

JUDICIAL POWER AND CHURCH AUTONOMY

*Branton J. Nestor**

The church autonomy doctrine limits judicial power. The doctrine provides important protections for religious institutions in our constitutional system. It protects the right of religious institutions to decide matters of church government, faith, and doctrine without improper interference from secular authorities. But while the doctrine has both deep historical roots and broad contemporary acceptance, there remain several challenging questions of exceptional importance that split courts and divide scholars. One question that has provoked significant debate is the relationship between church autonomy and judicial power. Does church autonomy limit the judicial power of civil courts to adjudicate suits implicating matters of church government, faith, and doctrine? And if so, what mandatory limits or prudential safeguards on the exercise of judicial power must or should be respected by civil courts? Given the Supreme Court's commitment to interpreting the Religion Clauses by reference to historical practice, the origins and historical understanding of the doctrine are relevant to drawing the line between judicial power and church autonomy. But that history and its implications remain underdeveloped.

This Article suggests that the church autonomy doctrine, viewed in light of its history and tradition, imposes broad limits on the power of civil courts to exercise judicial review over matters of church government, faith, and doctrine reserved to ecclesiastical authorities. The church autonomy doctrine as it developed in historical practice limited the power of civil courts to exercise jurisdiction over or to inquire into ecclesiastical matters reserved to competent ecclesiastical authorities. Such limitations on judicial power over ecclesiastical matters were grounded in a trifecta of free exercise, non-establishment, and voluntary-association principles—which preserved an important

© 2025 Branton J. Nestor. Individuals and nonprofit institutions may reproduce and distribute copies of this Article in any format at or below cost, for educational purposes, so long as each copy identifies the author, provides a citation to the *Notre Dame Law Review*, and includes this provision in the copyright notice.

* Fellow, Stanford Constitutional Law Center (2024–25). Thanks to Stephanie Barclay, Daniel Blomberg, Samuel Bray, Jud Campbell, Anthony Deardurff, Marc DeGirolami, Kellen Funk, Rick Garnett, Christopher Lund, Michael McConnell, James Phillips, Lee Otis, Owen Smitherman, Lael Weinberger, and Judges O'Scannlain and Richardson, as well as to participants at the Stanford Constitutional Law Center Works-In-Progress Workshop, Notre Dame Law & Religion Junior Faculty Conference, and Federalist Society Junior Scholars Colloquium. Thank you as well to the Volume 100 editors of the *Notre Dame Law Review*.

sphere of church autonomy. There were, to be sure, limits to the doctrine’s substantive protections and procedural safeguards—and even if civil courts agreed on broad church autonomy principles, they debated how to work out the line between church autonomy and judicial power in judicial practice—and the line between church authority and civil courts evolved and developed over time. But the main point, for present purposes, is to suggest that the church autonomy doctrine, as it settled in American judicial practice, generally limited the power of civil courts to exercise judicial power over matters of church government, faith, and doctrine—and these limitations both protected religious freedom from judicial interference and prevented judicial authorities from violating non-establishment principles. In doing so, the church autonomy doctrine entrenched important safeguards that limited the power of civil courts to trudge into matters of church government, faith, and doctrine—suggesting some important lessons for civil procedure and church autonomy today.

- INTRODUCTION 1902
- I. HISTORY AND TRADITION OF CHURCH AUTONOMY 1907
 - A. *Church Autonomy Before the Constitution* 1907
 - 1. English Common Law Tradition 1907
 - 2. American Colonies and Early Independence 1910
 - B. *Church Autonomy During the Framing* 1911
 - 1. Expanding Free Exercise and Growing Disestablishment 1912
 - 2. Early Church Autonomy Episodes 1914
 - C. *Church Autonomy and Judicial Power* 1916
 - 1. Substantive Scope: Protection for Ecclesiastical Institutions 1918
 - a. Faith and Doctrine 1919
 - b. Church Government and Discipline 1919
 - 2. Procedural Scope: Limitations on Judicial Review 1920
 - a. Limitations on Jurisdiction 1921
 - i. Early Federal Doctrine 1921
 - ii. Early State Doctrine 1926
 - b. Limitations on Inquiry and Interference 1931
 - i. Early Federal Doctrine 1931
 - ii. Early State Doctrine 1933
 - 3. Limitations 1939
 - a. Substantive Limitations 1939
 - b. Procedural Limitations 1940
 - i. Jurisdictional Review 1940
 - ii. Fraud or Collusion Review 1944
 - iii. Arbitrariness and Procedural Review 1946
 - iv. Religious Questions 1948
 - D. *Modern Developments and Expansion* 1953
 - 1. Constitutionalization 1953

- 2. Withering Exceptions1954
- 3. Broader Shifts.....1954
- II. IMPLICATIONS.....1955
 - A. *General Lesson: Church Autonomy Limits Judicial Power*1956
 - B. *Specific Applications for Modern Civil Procedure*1959
 - 1. Order of Operations1959
 - a. Mandatory.....1960
 - i. Non-Establishment.....1966
 - b. Prudential.....1968
 - 2. Interlocutory Appeals1971
- III. CONCERNS AND RESPONSES1977
 - A. *Methodological and Historical Concerns*.....1978
 - 1. Methodological Concern.....1978
 - 2. Historical Concern.....1980
 - B. *Normative Concerns*.....1983
 - 1. Neutrality Concern.....1983
 - 2. Institutional Concern.....1985
 - 3. Practical Concern.....1990
- CONCLUSION.....1993

INTRODUCTION

The church autonomy doctrine limits judicial power. The doctrine—which prohibits civil government from exercising secular authority over internal ecclesiastical matters—provides important protections for religious liberty in our constitutional system. It protects the right of religious institutions “to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”¹ While early courts grounded the doctrine in a “broad and sound view of the relations of church and state under our system of laws,” the contemporary Supreme Court has explained that the doctrine is now constitutional.² It reflects the mandates of both the Free Exercise Clause (which prevents the government “from interfering with the freedom of religious groups”³) and the Establishment Clause (which “prohibits government involvement in such ecclesiastical decisions”⁴).⁵ Under our constitutional system, “whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them”⁶—and civil courts have traditionally maintained that they exercise no “jurisdiction” over or power to “inquire into” ecclesiastical decisions protected by the church autonomy doctrine.⁷

But while the church autonomy doctrine has deep historical roots,⁸ and broad acceptance in contemporary doctrine (notwithstanding scholarly clashes over the doctrine’s validity and contours),⁹ there remain several challenging questions of exceptional importance that split courts and divide scholars. These debates include questions about the doctrine’s substantive protections (e.g., whether/when the doctrine permits applying neutral legal principles to ecclesiastical

1 *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 186 (2012) (quoting *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952)); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020) (quoting *Kedroff*, 344 U.S. at 116); see, e.g., Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981).

2 *Hosanna-Tabor*, 565 U.S. at 185 (quoting *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1872)).

3 *Id.* at 184.

4 *Id.* at 189.

5 U.S. CONST. amend. I.

6 *Watson*, 80 U.S. (13 Wall.) at 727.

7 *Id.* at 733.

8 See *Hosanna-Tabor*, 565 U.S. at 182–87 (tracing the history); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2061–62 (2020) (building out the history).

9 *Hosanna-Tabor*, 565 U.S. at 186; *Our Lady*, 140 S. Ct. at 2061–62.

disputes) and procedural safeguards (e.g., whether the doctrine provides safeguards from suit or just protections from liability). Thoughtful scholars—invoking historical, normative, practical, and other considerations—have carefully fleshed out the lines of debate over the church autonomy doctrine’s validity (should there be such a doctrine?), rationales (what drives the doctrine?), and scope (what does the doctrine cover?).¹⁰

One particularly important line of debate is the relationship between church autonomy and judicial power.¹¹ Does the church

10 For scholarship focused on the church autonomy doctrine generally, see, for example, Laycock, *supra* note 1; and Douglas Laycock, *Church Autonomy Revisited*, 7 GEO. J.L. & PUB. POL’Y 253 (2009). Such scholarship has focused on a few main lines. First, whether the doctrine is grounded in free exercise, non-establishment, and/or other principles. See Carl H. Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J.L. & POL. 445, 461 (2002) (discussing non-establishment); Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789, 1808 n.58 (discussing both non-establishment and free exercise clauses); Laycock, *supra* note 1, at 1373 (discussing free exercise); Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 BYU L. REV. 1633, 1636 (same); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 4 (2000) (same); see also, e.g., Richard W. Garnett, *The Freedom of the Church*, 4 J. CATH. SOC. THOUGHT 59, 81 (2007) (describing various church autonomy doctrines as a “good to be promoted”) [hereinafter Garnett, *The Freedom*]; Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor*, 108 NW. U. L. REV. 1183 (2014) (explaining *Hosanna-Tabor*’s underpinnings and applications); Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1 (2011) [hereinafter Lund, *In Defense*]. See generally Lael Weinberger, *The Limits of Church Autonomy*, 98 NOTRE DAME L. REV. 1253, 1259 (2023) (collecting sources); Michael A. Helfand, *Implied Consent to Religious Institutions: A Primer and a Defense*, 50 CONN. L. REV. 877, 890–91 (2018) (explaining the debate). Second, whether the doctrine is about religious institutions or religious individuals. See, e.g., Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273 (2008) (advocating an “infrastructural” approach, *id.* at 294—and collecting sources) [hereinafter Garnett, *Do Churches*]; Paul Horwitz, *Defending (Religious) Institutionalism*, 99 VA. L. REV. 1049 (2013); Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37 (2002) (grounding the church autonomy doctrine in associational liberties); Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917 (2013) (rejecting religious institutionalism and grounding doctrine in individual liberty interests—and collecting sources). Third, whether the doctrine is practically and normatively defensible. See, e.g., Laycock, *supra* (broadly defending the church autonomy doctrine); Lund, *In Defense*, *supra* (defending the ministerial exception); Weinberger, *supra*, at 1321 (arguing that the church autonomy doctrine adequately captures the normative and practical concerns); Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965 (2007) (raising practical concerns—and collecting sources).

11 For scholarship focused on the doctrine’s civil procedure implications, see, for example, Peter J. Smith & Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 FORDHAM L. REV. 1847 (2018) (viewing the doctrine as limiting the power of civil courts to intervene in ecclesiastical affairs); Mark E. Chopko & Marissa Parker, *Still a Threshold Question: Refining the Ministerial Exception Post-Hosanna-Tabor*, 10 FIRST AMEND. L. REV. 233

autonomy doctrine limit the power of civil courts to exercise judicial review over ecclesiastical decisions? If so, what limits on the exercise of judicial power over ecclesiastical decisions does the church autonomy doctrine mandate or permit? And how does the doctrine interact with a host of other entangled civil procedure questions—including, *inter alia*, order-of-operations, interlocutory appeals, and waiver and forfeiture questions? These and related questions split courts—and generate confusion and uncertainty in the law.¹²

These questions are exceptionally important. They implicate fundamental free exercise, non-establishment, and church-state principles at the core of our system of laws. And they carry great practical importance for churches and other litigants—particularly as the risk of expensive litigation and intrusive review risks draining church resources, warping church decisionmaking, and otherwise infringing on church prerogative within the ecclesiastical domain. Given the Supreme Court’s commitment to interpreting the church autonomy

(2012) (similar); Thomas C. Berg, Kimberlee Wood Colby, Carl H. Esbeck & Richard W. Garnett, *Religious Freedom, Church-State Separation, & the Ministerial Exception*, 106 NW. U. L. REV. COLLOQUY 175 (2011) (similar); Carl H. Esbeck, *An Extended Essay on Church Autonomy*, 22 FEDERALIST SOC’Y. REV. 244 (2021); Paul Horwitz, *Act III of the Ministerial Exception*, 106 NW. U. L. REV. COLLOQUY 156 (2011) (similar); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 118 (2009) (similar); Gregory A. Kalscheur, *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject-Matter Jurisdiction, and the Freedom of the Church*, 17 WM. & MARY BILL RTS. J. 43 (2008); Note, *Constitutional Limitations on State Court Review of Hierarchical Church Judiciary Decisions*, 54 COLUM. L. REV. 435, 436–37 (1954) (similar); Michael J. West, Note, *Waiving the Ministerial Exception*, 103 VA. L. REV. 1861 (2017); Stephen D. Smith, *The Jurisdictional Conception of Church Autonomy*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 19 (Micah Schwartzman et al. eds., 2016); Lael Weinberger, *Is Church Autonomy Jurisdictional?*, 54 LOY. U. CHI. L.J. 471 (2022) (collecting scholarship). Compare Michael A. Helfand, *Religion’s Footnote Four: Church Autonomy as Arbitration*, 97 MINN. L. REV. 1891 (2013) (rejecting the jurisdictional view of church autonomy), and Mark D. Rosen, *Religious Institutions, Liberal States, and the Political Architecture of Overlapping Spheres*, 2014 U. ILL. L. REV. 737 (advocating an alternative approach), with Howard M. Wasserman, *Prescriptive Jurisdiction, Adjudicative Jurisdiction, and the Ministerial Exemption*, 160 U. PA. L. REV. PENNUMBRA 289 (2012).

12 See, e.g., *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) (arguing that church autonomy protects churches from the “very process of inquiry” and litigation (quoting *NLRB v. Cath. Bishop of Chi.*, 440 U.S. 490, 502 (1979))); *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, 980 F.3d 1066, 1067–75 (5th Cir. 2020) (Ho, J., dissenting from denial of rehearing en banc) (arguing that church autonomy provides a constitutionally grounded, mandatory protection that limits judicial review); *McRaney*, 980 F.3d at 1075–82 (Oldham, J., dissenting from denial of rehearing en banc) (same); *Belya v. Kapral*, 59 F.4th 570, 573–82 (2d Cir. 2023) (Park, J., dissenting from order denying rehearing en banc) (same); *Huntsman v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints*, 127 F.4th 784, 800–14 (9th Cir. 2025) (Bumatay, J., concurring) (same); *id.* at 792–800 (Bress, J., concurring in judgment) (similar); see also, e.g., *Palmer v. Liberty Univ., Inc.*, 72 F.4th 52, 79 (4th Cir. 2023) (Richardson, J., concurring in judgment) (grounding the doctrine’s procedural safeguards in prudential concerns).

doctrine by reference to constitutional history and tradition,¹³ the historical origins and traditional understanding of the church autonomy doctrine will be relevant to how these substantive and procedural questions are ultimately answered. And, in particular, they will be relevant to resolving the ongoing debate over whether the church autonomy doctrine provides procedural protections from the very process of litigation itself, or whether it instead operates as an ordinary affirmative defense.

This Article—stepping into this debate—argues that church autonomy limits judicial power. It suggests that the church autonomy doctrine, viewed in light of history, tradition, and precedent, is best understood to limit the exercise of judicial power by civil courts over matters of church government, faith, and doctrine that are reserved to churches under our system of laws. In particular, the church autonomy doctrine embraced by American courts, as it settled in judicial practice, historically and traditionally limited their power to exercise jurisdiction over or to inquire into such protected ecclesiastical decisionmaking—in short, the church autonomy doctrine imposed limitations on judicial review.

This limitation on judicial review emerged in two interrelated ways. First, the church autonomy doctrine was historically understood to limit the “jurisdiction” of civil courts to adjudicate matters covered by the church autonomy doctrine for reasons grounded in free-exercise and non-establishment principles¹⁴—and civil courts traditionally recognized that they could “exercise no jurisdiction” over “matter[s] which concern[] theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them.”¹⁵ Second, the church autonomy doctrine was historically understood to prevent civil courts from inquiring into ecclesiastical matters protected by the doctrine for reasons similarly grounded in free-exercise and non-establishment principles¹⁶—and civil courts traditionally recognized that they could not “inquire” into “question[s] of ecclesiastical cognizance.”¹⁷ In

13 See *Hosanna-Tabor*, 565 U.S. at 182–87; *Our Lady*, 140 S. Ct. at 2061–62; see also, e.g., *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022). This Article takes an ecumenical approach to the methodology and terminology of history and tradition—and recognizes that debate ensues over the proper methodology (and terminology).

14 See *infra* sub-subsection I.C.2.a.

15 *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1872); see, e.g., *Chase v. Cheney*, 58 Ill. 509, 535–38 (1871); *Shannon v. Frost*, 42 Ky. (3 B. Mon.) 253, 258–62 (1842); *State ex rel. Hatfield v. Cummins*, 85 N.E. 359, 360–62 (Ind. 1908); *Hynes v. Lillis*, 170 S.W. 396, 398–400 (Mo. Ct. App. 1914); see also *infra* sub-subsection I.C.2.a.

16 See *infra* sub-subsection I.C.2.b.

17 *Chase*, 58 Ill. at 535, 535–38; see, e.g., *Watson*, 80 U.S. (13 Wall.) at 727–35; *Minister, Elders and Deacons of the Reformed Protestant Dutch Church v. Bradford*, 8 Cow. 457,

doing so, the church autonomy doctrine's limitations on judicial intervention by civil courts reflected both a protection for churches and a disability for courts. It protected the freedom of religious institutions over protected ecclesiastical matters, including against interference by civil courts—reflecting, *inter alia*, the doctrine's free exercise underpinnings. It also prevented civil courts from wielding judicial power to review or inquire into protected ecclesiastical decisions—reflecting, *inter alia*, the doctrine's non-establishment underpinnings. The doctrine on the ground—as early American courts worked out new church autonomy principles in blackletter law—was complicated in practice. The line between church and state was not always clear and not always static—and as many have observed, the church-state line evolved over time.¹⁸ And civil courts—which often engaged with religious law and religious institutions in ways surprising to modern readers—sometimes engaged in marginal civil court review of church decisions for lack of jurisdiction, failure to comply with church procedural and substantive rules, and fraud and collusion.¹⁹ But it is significant that early American courts generally maintained, at a broad level and as the doctrine settled, that churches should generally have authority to decide matters of church government, faith, and doctrine—and that church autonomy principles limited the power of civil courts to exercise judicial review over ecclesiastical matters reserved to ecclesiastical institutions.

