CHURCH AUTONOMY DOCTRINE

Carl H. Esbeck*

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 recognized by the Supreme Court of the United States in the post-Civil War case of *Watson v. Jones*.[3] And early this century, in the unanimous decision of *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,[4] the theory of church autonomy took on 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 subject 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. The heart of the matter being 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 teacher who was assigned some religious duties.[7] The core of the matter being 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 we cannot have government taking sides in what is ultimately an insider 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,

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* R.B. Price Professor Emeritus and Isabella Wade & Paul C. Lyda Professor of Law Emeritus, University of Missouri.

[1] The term "church autonomy" was first used by law professor Paul G. Kauper in *Church Autonomy and the First Amendment: The Presbyterian Church Case*, 1969 SUP. CT. REV. 347 (1969). However, the concept of church autonomy was recognized as being lodged in the Court's First Amendment jurisprudence as early as Mark DeWolfe Howe, *Foreward: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91 (1953). Professor Howe's essay remarks on the Court's 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" 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. (15 Wall.) 131 (1872).

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

[5] *Id*. at 188. The term "ministerial exception" was first used in Rayburn v. General Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1168 (4th Cir. 1985). A similar result was earlier reached in McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972), but *McClure* did not coin the term ministerial exception. There has developed unease 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] The Court wrote that the "ministerial exception *bars . . . a suit*" challenging the school's decision to dismiss the teacher. *Id*. at 196 (emphasis added).

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 dismissing 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, as distinct from who determines, in the first instance, the correct tenets of that faith. But both these variations in the disputed question fall within the zone of church autonomy.

A recent opinion letter by the Wage and Hour Division, U.S. Department of Labor, had little trouble applying the ministerial exception to teachers employed by a religious preschool thereby shielding the school from the minimum salary and overtime strictures of the Fair Labor Standards Act.[8] This common sense approach to who is functionally a minister would seem to pose questions like whether the employee must perform duties that align with the employer's theological beliefs, standards, or practices; if the duties entail conveying the employer's message or carrying out its mission; if the job entails selecting or creating religious content; or if one of the tasks is leading others toward greater maturity in the employer's religion.

Notwithstanding the promising unanimity in *Hosanna-Tabor* and this commonsense approach under the Fair Labor Standards Act, the High Court continues to regularly receive petitions to superintend church autonomy cases in lower federal and state courts, many of which evidence an overly wooden understanding of those subject matters of interior governance that are within a church's space for its exclusive operation. Such rigidity was exemplified in the circuit courts in *Our Lady of Guadalupe School v. Morrissey-Berru*,[9] but the High Court reversed. The justices took less of a checklist approach in finding that for practical purposes classroom teachers at a K-12 religious school were functionally ministers of the faith to the next generation, thus the dismissal of an elementary teacher was categorically immune to claims of employment discrimination.[10] We cannot, consistent with religious autonomy, have civil authorities telling a religious organization which ministers it may hire or fire. Consider *Gordon College v. DeWeese-Boyd*,[11] where the interlocutory nature of a judgment below rejecting a ministerial-exception defense made the sought-after appeal an unsuitable vehicle for the Court's review; nevertheless, four justices filed a statement suggesting that a faculty member at a religious college that is expected to integrate a Christian worldview into all her teaching and research, and to mentor students in the sponsoring faith, was likely a "minister" for purposes of the ministerial exception.[12] Also consider *Seattle's Union Gospel Mission v. Woods*,[13] where the lower court had not yet ruled on the ministerial exception defense, the Court deemed an interlocutory appeal not a suitable vehicle to take up church autonomy for the first time on appeal; nevertheless, two justices filed a statement suggesting that church autonomy would apply where among the qualifications for a position of staff attorney at a

[8] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2021-2 (Jan. 8, 2021), *available at* https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/FLSA/2021_01_08_02_FLSA.pdf.
[9] 140 S. Ct. 2049 (2020).
[10] *Id.* at 2062-68.
[11] 142 S. Ct. 952 (2022) (cert. denied).
[12] *Id.* at 953-55 (statement by Justice Alito, joined by Thomas, Kavanaugh, and Barrett, JJ.).
[13] 142 S. Ct. 1094 (2022) (cert. denied).

ministry to the homeless were to live a straight lifestyle, be active in one's local church, and have a passion for converting others to Christianity.[14]

When confronted with church autonomy theory, these and other courts are tacitly struggling with where to locate the boundary that marks off matters of internal church governance to the exclusion of the government's general 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. Saint 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.[15]

