Reoccurring Problems in Church Autonomy Doctrine

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INTRODUCTION

Church autonomy is a First Amendment doctrine altogether distinct from the more familiar claims brought under the Free Exercise Clause and the Establishment Clause. It was first recognized by the U.S. Supreme Court in Watson v. Jones, 80 U.S. (15 Wall.) 131 (1872), and took its mature form as a restraint on government authority bearing on the internal governance of churches in Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171 (2012). *Hosanna-Tabor* pointed out, moreover, that because church autonomy is not at all like a personal rights claim invoking the Free Exercise Clause, the decision in Employment Division v. Smith, 494 U.S. 872 (1990), did not apply to truncate the protection of religious liberty. *Hosanna-Tabor*, 565 U.S. at 190.

The scope of this zone of ecclesiastical autonomy extends not only to employment claims brought by ministers, but to matters concerning doctrinal disputes as well as a religious organization's choice of polity and criteria for membership. Nevertheless, the High Court continues to superintend federal and state lower courts that often have too narrow a concept of those subject matters within the theory's scope. *See, e.g.,* Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049 (2020), holding that elementary teachers at religious schools are functionally ministers of the faith to the next generation whose dismissals are immune to employment discrimination claims.

With the help of *Hosanna-Tabor* and *Our Lady*, the doctrine of church autonomy has taken on sufficient definition that a fair amount can be said with confidence as to both its specific applications and its overall theory. Much flows from understanding that the character of church autonomy is not a constitutional right vested in each person, but a restraint on government power with respect to the sphere of internal governance of institutional religion. This juridical character entails blocking from government regulation a few discrete subject matters that together comprise a zone of operation wholly reserved to religious organizations. Church autonomy can be conceptualized as separating the internal governance of the church from the precincts of regulatory power, a form of church-state relations. There remain implications and issues, however, in need of clarification. *See* **An Extended Essay on Church Autonomy** (hereinafter "Extended Essay"; copy in your conference materials). It is to these reoccurring problems that we give our attention in this workshop.

I.

QUICK REVIEW

A quick refresher follows concerning the basics of church autonomy doctrine so that we are all starting on the same page.

1. Church autonomy is different from the more familiar claims brought under either the Free Exercise Clause or the Establishment Clause. So, going forward, we need to think of First Amendment religious freedom as three distinct lines of case-law authority.[1] In particular, we need to avoid confusing church autonomy with what are really just ordinary claims under the Free Exercise Clause (*i.e.*, resisting government-imposed religious burdens).

-See Extended Essay, text at nn. 1-20.

2. The five subject matters that the U.S. Supreme Court has identified as coming within the zone of church autonomy are: (i) doctrinal debates and religious issues;[2] (ii) disagreements over ecclesial polity; (iii) the selection, supervision, control, and dismissal of ministers and other religious functionaries; (iv) the qualifications for membership and excommunication, including who is in good standing with the church; and (v) internal church communications about any of the four foregoing matters.[3]

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[1] The U.S. Supreme Court's church autonomy cases are rather few. In chronological order they are: Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872) (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 official); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952) (involving a legislative attempt to alter the polity of a church); Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960) (per curiam) (involving a judicial 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 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 Evangelical Lutheran Church & School v. EEOC, 565 U.S. 171 (2012) (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).

[2] The idea is you can't have an outside civil magistrate taking sides in a disagreement over doctrine among insiders to a religious organization. The government does not decide who is orthodox and who is the heretic. Debates over doctrine and religious issues within the organization are not to be confused with disputes with the government that arise over the application of doctrine. The latter are not church autonomy but ordinary free-sexercise claims.

[3] On certain internal church communications being protected by church autonomy, *see* Bryce v. Episcopal Church in the Diocese of Colorado, 289 F.3d 648, 657-59 (10th Cir. 2002); McCraney v. North American Mission Bd. of the Southern Baptist Convention, Inc., 980 F.3d 1066, 1074 (5th Cir. 2020) (Judge Ho's citations and quotes dissenting from denial of en banc review). Also helpful is Whole Woman's Health v. Smith, 896 F.3d 362, 373 (5th Cir. 2018) (refusing to compel discovery of a third-party religious group's "internal communications" in part because the

-See Extended Essay, text at nn. 26-38.

II.

REOCCURING PROBLEMS WITH CHURCH AUTONOMY

1. In applying the "ministerial exception" as a categorical immunity to employment discrimination claims brought against a religious organization, the trial court should early determine if the claimant is a minister or other religious functionary.[4] In doing so, care must be taken to not get entangled in a religious dispute. The answer is not to have the church—a party to the litigation—unilaterally designate those among its employees who meet the definition of minister or religious functionary. This was J. Thomas' solution, concurring in *Hosanna-Tabor* and *Our Lady*. Civil courts, rather, retain the final authority to decide this definitional question.[5] It is a mixed question of law and fact. The factual inquiry, however, will sometimes entail answering a religious question. And civil courts are prohibited from resolving disputed religious questions. How do we resolve this conundrum?

