MASTERING THE DOCTRINE OF CHURCH AUTONOMY

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I. OVERVIEW

Church autonomy[1] is a First Amendment doctrine altogether distinct from the more familiar causes of action brought under the Establishment Clause and the Free Exercise Clause. The principle of church autonomy[2] was first

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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. However, the concept of church autonomy was recognized as being lodged in the Court's First Amendment jurisprudence as early as Mark DeWolfe Howe, *Foreword: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91 (1953). Professor Howe's essay remarks on the Court's decision in *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952).

2. The Supreme Court settled on the label "church autonomy" in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2061 (2020) ("The constitutional foundation for our holding was the general principle of church autonomy to which we have already referred . . . ."). In lieu of the church autonomy label, some lower courts use the term "ecclesiastical abstention." But "ecclesiastical"

recognized by the Supreme Court of the United States in the post-Civil War case *Watson v. Jones*.[3] And early this century, in the unanimous decision *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,[4] the theory of church autonomy assumed its most fully developed form as a constitutional immunity (dubbed the "ministerial exception" in the federal circuits when the immunity arises in the context of employment disputes)[5] from government oversight that "interferes with the internal governance of the church."[6] In *Watson*, the matter of internal governance that was immune from litigation was an internecine dispute over local church property that turned on which ecclesial unit within a larger denomination had final authority to resolve the disagreement.[7] The heart of the matter was that every church gets to choose its own polity. In *Hosanna-Tabor*, the matter of internal governance that was immune from litigation was a suit for employment discrimination against a religious school over the dismissal of a disabled teacher who was assigned some religious duties.[8] The heart of the matter was that every church gets to choose its own spiritual leaders.

With church autonomy theory, a leading principle at work is that in a nation marked by the separation of church and state, the system cannot have government taking sides in what is ultimately a dispute over correct religious doctrine or practice. Nor can a civil magistrate, in a republic of states that have long since disestablished their official churches, now have a role in selecting those employees best suited to carrying on the ministry of a religious body. When framed in this manner, it is not surprising that the Supreme Court was unanimous in barring the discrimination claim in *Hosanna-Tabor*, which was more about who teaches impressionable students in order that they be rightly formed in the school's faith than it was about who ultimately determines the

is far too narrow a label to embrace the doctrine's scope. And "abstention" wrongly suggests that the doctrine is discretionary. When it applies, church autonomy is mandated by the First Amendment.

3. 80 U.S. (13 Wall.) 679 (1872).

4. 565 U.S. 171 (2012).

5. *Id.* at 188. The term "ministerial exception" was first used in *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985). A similar result was reached in the older case of *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), but *McClure* did not coin the term ministerial exception. Unease has developed with "ministerial" as a label for the defense because one does not need to be an ordained cleric or otherwise a religious minister to be subject to the doctrine. As of yet, however, the courts have not settled on a more apt phrase.

6. *Hosanna-Tabor*, 565 U.S. at 188.

7. *Watson*, 80 U.S. at 726–27.

8. The Court wrote that "the ministerial exception *bars . . . a suit*" challenging the school's decision to dismiss the teacher. *Hosanna-Tabor*, 565 U.S. at 196 (emphasis added).

correct tenets of the faith.[9] But, as it happens, both these variations on the disputed question fall within the zone of church autonomy.

Despite the promising unanimity in *Hosanna-Tabor*, the Court continues to regularly receive petitions to superintend church autonomy cases from lower federal and state courts.[10] The ministerial exception is neither broad nor narrow, but it is flexible. Many of the inferior courts taking up the matter demonstrate an overly rigid understanding of those subject matters of internal governance that are within a church's space for its exclusive operation.[11] Such rigidity was exemplified by the circuit courts in *Our Lady of Guadalupe School v. Morrissey-Berru*,[12] hence the Supreme Court reversed. The Justices took less of a checklist approach in finding that, for practical purposes, classroom teachers at K–12 religious schools were functionally ministers of the faith to the next generation, so dismissal of an elementary teacher was a decision categorically immune from employment claims.[13] The law cannot, consistent with religious autonomy, have civil authorities telling a religious organization the ministers it may hire and fire.

Notwithstanding *Hosanna-Tabor* and *Our Lady of Guadalupe*, when confronted with a church autonomy defense, intermediate appellate courts are tacitly struggling with where to fix the boundary that marks off matters of internal church governance to the exclusion of the government's regulatory powers. In the past, the Supreme Court has responded to this line-drawing task with general language, the most quoted being a passage from *Kedroff v. St. Nicholas Cathedral* 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."[14]

Similarly, *Serbian Eastern Orthodox Diocese v. Milivojevich* recited that the First Amendment permits "religious organizations to establish their own rules and regulations for internal discipline and government."[15] Thus, authorities must defer to decisions by such bodies "on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law," and these

9. *Id.*
10. *Id.* at 196, 198.
11. *See, e.g.*, Tucker v. Faith Bible Chapel Int'l, 36 F.4th 1021 (10th Cir. 2022).
12. 140 S. Ct. 2049 (2020).
13. *Id.* at 2062–67.
14. 344 U.S. 94, 116 (1952).
15. 426 U.S. 696, 724 (1976).

same civil authorities are not to delve 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."[16]

An equally overarching passage appeared in *Our Lady of Guadalupe* to explain the result in *Hosanna-Tabor*: "The constitutional foundation for our holding was the 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."[17] Accordingly, the theory of church autonomy casts zones of independence to those relatively few but "core" organizational structures, rituals, and doctrines, as well as "key" personnel and membership functions, that determine the destiny of the religious entity in question.[18]

A. The Four Domains of Church Autonomy

While the High Court's general language concerning the scope of immunity provides helpful starting points, closer systemization is needed to solve the inevitable disputes over fine points and close cases. The place to begin is with the full topical range of the Supreme Court's caselaw. In such a survey, church autonomy doctrine sets apart the following subject-matter domains where religious organizations are immune: (1) the resolution of religious questions or disputes, such as testing the validity, meaning, or importance of an organization's religious beliefs and practices;[19] (2) determination of a religious entity's polity, including determinations of who has final authority within the

16. *Id.* at 713–14 (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 733 (1872)).

17. 140 S. Ct. 2049, 2061 (2020).

18. *Id.* at 2055 ("core"); *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring) ("key").

19. *See* Thomas v. Rev. Bd., 450 U.S. 707, 715–16 (1981) (holding, inter alia, that courts are not arbiters of scriptural interpretation); Md. & Va. Eldership of Churches of God v. Church of God at Sharpsburg, 396 U.S. 367, 368 (1970) (per curiam) (holding that courts cannot adjudicate doctrinal disputes); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449–51 (1969) (refusing to follow a legal rule that discourages changes in doctrine); United States v. Ballard, 322 U.S. 78, 83–83, 88 (1944) (jury not permitted to sit in judgment over validity of religious claims but may inquire into sincerity); *Watson*, 80 U.S. (13 Wall.) at 725–33 (rejecting implied-trust rule because of its departure-from-doctrine inquiry).

