of their titles to land. An order of Ursuline nuns had operated a convent, orphanage, and school for girls and young women in New Orleans since 1727. The sisters had received their lands from the French Crown as a feature of the established church. The sisters wondered what this meant for their works of charity and education in a nation they regarded as Protestant but without an established religion. In a letter dated June 13, 1804, the Mother Superior of the convent wrote President Jefferson setting forth her anxieties about the security of title to the real estate used by the Ursuline ministries. A month later, on July 13, Jefferson responded with his own letter. He began by assuring the nuns that the transfer of control from Catholic France to the United States would not undermine the ownership of their religious school and the glebe lands

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[265] *Id.* at 282.
[266] *Id*.
[267] *See id*. at 282-83 for a fuller telling of the incident.

that supported it. However, Jefferson went further and assured the convent, school, and orphanage freedom of self-governance and freedom from the superintending hand of government. As the president explained, "the principles of the constitution . . . are a sure guaranty to you that [your property] will be preserved to you sacred and inviolate, and that your institution will be permitted to govern itself according to it's [*sic*] own voluntary rules, without interference from the civil authority."[268] The latter—the ability to govern itself free of bylaws except those adopted voluntarily and self-enforced—was a liberty the Ursulines would not have enjoyed under the French establishment.

These episodes give a taste of how the federal church-government understanding was implemented in the post-revolutionary period, and they show that church autonomy was presupposed where the government would otherwise have become entangled in the internal governance of religious ministries. These accounts confirm that *Hosanna-Tabor* and *Our Lady* were on target.

V. CONCLUSION

Over 230 years after adoption of the First Amendment, the doctrine of church autonomy, and its ministerial exception in particular, remain projects under development. Yet the most important features of these concepts were settled in *Kedroff* and *Hosanna-Tabor*. The Supreme Court has recognized the doctrine of church autonomy since at least *Watson*, and the doctrine has a body of precedent different from those lines of cases decided under the Free Exercise Clause and the Establishment Clause, respectively. Church autonomy protects churches, religious schools, and other genuinely religious organizations, but not as entities with freedom of association rights like any other organization, and not as mere voluntary associations representing the aggregate rights of their individual members. Rather, it protects them as ontological beings. Churches and other genuinely religious organizations are tacitly acknowledged by the U.S. Supreme Court to exist in their own right, and not because the government or the positive law is willing to recognize that they exist. Indeed, these organizations preexisted the state, and they transcend the state in that they are not confined to the recognized borders of a Westphalian state. The doctrine thereby has the state acknowledging that it is not all powerful. Surely this is an encouraging incident of secular modesty.

[268] *Id.* at 281. *See generally id*. at 278-81.

In an adversarial system, church autonomy will always be contested out on the frontiers. However, building on *Watson* and *Kedroff*, the High Court has strongly reaffirmed in the seminal case of *Hosanna-Tabor* that a religious organization's internal governance is a government-free zone. And while the ministerial exception is an affirmative defense for purposes of pleading and pretrial practice, once its prima facie elements are proven-up by the religious organization the doctrine of church autonomy affords a categorical immunity, rooted in the Constitution, that cannot be waived—the strongest protection available in law.