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" and therefore authorities must defer to decisions by such bodies "on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law," and these 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]

The *Hosanna-Tabor* Court recalled a passage in *Watson* which related that "whenever the questions of discipline, or of faith or ecclesiastical rule, custom or law" have been internally determined by church officials, such matters are now closed and not to be reopened by civic authorities.[17] 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."[18] Accordingly, the theory of church autonomy casts a zone 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.[19]

While the High Court's general language concerning the scope of the immunity provides helpful starting points, more systemization is needed to solve the inevitable disputes over fine

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[14] *Id.* at 1095-97 (statement by Justice Alito, joined by Thomas, J.). Justice Alito thought it relevant, moreover, that the applicant announced that his motivation in applying for the position was to protest the employer's religious views.
[15] 344 U.S. 94, 116 (1952) (footnote omitted).
[16] 426 U.S. 696, 713, 714, 724 (1976).
[17] 565 U.S. at 185 (quoting *Watson*, 80 U.S. at 727).
[18] 140 S. Ct. at 2061.
[19] *Id.* at 2055 ("core"); *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring) ("key").

points and close cases.[20] The place to begin is with the full subject-matter range of the High Court's case law. In such a review, we have it that church-autonomy doctrine has been found to set apart the following subject matters over which religious organizations are immune: (1) the resolution of religious questions or disputes, as well as testing the validity, meaning, or importance of an organization's religious beliefs and practices;[21] (2) disagreements over a religious entity's polity, including determinations of who has final authority within the entity to resolve an ongoing dispute;[22] (3) the administration of the rituals and rites of the faith, as well as controlling the use of sacred properties;[23] (4) the qualifications, selection, promotion, and dismissal of ministers and other religious functionaries; [24] (5) the criteria for membership and

[20] Following *Hosanna-Tabor*, an initial round of scholarship probed the theoretical basis for church autonomy, but there was little progress on the line-drawing task which is the most pressing need of litigants and the courts. *See* Alan Brownstein, *Protecting the Religious Liberty of Religious Institutions*, 21 J. OF CONTEMP. LEGAL ISS. 201 (2013); Richard W. Garnett, *The Freedom of the Church: (Towards) An Exposition, Translation, and Defense*, 21 J. OF CONTEMP. LEGAL ISS. 33 (2013); Paul Horwitz, *Defending (Religious) Institutionalism*, 99 VA. L. REV. 1049 (2013); Andrew Koppelman, *"Freedom of the Church" and the Authority of the State*, 21 J. OF CONTEMP. LEGAL ISS. 145 (2013); Michael W. McConnell, *Reflections on* Hosanna Tabor, 35 HARV. J. L. & PUB. POL'Y 821 (2012); Richard C. Schragger & Micah Schwartzman, *Lost in Translation: A Dilemma for Freedom of the Church*, 21 J. OF CONTEMP. LEGAL ISS. 15 (2013).

[21] *See Thomas v. Review Bd.*, 450 U.S. 707, 715-16 (1981) (holding inter alia that courts are not arbiters of scriptural interpretation); Maryland & Va. Churches of God v. Church 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 Church, 393 U.S. 440, 449-51 (1969) (refusing to follow a legal rule that discourages changes in doctrine); *Watson*, 80 U.S. at 725-33 (rejecting implied-trust rule because of its departure-from-doctrine inquiry); *see also* Order of St. Benedict v. Steinhauser, 234 U.S. 640, 647-51 (1914) (finding that religious practices concerning vow of poverty and communal ownership of property are not violative of individual liberty and will be enforced by the courts).

[22] *See Milivojevich*, 426 U.S. at 708-24 (civil courts may not probe into church polity); *Presbyterian Church*, 393 U.S. at 451 (civil courts may not interpret and weigh church doctrine); Kreshik 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*, 344 U.S. at 119 (same); Shepard v. Barkley, 247 U.S. 1, 2 (1918) (aff'd mem.) (a court may not interfere with merger of two Presbyterian denominations).