The upshot is that the church autonomy doctrine's history and tradition suggest that it limits the power of civil courts to exercise judicial power over matters of church government, faith, and doctrine. History and tradition don't resolve all modern problems. But they do provide some guidance for civil courts today. One general implication is that the church autonomy doctrine imposes at least some limits on the power of civil courts to exercise judicial power over matters implicating church government, faith, and doctrine. It suggests some mandatory limits—prohibiting some suits and barring some forms of judicial review and inquiry. It also suggests some prudential limits—suggesting free-exercise and non-establishment principles that should guide judicial discretion. Debate over the nature and scope of such mandatory and prudential limits is important—but agreeing on the general principle that church autonomy imposes at least some limits on civil courts provides common ground for working out the hard remaining questions. In addition to this general implication, the

504–05, 533 (N.Y. 1826); *Proprietors of the Meeting-House in Hollis St. v. Pierpont*, 48 Mass. (7 Met.) 495, 495–99 (1844); *German Reformed Church v. Commonwealth ex rel. Seibert*, 3 Pa. 282, 289–91 (1846); *Sale v. First Regular Baptist Church*, 17 N.W. 143, 145 (Iowa 1883); *see also infra* subsection I.C.1.

18 *See infra* Part I.

19 *See infra* sub-subsection I.C.3.b.

historical limitations on judicial power imposed by the church autonomy doctrine suggest important implications for contemporary civil procedure—suggesting that the church autonomy doctrine may impose at least some limits on the power of civil courts to exercise jurisdiction over or to inquire into matters of church government, faith, and doctrine in ways relevant to more specific civil-procedure puzzles confronting courts today (e.g., order-of-operations doctrine, interlocutory-appeals doctrine, and waiver and forfeiture). More work remains to be done—more history to plumb, more doctrine to explore. But the point here—and the broad suggestion raised by the discussion below—is that church autonomy historically limited the power of civil courts to exercise jurisdiction over or to inquire into matters of church government, faith, and doctrine, and it imposed those limits to protect, inter alia, free-exercise and non-establishment principles.

I. HISTORY AND TRADITION OF CHURCH AUTONOMY

This first Part traces the history and tradition of the church autonomy doctrine. It focuses on the extent to which the church autonomy doctrine limited judicial review by civil courts. And it explains how the church autonomy doctrine came to rest on a combination of free exercise, non-establishment, and voluntary-association principles as it developed in America. The doctrine was complicated in practice and evolved over time. But it limited judicial power in important ways.

A. *Church Autonomy Before the Constitution*

Church autonomy is older than America. While debate surrounds what history matters to our Constitution, the point here is that the church autonomy doctrine—and the line separating civil and religious authority—is ancient and developed over time.

1. English Common Law Tradition

The origins of the church autonomy doctrine are ancient. The line between religious and secular authority—between the “two kingdoms,” “two swords,” or “two spheres”—existed, in at least some form, from time immemorial. It was embraced by early Christians, familiar in the Middle Ages, and an important principle in Reformation and Enlightenment Europe.²⁰ Although both the principle and the practice of church-state relations were contested (recall the Investiture

20 See, e.g., Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. Rev. 1385, 1391, 1401–14; Esbeck, *supra* note 11, at 268–72; Garnett, *The Freedom*, *supra* note 10, at 59–60, 66–68.

Crisis), the Western tradition broadly embraced the view that there was some line between civil and religious authority—separating the State (the things owed to Caesar) and the Church (the things owed to God).²¹

England had at least *some* acknowledgment of early church autonomy principles.²² Such principles—in at least some form—were recognized by English jurists, embraced by English clerics, and acknowledged by England’s government.²³ One famous manifestation (relied upon by *Hosanna-Tabor*) emerges from Magna Carta—in which the English Crown agreed that “the English church is to be free, and shall have its rights undiminished and its liberties unimpaired.”²⁴ The Crown, in particular, accepted the “freedom of [the Church’s] elections, which is thought to be of the greatest necessity and importance.”²⁵ Such history has often been taken to reflect—at a high level of generality—a deeply grounded understanding of the relationship between church autonomy and civil government that preserved at least some freedom of the Church (and it was generally a single Church—or a limited set of churches) from civil control.²⁶

But “[t]hat freedom in many cases may have been more theoretical than real”—and much of that freedom “did not survive the reign of Henry VIII, even in theory,” as the post-Reformation English government tightened secular control over formerly Catholic ecclesiastical institutions and secured a state-dominated, established church (with some limitations).²⁷ The acts of secular control—ably

21 See, e.g., Garnett, *The Freedom*, *supra* note 10, at 60 (citing GEORGE WEIGEL, *THE CUBE AND THE CATHEDRAL: EUROPE, AMERICA, AND POLITICS WITHOUT GOD* 101 (2005)); see also, e.g., Esbeck, *supra* note 20, at 1589.

22 Weinberger, *supra* note 11, at 489–90; see also FELIX MAKOWER, *THE CONSTITUTIONAL HISTORY AND CONSTITUTION OF THE CHURCH OF ENGLAND* 384–94 (Burt Franklin 1960) (1895); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 182 (2012).

23 See *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, 980 F.3d 1066, 1076–78 (5th Cir. 2020) (Oldham, J., dissenting from the denial of rehearing en banc) (first citing FELIX MAKOWER, *THE CONSTITUTIONAL HISTORY AND CONSTITUTION OF THE CHURCH OF ENGLAND* 384–94 (London, Swann Sonnenschein & Co. 1895); then citing W.R.W. STEPHENS, *THE ENGLISH CHURCH FROM THE NORMAN CONQUEST TO THE ACCESSION OF EDWARD I* (1901); then citing 1 WILLIAM STUBBS, *THE CONSTITUTIONAL HISTORY OF ENGLAND IN ITS ORIGIN AND DEVELOPMENT* 307–08 (6th ed. Oxford, Clarendon Press 1897); and then citing Roland G. Usher, *Nicholas Fuller: A Forgotten Exponent of English Liberty*, 12 AM. HIST. REV. 743, 747–48 (1907)).

24 MAGNA CARTA, ch. 1 (1215), *reprinted in* J.C. HOLT, *MAGNA CARTA* app. 6, at 379 (3d ed., Cambridge Univ. Press 2015) (1965); see also Esbeck, *supra* note 20, at 1407–08.

25 MAGNA CARTA, *supra* note 24, at ch. 1.

26 See, e.g., Weinberger, *supra* note 10, at 1295.

27 *Hosanna-Tabor*, 565 U.S. at 182; see also Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2112–15 (2003).

documented by Professor McConnell and others²⁸—are well-known: the Act of Supremacy 1534 (which made the English monarch the head of the English church),²⁹ the Appointment of Bishops Act 1533 (which gave the English monarch authority to appoint the English church's high officials),³⁰ and the various Acts of Uniformity³¹ (which “tightened further the government’s grip on the exercise of religion,” including by “limit[ing] service as a minister to those who formally assented to prescribed tenets and pledged to follow the mode of worship set forth in the Book of Common Prayer”³²).

There were, to be sure, some enduring limits on the authority of particular secular authorities (like courts) to interfere in certain ecclesiastical matters (like ministerial prerogatives). As Judge Oldham has explained, there was an “ancient” line prohibiting civil courts from adjudicating ecclesiastical matters (even if other secular authorities, such as the Crown and Parliament, retained power here).³³ Two points are most salient. First, during the pre-Reformation Middle Ages, “clergy were categorically exempt from the reach of civil courts,” and “civil courts were powerless to interfere with the matters affecting clergy or other ministerial prerogatives.”³⁴ Second, over time (and even after the Reformation), while “civil and ecclesiastical courts . . . dispute[d] the boundaries of their respective jurisdictions,” there was “little dispute about ecclesiastical jurisdiction over ecclesiastical matters like ministry disputes and discipline,” or about the “jurisdictional line prohibiting civil courts from intruding on [such] ecclesiastical matters.”³⁵ But while the English constitutional tradition recognized a distinction between civil and religious authority—and recognized important (if contested) limits on the authority of civil courts over ecclesiastical matters—the English system had a firmly established church, with significant state control over “matters of church government as well as those of faith and doctrine.”³⁶

28 See McConnell, *supra* note 27, at 2112–15.

29 See Act of Supremacy 1534, 26 Hen. 8 c. 1.

30 See Appointment of Bishops Act 1533, 25 Hen. 8 c. 20.

31 See Act of Uniformity 1559, 1 Eliz. c. 2; Act of Uniformity 1549, 2 & 3 Edw. 6 c. 1; Act of Uniformity 1662, 14 Car. 2 c. 4; see also McConnell, *supra* note 27, at 2112–14.

32 *Hosanna-Tabor*, 565 U.S. at 182.

33 *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, 980 F.3d 1066, 1077 (5th Cir. 2020) (Oldham, J., dissenting from denial of rehearing en banc).

34 *Id.* at 1076 (citing MAKOWER, *supra* note 23, at 384–94).

35 *Id.* at 1077–78 (citing MAKOWER, *supra* note 23, at 392–93) (discussing, inter alia, *Nicholas Fuller’s Case* (1607), 77 Eng. Rep. 1322; 12 Co. Rep. 41).

36 See, e.g., *Hosanna-Tabor*, 565 U.S. at 186 (quoting *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952)); see also McConnell, *supra* note 27, at 2112–14.

2. American Colonies and Early Independence

“Established religion came to these shores with the earliest colonists.”³⁷ While colonial charters and state statutes and constitutions undoubtedly broadened protection for religious belief and exercise in the New World³⁸—and while some colonies certainly “chafed” at or sought to “escape” the national, established Church of England³⁹—established religion “persisted throughout the colonial period.”⁴⁰ Such colonial religious establishments—as Professor McConnell has explained—“assumed two principal forms.”⁴¹ The first form was “an exclusive Anglican establishment in the southern states” (based on “support of the mother country,” and “designed in part to foster loyalty and submission to governmental authorities”).⁴² The second form was “a localized Puritan establishment in the New England states other than Rhode Island” (“based on the intense religious convictions of the people, in the teeth of opposition from the mother country”).⁴³ Such establishments—sometimes driven by theology (establishments make good Christians), sometimes motivated by politics (establishments make good citizens)—were key features of the early American tradition.

Establishments, according to several scholars and judges, had several hallmarks. According to Professor McConnell, these included: (1) mandatory attendance at religious worship services in the state church;⁴⁴ (2) public financial support of the state church;⁴⁵ (3) prohibition of religious worship in other denominations;⁴⁶ (4) use of the state church for civil functions;⁴⁷ (5) limitation of political participation to members of the state church;⁴⁸ and (6) governmental control over the doctrines, structure, and personnel of the state church.⁴⁹ What exactly constituted an “establishment” remains subject to ongoing debate. But it is broadly acknowledged that the sixth category—

37 McConnell, *supra* note 27, at 2115.

38 See, e.g., *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1899 & n.34 (2021) (Alito, J., concurring in judgment) (citing Branton J. Nestor, Note, *The Original Meaning and Significance of Early State Provisos to the Free Exercise of Religion*, 42 HARV. J.L. & PUB. POL’Y 971 (2019)) (collecting literature).

39 *Hosanna-Tabor*, 565 U.S. at 182–83.

40 McConnell, *supra* note 27, at 2116, 2115–16.

41 *Id.* at 2115.

42 *Id.* at 2115–16.

43 *Id.*

44 *Id.* at 2144.

45 *Id.* at 2146.

46 *Id.* at 2159.

47 *Id.* at 2169.

48 *Id.* at 2176.

49 *Id.* at 2131.

government control over ecclesiastical matters—was a significant and widespread feature of colonial and state establishments.⁵⁰

Such government control over church matters took two broad forms. First, states and colonies asserted power over “doctrines and liturgy”—including over church articles of faith, church organization and structure, and other points of church doctrine and liturgy.⁵¹ Second, states and colonies also exercised control over “[a]ppointment of [b]ishops and [c]lergy.”⁵² Even if such state control over religion was not absolute—it was qualified in principle and practice, and sensitive to regional variations and temporal changes—the general rule in early America was not the separation of church and state. It was religious establishment.

B. Church Autonomy During the Framing

“It was against this background that the First Amendment was adopted.”⁵³ “Familiar with life under the established Church of England,” and under early American establishments, the Framers “sought to foreclose the possibility of a national church.”⁵⁴ By forbidding the “establishment of religion” and guaranteeing the “free exercise thereof,” the Religion Clauses ensured that the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices.⁵⁵ “The Establishment Clause prevent[ed] the [federal] [g]overnment from appointing ministers, and the Free Exercise Clause prevent[ed] it from interfering with the freedom of religious groups to select their own.”⁵⁶ This “understanding of the Religion Clauses was reflected”⁵⁷ in the “original public understanding of church autonomy in America”⁵⁸—and, in particular, it was consistent

50 *Id.* at 2131.

51 *Id.* at 2132, 2132–36.

52 *Id.* at 2136.

53 *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 183 (2012); *see also* McConnell, *supra* note 27, at 2107; NATHAN S. CHAPMAN & MICHAEL W. MCCONNELL, *AGREEING TO DISAGREE: HOW THE ESTABLISHMENT CLAUSE PROTECTS RELIGIOUS DIVERSITY AND FREEDOM OF CONSCIENCE* 9 (2023); Weinberger, *supra* note 10, at 1292–93, 1293 n.224.

54 *Hosanna-Tabor*, 565 U.S. at 183.

55 U.S. CONST. amend. I.

56 *Hosanna-Tabor*, 565 U.S. at 184.

57 *Id.*

58 *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, 980 F.3d 1066, 1078 (5th Cir. 2020) (Oldham, J., dissenting from denial of rehearing en banc) (first citing Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1431 (1990); then citing Esbeck, *supra* note 20, at 1420; and then citing Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U L. REV. 346,

with the Framing generation’s recognition of “the jurisdictional boundary between religious and civil authority,”⁵⁹ and the impermissibility of “state interference [in] matters of church government as well as those of faith and doctrine.”⁶⁰ The Religion Clauses reflected, in many ways, a structural restraint—reflecting the “jurisdictional” limitations of the federal government over religion.⁶¹ And it was not only federal law that embraced disestablishment. State practice—long supportive of religious establishments—changed too. The states were not originally subject to the Establishment Clause (which *protected* state-level establishments from federal incursion).⁶² But for various theological and political reasons—and over patriotic debate on both sides—the states also underwent a rapid process of disestablishment, with the last state establishment ending in the 1830s.⁶³ What emerged—over time and with complications—was a general recognition of church autonomy principles that limited the power of civil courts over matters of church government, faith, and doctrine.

1. Expanding Free Exercise and Growing Disestablishment

The Framing generation experienced a significant expansion of free exercise protections and religious disestablishment.⁶⁴ Several converging factors—well-documented by Professor McConnell—explain the rise of free exercise and non-establishment in America. These include, *inter alia*:

- (1) political reactions to the Revolution (Anglican establishments did not survive long in independent America);
- (2) the founding generation’s embrace of Lockean and related philosophical thought (embraced by leading politicians, writers, and political philosophers (e.g., James Madison, Thomas Jefferson, and others), and advanced by religious dissenters and preachers (e.g., Isaac Backus)), which embraced both

354 (2002)); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2061–62 (2020).

59 *McRaney*, 980 F.3d at 1078 (Oldham, J., dissenting from denial of rehearing en banc).

60 *Id.* at 1068 (Ho, J., dissenting from denial of rehearing en banc) (quoting *Our Lady*, 140 S. Ct. at 2055).

61 *See, e.g.*, Esbeck, *supra* note 20, at 1589; VINCENT PHILLIP MUÑOZ, RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING: NATURAL RIGHTS AND THE ORIGINAL MEANINGS OF THE FIRST AMENDMENT RELIGION CLAUSES 166 (2022).

62 *See, e.g.*, MUÑOZ, *supra* note 61, at 175–76; McConnell, *supra* note 27, at 2109.

63 *See* McConnell, *supra* note 27, at 2126; CHAPMAN & MCCONNELL, *supra* note 53, at 43, 73.

64 *See, e.g.*, McConnell, *supra* note 27, at 2109; Nestor, *supra* note 38, at 975.

- (a) a limited civil state, and
 - (b) an acknowledgment of a line between “civil” and “ecclesiastical” authority; and, critically,
- (3) the founding generation’s influence from religious awakenings and the rise of evangelization, which favored preserving room for religious autonomy free from state interference, for a mix of
- (a) practical reasons (established churches and evangelical bodies often conflicted), and
 - (b) religious reasons (disestablishment was viewed as necessary to foster true religion, unsullied by state involvement).⁶⁵

The arguments for and against religious establishment were serious—and, as Professor McConnell has observed, patriots of the Revolution found themselves on both sides of the debate.⁶⁶

These principles converged on broad agreement that there was at least *some* division of authority between secular government and ecclesiastical matters. Perhaps the best restatement of the principle comes from John Locke (who was “indispensable” to the Framers—even if the Framers went farther in protecting religion).⁶⁷ Locke explained that it was “necessary to distinguish exactly the business of civil government from that of religion, and to settle the just bounds that lie between the one and the other.”⁶⁸ While it was “the duty of the civil magistrate, by the impartial execution of equal laws, to secure unto all the people in general, and to every one of his subjects in particular, the just possession of these things belonging to this life,” the “jurisdiction of the magistrate reaches only to these civil concernments . . . it neither can nor ought in any manner to be extended to the salvation of souls.”⁶⁹ This “jurisdictional” view of church-state relations—which broadly echoed the “two kingdoms” and “sphere sovereignty” principles from generations past—remained an important part of the intellectual backdrop for the church autonomy doctrine embraced by founding and framing-generation Americans. Advocates of the Religion Clauses (and their state analogues)—who often went farther than Locke in protecting religious exercise—built on this “jurisdictional”

65 See generally McConnell, *supra* note 27. See CHAPMAN & MCCONNELL, *supra* note 53, at 42–43, 47.

66 See McConnell, *supra* note 27, at 2108.

67 McConnell, *supra* note 58, at 1431, 1443–46.

68 JOHN LOCKE, A LETTER CONCERNING TOLERATION (1689), *reprinted in* JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 215, 218 (Ian Shapiro ed., Yale Univ. Press 2003).