Currently awaiting decision in the Supreme Court is Catholic Charities Bureau, Inc. v. Wisconsin Labor & Industry Review Commission, 2024 WI 13, 411 Wis. 2d 1, 3 N.W.3d 666, *cert. granted*, 2024 WL 5112872 (U.S. Dec. 16, 2024) (No. 12-154). The underlying issue is whether a religious social-service organization qualifies for a statutory exemption to an unemployment insurance tax if it is "operated primarily for religious purposes." Petition for a Writ of Certiorari at 2–3, *Catholic Charities Bureau*, 2024 WI 13, *cert. granted*, 2024 WL 5112872 (No. 12-154). Judicial gloss on the statute has civil authorities asking whether the organization's practices were "typical" or "primarily" religious and whether the organization was disqualified because it served needy persons outside the faith. *Id.* at *2. These are inquiries that cause civil authorities to answer religious questions, as well as for the tax to discriminate among religious denominations. A decision is expected in June 2025.

entity to settle an ongoing dispute;[20] (3) the qualifications, selection, supervision, promotion, and dismissal of ministers and other religious functionaries;[21] and (4) the criteria for membership and the basis for discipline and severance, including determining which ecclesial sub-entities are in good standing with the church.[22] Intra-church communications made while acting within the scope of any one of the four foregoing zones are subsumed in the domains and thereby are also shielded by church autonomy.[23]

20. *See* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708–24 (1976) (civil courts may not probe into church polity); *Presbyterian Church*, 393 U.S. at 451 (civil courts may not interpret or weigh church doctrine); Kreshik v. St. Nicholas Cathedral, 363 U.S. 190, 191 (1960) (per curiam) (First Amendment prevents judiciary, as well as legislature, from interfering in ecclesiastical governance of Russian Orthodox Church); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 119 (1952) (same); Shepard v. Barkley, 247 U.S. 1, 2 (1918) (aff'd mem.) (a court may not interfere with merger of two Presbyterian denominations).

21. *Our Lady of Guadalupe*, 140 S. Ct. at 2064–65; *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 v. Roman Cath. Archbishop, 280 U.S. 1, 16 (1929) (declining to intervene on behalf of petitioner who sought order directing archbishop to appoint petitioner to ecclesiastical office). *See* NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 501–04 (1979) (refusal by the Court to force collective bargaining on religious 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 as applied to prohibiting employment of aliens to church's hiring of cleric); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 324–25 (1867) (it was unconstitutional to prevent priest from assuming his ecclesiastical position because of refusal to take government loyalty oath). The scope of the ministerial exception goes to the entire terms and conditions of a minister's employment. Demkovich v. St. Andrew the Apostle Par., 3 F.4th 968, 976–77 (7th Cir. 2021) (en banc).

22. *See* Bouldin v. Alexander, 82 U.S. (15 Wall.) 131, 139–40 (1872) ("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. (13 Wall.) at 733 (court has no jurisdiction over church discipline or the conformity of church members to the standard of morals required of them).

23. On internal church communications being protected by church autonomy, see Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 657–59 (10th Cir. 2002) (communication between church and members over reason for dismissal of youth pastor was protected by church autonomy. No need for plaintiff to be an employee relying on "ministerial exception"); 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 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"). Also helpful is McCraney v. North American Mission Board of the Southern Baptist Convention, Inc., 980 F.3d 1066, 1074 (5th Cir. 2020) (Judge Ho's citations and quotations dissenting from denial of rehearing en banc).

B. Additional Features and Distinctives of Church Autonomy

The nature of church autonomy as a distinct constitutional defense became more evident when, in cases decided this century, the Supreme Court announced that the theory rests on both of the Religion Clauses in the First Amendment.[24] A second way in which church autonomy theory stands apart is that the doctrine has its own unique line of Supreme Court caselaw.[25] A third distinct feature is that to set aside zones of autonomy for a few discrete subjects means that the doctrine is not a personal right but is structural in nature and thus not waivable.[26] Fourthly, it follows that when a court finds the doctrine is applicable, the judgment of dismissal is categorical. This means, for example,

24. *Our Lady of Guadalupe*, 140 S. Ct. at 2060; Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 181, 184, 188–89 (2012). The Chief Justice explained the play between the two Clauses this way:

> 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 the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.

Hosanna-Tabor, 565 U.S. at 188–89. Accordingly, personal religious exercise (Free Exercise Clause) is seen as being enlarged when disestablishment (Establishment Clause) is understood as separating the machinery of government from involvement with the internal operations of religious bodies.

25. The 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 Cath. Archbishop, 280 U.S. 1 (1929) (involving the authority to appoint or remove a church official); United States v. Ballard, 322 U.S. 78 (1944) (jury in criminal matter is not permitted to inquire into validity of religious claims); 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 Presbyterian Church, 393 U.S. 440 (1969) (involving control over church property disputed by factions within a church); Md. & Va. Eldership of Churches of God v. Church of God at Sharpsburg, 396 U.S. 367 (1970) (per curiam) (involving control over church property disputed by factions within a church); Serbian E. 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); NLRB v. Cath. Bishop of Chi., 440 U.S. 490 (1979) (absent expressed congressional intent, religious K–12 schools not subject to mandatory collective bargaining); Jones v. Wolf, 443 U.S. 595 (1979) (involving control over church property disputed by factions within a church); Thomas v. Rev. Bd., 450 U.S. 707 (1981) (State not permitted to introduce testimony of who has correct interpretation of teachings by Jehovah's Witnesses); *Hosanna-Tabor*, 565 U.S. 171 (2012) (involving application of the ministerial exception); *Our Lady of Guadalupe*, 140 S. Ct. 2049 (2020) (involving application of the ministerial exception).

26. 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, a limitation that can never be waived."). *See* Billard v. Charlotte Cath. High Sch., 101 F.4th 316 (4th Cir. 2024) (while not jurisdictional, the ministerial exception defense is structural; hence, the panel rejected waiver of church autonomy defense).

that in employment discrimination claims, courts will not entertain an employee's appeal to pretext.[27]

Going forward, then, it is clarifying to conceptualize the full range of First Amendment religious freedom jurisprudence as having three distinct tracks: church autonomy cases, nonestablishment cases, and free exercise cases.[28] This means, among other things, avoiding the all-too-common conflation of the doctrine of church autonomy with conventional lawsuits under the Free Exercise Clause[29] and still other traditional lawsuits under the Establishment Clause.[30] For example, whether the government is trying to resolve a religious

27. *Hosanna-Tabor*, 565 U.S. at 194–95 (not permitting a plaintiff to argue pretext in response to Lutheran school's dismissal of fourth grade teacher because she was a minister); *Conlon*, 777 F.3d at 836. Church autonomy does not permit a court to inquire into the reasons behind the dismissal of a minister. All that matters is that the case involved a minister.

28. From a textualist standpoint, this raises interpretive difficulties, namely: how do two phrases in the text of the First Amendment give rise to three distinct causes of action? The Court did not address the difficulty, except to say that the church autonomy line of cases arises from both nonestablishment and free exercise concepts. *Hosanna-Tabor*, 565 U.S. at 184, 188–89. We are left with the impression that the Court is of the mind that the reliance on both Clauses combined justifies church autonomy theory as a third cause of action.