[23] Section 6(b) of the Respect for Marriage Act (codified as a note to 1 U.S.C. § 7), grants a right to a church or other religious nonprofit to refuse the use of its sanctuary or similar facility for the solemnization or celebration of a same-sex marriage. The Respect for Marriage Act was bipartisan legislation enacted on Dec. 13, 2022. P. L. 117-228, 136 Stat. 2305 (2022). The U.S. Supreme Court has no land-use cases involving churches that fall into this second category. The state courts do, but the cases often were decided before church autonomy doctrine fully bloomed in *Hosanna-Tabor*. *See, e.g.,* First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174, 178 (Wash. 1992) (municipal landmarking of exterior of historic downtown church violated constitutional religious freedom, and that conclusion was only compounded by an exemption in the ordinance for building changes based on church liturgy or ritual); Society of Jesus of New Eng. v. Boston Landmarks Comm'n, 564 N.E.2d 571 (Mass. 1990) (municipal landmarking of interior of Catholic church, including refusal to permit relocation and renovation of the alter in sanctuary, violated constitutional religious freedom). There are landmarking cases that initially appear to the contrary, but they are not because counsel for the church failed to raise church autonomy as distinct from routine free exercise and nonestablishment defenses. *See, e.g.,* Rector, Wardens, and Members of Vestry of St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990).

[24] *See Our Lady of Guadalupe*, 140 S. Ct. at 2062; *Hosanna-Tabor*, 565 U.S. at 190-95; *Milivojevich*, 426 U.S. at 708-20 (civil courts may not probe into defrocking of cleric); *Kedroff*, 344 U.S. at 116 (courts may not probe into clerical appointments); Gonzalez v. Roman Catholic 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 also* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 501-04 (1979) (refusal by Court to force collective bargaining on parochial school because of interference with relationship between church superiors and lay teachers); Rector of Holy Trinity

bases for its severance, including determining which ecclesial sub-entities are in good standing with the church; [25] and (6) those internal church communications[26] made while acting within the scope of one of the five foregoing topics shielded by church autonomy.[27]

As can be seen in this long string of cases, rarely is the government a named party in a lawsuit involving one of the forgoing six subject matters.[28] Rather, the government (although not a named party) is effectively taking sides in a religious question or dispute by determining the rule of law that governs the case. It is the latter, the taking sides by interfering with a church's polity, its staffing of ministers, the expelling a member, and so on, that gives rise to the church autonomy defense.[29]

The nature of church autonomy as a distinct constitutional defense became more evident when, in cases decided in this new century, the Supreme Court announced that the

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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 clerical hiring); Cummings v. Missouri, 71 U.S. 277 (1867) (it was unconstitutional to prevent priest from assuming his ecclesiastical position because of refusal to take 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 Parish, 3 F.4th 968, 976-77 (7th Cir. 2021) (en banc).

[25] *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. at 733 (court has no jurisdiction over church discipline or the conformity of church members to the standard of morals required of them). *See also Order of St. Benedict*, 234 U.S. at 647-51 (so long as individual voluntarily joined a religious group and is free to leave at any time, religious liberty is not violated, and members are bound to prior rules consensually entered, such as vow of poverty and communal ownership of property). The subject of autonomy includes the spiritual discipline of members; in contrast, any corporal discipline is reserved for the state.

[26] 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); 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 Bd. of the Southern Baptist Convention, Inc., 980 F.3d 1066, 1074 (5th Cir. 2020) (Judge Ho's citations and quotations dissenting from denial of en banc review).

[27] It could be said that this sixth item is not really a category distinct from the first five, but the item is necessarily subsumed in each of the preceding five categories whenever the respective topic gives rise to internal communication. I agree. However, it is clarifying—if perhaps overly cautious—to list internal communications separately.

[28] No government agency or official was a named party in *Our Lady of Guadalupe*, 140 S. Ct. at 2058-59.

[29] Although less common, church autonomy is not just a defense but can be brought as a primary cause of action. The latter happens when a religious organization initiates a lawsuit and affirmatively invokes church autonomy theory to enjoin an invasive action by the government. *See* Darren Patterson Christian Acad. v. Roy, 2023 WL 7270874, at *19 (D. Colo. Oct. 20, 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 University, 542 F. Supp.3d 621 (E.D. Mich. 2021) (upholding church autonomy challenged to university rule that interfered with a student religious organization selecting its leaders using religious criteria).

theory rests on both of the Religion Clauses in the First Amendment.[30] A second way in which church autonomy theory stands apart is that the doctrine has its own unique line of U.S. Supreme Court case law.[31] A third distinct feature is that to preserve such a zone 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.[32] Fourthly, it follows that when a court finds the doctrine is applicable the judgment of dismissal is categorical, thus courts will not entertain a claim of pretext.[33]

Going forward, then, it is clarifying to conceptualize the full range of First Amendment religious freedom jurisprudence as having three different tracks: church autonomy cases,[34] nonestablishment cases, and free exercise cases.[35] This means, among other things, avoiding the all-too-common conflation of the doctrine of church autonomy with conventional lawsuits

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[30] *Our Lady of Guadalupe*, 140 S. Ct. at 2060; *Hosanna-Tabor*, 565 U.S. at 181, 184, 188-89. 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.