69 *Id.*

conception,⁷⁰ explaining, *inter alia*, that “religious opinions a[re] not the objects of civil government, nor any way under its jurisdiction”⁷¹ (based on, *inter alia*, the “inalienable” nature of religious liberty⁷²), and that the “derivative and limited” “jurisdiction” of civil government did not grant it “authority” over matters of “Religion” (based on, *inter alia*, the lack of civil competence over religion and the risk of corruption of religion through governmental interference).⁷³

2. Early Church Autonomy Episodes

Framing-era American thought maintained that the church autonomy doctrine limited civil authority over ecclesiastical matters in at least some ways—as demonstrated by, *inter alia*, several well-known, Framing-era episodes (summarized only briefly here because already canvassed elsewhere).⁷⁴ These include, among others: (1) President Madison’s refusal to answer Bishop Carroll’s inquiry regarding who should direct the Catholic Church’s affairs in the newly-acquired Louisiana territory based on his view that the “scrupulous policy of the Constitution in guarding against a political interference with religious affairs” prevented the government from even opining on the “selection of ecclesiastical individuals”;⁷⁵ (2) President Madison’s decision to veto a bill incorporating the Protestant Episcopal Church in the District of Columbia based on his view that it “exceeds the rightful authority to which Governments are limited, by the essential distinction between civil and religious functions, and violates, in particular, the . . . Constitution of the United States”;⁷⁶ and (3) President Jefferson’s assurance to the Ursuline Sisters of New Orleans that the “principles of the Constitution [and government of the United States] ‘are a sure guaranty . . . that [their] [i]nstitution will be permitted to govern itself

70 See *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, 980 F.3d 1066, 1078 (5th Cir. 2020) (Oldham, J., dissenting from denial of rehearing en banc).

71 *Id.* (alteration in original) (quoting JOHN LELAND, *THE YANKEE SPY* (1794) [hereinafter JOHN LELAND, *THE YANKEE SPY*], *reprinted in* JOHN LELAND, *THE WRITINGS OF THE LATE ELDER JOHN LELAND* 213, 228 (L.F. Green ed., N.Y. G.W. Wood 1845)).

72 LELAND, *THE YANKEE SPY*, *supra* note 71, at 228.

73 *McRaney*, 980 F.3d at 1079 (Oldham, J., dissenting from denial of rehearing en banc) (quoting James Madison, Memorial and Remonstrance Against Religious Assessments (June 20, 1785), *in* 5 *THE FOUNDERS’ CONSTITUTION* 82, 82 (Philip B. Kurland & Ralph Lerner eds., 1987)).

74 *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 184–85 (2012); Berg et al., *supra* note 11, at 181; Esbeck, *supra* note 11, at 268–72.

75 *Hosanna-Tabor*, 565 U.S. at 184–85 (quoting Letter from James Madison, Sec’y of State, to John Carroll, Archbishop, Archdiocese of Baltimore (Nov. 20, 1806), *reprinted in* 20 *RECS. AM. CATH. HIST. SOC’Y* 63, 63–64 (1909)).

76 *Id.* at 184–85 (quoting 22 *ANNALS OF CONG.* 982–83 (1811) (statement of President James Madison)).

according to its own voluntary rules without interference from the civil authority,”⁷⁷ in addition to other similar episodes.⁷⁸ Such events, as the Court explained in *Hosanna-Tabor*, supported the view that it was “impermissible for the government to contradict a church’s determination of who can act as its ministers,” or other “internal church decision[s] that affect[] the faith and mission of the church.”⁷⁹ Civil government lacked power over these issues. And religious institutions enjoyed freedom over these issues. It was a double-edged jurisdictional limitation.

One important clarification is necessary here. Discussions of the Religion Clauses sometimes invoke the (in)famous “wall of separation” line derived from President Jefferson’s well-known Letter to the Danbury Baptist Association, to suggest a secularized Constitution and an impermeable separation between religion and politics.⁸⁰ But as others have noted, the “wall of separation” metaphor used by President Jefferson—ultimately derived from a letter that President Jefferson arguably used as an excuse “to reprimand his clerical and Federalist opponents and to propagate his own, profoundly anticlerical, vision of the relationship of religion to politics”⁸¹—was a metaphor that “went almost completely unnoticed in the nineteenth century,”⁸² and

was generally misunderstood in the twentieth century: “[W]hat should be regarded as an important feature of religious freedom under constitutionally limited government too often serves as a slogan, and is too often employed as a rallying cry, not for the distinctiveness and independence of religious institutions, but for the marginalization and privatization of religious faith.”⁸³

The basic point is that while church autonomy was an important and acknowledged principle, free-exercise and non-establishment principles did not mean a secular polity. Far from it. Religion, for many

77 Berg et al., *supra* note 11, at 182 (emphasis omitted) (quoting 1 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 678 (1950)).

78 See *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2061–62 (2020); *McRaney*, 980 F.3d at 1079 (Oldham, J., dissenting from denial of rehearing en banc); *Huntsman v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints*, 127 F.4th 784, 806–08 (9th Cir. 2025) (Bumatay, J., concurring) (collecting additional points—and focusing on the Madisonian view).

79 *Hosanna-Tabor*, 565 U.S. at 185, 190.

80 Letter from Thomas Jefferson, President, to the Danbury Baptist Association (Jan. 1, 1802), in 36 THE PAPERS OF THOMAS JEFFERSON 258, 258 (Barbara B. Oberg ed., 2009)

81 *McRaney*, 980 F.3d at 1079 (Oldham, J., dissenting from denial of rehearing en banc) (quoting PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 144 (2002)).

82 *Id.* (citing HAMBURGER, *supra* note 81, at 162–64).

83 *Id.* at 1079–80 (citations omitted) (quoting Richard W. Garnett, *Pluralism, Dialogue, and Freedom: Professor Robert Rodes and the Church-State Nexus*, 22 J.L. & RELIGION 503, 504 (2007)).

Americans, was a public good, even if the state generally lacked authority over religious institutions' ecclesiastical affairs.⁸⁴

C. Church Autonomy and Judicial Power

Church autonomy principles also developed and unfolded in American civil courts—which broadly embraced some account of church autonomy, even if they debated what that principle entailed and how it applied in practice. While it was “some time” before the doctrine fully emerged and developed, civil courts over time generally “confirm[ed] that it [was] impermissible for the government to contradict a church’s determination of who can act as its ministers” or how it should manage its internal, “ecclesiastical” affairs.⁸⁵ The law on the ground was complicated—there was broad agreement on the church autonomy principle, but also substantial disagreement on how to properly achieve and limit that principle in practice. But the basic rule that emerged as the doctrine settled over nineteenth century practice, despite evolutions and complications and murkiness in the historical doctrine (including fascinating exceptions for marginal civil court review, in some circumstances), was that “whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them”⁸⁶—and “over ecclesiastical and religious controversies, ‘civil courts exercise no jurisdiction.’”⁸⁷ Church autonomy, in short, limited judicial power.

The story on the ground was, to emphasize, not without complications. At a broad level, church autonomy—the principle that churches should decide for themselves, free from state interference, matters of church governance, faith, and doctrine—was a significant (if limited and contested) principle in early American practice.⁸⁸ There emerged broad agreement that churches should generally have the freedom to decide church matters—a free exercise principle.⁸⁹

84 See CHAPMAN & MCCONNELL, *supra* note 53, at 43.

85 *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 185 (2012).

86 *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1872).

87 *McRaney*, 980 F.3d at 1080 (Oldham, J., dissenting from denial of rehearing en banc) (quoting *Watson*, 80 U.S. (13 Wall.) at 733).

88 Garnett, *The Freedom*, *supra* note 10, at 74; Lael Weinberger, *The Origins of Church Autonomy: Religious Liberty After Disestablishment* 2–3 (Jan. 6, 2026) (unpublished manuscript) (on file with author); see also, e.g., *Watson*, 80 U.S. (13 Wall.) at 724–35 (collecting cases).

89 See Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 731 (1992); Weinberger, *supra* note 11, at 472, 476–77.

And there emerged broad agreement that states should generally not decide such church matters—a non-establishment principle.⁹⁰ Church autonomy was important. But it was not unlimited. And it did not come preassembled. Early Americans—worried about concentrated power even in religious institutions—limited and qualified church institutional power over temporal matters (e.g., property holdings), even as they carried out disestablishment.⁹¹ Disestablishment, in many ways, reflected a moderated attitude toward religious institutions. Disestablishment rejected (or let lapse) many of the familiar elements of religious establishments.⁹² Disestablishment also leveraged existing black-letter law—including, *inter alia*, corporate law. It offered general incorporation (a significant benefit—once reserved to established churches) to religious institutions more generally, permitting religious institutions to exercise a “positive” and “corporate” religious liberty.⁹³ But—according to some—disestablishment also reflected an attempt “to limit the ability of religious organizations to acquire and hold wealth,” and, as the price of legal incorporation, sought to “impose[] strict controls on church governance, mandating the election of lay trustees to hold and manage church property.”⁹⁴ These limits and conditions—republican and lay-friendly—did not mean that there was no recognition of the freedom of churches to govern church affairs (particularly if the religious institution was not thrust into the temporal sphere, through corporate law or otherwise).⁹⁵ But they did reflect the fact that American courts had challenging problems on their hands. Ultimately, the historical caselaw discussed here broadly supports the view that there was *some* church autonomy principle (i.e., the right of religious institutions to decide matters of church government, faith, and doctrine) and that this principle imposed at least *some* limits on judicial power (i.e., church autonomy limited and shaped the power of civil courts to adjudicate disputes raising ecclesiastical questions). The conception of church autonomy developed over time. The view of churches developed—churches, over time, “no longer counted as sovereign governing bodies and therefore no longer raised the threat of *imperium in imperio*.”⁹⁶ And the understanding of church autonomy, and its blackletter implications, similarly developed—“religious

90 See McConnell, *supra* note 89, at 731; Weinberger, *supra* note 11, at 472, 476–77.

91 See Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Power and Property Before the Civil War*, 162 U. PA. L. REV. 307, 319, 321–22 (2014); Kellen Funk, *Church Corporations and the Conflict of Laws in Antebellum America*, 32 J.L. & RELIGION 263, 269 (2017).

92 See, e.g., McConnell, *supra* note 58, at 1436–37.

93 Funk, *supra* note 91, at 278; see Weinberger, *supra* note 11, at 489.

94 Gordon, *supra* note 91, at 311 (footnote omitted).

95 See, e.g., Weinberger, *supra* note 11, at 476–77; Funk, *supra* note 91, at 265, 268.

96 Funk, *supra* note 91, at 273.

freedom in antebellum America” was, over time, conceptualized as a “positive liberty, a liberty that certain institutions could act in the world of property and contract in meaningful ways,” and “[i]n this sense religious freedom was a corporate freedom, the right of an aggregate to see its institutional rules and actions validated in the state courts.”⁹⁷

Two points warrant emphasis. First, there was broad agreement on the church autonomy principle, and that judicial review should be structured to optimally minimize judicial interference with ecclesiastical decisions. Second, there was significant disagreement on how to put the church autonomy principle into practice. These likely stemmed from disagreements over, *inter alia*, the substantive scope of church autonomy (e.g., which matters were ecclesiastical?), the proper balance between church authority and compelling public interests (e.g., how far to empower churches—given the republican fear of an *imperium in imperio*), and how to implement the church autonomy doctrine in practice in a variety of blackletter legal contexts (e.g., tort law, property and trust law, and corporate law). Thoughtful scholars have weighed in here⁹⁸—and the key point here is that, as complicated and nuanced as church autonomy was, there emerged, over time and over debates, broad agreement that church autonomy imposed at least *some* limits on the judicial power of civil courts over ecclesiastical matters reserved to ecclesiastical authorities.

1. Substantive Scope: Protection for Ecclesiastical Institutions

Start with the doctrine’s substance.⁹⁹ The church autonomy doctrine came to shield matters that “concern[ed] theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them.”¹⁰⁰ Such historical protections for ecclesiastical decisionmaking are broadly consistent with contemporary doctrine—which protects the “right of religious institutions ‘to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.’”¹⁰¹

97 *Id.* at 278.

98 *See id.*; Gordon, *supra* note 91, at 313–35; McConnell, *supra* note 10, at 19–20; Weinberger, *supra* note 11, at 476–77.

99 *See* McConnell, *supra* note 10, at 16–31; Weinberger, *supra* note 11.

100 *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1872).

101 *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020) (quoting *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952)).

a. Faith and Doctrine

The church autonomy doctrine generally shielded “questions of . . . faith [and] ecclesiastical rule, custom, [and] law” from review by civil courts when such questions had been decided by competent church authorities.¹⁰² Such religious questions encompassed, *inter alia*, (1) what religious doctrine to embrace and promote, (2) what liturgical customs to adopt and practice, (3) what church government structure to embrace, (4) whether church leaders and members were in conformity with church doctrine or were otherwise fit to remain within the church, and (5) what ecclesiastical rules and procedures would govern the life of the church and how they applied to particular matters and controversies.¹⁰³ Such protections for ecclesiastical decisionmaking were broadly acknowledged by American courts—which repeatedly acknowledged that questions of “faith,” “doctrine,” and “theology,” and the like were generally reserved to competent religious authorities. There were, of course, challenges. The best way to draw the line between church autonomy and civil power was complicated in both theory and practice. And civil courts were not completely sanitized from religious questions—as explained below, they often undertook circumscribed review of church history, documents, and doctrine in limited circumstances. But there was broad consensus that church autonomy broadly protected the authority of religious institutions over “matters of church government as well as those of faith and doctrine.”¹⁰⁴

b. Church Government and Discipline

The church autonomy doctrine also shielded matters of “ecclesiastical government” and “church discipline.”¹⁰⁵ First, to select what type of church government to adopt. Such authority—which was necessary for a church to decide what type of church it would be—generally included the power (1) to select the general governing structures of the church (e.g., to decide upon the “ecclesiastical government of all the individual members, congregations, and officers” within the church), (2) to decide how to resolve disputes within the church raising ecclesiastical and religious questions (e.g., “to create tribunals for the decision of controverted questions of faith”), and (3) to actually decide ecclesiastical questions—including the meaning and

102 *Watson*, 80 U.S. (13 Wall.) at 727.

103 *See id.* at 726–35 (collecting cases); *see also, e.g.*, Weinberger, *supra* note 10, at 1307–15.

104 Weinberger, *supra* note 11, at 477 (quoting *Kedroff*, 344 U.S. at 115).

105 *Watson*, 80 U.S. (13 Wall.) at 733.

application of “ecclesiastical rule, custom, or law.”¹⁰⁶ Second, to determine who would lead the church. Such authority—which was necessary for a church to decide who would lead the church, embody its faith, and teach its doctrines—generally included the power to (1) hire/fire religious officials within the church, (2) determine the moral standards and doctrinal theology that religious officials must embrace, and (3) to enforce such moral standards—including through church discipline.¹⁰⁷ Third, to decide who would be a part of the church. Such authority—which was necessary to decide what type of religious community to create (and who would be part of the religious body)—included several related powers: (1) to admit/expel church members; (2) to determine the moral standards and doctrinal commitments of church members; and (3) as with ministers, to enforce such moral standards through disciplinary mechanisms (e.g., expulsion or excommunication).¹⁰⁸ These forms of church government and church discipline were broadly reserved, within limits, to religious authorities—and civil courts consistently grounded them in free exercise and non-establishment principles.

2. Procedural Scope: Limitations on Judicial Review

The church autonomy doctrine carried an important procedural dimension, which developed over time, that limited the power of civil courts to exercise judicial review over ecclesiastical matters reserved to competent ecclesiastical authorities—and such limitations safeguarded free exercise and non-establishment principles. Thoughtful scholars have carefully engaged with important features of this law, and this discussion seeks to add a few more historical points to the discussion.¹⁰⁹ While the doctrine on the ground was complicated—particularly as, according to some scholars, Americans balanced religious freedom against republican fears of concentrated institutional power—the prevailing rule that emerged over time was that church autonomy principles limited the power of civil courts over ecclesiastical matters reserved to ecclesiastical institutions. Civil courts lacked jurisdiction over ecclesiastical matters. And even where civil courts had jurisdiction over property or other civil matters, civil courts owed religious institutions deference on ecclesiastical matters.

Perhaps the leading representation of where the doctrine evolved comes from *Watson*, which explained that

106 *Id.* at 729, 728–29; see Weinberger, *supra* note 10, at 1307–15.

107 *Watson*, 80 U.S. (13 Wall.) at 726–35 (collecting cases).

108 *Id.*

109 See Gordon, *supra* note 91, at 325; Funk, *supra* note 91, at 273–82.

whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.¹¹⁰

And where a matter was “strictly and purely ecclesiastical in its character”—including matters concerning “theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them”—the civil courts had no power to exercise “jurisdiction” over or “inquire” into such ecclesiastical decisions by ecclesiastical authorities.¹¹¹ Church autonomy evolved over time—but as the doctrine evolved and settled, church autonomy, in important ways, limited judicial power.

a. Limitations on Jurisdiction

First, civil courts—channeling both free exercise and non-establishment concerns—came to maintain that over matters “strictly and purely ecclesiastical in . . . character”—such as matters of “theological controversy, church discipline, ecclesiastical government or the conformity of the members of the church to the standard of morals required”—the “civil courts exercise no jurisdiction.”¹¹² While the church autonomy doctrine evolved over time, and one can debate whether “jurisdiction” referred to Article III “subject-matter” jurisdiction in the “civil procedure” sense (and future work should flesh out this question), the key point for present purposes is that civil courts understood the church autonomy doctrine to limit their authority to exercise judicial power over ecclesiastical matters reserved to ecclesiastical authorities.¹¹³

i. Early Federal Doctrine

The leading federal example illustrating the church autonomy doctrine’s jurisdictional character comes from the Supreme Court’s landmark decision in *Watson v. Jones*.¹¹⁴ This case involved a property dispute between proslavery and antislavery factions over control of the

110 *Watson*, 80 U.S. (13 Wall.) at 727.

111 *Id.* at 727, 730, 733.

112 *Id.* at 733.

113 See *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, 980 F.3d 1066, 1076 (5th Cir. 2020) (Oldham, J., dissenting from denial of rehearing en banc); see also Weinberger, *supra* note 11, at 476–85.

114 *Watson*, 80 U.S. (13 Wall.) 679; see *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 185–86 (2012) (relying on *Watson*).