29. For conventional claims under the Free Exercise Clause, the general rule is that the Clause is not violated when a law of general applicability, neutral as to religion, has a disparate impact on a religious practice. Emp. Div. v. Smith, 494 U.S. 872, 878–79 (1990). The general rule does not apply in three instances: First, the Free Exercise Clause applies when the government intentionally discriminates against a religious practice. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993). Such a law is not religiously neutral. Second, the Free Exercise Clause applies to laws with accommodations for secular practices that fail to have like accommodations for religious practices, thereby devaluing religion. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021) (a law "lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way"). For example, when case-by-case exemptions are available at the discretion of a government official, a comparable exemption cannot be denied to a religious claimant. Third, the Free Exercise Clause applies when the government extends a benefit to the private sector but excludes persons or organizations on account of religion. Carson v. Makin, 142 S. Ct. 1987, 1998 (2022) (law providing state funding of K–12 schools, except for those schools that are "sectarian," is unconstitutional). Again, such a law is not religiously neutral.

30. Now that the Free Exercise Clause requires that exemptions and benefits be distributed without regard to an organization's religious status or its use of a government benefit, *Carson*, 142 S. Ct. at 1998–2000, and that the three-part *Lemon* test and the endorsement test have been abandoned, Kennedy v. Bremerton School District, 142 S. Ct. 2407, 2427–28 (2022), the Establishment Clause is rolled back so that the two Religion Clauses are in harmony, *id.* at 2426, 2432. This leaves four conventional claims under the Establishment Clause. First, the government cannot coerce religious belief or practice. *Id.* at 2428–30 (reviewing authorities but finding no coercion on these facts). Religious establishments have typically required attendance at worship services and subscription to articles of faith. Second, even in the absence of coercion, the government may not favor one church or

dispute between factions within a church or whether the government is attempting to answer a disputed religious question, both are categorically forbidden by church autonomy. Such instances are not to be confused with the more frequent situation where the application or practice of a religious doctrine comes into conflict with a generally applicable law. In such an instance, the contest is over a church's religious practice or observance being materially burdened by a law or government official. The latter is just a conventional claim arising under the Free Exercise Clause. The two types of claims (free exercise and church autonomy) have markedly different standards of review. This difference proved pivotal in *Hosanna-Tabor* when distinguishing *Employment Division v. Smith.*[31] *Smith* is applicable only to traditional Free Exercise Clause claims. Given that *Hosanna-Tabor* was a church autonomy case, not a conventional free exercise case, the less rigorous standard of review that is associated with *Smith* was inapplicable.[32]

One key to conceptually setting apart church autonomy cases from conventional free exercise claims begins with an appreciation that church autonomy claims are not a mere aggregate of the personal rights of a church's members.[33] Rather, the doctrine of church autonomy is a structural limit on the

religion over others. Larson v. Valente, 456 U.S. 228, 246 (1982). The essence of an established church is that it is the denomination favored by the government. Third, the government may not compel those in the private sector unyieldingly to prefer religion over nonreligion. Est. of Thornton v. Caldor, Inc., 472 U.S. 703, 708–11 (1985) (striking down statute requiring employers to accommodate an employee's Sabbath over all competing requests not to work weekends). Fourth, compelled exposure to the government's promptings of religious belief or practice is a forbidden establishment. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 205 (1963) (teacher-led prayer and devotional Bible reading in compulsory public schools is unconstitutional). However, mere unwanted exposure to religious expression when historically grounded in the nation's founding or traditions is permissible. *See* Am. Legion v. Am. Humanist Assoc., 139 S. Ct. 2067, 2074, 2077, 2090 (2019) (plurality opinion) (a Latin cross featured in memorial to those who died in the Great War was constitutional); Van Orden v. Perry, 545 U.S. 677 (2005) (plurality op.) (a Ten Commandments display on state capitol grounds, situated among other memorials and statuary, was constitutional).

31. 492 U.S. at 883–86 (holding that with respect to generally applicable legislation, neutral as to religion, the Free Exercise Clause requires only a rational-basis standard of review).

32. *Hosanna-Tabor* pointed out that because church autonomy is not at all like a personal-rights claim invoking the Free Exercise Clause, the standard of review in *Smith* does not apply. *Hosanna-Tabor*, 565 U.S. at 189–90.

33. Justice William Brennan's concurring opinion in *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), put it nicely:

> [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

government's constitutional authority[34]—much like the Constitution's three branches, each with limited authority. Just as the structural feature of separation of powers denotes limited, delegated powers vested in each of the government's three branches, with checks and balances among them, church autonomy is structural in that it denotes inherent, limited powers vested exclusively in institutional religion and still other powers vested exclusively in civil government.[35] This is often referred to colloquially as a type of separation of church and state. Its structural character means that institutional religion is vested with a discrete zone of reserved operations.[36]

This is demonstrated, for example, in cases like *Hosanna-Tabor*—the authority to hire, promote, oversee, and discharge a religious functionary is reserved to the church alone. Once the Court determined that the teacher's job description fell, at least in part,[37] within the "ministerial" sphere, the case was over. There could be no follow-on inquiry into whether the school's rationale for the teacher's dismissal was pretextual.[38] Rather, as the Chief Justice wrote, once it was decided that some of the employee's tasks were those of a "minister," the government's continuing authority over the dispute was foreclosed. The First Amendment had already struck the balance in favor of the church school.[39]

> 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.

Id. at 341–42 (Brennan, J., concurring in the judgment) (footnote omitted) (citation omitted).

34. *See* Lee v. Sixth Mount Zion Baptist Church, 903 F.3d 113, 118 n.4 (3d Cir. 2018); Whole Woman's Health v. Smith, 896 F.3d 362, 367, 373–74 (5th Cir. 2018) (citing *Hosanna-Tabor* to conclude that the Religion Clauses' "structural protection" applies against "judicial discovery procedures"); Conlon v. InterVarsity Christian Fellowship, 777 F.3d 829, 836 (6th Cir. 2015). *See also* Belya v. Kapral, 59 F.4th 570, 578–79 (2d Cir. 2023) (Park, J., dissenting from an order denying rehearing en banc by 6–6 vote).

35. *See, e.g.*, Kiryas Joel Vill. Bd. of Educ. Sch. Dist. v. Grumet, 512 U.S. 687, 690 (1994) (operation of government school district is exclusively governmental function); Larkin v. Grendel's Den, Inc., 459 U.S. 116, 126 (1982) (issuance of liquor license is exclusively governmental function).

36. These reserved operations are the four domains listed *supra* text accompanying notes 19-22.

37. The religious tasks of a "minister" need not take up a very large percentage of an employee's day. In *Hosanna-Tabor* the teacher had many secular tasks. It was said that "her religious duties consumed only 45 minutes of each workday." Nevertheless, the test for employees that qualify as "ministers" is not, as the Chief Justice put it, "one that can be resolved by a stopwatch." 565 U.S. at 193–94. That is, if an employee is a minister for any part of his or her job, he or she is a minister for all purposes when it comes to application of the church autonomy defense.

38. *Id.* at 194–95.

39. *Id.* at 196 ("When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has [already] struck the balance for us.").

When it applies, therefore, the theory of church autonomy gives rise to an immunity from being sued over matters in the four zones.[40] This means that the immunity here is not a mere ordinary defense to liability.[41] Rather, it is a bar to litigation. Therefore, the ministerial exception, if it applies, brings an abrupt end to an employment discrimination claim. And it also puts an end to claims of sexual harassment, hostile environment, and retaliation,[42] as well as a tort or breach of contract claim, if arising out of the same set of operative facts.[43] It follows that civil discovery should be limited to church autonomy issues until it is resolved whether the lawsuit is indeed a church autonomy case.[44] If it is, the suit must be immediately dismissed.[45] However, if it is not an autonomy

40. *Id.* ("the ministerial exception *bars . . . a suit*") (emphasis added).