-See Extended Essay, text at nn. 89-93.

2. The "ministerial exception" may be invoked by churches and other religious organizations.[6] But how do we define "religious organization," and is the exception sill permitted if the religious organization, although once religious, has secularized over time? How do courts answer these questions without violating the rule against deciding religious disputes?[7]

-See Extended Essay, text at nn. 53-57.

3. It is agreed all around that an individual may resign from a religious organization at any time. This is called the "right of exit." Resignation of membership without more is not a First

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discovery order "interfere[d] with (the group's) decision-making processes," "expose[d] those processes to an opponent," and "w[ould] induce similar ongoing intrusions against religious bodies' self-government").

[4] *See* Gordon College v. DeWeese-Boyd, No. 21-145 *cert. denied*, 142 S. Ct. 952 (2022) (concurring op. by J. Alito, joined by Thomas, Kavanaugh and Barrett, JJ.) (suggesting that job requirements of faculty at a Christian college to integrate one's faith with one's teaching and scholarship, as well as to instill in one's students a Christian worldview in their approach to all academic disciplines, were religious functions for purposes of the ministerial exception); Seattle Union Gospel Mission v. Woods, No. 21-144 *cert. denied*, 142 S. Ct. 1094 (2022) (concurring op. by J. Alito, joined by Thomas, J.) (suggesting that Oregon Supreme Court had too narrow a view of "minister" with respect to employment tasks of legal aid attorney).

[5] *Hosanna-Tabor* and *Our Lady* tacitly rejected Justice Thomas' suggestion. Federal courts do not give up their Article III jurisdiction to determine their own jurisdiction, which is what J. Thomas' concurrences would imply.

[6] *See* Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 310 (4th Cir. 2004) (applying ministerial exception to a Jewish nursing home). Do not conflate this problem with the question of who qualifies for the religious employer exemption to Title VII of the '64 Civil Rights Act. The latter definition is narrower.

[7] *See* generally Judge Ho's citations and quotes, *McCraney*, 980 F.3d at 1074-75 (dissenting op.).

Amendment right because the government is not involved. But if the right is limited in some manner by the law, then the First Amendment would become the basis for the right.

a. Disputes over an individual's qualifications for church membership have long been understood to be within the scope of church autonomy. Voting for officers or access to sacraments may hinge on membership. However, formal church membership is in decline. Churches are increasingly thinking in terms of regular attenders, donors, and volunteers. For church autonomy purposes, should the church autonomy subject of membership be expanded? For example, what should a court do if a tort claim arises from a church barring from worship services a longstanding attender (but nonmember)?

b. Former church members sometimes bring claims sounding in tort, and church autonomy is raised as a defense. For example, there have been unsuccessful claims by a former member to stop the Amish practice of shunning. In Guinn v. Church of Christ of Collinsville, 775 P.2d 766 (Okla. 1989), a member of a local church undergoing discipline for sexual improprieties and dishonesty, upon learning that she was about to be disciplined on Sunday morning, notified the elders that she was resigning her membership effectively immediately—an exercise of her "right of exit." When the elders nonetheless proceeded to discipline her before the congregation on the following Sunday, the plaintiff sued in tort seeking damages for invasion of privacy. The state supreme court held that the plaintiff's resignation of membership was effective when tendered and therefore the tort claim could proceed. No church autonomy defense was allowed. Was *Guinn* correctly decided?

Certainly Guinn's resignation from membership is the proper time for drawing a line, but at that moment in time just what is being separated from what?[8] Church discipline is not for the wayward member alone, but is a teaching moment for all of the church ("tell it to the church," Matt. 18:17). In that view, discipline of a former member may safely proceed concerning misconduct that occurred when the claimant still held her membership.[9]

4. In lawsuits between two factions within a local church, or between a local church and its denomination, over who gets to keep ownership of the local church property, the Supreme Court has permitted the high court in each state to continue to apply a rule of judicial-deference[10] or to adopt neutral-principles-of-law based on trust, property, and nonprofit

[8] It has long been understood that any gifts or donations completed before a member's resignation remain with the church. Baker v. Nachtrieb, 60 U.S. (19 How.) 126 (1856); cf. Garcia v. Church of Scientology Flag Service Org. Inc., 2021 WL 5074465 (11th Cir. Nov. 2, 2021) (enforcing arbitration award with respect to request for donation refund).

[9] *See* Church of Scientology Int'l v. Bixler, *petition for cert. pending*, U.S. Sup. Ct. No. 22-60. In *Bixler*, a California court of appeals held that ex-Scientology members had a right under Free Exercise Clause to exit the church and, in later pursuing tort claims against the church for sexual assaults, the ex-members did not waive that right to sue in an arbitration agreement, signed while members, with respect to tortious conduct occurring after resignation of their membership.