Walnut Street Presbyterian Church, located in Louisville, Kentucky.¹¹⁵ The General Assembly of the Presbyterian Church recognized the antislavery faction, and the Supreme Court—applying a “broad and sound view of the relations of church and state under our system of laws”—declined to question the General Assembly’s determination.¹¹⁶ The Court—largely rejecting the English practice of identifying the “true standard of faith in the church organization, and which of the contending parties . . . holds to this standard”—held that

whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.¹¹⁷

The Court indicated that, at least by *Watson*’s time, the church autonomy doctrine was jurisdictional in character—it limited judicial power over ecclesiastical decisions. It explained that while civil courts could take “jurisdiction” over nonecclesiastical matters (e.g., ordinary property rights—what church member owned the farm), they could not take “jurisdiction” over matters “strictly and purely ecclesiastical in . . . character” (e.g., which faction adhered to the “true faith” or whether the church member should be expelled from the church).¹¹⁸ Ecclesiastical authorities, rather than civil courts, must have the final say over matters involving “theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required”—and over disputes that are “strictly and purely ecclesiastical in . . . character,” the “civil courts exercise no jurisdiction.”¹¹⁹ Where a competent church authority had spoken on an “ecclesiastical matter”—a question of “discipline,” “faith,” or “ecclesiastical rule”—that was generally the end of the matter.¹²⁰ According to *Watson*, the “legal tribunals must accept such decisions as final, and as binding on them.”¹²¹ Such “decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself applies for”¹²²—and even where a “civil right depends upon an ecclesiastical matter, [and] it is the civil court and not the ecclesiastical which is to decide . . . the civil tribunal tries the civil right, and no more, taking the ecclesiastical decisions out of

115 *Watson*, 80 U.S. (13 Wall.) at 684–85.

116 *Id.* at 727.

117 *Id.*

118 *Id.* at 733, 727–35.

119 *Id.* at 733.

120 *Id.*

121 *Id.* at 727.

122 *Id.* at 729.

which the civil right arises as it finds them.”¹²³ Such ecclesiastical decisions were “not examinable” by civil courts—and civil courts regularly recognized they had no jurisdiction to review or to correct such ecclesiastical decisions.¹²⁴ This jurisdictional limitation, which sounds in both deference and abstention to modern ears, was ultimately a limitation on judicial power over church matters—ecclesiastical matters were left to ecclesiastical authorities, and civil authorities generally lacked jurisdiction to review or revise such ecclesiastical decisions.

This jurisdictional limitation—which underscored the immense power in drawing the “civil” and “ecclesiastical” line—served important purposes. *Watson* grounded the doctrine in free-exercise, non-establishment, and voluntary-association principles.

In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it.¹²⁵

It further explained:

But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.

Nor do we see that justice would be likely to be promoted by submitting those decisions to review in the ordinary judicial tribunals. . . . It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned

123 *Id.* at 731.

124 *Id.*

125 *Id.* at 728–29.

tribunal in the law which should decide the case, to one which is less so.¹²⁶

Watson explained that the church autonomy doctrine was jurisdictional—and that its jurisdictional limits protected religious institutions from improper interference by civil courts.

Watson explained that its “rule of action” was “founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority.”¹²⁷ Such judicial authority, *Watson* suggested, established that civil courts lacked “jurisdiction” over protected ecclesiastical matters in order to respect free-exercise and non-establishment principles. First—drawing from Kentucky—*Watson* recognized that civil courts “having no ecclesiastical jurisdiction, cannot revise or question ordinary acts of church discipline.”¹²⁸ Second—drawing from South Carolina—*Watson* emphasized that

[i]t belongs not to the civil power to enter into or review the proceedings of a [S]piritual [C]ourt. The structure of our government has, for the preservation of [C]ivil [L]iberty, rescued the [T]emporal [I]nstitutions from religious interference. On the other hand, it has secured [R]eligious liberty from the invasion of the [C]ivil [A]uthority,”

such that “[t]he judgments . . . of religious associations, bearing on their own members, are not examinable.”¹²⁹ Third—drawing from additional states—*Watson* emphasized that (1) the “judicial eye cannot penetrate the veil of the church[,] for the forbidden purpose of vindicating the alleged wrongs of excised members,” and cannot impose the “supervisory power of the civil tribunals”;¹³⁰ (2) in the “administration of ecclesiastical discipline,” a “spiritual court is the exclusive judge of its own jurisdiction, [. . .] and[that] its decision of that question is binding on the secular courts”;¹³¹ and (3) the “decisions of ecclesiastical courts . . . are final[;] as they are the best judges of what constitutes an offence against the word of God and the discipline of the church.”¹³²

126 *Id.* at 729.

127 *Id.* at 727.

128 *Id.* at 730 (quoting *Shannon v. Frost*, 42 Ky. (3 B. Mon.) 253, 258 (1842)).

129 *Id.* at 730–31 (quoting *Harmon v. Dreher*, 17 S.C. Eq. (Speers Eq.) 87, 120 (Ct. App. 1843)) (quote corrected).

130 *Id.* at 731 (quoting *Ferraria v. Vasconcelles*, 23 Ill. 403 (456 original ed.), 408 (1860)).

131 *Id.* (quoting *Chase v. Cheney*, 58 Ill. 509, 541–42 (1871) (Lawrence, C.J., dissenting) (restating the majority position)) (quote corrected).

132 *Id.* at 732 (quoting *German Reformed Church v. Commonwealth ex rel. Seibert*, 3 Pa. 282, 291 (1846)).

Other federal courts—taking *Watson's* line—maintained that the church autonomy doctrine was jurisdictional. First, federal decisions during this period traced *Watson's* line in characterizing the church autonomy doctrine as jurisdictional—explaining that, with some qualifications, where a matter is of “ecclesiastical cognizance, . . . the judgment of the ecclesiastical court is conclusive, and no civil court has jurisdiction or power to revise it, or to question its correctness.”¹³³ Second, federal decisions during this period recognized *Watson's* justifications for the jurisdictional limitations imposed by the church autonomy doctrine—and often tied such jurisdictional limitations to the need to protect religious institutions from undue civil interference and the need to prevent civil courts from becoming improperly involved in religious disputes over which they often said they had neither competence nor cognizance.¹³⁴ As one court explained,

The church as an organized body of members must have laws and ordinances for the regulation of its existence, and for the preservation of its doctrine and discipline, and also to maintain the purity of its membership. Without such laws and ordinances, it would be impossible to maintain discipline and church establishment.¹³⁵

Were civil courts to exercise jurisdiction over such ecclesiastical matters, it would create problems.

[W]here the subject-matter of the judgment or determination of the ecclesiastical court, attempted to be brought under review by a civil court, is of ecclesiastical cognizance, . . . the judgment of the ecclesiastical court is conclusive, and no civil court has jurisdiction or power to revise it, or to question its correctness. To hold otherwise, would be to open the doors of the civil courts and to bring into them, at the election of defeated parties, all charges of the violation of church canons, ordinances, rules of discipline, and for departures from moral standards, instead of having those matters definitively settled within the domain of church government, where, according to established principle and settled policy, they ought to be settled.¹³⁶

133 *Satterlee v. United States ex rel. Williams*, 20 App. D.C. 393, 416–17 (D.C. Cir. 1902).

134 *See id.* at 412–20 (discussing “jurisdiction”—tied to *Watson's* rationales); *Brundage v. Deardorf*, 92 F. 214, 228–29 (6th Cir. 1899) (discussing “jurisdiction”—tied to *Watson's* rationales); *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 139–40 (1872) (explaining there is “no power to revise or question ordinary acts of church discipline, or excision from membership,” *id.* at 139); *United States ex rel. Johnson v. First Colored Baptist Church*, 13 F.2d 296, 297 (D.C. Cir. 1926) (discussing “jurisdiction”); *Gonzalez v. Roman Cath. Archbishop of Manila*, 280 U.S. 1, 16 (1929) (recognizing *Watson's* rule, *abrogated by Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976)).

135 *Satterlee*, 20 App. D.C. at 407.

136 *Id.* at 416–17.

In short, other federal cases—following *Watson's* path—explained that the church autonomy doctrine limited judicial review.

ii. Early State Doctrine

State cases similarly recognized that church autonomy prohibited civil court jurisdiction over protected ecclesiastical decisions.

Start with the mid-nineteenth-century cases. One example illustrating the church autonomy doctrine's jurisdictional character is the Illinois Supreme Court's decision in *Chase v. Cheney*.¹³⁷ In this case, the Illinois Supreme Court refused to enjoin an ecclesiastical court from adjudicating a minister's alleged ecclesiastical offenses (e.g., deviating from the Book of Common Prayer)—explaining that it had no desire “to become [the] *de facto* heads of the church,” and “no right . . . to dictate ecclesiastical law” (or “jurisdiction” to do so).¹³⁸ While “civil courts will interfere with churches . . . when rights of property or civil rights are involved,” they may not “revise the decisions of such associations, upon ecclesiastical matters”¹³⁹—and the “controlling principle” is that “[c]auses spiritual must be judged by judges of the spirituality, and causes temporal by temporal judges.”¹⁴⁰ Here, the court could not “inquire whether the alleged [conduct] is any offense” because the alleged offense was a “question of ecclesiastical cognizance,” and a civil court was “no forum for such adjudication.”¹⁴¹ The reason for this limitation on civil court authority was that the “[f]reedom of religious profession and worship can not be maintained, if the civil courts trench upon the domain of the church, construe its canons and rules, dictate its discipline, and regulate its trials”¹⁴²—and the “church should guard its own fold; enact and construe its own laws; enforce its own discipline; and thus will be maintained the boundary between the temporal and spiritual power.”¹⁴³

Another example illustrating the church autonomy doctrine's jurisdictional character is the Kentucky Court of Appeals' decision in *Shannon v. Frost*.¹⁴⁴ This case involved a property dispute between a local Baptist Church and expelled members of such Church over control of the Frankfurt Baptist Church.¹⁴⁵ The local Church had expelled these members, and the Kentucky court declined to question such

137 *Chase*, 58 Ill. at 527.

138 *Id.* at 535.

139 *Id.* at 537–38.

140 *Id.* at 538 (quotation omitted).

141 *Id.* at 535.

142 *Id.* at 537.

143 *Id.* at 535.

144 *Shannon v. Frost*, 42 Ky. (3 B. Mon.) 253 (1842).

145 *Id.* at 253.

expulsion and held that such expulsion extinguished the expelled members' right to use the church property—explaining that the court, “having no ecclesiastical jurisdiction, cannot revise or question ordinary acts of church discipline or excision,” and the court “cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly . . . cut off from the body of the church,” or otherwise exercise “supervision or control” or offer “redress” regarding such ecclesiastical disputes.¹⁴⁶ In explaining why the civil court lacked “ecclesiastical jurisdiction” over such disputes, the Kentucky court explained:

The judicial eye of the civil authority of this land of religious liberty, cannot penetrate the veil of the Church, nor can the arm of this Court either rend or touch that veil for the forbidden purpose of vindicating the alleged wrongs of the excinded members. When they became members . . . they voluntarily subjected themselves to the ecclesiastical power, and cannot invoke the supervision or control of that jurisdiction by this or any other civil tribunal.¹⁴⁷

If their “sentence be unjust, the only appeal is to the omniscient Judge of all”—and “they can obtain no redress in this [civil] forum,” which lacks “ecclesiastical jurisdiction” over such disputes.¹⁴⁸

These decisions are representative of many other state court decisions. These decisions generally affirmed that

- (1) the church autonomy doctrine was “jurisdictional” in character, and/or limited the “power” of civil courts to adjudicate ecclesiastical matters reserved to ecclesiastical authorities;¹⁴⁹ and

146 *Id.* at 258–59, 261.

147 *Id.* at 259.

148 *Id.* at 258, 261.

149 *See, e.g.*, *Harmon v. Dreher*, 17 S.C. Eq. (Speers Eq.) 87, 120 (Ct. App. 1843) (discussing “review,” “examin[e]” or “inquire”); *German Reformed Church v. Commonwealth ex rel. Seibert*, 3 Pa. 282, 290 (1846) (discussing “supervise”); *Robertson v. Bullions*, 9 Barb. 64, 88 (N.Y. Gen. Term. 1850) (discussing “jurisdiction”), *aff’d*, 11 N.Y. 243 (1854); *State ex rel. Watson v. Farris*, 45 Mo. 183, 197–201 (1869) (discussing “interfere,” *id.* at 197, or “penetrate,” *id.* at 201); *Watson v. Garvin*, 54 Mo. 353, 378 (1873) (per curiam) (discussing “jurisdiction”); *Connitt v. Reformed Protestant Dutch Church of New Prospect*, 54 N.Y. 551, 562–63 (1874) (discussing “review” and “inquire”); *Sale v. First Regular Baptist Church*, 17 N.W. 143, 144–45 (Iowa 1883) (discussing “jurisdiction” and “inquire”); *Nance v. Busby*, 18 S.W. 874, 877–82 (Tenn. 1892) (discussing “jurisdiction”); *Pounder v. Ash*, 63 N.W. 48, 50 (Neb. 1895) (discussing “jurisdiction,” “interfer[e],” and “examine”); *Dees v. Moss Point Baptist Church*, 17 So. 1, 2 (Miss. 1895) (discussing “jurisdiction”); *Waller v. Howell*, 45 N.Y.S. 790, 791–93 (Sup. Ct. 1897) (discussing “jurisdiction” and “province,” *id.* at 791, and “judicial cognizance,” *id.* at 793); *State ex rel. Soares v. Hebrew Congregation “Dispersed of Judah,”* 31 La. Ann. 205, 208 (1879) (discussing “jurisdiction” and “inquire”); *Landis v. Campbell*, 79 Mo. 433, 437–41 (1883) (discussing “jurisdiction,” “inquire,” *id.* at 438

- (2) the church autonomy doctrine's limitations on judicial review were designed to, inter alia,
- (a) protect religious institutions from undue civil court interference (a free-exercise principle),¹⁵⁰ and
 - (b) prevent civil courts from becoming entangled in ecclesiastical disputes or offering ecclesiastical answers—matters over which, inter alia, they lacked authority (a non-establishment principle).¹⁵¹

Church autonomy's jurisdictional divide, in short, both protected churches from interference and kept civil courts in their sphere.

Next take cases from the turn of the twentieth century. One state-court example illustrating the church autonomy doctrine's jurisdictional character during this period is the Indiana Supreme Court's

(quoting *Garvin*, 54 Mo. at 364), and "question"); *Travers v. Abbey*, 58 S.W. 247, 247–48 (Tenn. 1900) (discussing "review," *id.* at 247, "inquire," *id.* at 248, and "jurisdiction," *id.* at 247).

150 See, e.g., *Harmon*, 17 S.C. Eq. (Speers Eq.) at 120 ("The structure of our government . . . secured Religious liberty from the invasion of the Civil Authority."); *Farris*, 45 Mo. at 197–201 (discussing how civil courts will not "penetrate the veil of this church power," *id.* at 201); *Garvin*, 54 Mo. at 378 (discussing the "foundation of religious liberty in Republican governments"); *Soares*, 31 La. Ann. at 207 (discussing the "full and free right" to exercise religion (quoting *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728 (1872)) and "religious liberty" (quoting *Harmon*, 17 S.C. Eq. (Speers Eq.) at 120)); *Nance*, 18 S.W. at 877–82 (discussing "freedom as a church," *id.* at 879—and "the full and free right" to exercise religion and to "organize voluntary religious associations" (quoting *Watson*, 80 U.S. (13 Wall.) at 728)); *Pounder*, 63 N.W. at 50 (discussing how "church should be free from the interference of the courts"—and "the full and free right" to exercise religion and form religious associations (quoting *Watson*, 80 U.S. (13 Wall.) at 728)); *Waller*, 45 N.Y.S. at 791–93 (asserting that "religious liberty" prohibits the "judicial eye" from "penetrat[ing] the veil of the church," *id.* at 793 (quoting *Shannon*, 42 Ky. (3 B. Mon.) at 259)).

151 See, e.g., *Farris*, 45 Mo. at 197–201 (discussing the "total disconnection between church and state," *id.* at 198, and "utter impolicy," *id.* at 197, and "appropriate spheres," *id.* at 198); *Soares*, 31 La. Ann. at 206–09 (discussing the "separation of Church and State," *id.* at 206, and "the establishment of no sect," *id.* at 207 (quoting *Watson*, 80 U.S. (13 Wall.) at 728)); *German Reformed Church*, 3 Pa. at 282, 289–91 (stating that churches are "best judges," and thus avoiding a "sea of uncertainty and doubt," *id.* at 291); *Connitt*, 54 N.Y. at 562 (discussing the "broad and sound view of the relations of church and State"); *Nance*, 18 S.W. at 877–82 (recognizing that "in this country," civil courts have "no ecclesiastical jurisdiction," and law supports "establishment of no [sect]," *id.* at 879 (quoting *Watson*, 80 U.S. (13 Wall.) at 728) (quote corrected)); *Pounder*, 63 N.W. at 48–51 (requiring "church and state be completely severed, or as nearly as may be and can be," and "establishment of no sect," *id.* at 50 (quoting *Watson*, 80 U.S. (13 Wall.) at 728)); *Landis*, 79 Mo. at 437–41 (asserting that individuals "subject themselves" to church authorities and civil courts are "ignorant" of ecclesiastical matters *id.* at 439); *Waller*, 45 N.Y.S. at 791–93 (avoiding "entering [a] wedge whereby the symmetry of our governmental system with regard to church and state might readily be destroyed," *id.* at 792 (quoting *McGuire v. Trs. of of Saint Patrick's Cathedral*, 27 N.Y. St. Rep. 192, 201 (1889))).

decision in *State ex rel. Hatfield v. Cummins*.¹⁵² In this case, an expelled church member turned to the state courts to combat his expulsion, asking the civil courts to issue a writ requiring the church to “hear his appeal,” with the aim of securing his “reinstatement . . . in the church from which he . . . alleged to have been wrongfully expelled.”¹⁵³ The Indiana Supreme Court, however, refused to interfere, explaining that (1) the “right” at issue was “one of religious association and worship,” and no “civil or property right” was involved;¹⁵⁴ (2) the “[c]ivil courts have no jurisdiction and will not pass upon such ecclesiastical matters as expulsion from church membership, in cases where no civil or temporal rights are involved”;¹⁵⁵ and (3) the “settled character of this principle, and the fundamental ground upon which it rests,” were “clearly exhibited” in existing caselaw¹⁵⁶—and the court explained that “[c]ivil courts in this country have no ecclesiastical jurisdiction,” and this lack of ecclesiastical jurisdiction was a necessary principle in “this land of religious liberty.”¹⁵⁷ Accordingly, in a matter such as this—which was “purely ecclesiastical”—the secular courts had no “jurisdiction to supervise and control” the ecclesiastical institution, and the matter must remain outside the “domain of the civil courts.”¹⁵⁸

Another state-court example similarly illustrating the church autonomy doctrine’s jurisdictional character is the Missouri Court of Appeals’ decision in *Hynes v. Lillis*.¹⁵⁹ In this case, a removed priest turned to the state courts—asking the courts to order the local bishop to “reinstat[e]” him to his “spiritual office” and its accompanying emoluments (including his “salary” and ability to occupy “parish property”).¹⁶⁰ The Missouri state court, however, refused to interfere in this ecclesiastical matter and to reinstate the defrocked priest—and the Missouri Court of Appeals explained that, *inter alia*, (1) although if a “right of property be concerned, jurisdiction of secular courts will attach,” “[w]hatever pertained to the government of the church, the discipline of its members, and the duration of service and place of its exercise of the priesthood must necessarily be within the jurisdiction of the ecclesiastical tribunal, to the exclusion of the secular courts of the

152 *State ex rel. Hatfield v. Cummins*, 85 N.E. 359, 360 (Ind. 1908).