[31] The Supreme Court's church autonomy cases are rather few. In chronological order they are: *Watson*, 80 U.S. (13 Wall.) 679 (1872) (involving control over church property disputed by factions within a church); *Bouldin*, 82 U.S. at 139-40 (involving an attempted takeover of a church by rogue elements); *Gonzalez*, 280 U.S. 1 (involving the authority to appoint or remove a church official); *Kedroff*, 344 U.S. 94 (1952) (involving a legislative attempt to alter the polity of a church); *Kreshik*, 363 U.S. 190 (involving a judicial attempt to alter the polity of a church); *Presbyterian Church*, 393 U.S. 440 (involving control over church property disputed by factions within a church); *Church at Sharpsburg*, 396 U.S. 367 (involving control over church property disputed by factions within a church); *Milivojevich*, 426 U.S. 696 (1976) (involving the authority to appoint or remove a church minister and to reorganize the church polity); *Catholic Bishop of Chicago*, 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); *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).

[32] 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 Catholic High School, 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).

[33] *Hosanna-Tabor*, 565 U.S. at 194-95 (not permitting a plaintiff to argue pretext in reply 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, full stop.

[34] Professor Michael McConnell notes that church autonomy "was the first kind of religious freedom to appear in the western world, but got short shrift from the Court for decades." McConnell, *supra* note 20 at 836.

[35] From an originalist 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.

under the Free Exercise Clause[36] and still other suits under the Establishment Clause.[37] For example, religious disputes between factions within a church or when the government attempts to answer a disputed religious question, both are 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 in conflict with a generally applicable law.[38] In such an instance, the relevant contest is not between internal church factions with the government

[36] For straight-up claims under 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. Employment Division v. Smith, 494 U.S. 872 (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 (1993). Such a law is not religion neutral. Second, the Free Exercise Clause applies to laws with exemptions 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"). When an individual exemption is available at the discretion of a government official, then 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 religious persons or organizations on account of religion. Carson v. Makin, 142 S. Ct. 1987, 2000-21 (2022) (law providing state funding of K-12 schools, except for those schools that are "sectarian," is unconstitutional). Again, such a law is not religion neutral.

[37] 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 government benefits (Carson v. Makin, 142 S. Ct. 1987, 2000-01 (2022)), and that the three-part *Lemon* test and the endorsement test have been abandoned (Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427-28 (2022)), the Establishment Clause is rolled back in order that the two Religion Clauses are in harmony (*id.* at 2426-27, 2432). This leaves four straight-up claims under the Establishment Clause. First, the government cannot coerce religious belief or practice. *Kennedy*, 142 S. Ct. at 2428-32 (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, the government may not favor one church or denomination over others. Larson v. Valente, 456 U.S. 228 (1982). The essence of an established church is that it is the denomination favored by the government. Third, the government is not to compel those in the private sector unyieldingly to prefer religion over nonreligion. Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) (striking down statute requiring employers to accommodate an employee's Sabbath over all competing requests to not work weekends). Fourth, in some circumstances unwanted exposure to religious expression by the government can present a forbidden establishment. School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963) (teacher-led prayer and devotional Bible reading in compulsory public schools is unconstitutional). However, such expression if historically grounded in the nation's founding and patriotism is permitted of the government, unless intended to exclude or disparage a particular religion while honoring others. *See* American Legion v. American Humanist Assoc., 139 S. Ct. 2067 (2019) (a Latin cross featured in memorial to those who died in the Great War was not unconstitutional); McCreary County v. ACLU, 545 U.S. 844 (2005) (a Ten Commandments display on state capitol grounds, situated among other memorials and statuary, was constitutional).