41. In a footnote, the Court in *Hosanna-Tabor* observed that church autonomy was not a "jurisdictional bar" but an "affirmative defense." *Id.* at 195 n.4. Church autonomy does not go to a federal court's subject matter jurisdiction under U.S. CONST. art. III. Rather, church autonomy is grounded in the First Amendment. And as already discussed, church autonomy is structural by its very nature. *See supra* notes 26, 34-36 and accompanying text. A federal court, of course, has no authority to ignore constitutional structure. In *Hosanna-Tabor*, this meant immediate dismissal of the entire lawsuit once it was recognized that the employee bringing the claim was a "minister."

In the distant past, the Supreme Court sometimes spoke in terms of lacking jurisdiction when dealing with a church autonomy case. *See, e.g.*, Watson v. Jones, 80 U.S. (13 Wall.) 679, 733 (1872) (stating that there is no court jurisdiction concerning disputes over church discipline or the conformity of members to the standard of morals required of them). This confused church autonomy as structural (which it is) with church autonomy being a matter of Article III subject matter jurisdiction (which it is not). The root of the problem is that the word "jurisdiction" was being used in two different senses: Art. III jurisdiction and constitutional structure.

42. *See* Markel v. Union of Orthodox Jewish Congregations of Am., 124 F.4th 796, 803, 810–11, 810 n.6 (9th Cir. 2024) (observing that prior ruling in this circuit declining to dismiss sexual harassment claim in the face of church autonomy defense has been overruled by *Hosanna-Tabor*); Demkovich v. St. Andrew the Apostle Par., 3 F.4th 968, 972 (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 Cath. Diocese of Tulsa, 611 F.3d 1238, 1240, 1246 (10th Cir. 2010) (same).

43. *See Markel*, 124 F.4th at 802–03, 810 n.6 (dismissing employment claims for wage and hour, as well as torts of fraud and misrepresentation, citing church autonomy); Bell v. Presbyterian Church (U.S.A.), 126 F.3d 328 (4th Cir. 1997) (dismissing action by laid-off minister who sued denomination, by which he was never employed, alleging state law tort claims for, among other counts, tortious interference with employment contract and intentional infliction of emotional distress).

44. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060–61 (2020); *Markel*, 124 F.4th at 808–09, 809 n.5 (once properly raised, discovery should be limited to threshold issue of the applicability of church autonomy); McCarthy v. Fuller, 714 F.3d 971, 975–76 (7th Cir. 2013); *Demkovich*, 3 F.4th at 980–82; and EEOC v. Cath. Univ. of Am., 83 F.3d 455, 466–67 (D.C. Cir. 1996).

45. At this juncture there frequently arises a chicken or the egg problem. If the subject of the case falls within one of the zones of church autonomy, then the church cannot be sued, and the complaint is summarily dismissed. However, certain minimal facts are a prerequisite to the matter

case then discovery on the merits may begin, and the case may proceed with trial preparation.[46] For a religious organization to be a party to litigation, without more, is not cause to dismiss for church autonomy.[47]

Rarely is the government a named party in a lawsuit involving one of the four foregoing domains.[48] Rather, the government (although not a named party)

falling within the sphere of church autonomy (see the four topics listed *supra* notes 19–22 and accompanying text), and complaining parties may genuinely contest those facts. Such a contest may complicate a motion to dismiss for failure to state a claim. For example, the record may be so underdeveloped that it is not yet clear if the employee filing the discrimination claim is a "minister" for purposes of the ministerial exception. While the typical employer will insist that enough uncontested facts are known such that the employee is a "minister," the typical employee will equally insist that certain essential facts are contested, and those disputes must be resolved before it can be determined if the case does indeed fall in the sweet spot of church autonomy. If the factual record is truly underdeveloped, discovery should be allowed limited to the motion to dismiss.

46. An interlocutory appeal is sometimes pursued by a religious employer if the trial court refuses to immediately grant a dismissal and instead orders the parties to proceed to discovery—discovery not just on the motion to dismiss because of the church autonomy doctrine but also on the merits. Sharply divided circuit judges have denied an interlocutory appeal. *See* Tucker v. Faith Bible Chapel Int'l, 36 F.4th 1021, 1047–48 (10th Cir. 2022) (rejecting interlocutory appeal), *reh'g en banc denied*, 53 F.4th 620, 622–23 (10th Cir. 2022) (split 6–4); Belya v. Kapral, 45 F.4th 621 (2d Cir. 2022) (rejecting interlocutory appeal), *reh'g en banc denied*, 59 F.4th 570 (2d. Cir. 2023) (split 6–6); O'Connell v. U.S. Council of Catholic Bishops, No. 23-7173 (D.C. Cir. Apr. 25, 2025) (panel denying interlocutory appeal); Garrick v. Moody Bible Inst., 95 F.4th 1104, 1106, 1117 (7th Cir. 2024) (panel split 2–1 disallowing interlocutory appeal).

Because church autonomy is an immunity from litigation, not just a defense to liability, the better view is that an interlocutory appeal should be allowed because: (a) the structural nature of church autonomy is conceptually distinct from the underlying merits and is indicative of a public interest—not just a private interest—in getting correct the divide between church and government; and (b) proceeding to trial on the merits, with the attendant probing discovery of modern litigation, causes an ongoing invasion of the autonomy of the religious institution not redressable after trial by suing the judge.

47. When a religious organization gets caught up in litigation, including probing discovery, in some instances that can lead to situations where the government is taking sides in a religious dispute and thus is violating church autonomy. But not every instance of a religious body being a party to civil litigation will transgress church autonomy. There are some court opinions that refer to civil litigation as always taking up a forbidden religious question. *See, e.g.*, *Our Lady of Guadalupe*, 140 S. Ct. at 2055 ("Judicial review" can "undermine the independence of religious institutions in a way that the First Amendment does not tolerate."); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713, 718 (1976) ("the First Amendment prohibits" "detailed [judicial] review" of evidence of a church's "ecclesiastical actions"). But only when the course of litigation has the government taking sides in a religious question, violating polity, or interfering with a cleric's employment or lay membership, that continued litigation rises to a matter of church autonomy. If the doctrine of church autonomy is not so limited, a church could never be a party to a civil suit, which is surely not the case autonomy.

48. *See, e.g.*, *Our Lady of Guadalupe*, 140 S. Ct. at 2058–59 (government agent or official not a named party in the case).

is effectively taking sides on a religious question by determining the rule of law that governs the case. It is the latter, the taking sides, that interferes with a church's polity, its staffing of ministers, the expelling of a member, and so on, that gives rise to the church autonomy defense. Although less common, church autonomy is not just an affirmative defense but can be initiated as a plaintiff's cause of action.[49]

In a similar vein, employees of churches, joined in their individual capacity for their activities on behalf of their religious employer, cannot be sued for claims within the church autonomy zones.[50] It is not that these employees are ministers or that their duties were religious; it is that as agents of the church their employment tasks fell into one of the protected domains of internal church governance.