153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.* at 360–61 (first quoting *White Lick Q. Meeting of Friends v. White Lick Q. Meeting of Friends*, 89 Ind. 136, 151 (1883); and then quoting *Shannon v. Frost*, 42 Ky. (3 B. Mon.) 253, 259 (1842)).

158 *Id.* at 362 (quoting *Sale v. First Regular Baptist Church*, 17 N.W. 143, 145 (Iowa 1883)).

159 *Hynes v. Lillis*, 170 S.W. 396, 398–400 (Mo. Ct. App. 1914).

160 *Id.* at 396, 398.

country”;¹⁶¹ and (2) the reason that civil courts “have no jurisdiction whatever in such matters, and cannot take cognizance of them at all,” is rooted in the “foundation of religious liberty in Republican governments”;¹⁶² and the basic principles that “[c]auses spiritual must be judged by judges of the spirituality, and causes temporal by temporal judges.”¹⁶³ Accordingly, in a matter such as this—involving the purely ecclesiastical “relation between pastor and the church”—the “civil courts have no jurisdiction.”¹⁶⁴

These decisions are broadly representative of other state-court decisions during this period—maintaining that

- (1) the church autonomy doctrine was “jurisdictional” in character and/or limited the “power” of civil courts to review church decisions on church matters; and
- (2) the church autonomy doctrine’s limitations on judicial review were designed, *inter alia*,
 - (a) to protect religious institutions from improper civil court interference, and
 - (b) to prevent civil courts from becoming enmeshed in ecclesiastical matters—over which, *inter alia*, they lacked authority.¹⁶⁵

Jurisdictional limitations on judicial power, in short, protected ecclesiastical decisionmaking and limited civil court power.

161 *Id.*

162 *Id.* at 398 (quoting *Watson v. Garvin*, 54 Mo. 353, 378 (1873) (*per curiam*)).

163 *Id.* at 400 (quotation omitted).

164 *Id.* at 398 (quoting *Garvin*, 54 Mo. at 378).

165 *See, e.g.*, *Hundley v. Collins*, 32 So. 575, 578–79 (Ala. 1902) (discussing “jurisdiction,” “noninterference,” *id.* at 579, “religious freedom,” and the “separation of state and church,” *id.* at 578); *Morris St. Baptist Church v. Dart*, 45 S.E. 753, 754 (S.C. 1903) (discussing “jurisdiction,” “interfer[ence],” “complete religious liberty, untrammelled by state authority,” and “matters of which [civil courts] have no special knowledge”); *Bonacum v. Harrington*, 91 N.W. 886, 887–88 (Neb. 1902) (discussing “review” (citing on *Pounder v. Ash*, 63 N.W. 48, 50–51 (Neb. 1895) (discussing free-exercise and non-establishment principles))); *Hendryx v. People’s United Church*, 84 P. 1123, 1127 (Wash. 1906) (recognizing *Watson’s* jurisdiction rule and justifications but articulating an exception for “fraudulent scheme[s]”); *Kauffman v. Plank*, 214 Ill. App. 290, 294 (1919) (discussing “exclusive jurisdiction of the church”); *Minton v. Leavell*, 297 S.W. 615, 621–22 (Tex. Civ. App. 1927) (discussing “jurisdiction,” “power,” “religious liberty,” and “separation of church and state,” *id.* at 622); *Moustakis v. Hellenic Orthodox Soc’y*, 159 N.E. 453, 455 (Mass. 1928) (discussing “province of civil courts,” “religious freedom” and avoiding “establish[ing] the courts as the final arbiter in every religious controversy” (emphasis omitted)); *Clapp v. Krug*, 22 S.W.2d 1025, 1026 (Ky. 1929) (stating that civil courts “decline[] to intervene” in “questions of a purely ecclesiastical nature, for there is a constitutional guaranty of freedom of religious profession and worship” and “separation of church and state”).

b. Limitations on Inquiry and Interference

Second, civil courts—similarly channeling both free exercise and non-establishment concerns—came to maintain, over time, that the church autonomy doctrine limited judicial “inquiry” into matters protected by the church autonomy doctrine.¹⁶⁶

i. Early Federal Doctrine

The leading federal example comes again from *Watson v. Jones*—which, as explained, maintained that the “civil courts exercise no jurisdiction” over a matter “strictly and purely ecclesiastical in its character, . . . a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them.”¹⁶⁷ In addition to articulating the church autonomy doctrine’s “jurisdictional” character, the *Watson* Court also articulated a feature of the church autonomy doctrine’s procedural protections that might be understood as a corollary to or alternative manifestation of the doctrine’s jurisdictional character: namely, the extent to which the doctrine prohibited civil courts from “inquir[ing]” into or “question[ing]” such protected ecclesiastical decisions in order to prevent civil court interference in religious disputes.¹⁶⁸

The rule under *Watson*—which reflected a tripartite framework for church property disputes (trusts were effectuated, congregational churches were governed by the ordinary voluntary-association principles, and hierarchical churches were owed deference)—recognized two principles relevant here.¹⁶⁹ First, perhaps undercutting support for the lack-of-competence account of the church autonomy doctrine’s procedural protections (i.e., the view that civil courts lack competence of religious questions—a view most commonly grounded in the Establishment Clause), the *Watson* Court maintained that in, for example, cases of “trusts” dedicated for the teaching of a particular doctrine, although

the task may be a delicate one and a difficult one, it will be the duty of the court in such cases, when the doctrine to be taught or the form of worship to be used is definitely and clearly laid down, to inquire whether the party accused of violating the trust is holding

166 *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727–35 (1872).

167 *Id.* at 733.

168 *See id.* at 727–35.

169 *Id.* at 726–27.

or teaching a different doctrine, or using a form of worship which is so far variant as to defeat the declared objects of the trust¹⁷⁰

—a position in some tension with the principle, embraced by contemporary doctrine but only enjoying mixed support in the early sources, that civil courts lack competence to decide religious questions (e.g., “abstruse problems of theological controversy”).¹⁷¹ Second, providing robust support for the institutional-deference account of the church autonomy doctrine’s procedural protections (i.e., the view that civil courts must defer to competent religious institutions over matters in their domain—a view commonly grounded in both the Establishment Clause and the Free Exercise Clause), the *Watson* Court held that “whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final”¹⁷²—and civil courts could not “inquire into all these matters” (i.e., the “whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of [the] religious denomination”) because doing so would “deprive these bodies of the right of construing their own church laws, would open the way to all the evils” attendant to the since-rejected English doctrine, “and would, in effect, transfer to the civil courts where property rights were concerned the decision of all ecclesiastical questions.”¹⁷³ Ultimately, while there were wrinkles in the doctrine, church autonomy prohibited civil court “inquiry” into or “examination” of religious questions reserved to religious authorities.¹⁷⁴

Next turn to the animating principles. First, limitations on civil court “inquiry” into protected ecclesiastical matters were grounded in free exercise principles—and the *Watson* Court explained that (1) it “belongs not to the civil power to enter into or review the proceedings of a [S]piritual [C]ourt” on spiritual matters because our “structure of . . . government” has “secured [R]eligious liberty from the invasion of the [C]ivil [A]uthority,” and such spiritual matters are not subject to civil court “examin[ation]” or “inquir[y]”;¹⁷⁵ and (2) the “judicial eye cannot penetrate the veil of the church” to review protected ecclesiastical decisions because doing so would undermine the “ecclesiastical power” of the church through interference by the improper

170 *Id.* at 724.

171 *Id.* at 728.

172 *Id.* at 727.

173 *Id.* at 733–34.

174 *See id.* at 727–735.

175 *Id.* at 730–31, 730–34 (quoting *Harmon v. Dreher*, 17 S.C. Eq. (Speers Eq.) 87, 120 (Ct. App. 1843)) (quote corrected).

“supervisory power of the civil tribunals.”¹⁷⁶ Second, the limitations on civil court “inquiry” into ecclesiastical matters were also grounded in non-establishment principles. Starting with the institutional-deference idea, the *Watson* Court explained that

whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them¹⁷⁷

because, among other things, “[i]t is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these [ecclesiastical] bodies as the ablest men in each are in reference to their own,”¹⁷⁸ such that exercising civil court power over such matters would “be an appeal from the more learned tribunal . . . to one which is less so.”¹⁷⁹ Turning to the judicial-competence idea, although the *Watson* Court recognized that civil courts could sometimes engage in the “delicate” and “difficult” task of determining whether a party had violated a trust by “holding or teaching a different doctrine . . . so far variant as to defeat the declared objects of the trust,”¹⁸⁰ the *Watson* Court also maintained that civil courts were generally

incompetent judges of matters of faith, discipline[,] and doctrine; and civil courts, if they should be so unwise as to attempt to supervise [ecclesiastical courts’] judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt[,] which would do anything but improve either religion or good morals.¹⁸¹

ii. Early State Doctrine

State cases similarly recognized that the church autonomy doctrine provided at least some protection from inquiry or review by civil courts into ecclesiastical matters reserved to ecclesiastical authorities.

One example comes from *Reformed Protestant Dutch Church v. Bradford*—a decision in which the state court dismissed suit based on the

176 *Id.* at 731 (quoting *Ferraria v. Vasconcelles*, 23 Ill. 403 (456 original ed.), 408 (1860)).

177 *Id.* at 727.

178 *Id.* at 729.

179 *Id.*

180 *Id.* at 724.

181 *Id.* at 732 (quoting *German Reformed Church v. Commonwealth ex rel. Seibert*, 3 Pa. 282, 291 (1846)) (quote corrected).

church autonomy doctrine.¹⁸² In this case, John Bradford—a minister convicted of drunkenness by a church court and ultimately removed—sued in state court, alleging that the church owed him his salary for the period between his suspension and ultimate removal.¹⁸³ The New York appellate court, however, rejected Bradford’s suit and held that the church’s removal decision could not be challenged in a civil court (and removed any of the minister’s pecuniary interest during the relevant period).¹⁸⁴ Senator Crary—writing in the church’s favor—explained in relevant part that the case should be dismissed because “common law courts are bound to respect [ecclesiastical] proceedings,” due to the “protection [owed to every] denomination in the government of its church.”¹⁸⁵ And even Chancellor Jones—who would have held against the church—agreed that civil courts lacked the authority to disturb such church removal decisions, and that “public investigations in the civil courts”¹⁸⁶ inquiring into the

infidelity and immorality of a minister of the gospel, on a public trial before a court and jury, in an action for his salary, or to conduct an inquiry into the soundness of his faith and religious opinion before a court of justice, would tend to produce unfavorable impressions of religion on the public mind, and . . . scandalize the public ministry of the gospel¹⁸⁷

in addition to other “mischiefs.”¹⁸⁸

Another example comes from *Meeting-House v. Pierpont*—where the state court denied discovery based on the church autonomy doctrine.¹⁸⁹ In this case, a minister (removed by his parish, but reinstated by his ecclesiastical council) sued the parish for backpay, and the parish filed a “bill of discovery” against the minister (designed to require the minister to attest to alleged immorality justifying the parish’s attempt to remove him).¹⁹⁰ But the state court denied the parish’s bill of discovery, explaining that the ecclesiastical council’s decision was “binding on the [parish], and cannot be revised in an action at law,” and the parish was “not entitled to the discovery sought, as the

182 *Minister, Elders and Deacons of the Reformed Protestant Dutch Church v. Bradford*, 8 Cow. 457 (N.Y. 1826).

183 *Id.* at 507–09 (opinion of Jones, C.).

184 *Id.* at 533 (opinion of Sen. Crane).

185 *Id.*

186 *Id.* at 504 (opinion of Jones, C.).

187 *Id.* at 505.

188 *Id.* at 504, 504–05.

189 *Proprietors of the Meeting-House in Hollis St. v. Pierpont*, 48 Mass. (7 Met.) 495, 499 (1844).

190 *Id.* at 495, 495–96.

[minister's] answers to the interrogatories in the [discovery] bill could not be given in evidence in the action at law."¹⁹¹

These examples, although relatively cryptic and potentially subject to competing interpretations, have resonance with other leading state-court decisions at the time—which consistently acknowledged that church autonomy imposed at least some limits on the exercise of judicial power to “inquire” into or “review” matters of church government, faith, and doctrine.¹⁹² These cases, which debated where to draw church autonomy's lines and what forms of civil-court inquiry were impermissible, generally held (1) that civil courts should not “trench upon the domain of the church, construe its canons and rules, dictate its discipline, and regulate its trials,” and should not “inquire” into

191 *Id.* at 496, 499.

192 *See, e.g.*, *Shannon v. Frost*, 42 Ky. (3 B. Mon.) 253, 258–61 (1842) (discussing “ecclesiastical jurisdiction,” “revis[ing] or question[ing],” and “supervision” of ecclesiastical decisions, *id.* at 258–59); *Harmon v. Dreher*, 17 S.C. Eq. (Speers Eq.) 87, 120 (Ct. App. 1843) (discussing the court's power to “review,” “examin[e],” and “inquire”); *German Reformed Church v. Commonwealth ex rel. Seibert*, 3 Pa. 282, 291 (1846) (discussing the court's power to “supervise”); *Walker v. Wainwright*, 16 Barb. 486, 487 (N.Y. Gen. Term 1853) (discussing “jurisdiction” and “inquir[y]”); *Robertson v. Bullions*, 9 Barb. 64, 106–07 (N.Y. Gen. Term. 1850) (discussing limits on civil court to review of ecclesiastical matters), *aff'd*, 11 N.Y. 243 (1854); *Landis v. Campbell*, 79 Mo. 433, 437–41 (1883) (discussing the court's power to “inquire,” “examine,” and “review” and its “jurisdiction,” *id.* at 438–39); *Nance v. Busby*, 18 S.W. 874, 877–82 (Tenn. 1892) (discussing the court's power to “inquire” and “ecclesiastical jurisdiction,” *id.* 878–79); *State ex rel. Watson v. Farris*, 45 Mo. 183, 197–201 (1869) (stating that civil courts may not “revise, modify or impair” purely ecclesiastical decisions, *id.* at 197); *Chase v. Cheney*, 58 Ill. 509, 531, 535–38 (1871) (discussing the court's power to “review” or “inquire,” *id.* at 531 (quoting *Walker* 16 Barb. at 487)); *Connitt v. Reformed Protestant Dutch Church of New Prospect*, 54 N.Y. 551, 557, 562 (1874) (discussing the court's power to “inquire,” *id.* at 562); *Sale v. First Regular Baptist Church*, 17 N.W. 143, 145 (Iowa 1883) (discussing the court's power to “inquire”); *Pounder v. Ash*, 63 N.W. 48, 50–51 (Neb. 1895) (discussing the court's power to “examine” or “review or retr[y],” *id.* at 50); *Travers v. Abbey*, 58 S.W. 247, 247–48 (Tenn. 1900) (discussing “review,” *id.* at 247); *Hundley v. Collins*, 32 So. 575, 578–79 (Ala. 1902) (discussing how the church is “self-governing and amenable to no court . . . in the discharge of its religious functions,” and the “arm of civil authority [is] short to reach it,” *id.* at 578); *State ex rel. Hatfield v. Cummins*, 85 N.E. 359, 360–62 (Ind. 1908) (discussing “jurisdiction” and “pass upon” or “revise or question,” *id.* at 360–61 (quoting *White Lick Q. Meeting of Friends v. White Lick Q. Meeting of Friends*, 89 Ind. 136, 151 (1883))); *Morris St. Baptist Church v. Dart*, 45 S.E. 753, 754 (S.C. 1903) (discussing “consideration” and “inquir[y]”); *Hynes v. Lillis*, 170 S.W. 396, 398–400 (Mo. Ct. App. 1914) (discussing the court's power to “inquire” and “supervis[e]” and the “exclusion of the secular courts” with some exceptions, *id.* at 398–99); *Kauffman v. Plank*, 214 Ill. App. 290, 294 (1919) (discussing the “exclusive jurisdiction of the church”); *Minton v. Leavell*, 297 S.W. 615, 621–22 (Tex. Civ. App. 1927) (discussing “question[s]” and “jurisdiction”); *Moustakis v. Hellenic Orthodox Soc'y*, 159 N.E. 453, 455–56 (Mass. 1928) (discussing how courts do not “entertain litigation where the subject-matter of dispute is strictly and purely ecclesiastical in character”).

“question[s] of ecclesiastical cognizance”;¹⁹³ (2) that civil courts are generally “incompetent judges of matters of faith, discipline and doctrine,” and should not “attempt to supervise [ecclesiastical] judgments,” lest they “involve themselves in a sea of uncertainty and doubt”;¹⁹⁴ (3) that civil courts “cannot inquire” into “purely ecclesiastical question[s]”;¹⁹⁵ and (4) that civil courts “will not inquire into [the] regularity or validity” of “purely disciplinary” decisions relating to the “ecclesiastical constitution and government of the church, and the exercise of its internal affairs.”¹⁹⁶ While, as explained, there were complications in the doctrine—and some state courts inquired into ecclesiastical matters to determine, inter alia, whether the ecclesiastical body had jurisdiction over the matter, whether the ecclesiastical body had acted arbitrarily, and whether a property trust endowed to a particular religious use had been respected—the dominant rule in the state-level church autonomy doctrine was that, where a competent ecclesiastical body had decided an ecclesiastical matter shielded by the church autonomy doctrine, the doctrine’s procedural protections imposed important limits on the power of civil courts to “inquire” into and “examine” the protected ecclesiastical decision.