[38] In limited instances involving disputes over church property, the Supreme Court has permitted states the option of resolving such disputes by resort to "neutral principles" of law. *See* Jones v. Wolf, 443 U.S. 595 (1979). This is because the rule to exercise judicial deference to the highest ecclesiastical adjudicatory to solve the dispute is not always possible if the highest adjudicatory within the polity is itself disputed. However, the "neutral principles" option is permitted by the Court only in disputes over church property. Demkovich v. St. Andrew the Apostle Parish, 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 (6th Cir. 1986) (rejecting "neutral principles of law" exception to church autonomy doctrine as applied to state law tort claims, including defamation and intentional infliction of emotional distress, against the church in challenge to forced retirement).

improperly siding with one of the factions. Rather, the contest is over a church's religious practice being materially burdened by a law or government official. The latter is just a straight-up claim arising under the Free Exercise Clause. The two types of claims have markedly different standards of review. This difference proved pivotal in *Hosanna-Tabor* when distinguishing *Employment Division v. Smith.*[39] *Smith* is applicable only to conventional Free Exercise Clause claims. Given that *Hosanna-Tabor* was a church autonomy case, not a straight-up free exercise case, the less rigorous standard of review for the government that is associated with *Smith* was inapplicable.[40]

The 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.[41] Rather, the doctrine of church autonomy is a structural limitation on the government's constitutional authority[42]—much like the Constitution's three branches, each with limited authority. Just as the structural feature of separation of powers denotes limited, delegated powers being vested in each of the government's three branches, with checks and balances among them, church autonomy is structural in the sense that it denotes inherent, limited powers vested exclusively in institutional religion and still other powers vesting exclusively in civil government.[43] This is often referred to in the vernacular as a type of separation of church and state. Its structural

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[39] 492 U.S. 872 (1990) (holding that with respect to generally applicable legislation, neutral as to religion, the Free Exercise Clause requires only a rational-basis standard of review).

[40] *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* did not apply. *Hosanna-Tabor*, 565 U.S. at 189-90.

[41] 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 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 (quotation marks omitted).

[42] *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); Garnett, *supra* note 20 at 39 ("[T]he differentiation of religious and political authorities is, like 'separation of powers' and 'federalism,' both a structural feature of our Constitution and an arrangement that contributes to its success."); *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). The structural nature of church autonomy doctrine as derived from the plain text of the First Amendment is a point developed *infra* Part II.

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

character means that institutional religion is vested with a discrete zone of reserved operations.[44]

One sees this demonstrated, for example, in cases like *Hosanna-Tabor*—the authority to hire, promote, and discharge a religious functionary is reserved to the church alone. Once the High Court determined that the teacher's job description fell, at least in part,[45] 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.[46] Rather, as the Chief Justice wrote, once 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.[47]

When it applies, therefore, the theory of church autonomy gives rise, in the first instance, to an immunity from being sued over matters in the zone.[48] This means that the immunity here is not just a defense as to liability.[49] Rather, it is a bar to litigation. That means that when the ministerial exception puts and end to an employment discrimination claim, it also puts an end to claims of harassment, hostile environment, and retaliation,[50] as well as a tort or breach of contract claim, arising out of the same set of operative facts.[51] Therefore, civil

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[44] These reserved operations are the six subject matters listed in the text *supra* notes 21-27.

[45] 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 solved by a stopwatch." 565 U.S. at 193. 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.

[46] *Id*. at 194-95.

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

[48] *Hosanna-Tabor*, 565 U.S. at 196 (the "ministerial exception *bars . . . a suit*") (emphasis added).

[49] 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 32, 41-47 and accompanying text. A federal court, of course, has no authority to ignore constitutional structure. In *Hosanna-Tabor*, for example, 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*, 80 U.S. at 733 (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. *See generally* Lael D. Weinberger, *Is Church Autonomy Jurisdictional?* 54 LOYOLA U. CHI. L.J. 471 (2022).

[50] *See* Demkovich v. Saint Andrew the Apostle Par., Calumet City, 3 F.4th 968 (7th Cir. 2021) (en banc) (holding that the ministerial exception does apply to employment discrimination claim alleging hostile work environment or sexual harassment); Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238 (10th Cir. 2010) (same).

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

discovery should be limited to church autonomy issues until it is resolved whether the lawsuit is indeed a church autonomy case.[52] If it is, the suit must be immediately dismissed.[53] If it is not an autonomy case, then discovery on the merits may resume and the case proceed with trial preparation.[54] For a religious organization to be a party to litigation, without more, is not within the scope of church autonomy.[55]

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

[52] *See Our Lady of Guadalupe*, 140 S. Ct. at 2060; McCarthy v. Fuller, 714 F.3d 971, 975 (7th Cir. 2013); Demkovich v. St. Andrew the Apostle Parish, 3 F.4th 968, 980-82 (7th Cir. 2021) (en banc); and EEOC v. Catholic Univ. of Am., 83 F.3d 455, 466-67 (D.C. Cir. 1996).

[53] 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 prerequisite to the matter falling within the sphere of church autonomy (see the six topics listed *supra* notes 21-27 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 they 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, limited discovery should be allowed on the motion to dismiss.