In limited instances involving a schism leading to a need to settle title to church property between the resulting factions, the Supreme Court has permitted states the option of resolving such clean-up by resort to "neutral principles of law."[51] This is because judicial deference to the highest ecclesiastical adjudicatory is not possible when the panicle judicatory within the church's polity is itself a religious dispute. In such circumstances a "neutral principles" option is permitted limited to the dispute over which faction gets to retain the church property.[52] If "neutral principles" were applied more broadly, what would be its limiting principle? The neutral principles exception promises

49. This happens when a religious organization initiates a lawsuit and invokes church autonomy theory to enjoin an invasive action by government. Indeed, the church might seek damages if the harm has already occurred. *See* Darren Patterson Christian Acad. v. Roy, 699 F. Supp. 3d 1163 (D. Colo. 2023) (finding likelihood of success on multiple claims, including church autonomy, where state preschool funding program, as a condition of funding, sought to impose employment nondiscrimination requirements on staffing of teachers at religious preschool); InterVarsity Christian Fellowship v. Bd. of Governors of Wayne State Univ., 542 F. Supp. 3d 621 (E.D. Mich. 2021) (upholding church autonomy challenge to university rule that interfered with a student religious organization selecting its leaders using religious criteria).

50. Markel v. Union of Orthodox Jewish Congregations of Am., 124 F.4th 796, 811–12 (9th Cir. 2024).

51. In only three instances has the Supreme Court resorted to "neutral principles" to resolve a church lawsuit. All three were intrachurch disputes over the division of church property. *See* Jones v. Wolf, 443 U.S. 595, 597 (1979); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969); Md. & Va. Eldership of Churches of God v. Church of God at Sharpsburg, 396 U.S. 367 (1970) (per curiam). In this century, the Court's only church autonomy cases were *Hosanna-Tabor* and *Our Lady of Guadalupe*. They were both about employment of a minister, and there is not so much as a whisper in either case about permitting resort to "neutral principles."

52. Demkovich v. St. Andrew the Apostle Par., 3 F.4th 968, 980 (7th Cir. 2021) (en banc) (resort to "neutral principles" not permitted in employment discrimination claim by minister alleging a hostile environment); Hutchison v. Thomas, 789 F.2d 392, 393, 396 (6th Cir. 1986) (rejecting "neutral principles of law" exception to church autonomy doctrine as applied to state tort claims, including defamation and intentional infliction of emotional distress, against a church in challenge to a forced retirement).

to swallow the rule.[53] That is not how exceptions to general principles work. Rather, the law employs the exception narrowly to preserve the primary operation of the general rule. Even more so here where the general principle is of First Amendment moment.

C. History and the Scope of Church Autonomy

The *Hosanna-Tabor* Court indicated that refinements concerning identifying the few subject matters that fall into the zones of church autonomy and those that do not are to be found in a particular chapter of our nation's founding.[54] This methodology is a type of interpretive originalism, albeit the Court did not use the term originalism to characterize what it was doing. The First Amendment was understood as rejecting, at the time of the American founding, the possibility of a national church with its pervasive regulation of religion, as was the case with Great Britain's established Church of England.[55] This makes sense because all thirteen states in rebellion were former British colonies and, as such, the Church of England was familiar to these Americans and, as an arm of the Crown, the Church was widely disdained by many patriots.

Chief Justice Roberts began his reliance on English church history by acknowledging that the Magna Carta of AD 1215 promised independence for the Church but quickly added that the promise was not kept.[56] The binding history in *Hosanna-Tabor* began in earnest with Henry VIII establishing the Church of England, confirmed by Parliament in 1534.[57] The Court's opinion moved forward to the struggles in England over a forced religious uniformity with the aim of stabilizing the kingdom's politics. Political unity was substantially achieved under Elizabeth I but not without religious resistance.[58] The religious imposition set in motion, for example, the Pilgrim and later Puritan immigrations to New England, the Quaker founding of Pennsylvania,

53 Hutchison v. Thomas, 789 F.2d 392, 393, 396 (6th Cir. 1986) (rejecting "neutral principles of law" exception to church autonomy doctrine as applied to state tort claims, including defamation and intentional infliction of emotional distress, against a church in challenge to forced retirement); Kaufmann v. Sheehan, 707 F.2d 355, 358–59 (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, 368 (Wash. 2012) (en banc) (rejecting "neutral principles of law" exception to church autonomy in state tort claim related to ministerial employment).

54. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 182–85 (2012).

55. *Id.* at 183.

56. *Id.* at 182.

57. *Id.*

58. *Id.*

and Catholics taking refuge in Lord Baltimore's Maryland.[59] This dissenter immigration contrasted with America's southern colonies where the established Church of England accompanied commercially minded settlers making their way to the New World.[60] After pointing out examples from Virginia and North Carolina where the Crown's colonial governors—not, as one would expect, the bishop in London—appointed Church of England rectors to vacant colonial vestries,[61] the Chief Justice observed:

> 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.[62]

It follows that the American frame (or "background," to use the term from *Hosanna-Tabor*) for the avoidance of government co-optation of religious entities was continental and later federal founding-era practices with respect to a national church.

II. FEDERAL EVENTS IMPLICATING CHURCH AUTONOMY DURING THE AMERICAN FOUNDING AND EARLY NATIONAL PERIOD

It is fair to say that the American Revolution brought not only a change in the political regime but—at the continental level certainly—a change in the government's relationship with the institutional churches.[63] The latter was new in that it openly rejected elements of Church of England establishmentarianism and required that the continental (later federal) government eschewed involvement with the internal operations of the several churches that populated the Atlantic seaboard.[64] Accordingly, this Part II identifies historical events that implicated church autonomy as understood from the words and behavior of the participating continental and later federal officials.

59. *Id.* at 182–83.

60. *Id.* at 183.

61. *Id.*

62. *Id.*

63. WILLIAM LEE MILLER, THE BUSINESS OF MAY NEXT: JAMES MADISON & THE FOUNDING 108-10 (1992); Robert M. Calhoon & Ruma Chopra, *Religion and the Loyalists, in* FAITH AND THE FOUNDERS OF THE AMERICAN REPUBLIC 101, 116 (Daniel L. Dreisbach & Mark David Hall eds., Oxford Univ. Press 2014).

64. STEVEN K. GREEN, SEPARATING CHURCH AND STATE: A HISTORY 108 (Cornell Univ. Press 2022); MICHAEL D. BREIDENBACH, OUR DEAR-BOUGHT LIBERTY: CATHOLICS AND RELIGIOUS TOLERATION IN EARLY AMERICA 200 (Harvard Univ. Press 2021) [hereinafter BREIDENBACH].

A. Request to Congress to Alter Anglican Liturgy

Convening on May 19, 1775, the Second Continental Congress assumed, on behalf of the thirteen colonies, responsibility for presenting a united front throughout the War of Independence. This body had limited legal authority, but due to the crisis it exerted a powerful influence over the legislatures in the individual colonies-turned-states. For example, in May of 1776, the Continental Congress urged each of the individual colonies to declare themselves states and to adopt written constitutions.[65] In July of that same year, the Congress issued the Declaration of Independence, and in March of 1781, it dissolved itself upon ratification of the Articles of Confederation.