Next, turn to the animating principles. First, the limitations on civil court “inquiry” into protected ecclesiastical matters were grounded in free exercise principles.¹⁹⁷ State courts—which generally maintained that improper civil court inquiry into ecclesiastical matters would present significant free exercise concerns by interfering with and burdening ecclesiastical institutions—explained that, inter alia, (1) the “judicial eye of the civil authority of this land of religious liberty, cannot penetrate the veil of the Church, nor can the arm of [civil

193 *Chase*, 58 Ill. at 535, 537, 535–38 (dismissing a challenge to a church trial of a minister).

194 *German Reformed Church*, 3 Pa. at 291, 289–91 (dismissing a challenge to church expulsion).

195 *Sale*, 17 N.W. at 145 (dismissing a challenge to church expulsion).

196 *Travers*, 58 S.W. at 247–48 (dismissing a challenge to a pastor’s removal).

197 See, e.g., *Shannon*, 42 Ky. (3 B. Mon.) at 258–61 (discussing “religious liberty,” *id.* at 259); *Harmon*, 17 S.C. Eq. (Speers Eq.) at 120 (discussing “[r]eligious liberty”); *Farris*, 45 Mo. at 197–201 (discussing the “veil of . . . church power,” *id.* at 201); *Watson v. Garvin*, 54 Mo. 353, 377–78 (1873) (per curiam) (discussing “religious liberty,” *id.* at 378); *Pounder*, 63 N.W. at 50–51 (asserting that “the church should be free from the interference of the courts” in ecclesiastical matters, *id.* at 50.); *Hundley*, 32 So. at 577–579 (discussing “religious freedom,” *id.* at 578); *Dart*, 45 S.E. at 754 (discussing “religious liberty”); *Cummins*, 85 N.E. at 360–62 (discussing the “full and free right” to exercise religion and “organize voluntary religious associations” (quoting *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728 (1872))); *Hynes*, 170 S.W. at 398–400 (discussing “religious liberty,” (quoting *Garvin*, 54 Mo. at 378)); *Nance*, 18 S.W. at 877–82 (“freedom as a church,” *id.* at 879); *Minton*, 297 S.W. at 621–22 (discussing “religious liberty,” *id.* at 621); *Moustakis*, 159 N.E. at 455 (discussing “religious freedom” (emphasis omitted)).

courts] either rend or touch that veil for the forbidden purpose of vindicating the alleged [rights] of the excinded members”,¹⁹⁸ (2) civil courts could not “question” or “inquire” 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”¹⁹⁹ because doing so would

open a door to untold evils in the administration of church affairs, not consistent with the principles of religious freedom as recognized in this country, where there is no established church or religion, where every man is entitled to hold and express with freedom his own religious views and convictions, and where the separation of state and church is so deeply intrenched in our constitutions and laws”;²⁰⁰

and (3) civil courts could not generally “enter into the consideration of church doctrine or church discipline,” nor “inquire” into ecclesiastical decisions shielded by the church autonomy doctrine, because “an attempt by the civil courts to deal with [such] matters of which they have no special knowledge . . . would be inconsistent with complete religious liberty, untrammelled by state authority.”²⁰¹

Second, the limitations on civil court “inquiry” into protected ecclesiastical matters were also grounded in non-establishment principles.²⁰² State courts—which sometimes embraced the institutional-

198 *Shannon*, 42 Ky. (3 B. Mon.) at 259, 258–62 (prohibiting civil courts from “revis[ing] or question[ing]” religious-member expulsion, *id.* at 258).

199 *Hundley*, 32 So. at 579 (quoting *Watson*, 80 U.S. (13 Wall.) at 733).

200 *Id.* at 578 (prohibiting civil courts from “question[ing]” religious-member expulsion).

201 *Dart*, 45 S.E. at 754 (prohibiting the civil court’s “inquir[y]” or review of a ministerial-removal decision by a competent church body).

202 See, e.g., *German Reformed Church v. Commonwealth ex rel. Seibert*, 3 Pa. 282, 289–91 (1846) (stating that civil courts are “incompetent judges of matters of faith, discipline and doctrine,” *id.* at 291); *Farris*, 45 Mo. at 197–201 (discussing the “disconnection between the church and state” and recognition of “appropriate spheres,” *id.* at 198); *Chase v. Cheney*, 58 Ill. 509, 535–38 (1871) (discussing the “boundary between the temporal and spiritual power” and how civil courts are not “*de facto* heads of the church” and cannot “inquire” into questions of “ecclesiastical cognizance” because they are not “forum[s] for such adjudication,” *id.* at 535); *Pounder*, 63 N.W. at 48–51 (“[T]he church and state [are] completely severed, or as nearly so as may be and can be with due observance of all proper laws.” *Id.* at 50.); *Hundley*, 32 So. at 577–579 (discussing the “separation of state and church” and asserting that there is “no established church or religion,” *id.* at 578); *Dart*, 45 S.E. at 754 (discussing how civil courts lack “special knowledge” over ecclesiastical matters); *Cummins*, 85 N.E. at 360–62 (discussing the “boundary between the temporal and spiritual power” and how the “law . . . is committed to the support of no dogma[, the] establishment of no sect” *id.* at 361 (first quoting *Chase*, 58 Ill. at 535; and then quoting *Watson*, 80 U.S. (13 Wall.) at 728) (quote corrected)); *Hynes*, 170 S.W. at 398–400 (“Causes spiritual must be judged by judges of the spirituality, and causes temporal by temporal judges.” *Id.* at 400 (citation omitted).); *Nance*, 18 S.W. at 876–82 (relying on *Watson*’s recognition that the

deference approach to the church autonomy doctrine and sometimes embraced the judicial-competence approach to the church autonomy doctrine—generally maintained that improper civil court inquiry into ecclesiastical matters would present non-establishment concerns. They maintained, *inter alia*, (1) that the “proper function[]” of civil courts—viewed in light of the “[h]app[ly] . . . total disconnection between the church and state” in “this country”—prevented civil courts from “penetrat[ing] the veil of . . . church power” and “explor[ing] the whole range of the doctrine and discipline of the . . . church, and survey[ing] the vast field of the Divine Word”;²⁰³ (2) that civil courts are “incompetent judges of matters of faith, discipline and doctrine,” and should not “attempt to supervise [ecclesiastical] judgments,” lest they “involve themselves in a sea of uncertainty and doubt,” and ecclesiastical tribunals are “the best judges of what constitutes an offence against the word of God and the discipline of the Church”;²⁰⁴ (3) that civil courts could not “inquire into” ecclesiastical decisions shielded by the church autonomy doctrine and must generally “hold aloof from controversies in ecclesiastical bodies” because otherwise challenges to such ecclesiastical decisions—which would “crowd the docket”—would risk violating the principle that “[c]auses spiritual must be judged by judges of the spirituality, and causes temporal by temporal judges”;²⁰⁵ and (4) that civil courts could not inquire into purely ecclesiastical questions because, beyond the basic fact that “ecclesiastical courts are the best judges of merely ecclesiastical questions,” such civil court inquiry would risk making civil courts the “de facto heads of the church,” and would also risk diluting the “boundary between the temporal and spiritual power,” burdening the power of the “church [to] guard its own fold[;] enact and construe its own laws[;] [and] enforce its own discipline” free from “subversion” by civil courts.²⁰⁶

“law . . . establish[es] . . . no [sect],” *id.* at 879 (quoting *Watson*, 80 U.S. (13 Wall.) at 728) (quote corrected)); *Minton*, 297 S.W. at 621–22 (discussing the “separation of church and state,” *id.* at 622); *Moustakis*, 159 N.E. at 454–56 (avoiding “establish[ing] the courts as the final arbiter in every religious controversy,” *id.* at 455).

203 *Farris*, 45 Mo. at 198, 201, 197–201 (prohibiting the civil court’s “explor[ation]” of ecclesiastical questions, *id.* at 198).

204 *German Reformed Church*, 3 Pa. at 291 (prohibiting the civil court’s “involve[ment]” in ecclesiastical disputes).

205 *Hynes*, 170 S.W. at 398–400 (quoting *Travers v. Abbey*, 58 S.W. 247, 248 (Tenn. 1900)) (prohibiting the civil court’s “inquir[y]” into minister removal).

206 *Cummins*, 85 N.E. at 361, 360–62 (first quoting *White Lick Q. Meeting of Friends v. White Lick Q. Meeting of Friends*, 89 Ind. 136, 151 (1883); then quoting *Chase*, 58 Ill. at 535; and then quoting *Watson*, 80 U.S. (13 Wall.) at 729) (quote corrected) (declining to “inquire” into a ministerial removal decision (quoting *Chase*, 58 Ill. at 535)).

3. Limitations

There were, however, several important limits to church autonomy. Church autonomy was fundamental. But it was not unlimited.

a. Substantive Limitations

First, there were limits to the church autonomy doctrine's substantive scope—both in terms of (1) what it protected (e.g., matters of church faith, government, and doctrine), and (2) what state interests prevailed notwithstanding such protection (e.g., the public peace, health, and safety).²⁰⁷ Church autonomy was, in many ways, a two-way street—reflecting an ecclesiastical/civil divide. Ecclesiastical authorities had jurisdiction over ecclesiastical matters (e.g., church faith, doctrine, and government). Civil authorities had jurisdiction over civil matters (e.g., public peace and safety and other secular, civil society interests related to tort, property, and contract law).²⁰⁸ *Watson* recognized that proper church-state relations limited both church and state:

The structure of our government has, for the preservation of [C]ivil [L]iberty, rescued the [T]emporal [I]nstitutions from religious interference. On the other hand, it has secured [R]eligious liberty from the invasion of the [C]ivil [A]uthority. . . . [Where] a civil right depends upon an ecclesiastical matter, it is the civil court[,] and not the ecclesiastical[,] which is to decide. [But] [t]he civil tribunal tries the civil right, and no more, taking the ecclesiastical decisions[,] out of which the [civil] right arises[,] as it finds them.²⁰⁹

An ecclesiastical court cannot resolve matters reserved to civil authorities (e.g., matters of criminal law, or civil law, such as property rights or other civil interests).²¹⁰ But an ecclesiastical court can resolve ecclesiastical matters—and civil courts “exercise no jurisdiction” over matters “strictly and purely ecclesiastical.”²¹¹ In addition, *Watson* and other leading decisions also recognized that church autonomy had important limiting principles—and early American courts suggested limits to religious exercise which “violate[d] the laws of morality and property,” or “infringe[d] personal rights.”²¹²

207 See *Watson*, 80 U.S. (13 Wall.) at 733; Weinberger, *supra* note 10, at 1259 (collecting literature).

208 See *Watson*, 80 U.S. (13 Wall.) at 730; see also *supra* notes 149–51, 1565–192, 197, 202.

209 *Watson*, 80 U.S. (13 Wall.) at 730–31 (quoting *Harmon v. Dreher*, 17 S.C. Eq. (Speers Eq.) 87, 120–21 (Ct. App. 1843)) (quote corrected).

210 *Id.* at 732–33.

211 *Id.* at 733.

212 *Id.* at 728; cf. *McConnell*, *supra* note 58, at 1455–56; *Nestor*, *supra* note 38, at 977–1015.

Those limits are, of course, hard to draw. To say that there is a church/state line is not to say that drawing that line is (or ever was) easy. What is a church (and what are ministers)? What decisions are ecclesiastical? What state interests are sufficient to prevail, notwithstanding protections for churches? What forms of church autonomy exist, and are all of its subcomponents analogous? How do these protections and limits shape contemporary doctrine, including civil procedure? One could go on—and future work will be needed here.²¹³ But there was broad agreement, at a high level, that matters of church government, faith, and doctrine marked the outer bounds of church autonomy—and that the doctrine recognized important limits that maintained the proper spheres for civil authority and ecclesiastical authority, thereby managing *imperium in imperio* fears and sustaining proper church-state relations.

b. Procedural Limitations

Second, at least some courts recognized additional qualifications to the rule that civil authorities generally lacked authority to review questions of church government, faith, and doctrine²¹⁴—though some of these qualifications had limited historical purchase in the nineteenth century and would wither in the twentieth century. These procedural limits warrant further inquiry—and the discussion here seeks to flag them for future work.²¹⁵

i. Jurisdictional Review

One potential limitation on the church autonomy doctrine is that some courts explained that they would not abstain or defer where the church authority lacked “jurisdiction.” Such a jurisdictional limitation—which was debated in early civil courts—reflected limitations on church authority vis-à-vis the state (an external limitation) and vis-à-vis church members (an internal limitation). First, reflecting the substantive limitations on church autonomy, many courts—including the *Watson v. Jones* Court—recognized an external jurisdictional line between church authority and civil authority that prevented churches from

213 See, e.g., *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, 980 F.3d 1066, 1082 (5th Cir. 2020) (Oldham, J., dissenting from denial of rehearing en banc); see also, e.g., Weinberger, *supra* note 88 (manuscript at 12–39); *supra* notes 10–12 and accompanying text (collecting debate over doctrine’s substantive scope).

214 See *Gonzalez v. Roman Cath. Archbishop of Manila*, 280 U.S. 1, 16 & n.3 (1929) (articulating procedural exceptions), *abrogated by Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696 (1976).

215 For relevant scholarship, see, for example, Helfand, *supra* note 11 at 1903 (collecting scholarship); and Helfand, *supra* note 10, at 920.

asserting authority over many civil, temporal matters (for example, trying members for murder, or adjudicating nonreligious property disputes).²¹⁶ Church-state relations were, as explained, a two-way street—churches had authority over the ecclesiastical, states had authority over the civil, and as a result church jurisdiction over civil matters was limited. Such an external jurisdictional limitation was critical—it separated the ecclesiastical and civil spheres, and it helped avoid *imperia in imperio* by preventing church authorities from exercising civil power. Second, some courts—including the Court of Appeals of Kentucky in *Watson v. Avery*—recognized an internal jurisdictional limitation. These courts recognized the general church autonomy principle that “civil courts cannot . . . rejudge the judgments of spiritual tribunals, as to matters within their jurisdiction.”²¹⁷ But these courts also maintained that the “jurisdiction of the ecclesiastical court” was “limited to subjects clearly within its province, according to the regulations or rules from which its authority is derived”—and civil courts could step in—assuming a civil hook (i.e., a civil right or property hook)—“where an ecclesiastical body or tribunal had transcended the scope of its authority, and attempted to adjudicate a matter as to which it had no jurisdiction.”²¹⁸ Such an internal jurisdictional limitation was often explained in terms of republican values and voluntary consent—ensuring that “individual and property rights” were respected according to the terms of the church constitution (a consent principle), and preventing church authorities from devolving into “government[s] of despotic and unlimited powers” (a republican principle), in addition to identifying which church entity had authority under the church’s rules and regulations to speak for the church.²¹⁹ In short, while civil courts still lacked jurisdiction over purely ecclesiastical disputes, they had jurisdiction over civil matters—and, according to some courts,

216 See *Watson*, 80 U.S. (13 Wall.) at 733–34.

217 *Watson v. Avery*, 65 Ky. (2 Bush) 332, 348, 348–49 (1867) (discussing “jurisdiction”); *accord* *Gartin v. Penick*, 68 Ky. (5 Bush) 110, 120 (1868) (discussing “jurisdiction”); *Perry v. Wheeler*, 75 Ky. (12 Bush) 541, 549–50 (1877) (discussing “jurisdiction” and rejecting the proposition that *Watson v. Jones* controlled); *Kerr’s Appeal*, 89 Pa. 97, 112 (1879) (discussing the “scope of its authority”); *Boyles v. Roberts*, 121 S.W. 805, 812 (Mo. 1909) (discussing the court’s action as “within the terms of the constitutional grant of power”); *Ramsey v. Hicks*, 91 N.E. 344, 350 (Ind. 1910) (discussing whether churches act “palpably without jurisdiction”); see also, e.g., *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 140 (1872) (describing how courts “may inquire” whether a decision “was the act of the church”); *Brundage v. Deardorf*, 55 F. 839, 847 (C.C.N.D. Ohio 1893) (Taft, J.) (discussing how the power of the “supreme judicatory . . . to construe the limitations of its own power” doesn’t encompass “open and avowed defiance of the original compact”); *Krecker v. Shirey*, 30 A. 440, 443 (Pa. 1894) (“[S]uch decisions plainly violate the law they profess to administer.”).

218 *Avery*, 65 Ky. (2 Bush) at 347–48.

219 *Id.* at 348–49.

they could use that civil jurisdictional hook for internal jurisdictional review, such that

when rights of property, which are secured to congregations and individuals by the organic law of the church, are violated by unconstitutional acts of the higher courts, the parties thus aggrieved are entitled to relief in the civil courts, as in ordinary cases of injury resulting from the violation of a contract, or the fundamental law of a voluntary association.²²⁰

The jurisdictional exception does not abrogate the broadly accepted church autonomy principle. The external jurisdictional exception does not undermine this principle—as *Watson* itself recognized, such an external jurisdictional exception, well-established in the early caselaw, reflected the inner logic and external limits of church autonomy itself.²²¹ The internal jurisdictional exception raises more interesting questions—but two main points here. First, such internal jurisdictional review—both its triggering conditions and its procedural scope—generated substantial debate, and many courts (including the *Watson* Court) often rejected more aggressive forms of internal jurisdictional review (at least where a competent and ultimate church authority had been identified—and that’s a critical condition).²²² *Watson* explained that “it may very well be conceded” that, if the church “should undertake to try one of its members for murder, and punish him with death or imprisonment,” or should “entertain jurisdiction” over church-member property that “in no sense depend[ed] on ecclesiastical questions,” the church decisions would be “of no validity in a civil court” and should be “utterly disregarded.”²²³ “But it is a very different thing where a subject-matter of dispute, strictly and purely

220 See, e.g., *id.* at 349 (discussing “jurisdiction,” *id.* at 348 (citing *Smith v. Nelson*, 18 Vt. 511, 566 (1846))); *Gartin*, 68 Ky. (5 Bush) at 120 (discussing “jurisdiction”); *Perry*, 75 Ky. (12 Bush) at 549–50 (discussing “jurisdiction” and rejecting the proposition that *Watson* controlled); *Kerr’s Appeal*, 89 Pa. at 112 (discussing the “scope of its authority”); *Boyles*, 121 S.W. at 812 (describing the court’s action as “within the terms of the constitutional grant of power”); *Ramsey*, 91 N.E. at 350 (discussing whether churches act “palpably without jurisdiction”); see also, e.g., *Bouldin*, 82 U.S. (15 Wall.) at 140 (discussing how courts “may inquire” whether a decision “was the act of the church”); *Landrith v. Hudgins*, 120 S.W. 783, 807 (Tenn. 1907) (recognizing the court’s limited power to intervene—including to determine “whether or not the resolution of expulsion was the act of the church”); *Brundage*, 55 F. at 847 (discussing the “open and avowed defiance of the original compact”); *Krecher*, 30 A. at 443 (discussing the consequences when ecclesiastical courts’ “decisions plainly violate the law they profess to administer”).