[54] 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 circuits have denied an interlocutory appeal. *See* Faith Bible Chapel Int'l v. Tucker, 36 F.4th 1021 (10th Cir. 2022) (rejecting interlocutory appeal), *reh'g en banc denied*, 53 F.4th 620 (10th Cir., filed Nov. 15, 2022) (split 6 to 4); Belya v. Kapral, 59 F.4th 570 (2d Cir. 2023), *denying rehearing en banc by 6-6 vote on panel opinion at* 45 F.4th 621 (2d Cir. 2022) (rejecting interlocutory appeal); Garrick v. Moody Bible Institute, 2024 WL 1154135 (7th Cir. Mar. 18, 2024) (panel split of 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, as well as indicative of a public interest—not just 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, is causing an ongoing invasion of the autonomy of the religious institution not redressable after trial by suing the judge.

[55] 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 violate 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 if always the cause of 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 Eastern 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 particular course of litigation has the government taking sides in a religious question does it rise to a matter of church autonomy. It is not the litigation and attendant discovery, without more, that invades 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.

The *Hosanna-Tabor* Court indicated that refinements concerning identifying the package of subject matters that fall into the zone of church autonomy and those that do not, are to be found in a particular chapter of our nation's founding.[56] This methodology is a type of interpretive originalism, albeit the Court did not use the term originalism to characterize what it was doing.[57] 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 Church of England. This makes sense, in the first instance, because all thirteen states in rebellion were 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 opposed by patriots.

Chief Justice Roberts began this reliance on English church history by acknowledging that the Magna Carta of 1215 A.D. promised independence for the Church, but quickly added that the promise was not kept.[58] The binding history in *Hosanna-Tabor* begins in earnest with Henry VIII establishing the Church of England, confirmed by Parliament in 1534.[59] The Court's opinion then moves forward to the struggles in England over a forced religious uniformity with the aim of stabilizing the nation's politics. Political unity was substantially achieved under Elizabeth I, but not without religious resistance. This religious imposition set in motion, for example, the Pilgrim and later Puritan immigrations to New England, the Quaker founding of Pennsylvania, and Catholics taking refuge in Lord Baltimore's Maryland. This dissenter immigration contrasted with America's more southern colonies where the established Church of England accompanied commercially minded settlers making their way to the New World. 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, then 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.[60]

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[56] *Hosanna-Tabor,* 565 U.S. at 182-85.

[57] The use of history prior to 1789 can provide legitimate evidence of the First Amendment's original meaning. And in so far as the Court is not relying on post-ratification history, the Court's interpretive method is not open to criticism as unfaithful to originalism. *See* Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477 (2023) (challenging the Supreme Court when it says it is doing originalism but relies on post-ratification events). *See generally* Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs, Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433 (2023) (arguing that the Court can embrace history within an originalist framework, but it should reject the idea that history can justify departures from the original public meaning of the constitutional text). *Cf*. DONALD L. DRAKEMAN, THE HOLLOW CORE OF CONSTITUTIONAL THEORY: WHY WE NEED THE FRAMERS 102-14, 144-52, 201-05 (Cambridge Univ. Press 2020) (arguing that a search for original public meaning does not work with respect to the Establishment Clause, thus the better interpretive rule is to look to the intent of the framers).

[58] 565 U.S. at 182.

[59] *Id.*

[60] *Id.* at 183.

It follows that the American frame (or "background," to use the term from *Hosanna-Tabor*) for the avoidance of government cooptation of religious entities is to eschew the founding-era practices of Great Britain with respect to the established Church of England.

From among America's organic documents, *Hosanna-Tabor* assumes *sub silentio* that the Religion Clauses of the First Amendment are the text for grounding the doctrine of church autonomy. The amendment was drafted by the First Congress in 1789 and ratified by the states during the balance of that year and throughout 1790. It seemed fitting, then, that the Chief Justice immediately followed the "background" passage quoted above with a short reference to the floor debates over the text of the Establishment Clause and Free Exercise Clause during the First Congress, as well as to acknowledge the heightened role in that law-making process that was played by James Madison, Jr.[61] But, when discussing church autonomy, the First Amendment is referenced in *Hosanna-Tabor* not as the locus of a closely negotiated text yielding a singular public meaning at the point in time it was ratified and became positive law,[62] but more as bracketing a founding period during which American patriots rejected Old World establishmentarian practices and, for example, proceeded in the period 1776–1800 to disestablish religion in six (North Carolina, New York, Virginia, Georgia, South Carolina, and Maryland) of the nine original states where there were still religious establishments at the outset of the revolution.[63]