General George Washington and the Continental Army occupied New York City in 1775 and the following year until driven out by the British in late August 1776. During the occupation, Anglican clergy in the city, all loyalists to Great Britain, continued the Book of Common Prayer's liturgical offering of weekly prayers for King George III.[66] It was suggested to these clergy that they modify the liturgy, but the loyalists were openly defiant and the prayers continued.[67] Given the offense, in July 1776 the New York Provincial Convention took the step of asking the Second Continental Congress to modify the Book of Common Prayer by deleting "all such prayers as interfere with the interest of the American cause."[68] Precedent for such a request was Parliament having amended on multiple occasions the Book of Common Prayer.[69] However, reflective of the new American thinking, the Provincial Convention added that "[i]t is a subject we are afraid to meddle with."[70] And, indeed, true to this sentiment, no record appears in the Continental Congress of having acted on the requested modification.[71]

65. *Documents from the Continental Congress and the Constitutional Convention*, LIBR. CONG., at 1774–1789, https://www.loc.gov/collections/continental-congress-and-constitutional-convention-from-1774-to-1789/articles-and-essays/timeline/1776 [https://perma.cc/U737-UQT9].

66. DISESTABLISHMENT AND RELIGIOUS DISSENT: CHURCH-STATE RELATIONS IN THE NEW AMERICAN STATES, 1776–1833, at 128 (NY) (Carl H. Esbeck & Jonathan J. Den Hartog eds., 2019) [hereinafter DISESTABLISHMENT IN THE STATES].

67. *Id.*

68. 1 JOURNALS OF THE PROVINCIAL CONGRESS, PROVINCIAL CONVENTION, COMMITTEE OF SAFETY AND COUNCIL OF SAFETY OF THE STATE OF NEW YORK, 520–21 (Thurlow Weed 1842).

69. *See, e.g.*, JOHN STRYPE, ANNALS OF THE REFORMATION AND ESTABLISHMENT OF RELIGION, AND OTHER VARIOUS OCCURRENCES IN THE CHURCH OF ENGLAND (1709).

70. 1 JOURNALS OF THE PROVINCIAL CONGRESS, PROVINCIAL CONVENTION, COMMITTEE OF SAFETY AND COUNCIL OF SAFETY OF THE STATE OF NEW YORK, 521 (Thurlow Weed 1842).

71. DISESTABLISHMENT IN THE STATES, *supra* note 66, at 128 (N.Y.).

B. French Request to Approve a Catholic Bishopric in America

At a time when military hostilities had ceased following the victory at Yorktown in October 1781, and the thirteen states were operating under the Articles of Confederation, an incident occurred that illustrates how relations between church and government had shifted in the minds of continental officials.[72] At the beginning of the Revolution, the Roman Catholic Church in British North America was under the charge of The Rev. James Talbot, Catholic Bishop of London.[73] When the colonies declared their independence and the ensuing war dragged on for seven years, contact with the Catholic 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.[74] Upon the signing of the Treaty of Paris in 1783, Talbot declared that he no longer exercised ecclesial jurisdiction in America.[75]

In response to these difficulties, Catholics in Maryland and Pennsylvania met to devise a solution. The Rev. John Lewis had been appointed vicar for the American Catholic churches by Talbot's predecessor.[76] Because of Talbot's difficulty in communicating with America, Lewis had been exercising increased supervisory authority.[77] 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 Catholics in the American states.[78] In the petition, The Rev. John Carroll of Maryland provided intriguing commentary on the American Catholic perspective concerning church-government relations under the Articles of Confederation.[79] Directed to a cardinal in Rome, Carroll wrote:

> 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 [i.e., the 13

72. The most thorough account is found at BREIDENBACH, *supra* note 64, at 207–17. The event is recorded by the Chief Justice in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 184 (2012). *See also* Michael D. Breidenbach, *Religious Tests, Loyalty Oaths, and the Ecclesiastical Context of the First Amendment*, *in* THE CAMBRIDGE COMPANION TO THE FIRST AMENDMENT AND RELIGIOUS LIBERTY 16y-69, 183-85 (Michael D. Breidenbach & Owen Anderson eds., Cambridge Univ. Press 2020) [hereinafter "Breidenbach, CAMBRIDGE COMPANION"].

73. 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, at 204–25 (1888).

74. *Id.* at 204.

75. *Id.* at 204–05.

76. *Id.* at 204.

77. *Id.* at 207.

78. *Id.* at 208–10.

79. *Id.* at 209.

> states] 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 [i.e., the Vatican] more than that which is essential to our religion, an acknowledgment of the Pope's spiritual supremacy over the whole Christian world.[80]

Meanwhile, the Catholic magisterium in France had plans of their own for the American church.[81] The Jesuits had flourished in America during the period of the London Bishop's oversight, Talbot having been friendly to that order.[82] However, clergy aligned with the Bourbon monarchy had urged Pope Clement XIV to dissolve the Society of Jesus, and they succeeded.[83] The French magisterium now sought to undermine the lingering influence of the Jesuits in the thirteen states.[84] A plan, apparently originating with Barbé Marbois, the French Minister to the confederated states, received support from the papal nuncio in Paris.[85] The nuncio sent instructions to Marbois in Philadelphia, directing him to petition Congress for authority to appoint a Catholic bishop in America.[86] That would have caused the American Bishop to receive his instructions via church authorities in Paris, as opposed to directly from the Vatican.[87] When Marbois sent the petition to Congress for approval (called *ius patronatus* or "rights of patronage"),[88] he received an unexpected response, yet one that was revealing of the changed American sentiments on church autonomy. 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

80. *Id.* at 211.
81. *Id.* at 212–13.
82. *Id.* at 55.
83. *Id.* at 226.
84. *Id.* at 210–18.
85. *Id.* at 213–15.
86. *Id.* at 213–14.
87. *Id.* at 212 n.1.
88. It appears the petition was forwarded to Congress in September 1783. Breidenbach, CAMBRIDGE COMPANION, *supra* note 72, at 183 n.60.

> 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 and powers of Congress, who have no authority to permit or refuse it, these powers being reserved to the several states individually.[89]

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 avert 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.[90] In this way, the first American Catholic bishopric was formed, with Carroll as bishop answering directly to the Pope.[91] The incident confirmed that ecclesiastical polity disputes were outside the authority of the confederation government.[92]

C. A Request to Congress to Approve a Seminary Is Waylaid

In September 1786, Bishop John Carroll wrote a letter replying to John Hock concerning the opening of a new seminary in America.[93] Hock is not further identified but given the topic and his being referred to as "your Excellency," he is likely a church official at the Vatican. Carroll suggests he favored the seminary but goes on to volunteer that, in America, no prior consultation is required with the Congress to start such a seminary. Indeed, Carroll thought it "expedient" to not seek such approval as "the American Congress does not wish to treat of matters which concern one or another group of Christians."[94] Rather, in matters concerning churches, Congress "allows full liberty, without governmental interference, with respect to whatever pertains to its cult, discipline and internal organization, provided however that no harm

89. 27 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 368 (Gaillard Hunt ed., 1928). An identical entry appears in the Congressional Journal on December 18, 1783, but absent "*Resolved*." 25 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 825–26 (Gaillard Hunt ed., 1928). The addition of "*Resolved*" indicates the day of final action by Congress.

90. 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, at 243-45 (1888).

91. *Id.* at 249–50.

92. Note that, in the view of Congress, the authority to approve the clerical appointment is reserved to the states.

93. Letter from Rev. John Carroll to John Hock (September 15, 1786), *in* 1 THE JOHN CARROLL PAPERS 1755–1791, at 199 (Thomas O'Brien Hanley ed., Univ. of Notre Dame Press 1976).

94. *Id.*

ensues to the Republic."[95] That quotation is a near headnote for modern church autonomy theory, a concept fully grasped at the time by a Catholic ecclesiastic, and that even before the implementation of the new Constitution.