221 *Watson*, 80 U.S. (13 Wall.) at 733.

222 *Id.*

223 *Id.*

ecclesiastical in its character . . . becomes the subject of its action.”²²⁴
In such a case,

[i]t may be said here, also, that no jurisdiction has been conferred on the tribunal to try the particular case before it, or that, in its judgment, it exceeds the powers conferred upon it, or that the laws of the church do not authorize the particular form of proceeding adopted [But] if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become, in almost every case, the criteria by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive these bodies of the right of construing their own church laws . . . [and] would, in effect, transfer to the civil courts where property rights were concerned the decision of all ecclesiastical questions.²²⁵

Civil courts wrestled with this principle. And it is easy to see why: civil and property rights were often downstream of ecclesiastical determinations, church regulations sometimes articulated the jurisdictional power of particular authorities over particular matters, and civil courts often needed to determine who actually spoke for the church. But many civil courts—taking a similar line to *Watson*—recognized at least *some* church autonomy limitations on and concerns with the power of civil courts to conduct internal-jurisdictional review of decisions by competent and final ecclesiastical authorities over ecclesiastical matters.²²⁶ Second, internal jurisdictional review—which required a civil hook—can be reconciled to the internal logic and external limitations on church autonomy. Such internal jurisdictional review was, as just explained, rationalized in terms of the various principles that both animated and bounded the church autonomy doctrine—including

224 *Id.*

225 *Id.* at 733–34 (emphasis omitted).

226 *See, e.g.,* *Chase v. Cheney*, 58 Ill. 509, 537–38 (1871) (discussing how civil courts “will interfere with churches or religious associations, when rights of property or civil rights are involved” but “will not revise the decisions of such associations, upon ecclesiastical matters, merely to ascertain their jurisdiction”); *Pounder v. Ash*, 63 N.W. 48, 50 (Neb. 1895) (similar); *Waller v. Howell*, 45 N.Y.S. 790, 791–92 (Sup. Ct. 1897) (similar); *State ex rel. Hatfield v. Cummins*, 85 N.E. 359, 361 (Ind. 1908) (similar); *see also, e.g.,* *Connitt v. Reformed Protestant Dutch Church of New Prospect*, 54 N.Y. 551, 561 (1874) (stating that when not “clearly an absence of jurisdiction,” “great weight” is given to church jurisdictional determinations); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 720–24 (1976) (recognizing complications in doctrine and reversing a state-court decision invalidating an ecclesiastical decision for an excess of ecclesiastical jurisdiction). *But see, e.g.,* *Satterlee v. United States ex rel. Williams*, 20 App. D.C. 393, 414 (D.C. Cir. 1902) (rejecting a reading of *Watson v. Jones* that holds that an ecclesiastical court is always “the exclusive judge of its own jurisdiction” (emphasis omitted)).

republican values, voluntary consent, and simply identifying the competent church authority—and it is telling that the same courts that embraced internal jurisdictional review also viewed themselves as maintaining fidelity to the general church autonomy principle, rightly understood. The upshot, for present purposes, is not to flesh out the validity and limits of the internal jurisdictional limitations. Instead, it is that such review was, at most, a form of “marginal civil court review,”²²⁷ one which early courts that embraced such review viewed as fully consistent with broader church autonomy principles.

ii. Fraud or Collusion Review

Another potential limitation on the church autonomy doctrine is that some courts did not defer to church authorities in cases of “fraud” or “collusion.”²²⁸ Under this exception, while a “charge of fraud against a great religious organization should not be entertained except upon clear proof,” the “general rule” was that “the presence of fraud would justify a [civil] court in taking cognizance of a question otherwise left for final determination” by a religious “tribunal.”²²⁹ The fraud-or-collusion exception—which drew from principles of voluntary consent and equitable power—appears to have arisen most commonly in the church autonomy context in very late nineteenth-century and early twentieth-century courts (with broad application, in some form, today), though such fraud exceptions were well-established in the corporate law, choice-of-law, judgment law, and contract law contexts that shaped church autonomy law.²³⁰ The Supreme Court—which did not mention this “fraud” or “collusion” exception in *Watson*—acknowledged this exception in dicta from *Gonzalez v. Roman Catholic Archbishop*. It explained that “[i]n the absence of *fraud, collusion, or*

227 *Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 447 (1969).

228 *Gonzalez v. Roman Cath. Archbishop of Manila*, 280 U.S. 1, 16 (1929) (discussing “fraud, collusion”), *abrogated by Milivojevich*, 426 U.S. 696; *see also, e.g., Helfand, supra* note 11, at 1942–51.

229 *Barkley v. Hayes*, 208 F. 319, 333 (W.D. Mo. 1913).

230 *See, e.g., Sampsell v. Escher*, 11 Ohio Dec. Reprint 351, 353 (Ct. Com. Pl. 1891) (discussing “fraud”); *Schweicker v. Husser*, 44 Ill. App. 566, 574 (1892) (discussing “fraudulent” conduct); *Brundage v. Deardorf*, 55 F. 839, 847–48 (C.C.N.D. Ohio 1893); *Hendryx v. People’s United Church*, 84 P. 1123, 1126–27 (Wash. 1906) (discussing “chicanery, deceit, or fraud” as violative of an “implied obligation”); *First Presbyterian Soc’y v. Markley*, 10 Ohio N.P. (n.s.) 529, 547 (Super. Ct. 1910) (discussing “fraud or collusion”); *Sanders v. Baggerly*, 131 S.W. 49, 56 (Ark. 1910) (discussing “fraud”); *Bentle v. Ulay*, 93 N.E. 459, 461 (Ind. App. 1910) (discussing “fraud”); *Cochran v. Eldridge*, 49 Pa. 365, 369 (1865) (discussing the “ground of fraud”); *Hilton v. Guyot*, 159 U.S. 113, 206 (1895) (discussing “fraud”); *Chapman v. Chapman*, 74 S.E. 661, 662 (W. Va. 1912). Such fraud exceptions were a recognized part of secular corporate law. *See, e.g., Funk, supra* note 91, at 280–81.

arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive.”²³¹ But while Supreme Court opinions made “references to the suggested exception[s],” no Supreme Court decision gave “concrete content to or applied the ‘exception.’”²³² And the Supreme Court later walked back much of *Gonzalez’s* dicta in *Milivojevich*. *Milivojevich* confirmed that “civil courts exercise no jurisdiction” over matters “strictly and purely ecclesiastical.”²³³ And—while it declined to opine on the “narrow” potential “fraud” or “collusion” exceptions—it flatly closed the door on the “arbitrariness” exception.²³⁴

The fraud-and-collusion exception does not abrogate the broadly accepted church autonomy principle that civil courts generally lack authority over ecclesiastical matters. First, the doctrine’s historical reach is, based on the literature today, relatively unclear and requires future work. Courts around the turn of the century recognized the fraud exception, as do many courts today. And similar fraud exceptions were recognized in the various corporate law, choice-of-law, and related doctrines that helped shape modern church autonomy law. But more work is necessary to ferret out the extent to which there was a prevailing and uniform view of the existence and scope of a fraud exception to church autonomy doctrine. Second, the fraud-or-collusion exception—even accepting its historical value—does not defeat the general rule: civil courts broadly embraced the view that they generally lacked power to exercise jurisdiction over or to inquire into ecclesiastical matters reserved to church authorities, and even the courts that recognized a fraud exception generally paid homage to broad church autonomy principles (fraud was, at most, an exception to the broader church autonomy rule). There are different ways to think about the exception. It might flow from church autonomy’s internal logic (church autonomy was, after all, based in part on voluntary consent). It might reflect external public interests (civil courts don’t often give fraudulent behavior aid in the exercise of their judicial power). Or it might simply reflect civil courts working out church autonomy in practice in the various blackletter contexts (where such fraud or collusion might ordinarily be relevant—consider, e.g., the corporate law context). Indeed, that is a common issue in this context—civil courts were tasked to apply blackletter legal doctrines in the new and developing context of church autonomy. In doing so, they were often tasked to

231 *Gonzalez*, 280 U.S. at 16 (recognizing “fraud, collusion”) (emphasis added).

232 *Milivojevich*, 426 U.S. at 712.

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

234 *Id.* at 712–13.

baptize the blackletter—to apply and adjust traditional blackletter legal doctrines to accommodate new American church autonomy commitments. But the basic point remains that civil courts (even those that acknowledged a potential fraud-or-collusion exception) generally maintained that church autonomy imposed important limitations on the exercise of judicial power.

iii. Arbitrariness and Procedural Review

A third set of potential limitations on the church autonomy doctrine was that some courts did not defer where competent church authorities acted substantively arbitrarily or procedurally deficiently. The idea was that while civil courts generally lacked authority to intervene in purely ecclesiastical disputes (a point of broad agreement), civil courts had limited power—where a civil or property right was at stake—to review the authoritative ecclesiastical authority’s decision for substantive arbitrariness or for violation of the religious institution’s procedural rules, and such limitations were, like the other procedural limitations, often explained in terms of republican principles (limiting church authority) and voluntary consent (ensuring that individual members’ rights were protected).²³⁵ Early civil courts wrestled with these exceptions—working through their scope, validity, and animating principles—but generally settled on the view that civil courts could not generally review purely ecclesiastical decisions for procedural or substantive errors but could, where a property or civil right was at stake, sometimes undertake a marginal review along these lines (though the doctrine generated considerable uncertainty over how to draw the civil/ecclesiastical line and how to treat civil rights that were downstream from ecclesiastical decisions).²³⁶

235 See Helfand, *supra* note 11, at 1943 (relying on, inter alia, *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 140 (1872) (discussing that a majority represents a church only if “they adhere to the organization and to the doctrines”) and collecting exemplar cases)); see also, e.g., *Hynes v. Lillis*, 170 S.W. 396, 398 (Mo. Ct. App. 1914) (discussing “regularity and validity” review unless a “right of property” is involved); *Boyles v. Roberts*, 121 S.W. 805, 812 (Mo. 1909) (reviewing for a “constitutional grant of power” if “property rights” are involved); *State ex rel. Hatfield v. Cummins*, 85 N.E. 359, 360–61 (Ind. 1908) (recognizing that courts may “entertain and determine judicially all such questions” and may “interpose to control the proceedings when a right to property is involved”); Helfand, *supra* note 11, at 1943 n.247 (citing *Brundage*, 55 F. at 846 (describing an “open, flagrant, avowed violation of” church law); then citing *Jennings v. Scarborough*, 28 A. 559, 562 (N.J. 1894) (describing a violation of church internal procedures); and then citing *Wallace v. Trs. of Gen. Assembly of United Presbyterian Church*, 50 A. 762, 763 (Pa. 1902) (same)); *Smith v. Nelson*, 18 Vt. 511, 558 (1846) (noting that—at least in some circumstances—the “regularity and effect of [ecclesiastical] proceedings may be examined”).

236 See, e.g., *Shannon v. Frost*, 42 Ky. (3 B. Mon) 253, 258 (1842) (explaining that civil courts “cannot decide who ought to be members of the church, nor whether the

Such substantive arbitrariness and procedural review exceptions—which call for further inquiry—complicate the picture but do not abrogate the general church autonomy principle that church autonomy imposed at least some limitations on civil court review.

First, the more aggressive forms of these procedural reviews are subject to doubt—both historically (where they had a mixed reception) and especially under contemporary doctrine (where they have been rejected, at least in part). Judicial decisions in the mid-to-late nineteenth century and the early twentieth century offered both free exercise and non-establishment reasons for rejecting at least some forms of procedural review where a matter was ecclesiastical, rather than civil—explaining that such review would trench upon the freedom of the church to govern itself, that it would entangle civil courts in religious disputes, and that it would ultimately bring civil authority to bear on a sphere reserved to ecclesiastical authorities.²³⁷ In more recent years, the Supreme Court—quoting *Watson v. Jones*'s holdings and cutting back *Gonzalez*'s dicta—summarized many of these considerations in *Milivojevic*. It explained that

no “arbitrariness” exception—in the sense of an inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations—is consistent with the constitutional mandate that civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law. For civil courts to analyze whether the ecclesiastical actions of a church judicatory are in that sense “arbitrary” must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question. But

excommunicated have been justly or unjustly, regularly or irregularly cut off from the body of the church”); *State ex rel. Watson v. Farris*, 45 Mo. 183, 197 (1869) (stating that ecclesiastical decision whether the matter was “regularly or irregularly before [the church tribunal], was a subject for it to determine for itself, and no civil court can revise, modify or impair its action in a matter of purely ecclesiastical concern”); *Fitzgerald v. Robinson*, 112 Mass. 371, 379 (1873) (similar); *Landis v. Campbell*, 79 Mo. 433, 439–40 (1883) (similar); *Nance v. Busby*, 18 S.W. 874, 879 (Tenn. 1892) (similar); *Travers*, 58 S.W. at 247–48 (similar); *Hundley v. Collins*, 32 So. 575, 578 (Ala. 1902) (similar); *Satterlee v. United States ex rel. Williams*, 20 App. D.C. 393, 419 (D.C. Cir. 1902) (similar); see also, e.g., *Harmon v. Dreher*, 17 S.C. Eq. (Speers Eq.) 87, 121 (Ct. App. 1843) (explaining that civil courts cannot “look into the regularity of the process by which the [ecclesiastical body] proceeded to its judgment”); *Chase v. Cheney*, 58 Ill. 509, 531 (1871) (similar); *Waller v. Howell*, 45 N.Y.S. 790, 793 (Sup. Ct. 1897) (similar); *Morris St. Baptist Church v. Dart*, 45 S.E. 753, 754 (S.C. 1903) (similar).

237 See, e.g., *Watson*, 80 U.S. (13 Wall.) at 727–29; see also *supra* notes 15, 17 (collecting cases rejecting/limiting such review).

this is exactly the inquiry that the First Amendment prohibits; recognition of such an exception would undermine the general rule that religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them.²³⁸

Indeed, "*Watson* itself requires [this] conclusion in its rejection of the analogous argument that ecclesiastical decisions of the highest church judicatories need only be accepted if the subject matter of the dispute is within their 'jurisdiction.'"²³⁹

Second, these various exceptions—even accepting their historical value—do not defeat the general principle that civil courts generally lacked jurisdiction over or power to inquire into ecclesiastical decisions reserved to church authorities. Like the other exceptions discussed above, these various exceptions—permitting marginal civil court review for arbitrariness and procedural and jurisdictional validity—were, at most, defined exceptions to a broadly recognized church autonomy principle. Civil courts (even those that embraced such exceptions) recognized that the church autonomy doctrine limited the exercise of judicial review over ecclesiastical matters, even if they disagreed on how to implement and limit that church autonomy doctrine in practice.²⁴⁰ Moreover, again like the other exceptions discussed above, these exceptions can plausibly be reconciled with the general church autonomy rule—particularly, as Professor Helfand has suggested, to notions of implied consent (an internal feature of church autonomy), but perhaps also to notions of republican limitations on concentrated power (an external limitation on church autonomy, which Professor Gordon and Professor Funk have discussed elsewhere).²⁴¹ The upshot for present purposes is, again not to resolve the ultimate validity, scope, and rationale for the exceptions—which warrant further work—but to explain that these exceptions were limited qualifications to important limitations on judicial review imposed by the church autonomy doctrine.

iv. Religious Questions

There is another important—if perhaps surprising—point: civil courts sometimes took cognizance of what modern readers might

238 *Milivojevič*, 426 U.S. at 713.

239 *Id.*

240 *See, e.g., Watson*, 80 U.S. (13 Wall.) at 727; *see also, e.g., supra* note 226.

241 Helfand, *supra* note 10, at 920; Funk, *supra* note 91, at 269; Gordon, *supra* note 91, at 368.

think of as “religious questions.”²⁴² Professor Funk—writing that “[j]udges treated religious doctrine as a foreign legal system with rules that could be ascertained and accorded respect in American courts”—suggests an important account of the evolution of civil-court engagement with religious law and institutions.²⁴³ Early civil courts, in the early years of disestablishment, treated religious law as a “foreign legal system,” and often “scour[ed] [religious] creeds in the same way judges customarily informed themselves of custom or foreign law.”²⁴⁴ This reflected the “paradoxical result” of “[d]isestablishment-by-incorporation” (i.e., spreading the benefits of incorporation to non-established religious institutions): even as “disestablishment in the name of religious freedom became entrenched,” civil courts “ever more invasively scrutinized church doctrine and personal belief.”²⁴⁵ Over time, however, civil courts “inaugurated a shift” in the “paradigm” that addressed this paradox—and “[r]ather than treat church doctrine and tradition as a body of foreign law waiting to be applied *de novo* by American courts,” civil courts came to “essentially treat[] these church tribunals as competent foreign courts,” and “[h]enceforth, courts would inquire not into church doctrine but into procedure: [d]ecisions made by duly elected trustees in a timely manner deserved deference.”²⁴⁶ The earlier, evolving position—civil courts could directly examine ecclesiastical questions—suggests some tensions, qualifications, or modifications to the principle that civil courts lacked authority to review or adjudicate ecclesiastical matters. The later, prevailing position—civil courts owed deference to competent ecclesiastical authorities, and could not exercise jurisdiction over or inquire into ecclesiastical matters reserved to ecclesiastical authorities—is broadly consistent with the doctrine canvassed above, which focuses on cases from this later era and restates the point that civil courts, as the doctrine settled, maintained that they lacked power to exercise “jurisdiction” over or “inquire” into ecclesiastical matters reserved to ecclesiastical authorities.