[10] *See* Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872).

corporation law.[11] The adoption of neutral-principles was a deviation from the doctrine of church autonomy. Since it first took place 50-years ago, about three-quarters of the states have adopted neutral-principles to resolve such lawsuits. However, the Court's departure was adopted to avoid occasional difficulties with the judicial-deference method. Nevertheless, it was narrow as it pertained only to intrachurch disputes over title to property where the two factions had abandoned any intent to proceed forward as one church. When the Supreme Court was confronted with an intrachurch property dispute where the factions intend to continue as one church, the neutral-principles deviation was not even considered. *See* 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).

-See Extended Essay, text at nn. 132-186.

As a matter of stare decisis, neutral-principles should be strictly confined to property disputes where the sole question for civil resolution is title to the local church property as between disputing parties. To not do so opens a wide avenue for the circumvention of the First Amendment doctrine of church autonomy.

What should be done with those lower courts, especially the lower state courts, that more widely apply neutral-principles to claims sounding in tort, contract, and trust claims? This is a case of widespread lack of understanding (or hostility) by these lower courts (and often the advocates before them) about the nature and scope of church autonomy theory. This is not to say that every claim sounding in tort or contract is barred by church autonomy. It is not. Rather, only if proving the elements of the common law claim would trench into one of the five subject matters devoted to church autonomy theory is the state-law claim barred. When the subject matter of the tort or breach of contract claim does not interfere with one of the five subjects, then the claimant may proceed to prove the claim unhindered by a church autonomy defense. The rubric of neutral-principles adds nothing to this analysis.[12]

-See Extended Essay, text at nn. 187-194.

5. In *Hosanna-Tabor*, 565 U.S. at 195 n. 4 (2012), the Supreme Court said that church autonomy was not a matter that went to a federal court's subject matter jurisdiction. The Court went on to say that church autonomy was an affirmative defense. There are two issues here, but they are intertwined.

[11] The Supreme Court has ruled in only three such cases: 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); Jones v. Wolf, 443 U.S. 595 (1979) (involving control over church property disputed by factions within a church).

[12] *See* McCraney v. North American Mission Bd. of the Southern Baptist Convention, Inc., 980 F.3d 1066, 1070-73 (5th Cir. 2020) (Ho, J., dissenting from denial of rehearing en banc).

a. If church autonomy is an affirmative defense, then the religious organization (generally the defendant) has the burden of pleading—and thereby bears the initial burden of proving sufficient facts to make out a prima facie case of church autonomy. This is fair. It makes little difference which party has the initial burden of pleading church autonomy.

-See Extended Essay, text at nn. 218-220.

b. It is also true, however, that as a general matter an affirmative defense can be waived if not timely raised. In this passing footnote, was the Court indirectly implying that church autonomy can be waived? That is unlikely. It would not be consistent with how the courts have long regarded church autonomy.[13] The doctrine is not regarded as a personal constitutional right (e.g., freedom of speech) that can be waived.

The reference in footnote 4 to subject matter jurisdiction (controlled by Art. III of the U.S. Const.)[14] can be reconciled simply by noting that church autonomy (controlled by the First Amend.) is a matter of constitutional structure[15]—and structure can never be waived. Just as the structural concept of "separation of powers" denotes limited, designated powers being vested in each of the government's three branches, church autonomy is structural in the sense that it denotes limited, designated powers vested exclusively in the institutional church and other powers vested exclusively in the state[16] (i.e., separation of church and state). Just as separation of powers is structural, separation of church and state is structural.

-See Extended Essay, text at nn. 213-217, 221-226.

6. Church autonomy does not require a showing of personal burden on a religious belief or practice of the church. Why is that?

[13] *See* Lee v. Sixth Mount Zion Baptist Church, 903 F.3d 113, 118 n.4 (3d Cir. 2018) (noting that although the district court first raised the ministerial exception, "the Church [wa]s not deemed to have waived it because the exception is rooted in constitutional limits on judicial authority"); Conlon v. InterVarsity Christian Fellowship, 777 F.3d 829, 836 (6th Cir. 2015) ("The Court's clear language [in *Hosanna-Tabor*] recognizes that the Constitution does not permit private parties to waive the First Amendment's ministerial exception.").

[14] Judge Oldham's dissent in *McRaney*, 980 F.3d at 1081-82, wrestles with past SCOTUS cases speaking in terms of jurisdiction. And, in any event, jurisdiction arises from Article III whereas church autonomy arises from the First Amendment.