At the federal level, where there never was an established or national church, from 1789 forward there was a presumption that religious bodies operated independent of the new government. To be sure, most states in New England (Massachusetts, Connecticut, New Hampshire, and soon Vermont[64]) still retained their church establishments. These four states were free to keep, modify, or abandon their Congregational Church establishments, because the Bill of Rights (including the no-establishment phrase of the First Amendment) only bound the federal government.[65] Accordingly, going forward from 1789 the inaugural federal government, in contrast to the preexisting thirteen states, as well as soon to be added states like Vermont, was denied power to "make . . . law[s] respecting an establishment of religion." This means that in following the interpretive rule in *Hosanna-Tabor,* judges should look only to

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[61] *Id.* at 183-84 (Madison stating that the form of the no-establishment text then being considered addressed the fear that, "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform").

[62] *See supra* note 57 and accompanying text (discussing originalism).

[63] At one time eleven of the original thirteen states had a religious establishment. Rhode Island and Pennsylvania were the two exceptions. Moreover, Delaware and New Jersey were always religiously plural, albeit decidedly Protestant. Only the Congregational establishments in Massachusetts, Connecticut, and New Hampshire survived into the nineteenth century. *See generally* DISESTABLISHMENT AND RELIGIOUS DISSENT: CHURCH-STATE RELATIONS IN THE NEW AMERICAN STATES, 1776-1833 (Carl H. Esbeck and Jonathan J. Den Hartog, eds., 2019).

[64] Vermont was admitted to the union as the fourteenth state on March 4, 1791.

[65] The Free Exercise Clause was not applied to the states until 1940, and the Establishment Clause was not so applied until 1947. *See* Everson v. Board of Education, 330 U.S. 1 (1947); Cantwell v. Connecticut, 310 U.S. 296 (1940). Both applications were made possible by way of the Fourteenth Amendment, which was not adopted until 1868.

early federal laws and practices—not the various and sometimes contradictory practices in the early states—to help determine the First Amendment's scope for church autonomy.[66]

The *Hosanna-Tabor* Court illustrates just such a focused reliance on a federal-only "background" with its discussion of two early applications of the First Amendment as the source text limiting the federal government. The first was in 1806 by then Secretary of State James Madison.[67] The second did not come until 1811, and involved the same James Madison, albeit now as President.[68] The dates of 1806 and 1811 are well-removed, of course, from the First Amendment's drafting and ratification in 1789-90. But, again, what explains these leaps in time is that the interpretive methodology in *Hosanna-Tabor* is not a search for the original public meaning at the instant in time that the First Amendment became positive law. Rather, church autonomy theory is about the new federal government rejecting any authority to setup a national religion, a concept given definition by the founders' rejection of a Church of England model, including how the spurning of governmental authority to establish and govern the internal operations of a church was understood in the early national period by federal officials (and former founders) implementing federal law.

The *Our Lady of Guadalupe* Court followed the same pattern in its reliance on history. The two anti-establishmentarian practices on display in *Hosanna-Tabor* were again brought to bear on employment discrimination litigation and the dismissal by a religious school of an elementary teacher. The Court rehearsed the accounts of the establishment of the 16th century Church of England and the Crown's involvement in the appointment of high church clerics, parliamentary-enforced uniformity of creed, liturgy, and sermons, the Church of England's common book of prayer as a point of political unity following the 1660 Restoration of the Stuart lineage by seating Charles II, and the Crown's religious test for admission to university and appointment to faculty.[69] Finally, the Court in *Our Lady of Guadalupe* called out the Church of England for its heavy-handed regulation in the colonies of Maryland and New York, where both clergy and teachers in church-sponsored schools had to be licensed by the government and had to take an oath of allegiance to the king.[70] For the Court, these colonial laws were relevant in the negative in that they preceded adoption of the First Amendment and thus helped to

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[66] In the decades before the Civil War, multiple states adopted laws limiting the amount of real estate that could be held by a church or the amount of assets that a church could accumulated. *See* Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Property and Power Before the Civil War*, 162 U. PENN. L. REV. 307 (2014). These mid-nineteenth century laws implicated church autonomy in some states and were the result of radically individualistic claims of religious liberty among Protestant populists, even claims to be at liberty from one's church hierarchy and its professional clergy. *See* NATHAN O. HATCH, THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY (Yale Univ. Press 1989). This was state legislation, however, and thus these occasional laws are not the subject of the Court's interpretive rule in *Hosanna-Tabor*. The latter rule arose from federal actors and these gave rise to the doctrine of church autonomy.