D. Catholic Unrest in the Louisiana Territory

The Louisiana Purchase of 1803 was the context for several applications of church autonomy. This vast land west of the Mississippi River held a century-old, established French Catholic Church, which from 1762 forward was maintained by the Spanish.[96] The treaty and purchase agreement between the United States and France guaranteed the inhabitants religious liberty—no small matter as the United States was perceived by French settlers as not only Protestant but anti-Catholic.[97] France ostensibly ceded the territory to Spain in 1762, but by secret agreement the vast area was administered by Spain for the benefit of France.[98] The final transfer from Spain to France, and then from France to the United States, took place in New Orleans on December 20, 1803.[99] The Catholic establishment in the territory quietly ceased to exist in late 1803 as the Spanish Crown no longer paid the priests and the Spanish civil law no longer operated to support the church.[100]

For purposes of the incoming federal administration, the land was divided into the 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.[101] In the spring of 1804, the governor of the Orleans Territory, W.C.C. Claiborne, wrote to Secretary of State, James 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."[102] Although the territorial governor was clearly pleased with this manner of handling the dispute and averting violence,

95. *Id.*; Breidenbach, CAMBRIDGE COMPANION, *supra* note 72, at 167.

96. Kevin Pybas, *Disestablishment in the Louisiana and Missouri Territories*, *in* DISESTABLISHMENT IN THE STATES, *supra* note 66, at 273; *see also* Breidenbach, CAMBRIDGE COMPANION, *supra* note 72, at 186–87, 191.

97. *See generally* Pybas, *supra* note 66, at 273–78; Breidenbach, CAMBRIDGE COMPANION, *supra* note 72, at 191.

98. Pybas, *supra* note 66, at 273–74.

99. *Id.* at 274.

100. *Id.* at 278.

101. *Id.* at 278–80, 285.

102. *Id.* at 281.

President Thomas Jefferson, who learned about it from Madison, was not.[103] 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.[104]

Jefferson's warning to not get involved in matters of church polity, or the supervision and discipline of clergy, was passed from Madison back down to the territorial governor.[105]

Only a year went by before Claiborne had an opportunity to put into practice Jefferson's principle of no federal intervention in disputes over polity or the assignment of clergy. In July of 1805, the governor became aware of a Spanish priest, Fr. Père Antoine, serving the Church of St. Louis in New Orleans.[106] The priest was at odds with his superior, The Rev. Walsh, who as the acting vicar general in the diocese was concerned that the priest had retained his loyalty to Spain.[107] The renegade priest was ordered removed by the acting vicar from his appointment to the Church of St. Louis.[108] However, the parish congregation resisted this reassignment and allowed Antoine to continue to conduct worship services.[109] Walsh reported his dilemma to the territorial governor, a behavior characteristic of a state-established church.[110] Claiborne, chastened by his earlier mishandling of affairs to the disappointment of Jefferson, declined to get involved in the religious dispute.[111] The governor did, however, ask for an interview with the wayward priest to inquire into possible sedition, a purely civil offense.[112]

The dispute between the laity at the Church of St. Louis and the vicar general went unresolved. The impasse continued for another 40 years until addressed by the Louisiana Supreme Court in 1844.[113] The lawsuit involved the ongoing dispute between the lay wardens of the Church of St. Louis and the current bishop, The Rev. Antoine Blanc, over who had authority to appoint

103. *Id.* at 282.
104. *Id.*
105. *Id.*
106. *Id.* at 282–83.
107. *Id.*
108. *Id.* at 282.
109. *Id.*
110. *Id.*
111. *Id.* at 283.
112. *Id.* at 282–83.
113. *Id.* at 286.

priests officiating at the church.[114] To complicate the litigation, when Louisiana became a state in 1812, the state constitution adopted no general provisions concerning religious liberty or the nonestablishment of religion. However tenuous, the state supreme court reasoned that this silence was because the authors of the Louisiana Constitution of 1812 had intended the state's continued reliance on the religious liberty clause in Article I of the Northwest Ordinance of 1787.[115] Provisions in that ordinance had been extended to the Orleans Territory by congressional legislation enacted in 1804 and amended in 1805.[116]

The state supreme court reasoned that under Article I of the Ordinance of 1787, federal territorial courts had no authority to resolve internal disputes concerning ecclesial appointments to a parish church.[117] By extension of this federal practice, the matter of ecclesial appointments under Louisiana law was said to rest solely in the hands of the bishop as a matter of church autonomy.[118] We thus have the unusual occurrence where the high court of a state is declaring the meaning of a 1789 congressional ordinance, one later extended in 1804 by Congress,[119] to harbor the principle that church autonomy embraces disputes over polity and ministerial appointments.

E. Security of Title to Former Establishmentarian Property

Some Catholic inhabitants of this former French territory had cause to be concerned for the security of their titles to real estate. Since 1727, an order of Ursuline nuns had operated a convent, orphanage, and school for girls and young women in the City of New Orleans.[120] The sisters had first received their lands from the Bourbon monarchy as a feature of the established Catholic Church.[121] The sisters wondered what the Louisiana Purchase meant for security of title to land on which they carried out their works of charity and

114. *Id.*

115. *Id.* at 286–87. The Northwest Ordinance appears at 32 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 314 (Roscoe R. Hill ed., 1936). Article I read, "no person demeaning himself in a peaceable and orderly matter shall ever be molested on account of his mode of worship or religious sentiments in the said territory." *Id.* at 318.

116. Pybas, *supra* note 66, at 286.

117. *Id.* at 287.

118. *Id.*

119. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50.

120. Pybas, *supra* note 66, at 280; *see also* Breidenbach, CAMBRIDGE COMPANION, *supra* note 72, at 187–89.

121. Pybas, *supra* note 66, at 279–81.

education, all in their new country that they regarded as Protestant but with no established religion.[122]

In a letter dated June 13, 1804, the Mother Superior of the convent wrote President Jefferson setting forth her anxieties about title to the real estate used by the Ursuline ministries.[123] A month later, on July 13, 1804, Jefferson responded with a letter of his own.[124] He began by assuring the nuns that the transfer from Catholic France to the United States would not undermine title to their religious school and the glebe lands that supported it.[125] However, Jefferson went further and assured the convent, school, and orphanage of their power of self-governance and immunity from the superintending hand of the federal government. As the president explained:

> [T]he [*sic*] principles of the [C]onstitution . . . are a sure guarantee 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.[126]

Ironically, the latter—the ability of the Ursuline Sisters to govern their own affairs free of civil law—was an autonomy the sisters would not have enjoyed under the previous Catholic establishment.

F. Old Habits, in Need of Being Broken

Walsh, the acting vicar general, died in August 1806.[127] That left a vacancy in the most senior Catholic position in the Orleans Territory. Members of the Church of St. Louis wanted Napoleon Bonaparte, then emperor of France, to name the Spanish Capuchin Antonio de Sedella as vicar.[128] The Pope sought to circumvent Napoleon and called on Bishop John Carroll in Baltimore.[129] It fell to Carroll to name the replacement.[130] This was against a background of continued unrest among the French inhabitants of Orleans as they assimilated with American settlers arriving from the east.[131] Interference from Napoleon aside, one source of tension was that the eastern arrivals were overwhelmingly

122. *Id.* at 280.

123. *Id.* at 280–81.

124. *Id.* at 281.

125. *Id.*

126. *Id.; see generally id*. at 278–81.