[15] *See* Conlon v. InterVarsity Christian Fellowship, 777 F.3d 829, 836 (6th Cir. 2015) (explaining that "[t]he ministerial exception is a structural limitation imposed on the government by the Religion Clauses, a limitation that can never be waived."). The panel majority in *Conlon*, 777 F.3d at 836, quotes *Hosanna-Tabor*, 132 S. Ct. at 702, 704, for church autonomy not being waivable because Religion Clauses are a "bar" that "prohibits" government involvement, and it being "impermissible" for courts to contradict the church in selection of its ministers. The choice of uncompromising words in *Hosanna-Tabor* shows that the restraint is structural.

[16] *See* Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) (issuance of liquor license is exclusive government function).

In *Hosanna-Tabor* the EEOC argued that the religious school's claim of religious burden was pretextual. EEOC's assertion was that the school was actually motivated to discriminate based on plaintiff's disability. The Court said that was irrelevant. With church autonomy doctrine, a court is not looking for instances of personal religious harm as if free-exercise were the claim. Rather, it is looking for instances where the government is trespassing on a religious organization's ability to operate unhindered in matters of the selection, promotion, and removal of ministers. The five internal operational matters are said to be core to a religious organization's self-governance and thus justify its autonomous character.

-See Extended Essay, text at nn. 67-73.

This is also a good juncture to remind the reader that a religious burden—while not required of church autonomy theory—is required to state an ordinary claim under the Free Exercise Clause. It is in the failure to make this distinction that leads to claims under the Free Exercise Clause mistakenly argued as church autonomy cases.

Additional conceptual problems are resolved when the doctrine of church autonomy is conceived as structural. Think in terms of why church autonomy cases entail no rights-balancing (e.g., no strict scrutiny), that church autonomy cannot be waived, the irrelevance of there being individual consent by claimant to the action by the church now the subject of the complaint, the limitation on discovery into the merits until there is first a determination concerning the applicability of church autonomy,[17] and a right to an interlocutory appeal if the affirmative defense is denied in a motion to dismiss.

-See Extended Essay, text at nn. 17-19, 199-235.

7. Church autonomy theory poses a theological proposition about the nature and actions of "a church," and—as with most matters of religious belief—the proposition is controverted. Catholic and Protestants have different theologies of "the church," as do different denominations within Protestantism. And certainly, non-Christian religions each view differently the role of their mosque, synagogue, or temple within their overall religious system. Accordingly, are not the civil courts prohibited from defining what is essential to the internal governance of "a church," a task that seems necessary to apply church autonomy theory? To further up the ante, one might ask: Is not the doctrine of church autonomy "an establishment of religion" forbidden by the First Amendment because the courts have been unthinkingly partial to a Christian understanding of what is "a church" when policing the boundaries of church autonomy doctrine?

[17] *See* Fratello v. Archdiocese of N.Y., 863 F.3d 190, 198 (2d Cir. 2017) (stating that "the district court appropriately ordered discovery limited to whether [plaintiff] was a minister within the meaning of the exception" when it found that it could not determine whether the ministerial exception applied on a motion to dismiss).

Perhaps because this is a theological proposition, and surely contestable, the *Hosanna-Tabor* Court instructed us to turn the question concerning the scope of the "ministerial exception" into a historical inquiry centered on the rejection of the Church of England establishment at the American founding (1774 - 1817)—this is what the American founders were rejecting.[18] I would add: the historical approach is appealing to originalists.

-See Extended Essay, text at nn. 236-268.

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Who is a minister or other religious functionary for purposes of a church autonomy defense is a mixed question of law and fact. Understandably, religious organizations like to raise this issue early via motion to dismiss or motion for summary judgment. However, be sure that there are sufficient uncontested material facts in the record before filing such a motion. Recent cases have had such motions denied primarily because the factual record was too thin.

That said, when a motion to dismiss or motion for summary judgment is denied, the courts should allow immediate interlocutory appeal via the collateral order doctrine. That is because church autonomy is structural, and to allow discovery on the merits to go forward in the trial court will produce yet more irreparable injury in the nature of interference into internal governance. Note, however, discovery on the initial motion should be allowed (if not futile) before the trial court rules.

There have been a couple of wrong decisions concerning the foregoing circumstances:
*Belya v. Kapral, No. 21-1498 (2d Cir. Aug. 17, 2022).
*Tucker v. Faith Bible Chapel Int'l, 36 F.4th 1021 (10th Cir. May 2022) (2-1), petition for rehearing en banc pending.
*McRaney v. North Am. Mission Bd. of the So. Baptist Conv., 980 F.3d 1066 (5th Cir. 2020) (petition for rehearing en banc denied, 9-8), cert. denied U.S. Sup. Ct. (2021).

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[18] Judge Oldham's dissent in *McRaney*, 980 F.3d at 832-33, is an illustration of the historical approach as adopted in *Hosanna-Tabor*. *See also Conlon*, 777 F.3d at 832-33 (historical approach).