[67] Madison as Secretary of State under President Thomas Jefferson declined to involve the U.S. in the appointment of a Catholic bishop in the Louisiana Territory. 565 U.S. at 182.

[68] *Id.* at 184-85. The second episode had Madison as President vetoing a bill to incorporate an Episcopal church in the District of Columbia.

[69] 140 S. Ct. at 2061.

[70] *Id.* at 2062.

identify the sort of intermeddling that America's founding generation was spurning when they rejected the establishment of a national religion.[71]

The intense opposition by most Americans to a formation of a Church of England bishopric on this side of the Atlantic reinforced the founders' desire for a complete avoidance by the nascent federal government in guiding the life and operation of churches here in America. This is illustrative of what it meant to be, as *Hosanna-Tabor* put it, an American patriot "[f]amiliar with life under the established Church of England,"[72] and rejecting such a model by disempowering the federal government in matters of creed, liturgy, and internal church governance.[73] This government-church separation, however, did not imply a general privatization of religion. Unlike the French Revolution, the American Revolution was not hostile to religion.[74] Religion in America continued to bear on the morals and values of citizens, how they voted, and the morality underlying the laws their representatives enacted.[75]

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[71] For examples of this methodology in the lower courts, *see* Conlon v. InterVarsity Christian Fellowship, 777 F.3d 829, 832-33 (6th Cir. 2015). *See also* Judge Oldham's dissent in McRaney v. North Am. Mission Bd. of S. Baptist Convention, 980 F.3d 1066 (5th Cir. 2020).

[72] *Hosanna-Tabor*, 565 U.S. at 183.

[73] Presumably the Chief Justice confined his examples to the first generation of federal officials because these were the individuals earlier involved in the formation of the nonestablishment and free exercise clause of the First Amendment. If *Hosanna-Tabor* had drawn from a longer period, one reaching events as distant as post-Civil War, one would find that the respect for church autonomy was more uneven. For example, the federal government forcing the Mormon Church into receivership over polygamy raised issues of church autonomy that largely went unaddressed. *See* Late Corporation of the Church of Jesus Christ of Latter-day Saints v. U.S., 136 U.S. 1 (1890); SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA 208-20 (U. of N.C. Press 2002). On the other hand, in much the same period the strong consensus in Congress that churches must be exempt from nondiscrimination legislation under the Civil Rights Act of 1875 is a clear instance of the federal government being highly supportive of church autonomy. *See* NATHAN S. CHAPMAN AND MICHAEL W. MCCONNELL, AGREEING TO DISAGREE: HOW THE ESTABLISHMENT CLAUSE PROTECTS RELIGIOUS DIVERSITY AND FREEDOM OF CONSCIENCE 175-77 (Oxford Univ. Press 2023).

[74] THOMAS S. KIDD, GOD OF LIBERTY: A RELIGIOUS HISTORY OF THE AMERICAN REVOLUTION 1-10, 97-128 (Basic Books 2010); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 pp. 8-9, 60, 114-19, 427-28 (Univ. of North Carolina Press 1998). Americans were a religious people, and even more so with the onset of the Second Great Awakening. GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815 pp. 576-77 (Oxford Univ. Press 2009) [hereinafter "WOOD, LIBERTY"]; JOHN H. WIGGER, TAKING HEAVEN BY STORM: METHODISM AND THE RISE OF POPULAR CHRISTIANITY IN AMERICA 3-9, 11-13, 17-19 (Oxford Univ. Press 1998). Additionally, churches and their related charitable ministries eagerly embraced the nonprofit corporate form then becoming widely available under the laws of the states and they rapidly began to build the private voluntary sector that forms much of what today we call civil society. WOOD, LIBERTY at 485-95.

[75] The no-establishment text worked a separation of sorts of the institutions of religion from the institutions of the federal republic. While the institutions of church and government can be separate, religion and politics cannot. Such a disjunction would rob believers and the organizations they form of a freedom enjoyed by all others. Churches and other houses of worship appropriately speak to how their teachings bear on social and political issues, all consistent with their right to freedom of speech. On the right of clergy and churches to speak on political matters, see Justice Brennan's concurring opinion in McDaniel v. Paty, 435 U.S. 618, 641 (1978) (plurality opinion) (striking down state law disqualifying clergy from holding public office).