127. *Id.* at 282–83.

128. *Id.* at 273–75, 283.

129. *Id.* at 283.

130. *Id.* at 283–84; s*ee also* BREIDENBACH, *supra* note 64, at 186–87; Breidenbach, CAMBRIDGE COMPANION, *supra* note 72, at 186–87, 191.

131. Pybas, *supra* note 66, at 274–78.

Protestant.[132] Given the delicacy of the matter, Carroll wrote to James Madison, Secretary of State, on November 17, 1806. Carroll stated that he would prefer a French-speaking, American-born candidate for vicar.[133] But if there was no such suitable person, would the Jefferson Administration accept a native of France who had lived in America for some time and who was demonstratively affectionate to the United States.[134] The implication was that Carroll had in mind such a person.[135] This collaboration was of the sort typical of a nation with an established church.[136]

Madison gave his official reply on November 20, 1806. The letter stated that because the matter "is entirely ecclesiastical it is deemed most congenial with the scrupulous policy of the Constitution in guarding against a political interference with religious affairs," he could not answer.[137] Madison then sent a second letter. This one was marked private and stated that indeed due to the local unrest the Jefferson Administration considered the matter sensitive and would welcome the bishop's care in the appointment.[138]

G. Jefferson on the Spiritual Disciplines of Fasting and Prayer

A Presbyterian minister in New York City, The Rev. Samuel Miller, wrote to President Thomas Jefferson on January 18, 1808, to inquire if Jefferson might favorably entertain a more formal request to issue a presidential proclamation recommending a national day of fasting and prayer.[139] Miller did not want a formal request from a body of clergy to go forward if such a request would embarrass everyone all around when refused by Jefferson.[140] Jefferson promptly replied in a letter dated January 23, 1808, urging that the request not

132. *Id.* at 284.

133. *Id.*

134. *Id.*

135. *Id.* The Chief Justice has an account of this event in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 184 (2012).

136. The practice continues to this day in England. *See, e.g.*, U.K. CABINET OFFICE, *Archbishop of Canterbury Appointment Process*, (Nov. 15, 2024), https://www.gov.uk/government/news/archbishop-of-canterbury-appointment-process [https://perma.cc/26W8-RJB2].

137. Pybas, *supra* note 66, at 284.

138. *Id.* at 284–85.

139. Letter from Samuel Miller to Thomas Jefferson (Jan. 18, 1808) (on file with the National Archives), https://founders.archives.gov/documents/Jefferson/99-01-02-7222 [https://perma.cc/9KH4-VQYE].

140. *Id.*

be issued. The president gave three reasons.[141] First, given the First Amendment Religion Clauses, no such authority lay with the federal government to direct the time or nature of religious observances and spiritual disciplines.[142] Second, if there was such governmental authority, it must be a power residing entirely in the states.[143] Third, it was not in the interest of the freedom of the churches to invite federal officers to direct them in the means and timing of their spiritual rites and practices.[144] Jefferson wrote:

> I have duly recieved [*sic*] your favor of the 18th and am thankful to you for having written it, because it is more agreeable to prevent than to refuse what I do not think myself authorised to comply with. I consider the government of the US. as interdicted by the [C]onstitution from intermedling [*sic*] with religious institutions, their doctrines, discipline, or exercises. [T]his results not only from the provision that no law shall be made respecting the establishment, or free exercise, of religion, but from that also which reserves to the states the powers not delegated to the US. [C]ertainly no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the general government. [I]t must then rest with the states, as far as it can be in any human authority. [B]ut it is only proposed that I should *recommend*, not prescribe a day of fasting & prayer. [T]hat is that I should *indirectly* assume to the US. an authority over religious exercises which the [C]onstitution has directly precluded them from. [I]t must be meant too that this recommendation is to carry some authority, and to be sanctioned by some penalty on those who disregard it: not indeed of fine & imprisonment but of some degree of proscription perhaps in public opinion. [A]nd does the change in the nature of the penalty make the recommendation the less a *law* of conduct for those to whom it is directed? I do not believe it is for the interest of religion to invite the civil magistrate to direct it's [*sic*] exercises, its discipline or its doctrines: nor of the religious societies that the General government should be invested with the power of effecting any uniformity of time or matter among them. [F]asting & prayer are religious exercises. [T]he enjoining them an act of

141. Letter from Thomas Jefferson to Samuel Miller (Jan. 23, 1808) (on file with the National Archives), https://founders.archives.gov/documents/Jefferson/99-01-02-7257 [https://perma.cc/8ALK-3VSQ].

142. *Id.*

143. *Id.*

144. *Id.*

> discipline, every religious society has a right to determine for itself the times for these exercises & the objects proper for them according to their own particular tenets. [A]nd this right can never be safer than in their own hands, where the [C]onstitution has deposited it.[145]

Jefferson went on to anticipate the objection that proclamations for a day of fasting and prayer had been issued by Presidents Washington and Adams.[146] While true, Jefferson attributed the actions of his predecessors as believed agreeable only because it was a practice familiar to state executives.[147] But such a precedent was no substitute for the lack of delegated power in the federal government.[148]

Once again, there appears the sharp founding-era distinction between the authority delegated to the federal government, on the one hand, and the residual establishmentarian authority continuing to reside in the several states. The First Amendment, including its Religion Clauses, bound only the federal government, and it is by the behavior of the federal government where the founding-era definition of church autonomy was being formed, and to where we now look as directed by *Hosanna-Tabor*. Of the limited subject matters reserved to church autonomy, the practice of prayer and the discipline of fasting fall into that category of control over religious rites and doctrine. As such, the means and efficacy of prayer and fasting are within the sole province of the church.

H. Madison's Veto Message and Church Polity

James Madison as President vetoed a bill to incorporate an Episcopal church in the District of Columbia.[149] Such an incorporation was a federal matter because the Constitution gave to Congress oversight of the District. According to Madison's message,[150] there were three reasons for the veto. The first implicated church autonomy, whereas the second and third gave rise to conventional Establishment Clause claims. First, the corporation's proposed by-laws, as explicitly set out in the bill, would deeply implicate federal officials

145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 33–34 (1982) [hereinafter CORD]. The Chief Justice has an account of this event in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 184–85 (2012).
150. 22 ANNALS OF CONG. 982–83 (1811).

in the details of clergy removal by the church, as well as any subsequent appointment to fill the vacancy. Madison wrote:

> The bill enacts into, and establishes by law, sundry rules and proceedings relative purely to the organization and polity of the church incorporated, and comprehending even the election and removal of the Minister of the same; so that no change could be made therein by the particular society, or by the general church of which it is a member . . . . This particular church, therefore, would so far be a religious establishment by law; a legal force and sanction being given to certain articles in its constitution and administration.[151]

The enlistment of federal officials to implement the details of a local church's polity, along with the parish's interactions with the parent denomination, fell well within the forbidden zones of church autonomy. Madison went on to complain that under the bill certain canons of the church were to be enforced by the government's penal law, and that the government funding of a parish school supporting children of the poor was a civil function improperly being delegated to the church.[152] These latter arrangements raised traditional claims under the Establishment Clause.[153]

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151. *Id.* at 983.

152. *Id.*

153. In the same month, Madison vetoed a congressional conveyance of a tract of land to a Baptist Church in the Mississippi Territory. CORD, *supra* note 149, at 34. That too presented a traditional claim under the Establishment Clause and not a church autonomy matter.