The historical doctrine, as described above, embraced the principle that church autonomy limited what civil courts could or should do in the exercise of their judicial power. Over time, American civil courts, which embraced church autonomy principles but struggled to specify such principles and work them out in practice, generally came to embrace an approach that was designed to secure church autonomy

242 For scholarship discussing the competency and authority of civil courts to engage with “religious questions,” see, for example, Funk, *supra* note 91, at 273–79; Garnett, *Do Churches*, *supra* note 10, at 292; and Helfand, *supra* note 11, at 1895.

243 Funk, *supra* note 91, at 282.

244 *Id.*

245 *Id.* at 273.

246 *Id.* at 281–82.

principles by protecting religious institutions and limiting secular courts—an approach that sounded in abstention and deference. A few points—particularly as the doctrine developed in later judicial practice—stand out. First, civil courts maintained that they generally exercised “no jurisdiction” over matters “purely ecclesiastical”—and they stated that they could not generally exercise “jurisdiction” over, “inquire” into, or “reverse” ecclesiastical decisions by competent ecclesiastical authorities.²⁴⁷ Second, civil courts—maintaining that they could “exercise no jurisdiction” over matters “strictly and purely ecclesiastical in . . . character”²⁴⁸—explained that where “a civil right depends upon an ecclesiastical matter, it is the civil court[,] and not the ecclesiastical[,] which is to decide. [But] [t]he civil tribunal tries the civil right, and no more, taking the ecclesiastical decisions[,] out of which the [civil] right arises[,] as it finds them.”²⁴⁹ Civil courts debated the line between ecclesiastical and civil matters—and remained cognizant of free-exercise and non-establishment principles in defining the “property” and “civil” interests that could trigger civil judicial authority.

A critical takeaway—considering the two points that, in mid-to-late nineteenth century practice, (1) civil courts maintained that they generally lacked jurisdiction over ecclesiastical matters (consider *Watson’s* rule), but (2) exercised review over matters closely tied to church law and institutions (consider Professor Funk’s examples)—is that respect for church autonomy’s limitations on civil courts did not mean that courts were categorically sanitized from religious law or blind to religious institutional decisionmaking, particularly not if, as Professor Funk notes, religious law was treated as “foreign law” and religious institutions were eventually treated as “competent foreign courts.”²⁵⁰ Even in the mid-to-late nineteenth century caselaw focused upon here—in which civil courts repeatedly disclaimed jurisdiction over ecclesiastical matters—civil courts sometimes engaged in marginal civil-court review of matters implicating religious law and religious institutions. One illustrative example was procedural review. As discussed above, civil courts sometimes engaged in “jurisdictional,” “bad faith,”

247 *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 732–33 (1872) (asserting that “civil courts exercise no jurisdiction” over matters “strictly and purely ecclesiastical,” *id.* at 733); *see, e.g.*, *Sale v. First Regular Baptist Church*, 17 N.W. 143, 144–45 (Iowa 1883) (explaining that civil courts cannot exercise “jurisdiction” or “inquire” into “purely ecclesiastical question”); *supra* notes 165, 192–96 and accompanying text (collecting cases).

248 *Watson*, 80 U.S. at 733.

249 *Id.* at 731 (quoting *Harmon v. Dreher*, 17 S.C. Eq. (Speers Eq.) 87, 121 (Ct. App. 1843)) (quote corrected); *see, e.g.*, *supra* notes 165, 192–96 and accompanying text (collecting cases).

250 *Watson*, 80 U.S. at 281.

“arbitrariness,” or other forms of marginal civil-court review (which sometimes required some evaluation of underlying religious institutional rules).²⁵¹ Such exceptions had a limited scope—and treating religious institutions like “competent foreign courts” generally meant that “courts would inquire not into church doctrine but into procedure,” in which “[d]ecisions made by duly elected trustees in a timely manner deserved deference” (and complicated questions arose where procedure and religion were interrelated).²⁵² Such exceptions (particularly to the extent that procedural review turned on consideration of religious institutional rules) were also debated in the historical caselaw (recall that *Watson* rejected at least one form of jurisdictional review) and had a complicated relationship to church autonomy principles (early courts and contemporary scholars have long debated these points). Another illustrative context (noted above, and discussed by *Watson*) often took cognizance of religious questions in the context of express-trust church property cases (who owned the church building under the trust?).²⁵³ It is no surprise that some form of religious-question doctrine developed—after all, it might be challenging to decide who did the donor entrust (or who is the authoritative church voice) without some consideration of church practices and doctrines (though strict neutral principles provides one potential secular answer).²⁵⁴ It is important to underscore that historic decisions felt themselves able to articulate both a relatively broad embrace of church autonomy principles, and a limited (if circumscribed and contested) role for civil authorities to take cognizance of matters implicating religion.

Three points here—relevant to the mid-to-late nineteenth century doctrine that developed—warrant emphasis. First, the general rule was not that civil courts always lacked authority to review matters implicating religious law or religious institutions. Instead, the prevailing rule that emerged over time was that civil courts (1) generally lacked power to review ecclesiastical decisions reserved to ecclesiastical authorities; but (2) in limited circumstances and specialized contexts, civil courts had some authority to engage in circumscribed, limited review implicating religious questions and institutions.²⁵⁵ Second, the general church autonomy rule—and its exceptions and qualifications—were viewed by civil courts as being broadly consistent with the

251 See Helfand, *supra* note 11, at 1958; *supra* note 231 and accompanying text.

252 Funk, *supra* note 91, at 281–82.

253 See *Watson*, 80 U.S. (13 Wall.) at 723–24; Funk, *supra* note 91, at 279–82; see also Helfand, *supra* note 11, at 1945 n.260.

254 See Weinberger, *supra* note 88 (manuscript at 15); cf. Michael W. McConnell & Luke W. Goodrich, *On Resolving Church Property Disputes*, 58 ARIZ. L. REV. 307, 338 (2016).

255 See Funk, *supra* note 91, at 273; Helfand, *supra* note 11, at 1945 n.260; Weinberger, *supra* note 88 (manuscript at 31); see also, e.g., *supra* notes 192–96.

church autonomy doctrine.²⁵⁶ Such exceptions, limitations, and surprising applications of the church autonomy doctrine reflected different ways of fleshing out the principle and implementing it in practice—but the key point is that civil courts, even those embracing broader forms of religious-question review, viewed such review as consistent with broader church autonomy principles. As Professor Funk notes, American “jurists had sound legal reasons for believing they were advancing the causes of disestablishment, religious freedom, republicanism, and a generalized Christianity” in how they structured their judicial review.²⁵⁷ Third, some of the underlying principles and analytical commitments of these cases evolved over time, particularly as civil courts worked out how to implement free exercise and non-establishment principles in practice.²⁵⁸ Perhaps one of the most important evolutions is that described by Professor Funk—earlier civil courts treated religious law as a foreign law, and later civil courts treated religious institutions as competent foreign courts (which limited the proper domain of civil-court review).²⁵⁹ Particularly in later judicial practice—as church temporal power was cabined, associated fears of *imperia in imperio* subsided, and church tribunals were treated as “competent foreign courts”—civil courts came to “inquire not into church doctrine but into procedure.”²⁶⁰ And perhaps, to look at the present, the seeds for the broader “hands off” approach to religious questions were potentially planted during this period—particularly by judicial decisions, reflecting civil court reluctance to become entangled in religious controversies, that broadly stated that civil courts simply lacked “competency” or “authority” over religious questions because they were religious questions.²⁶¹ The ultimate point, for present purposes, is that while civil courts sometimes adjudicated matters implicating religious questions, civil courts nevertheless maintained broad commitments to limitations on judicial power over ecclesiastical decisionmaking—suggesting a richer and more nuanced relationship between religious matters and civil adjudication.²⁶²

256 See Funk, *supra* note 91, at 273, 280–82; Weinberger, *supra* note 88 (manuscript at 44–45); see also, e.g., *supra* notes 192–96.

257 See Funk, *supra* note 91, at 277; Weinberger, *supra* note 88 (manuscript at 44–45).

258 See Funk, *supra* note 91, at 279–82; Weinberger, *supra* note 88 (manuscript at 44–45).

259 See Funk, *supra* note 91, 279–82.

260 See *id.* at 281–82, 279–82.

261 See *supra* notes 137–65 and accompanying text (collecting cases).

262 See Funk, *supra* note 91, at 277–78; Helfand, *supra* note 11, at 1927; Weinberger, *supra* note 88 (manuscript at 31).

D. Modern Developments and Expansion

Contemporary doctrine has broadly maintained fidelity to the historical church autonomy doctrine—protecting the freedom of religious institutions “to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”²⁶³ But a few important developments warrant comment—constitutionalization, withering exceptions, and historicization.

I. Constitutionalization

One important development has been the constitutionalization of church autonomy. The historic doctrine was, in *Watson*'s words, grounded “in a broad and sound view of the relations of church and state under our system of laws.”²⁶⁴ The doctrine sounded in terms familiar to constitutional law—articulating free exercise, non-establishment, and voluntary-association principles to justify the church autonomy doctrine. But there is debate over whether the church autonomy doctrine was a common law doctrine (perhaps with constitutional underpinnings) or a constitutional law doctrine.²⁶⁵ Those debates, however, have been put to rest as far as contemporary constitutional law is concerned. The Supreme Court in *Kedroff*—recognizing that *Watson* was decided “before judicial recognition of the coercive power of the Fourteenth Amendment to protect the limitations of the First Amendment against state action”—explained that *Watson*'s “general law” rule has a clear constitutional ring and radiates “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.”²⁶⁶ And the freedom over such matters—and over “[f]reedom to select the clergy” in particular—“must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.”²⁶⁷ And in *Hosanna-Tabor*—in a line affirmed again in *Our Lady*²⁶⁸—the Supreme Court affirmed the

263 *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 186 (2012) (quoting *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952)) (building on existing caselaw); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2061–62 (2020) (quoting *Kedroff*, 344 U.S. at 116); *see also Kreshik v. Saint Nicholas Cathedral of the Russian Orthodox Church*, 363 U.S. 190, 191 (1960) (per curiam) (applying *Kedroff* to the “judicial branch”).

264 *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1872).

265 *See supra* notes 1, 10, 90 (collecting literature).

266 *Kedroff*, 344 U.S. at 115–16.

267 *Id.* at 116.

268 *See Our Lady*, 140 S. Ct. at 2060.

church autonomy doctrine's foundations in both Religion Clauses: "The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."²⁶⁹ Church autonomy, now at least, has been constitutionalized.

2. Withering Exceptions

Another important development has been the withering of some of the historic church autonomy doctrine exceptions. Several courts recognized a variety of limits to the church autonomy doctrine—even if they debated which exceptions were justified.²⁷⁰ While the Supreme Court initially signaled some agreement with these old exceptions in *Gonzalez's* dicta (suggesting potential "fraud, collusion, or arbitrariness" exceptions),²⁷¹ the Supreme Court has since walked back much of that dicta-suggested agreement—and it is unclear how much life these exceptions will hold moving forward.²⁷² First, as explained above, the Court rejected the arbitrariness and procedural review exception in *Milivojevich*.²⁷³ Second, though the Court has left open the "bad faith" or "collusion" exceptions,²⁷⁴ the Court has declined to entrench them (calling them *Gonzalez's* "dictum only" to *Watson's* rule²⁷⁵), and some of its precedents—such as the general prohibition on probing the real motives of the church and avoiding religious entanglement—arguably provide the seeds for reducing these exceptions.

3. Broader Shifts

There is one additional, related development—the rise of history and tradition. The Establishment Clause was long governed by the now-interred *Lemon* test—which provided that a "statute must have a secular legislative purpose," the statute's "principal or primary effect must be one that neither advances nor inhibits religion," and "the statute must not foster 'an excessive government entanglement with

269 *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 184 (2012).

270 *See supra* notes subsection I.C.3.

271 *Gonzalez v. Roman Cath. Archbishop of Manila*, 280 U.S. 1, 16 (1929), *abrogated by* *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

272 *See, e.g.*, JOHN WITTE, JR., JOLE A. NICHOLS & RICHARD W. GARNETT, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 318–22 (5th ed. 2022) (tracing the line from, *inter alia*, *Gonzalez* to *Milivojevich*).

273 *Milivojevich*, 426 U.S. at 713.

274 *Id.*

275 *Id.* at 712.

religion.”²⁷⁶ Of course, *Lemon* was not the only game in town—history and tradition were relevant to the Establishment Clause and, to a lesser extent, the Free Exercise Clause. But the *Lemon* test has now been definitively abandoned—and “[i]n place of *Lemon*,” the “Establishment Clause must be interpreted by ‘reference to historical practices and understandings.’”²⁷⁷

This shift from *Lemon* is significant. As Judge Richardson has thoughtfully noted, some of the leading mid-twentieth century church autonomy cases—and particularly those prohibiting the “very process of inquiry” by civil courts—were predicated, at least in part, on *Lemon*.²⁷⁸ The extent to which such “‘entanglement’ concerns—as a constitutional matter—survive the demise of *Lemon v. Kurtzman*, is an open question.”²⁷⁹ After all, “‘*Lemon* and its ilk are not good law’ any longer. Today, we must evaluate Establishment Clause claims using ‘historical practice and understanding.’”²⁸⁰ That does not mean open season for judicial review of ecclesiastical decisions: (1) perhaps *Lemon*-era entanglement should be retained on stare decisis grounds; (2) perhaps *Lemon*-era entanglement reflects, more or less, the original meaning of the Religion Clauses; and (3) perhaps there are church autonomy-based limitations on judicial review that lead to the same place here.²⁸¹ The upshot of all this is that history and tradition are likely to have expanded importance here. *Lemon*’s death only heightens the need to do so with care.

II. IMPLICATIONS

What do these longstanding protections for church autonomy—and historical limits on judicial power over church matters—mean for our law today? Translating from historical practices to contemporary doctrine is no easy task—though it is an important one.²⁸² Such translation requires, inter alia, determining the historical answers and

276 *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)), *overruling recognized by* *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022).

277 *Kennedy*, 142 S. Ct. at 2428 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)).

278 *Palmer v. Liberty Univ., Inc.*, 72 F.4th 52, 75 (4th Cir. 2023) (Richardson, J., concurring in judgment) (quoting *NLRB v. Cath. Bishop of Chi.*, 440 U.S. 490, 502 (1979)).

279 *Id.* at 78 (citation omitted).

280 *Id.* (quoting *Firewalker-Fields v. Lee*, 58 F.4th 104, 121–22, 121 n.5 (4th Cir. 2023)).

281 See, e.g., Stephanie H. Barclay, *Untangling Entanglement*, 97 WASH. U. L. REV. 1701, 1720–28 (2020); William J. Haun, *Keeping Our Balance: Why the Free Exercise Clause Needs Text, History, and Tradition*, 46 HARV. J.L. & PUB. POL’Y 419, 445 (2023).

282 See generally Mila Sohoni, *The Puzzle of Procedural Originalism*, 72 DUKE L.J. 941 (2023).

adopting a jurisprudential framework for accounting for such historical answers in contemporary law—a task potentially complicated in the civil-procedure context, given potential changes in the practical, real-world concerns of modern litigation (e.g., modern discovery and litigation costs), developments in the doctrines of constitutional law and civil procedure (e.g., collateral order doctrine), and related challenges involved in asking what one’s account of the historical doctrine means against such practical changes and doctrinal developments. Here, the history and tradition of the church autonomy doctrine have important lessons for judicial power today—and even if they do not clearly resolve all of the relevant issues, they at least provide some guidance.

A. *General Lesson: Church Autonomy Limits Judicial Power*

The general lesson is that the church autonomy doctrine was a deeply grounded and fundamental part of our history and tradition, and it provided at least some limitations on the power of civil courts to exercise judicial review over ecclesiastical matters reserved to competent ecclesiastical authorities. Civil courts, as explained above, consistently maintained that the church autonomy doctrine limited their power to exercise jurisdiction over or to inquire into ecclesiastical matters reserved to ecclesiastical authorities—i.e., matters of church government, faith, and doctrine. And civil courts consistently explained that such limitations on the exercise of judicial power were designed, inter alia, to protect religious freedom interests (i.e., freedom of churches over church matters) and to respect non-establishment principles (i.e., limitations on civil governmental power over protected church matters). This general lesson—church autonomy limits judicial power—is an enduring, if qualified, feature of the history and tradition of American church-state relations.

This general point—church autonomy limits judicial power—suggests a basis for both mandatory and prudential limits. Start with mandatory limits. This idea—advanced by Judge Oldham’s *McRaney* dissent and Judge Bumatay’s *Huntsman* concurrence²⁸³—suggests that (1) civil-court exercise of judicial power is subject to constitutional and other mandatory limits; (2) one mandatory limit on judicial power is church autonomy; and (3) church autonomy prevents the exercise of judicial power over matters of church government, faith, and doctrine. The view that church autonomy imposes at least some limitations on the exercise of judicial power appears broadly consistent with the

283 See *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, 980 F.3d 1066, 1075–82 (5th Cir. 2020) (Oldham, J., dissenting from denial of rehearing en banc); *Huntsman v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints*, 127 F.4th 784, 800 (9th Cir. 2025) (Bumatay, J., concurring).

history and tradition of the doctrine, which, as explained, generally maintained that civil courts could not exercise jurisdiction over or inquire into church matters reserved to church authorities.²⁸⁴ Next consider prudential limits—the idea that church autonomy shapes the discretionary exercise of judicial power.²⁸⁵ This idea—suggested by Judge Richardson’s *Palmer* concurrence (treating the ministerial exception)²⁸⁶—suggests that (1) civil courts have valid, bounded discretion over certain case matters (e.g., order-of-operations); (2) such discretion can be informed by constitutional and other prudential considerations (e.g., respecting church autonomy concerns); and (3) church-autonomy concerns inform the exercise of civil-court discretion (e.g., church autonomy should be addressed at the threshold, where further inquiry would raise church-autonomy concerns). There are nested questions here—including a broader account of the interplay between judicial discretion and constitutional norms, and a specific account of how and when judicial inquiry burdens church autonomy. But the view that church autonomy is a valid prudential consideration appears consistent with the historical doctrine, which maintained that civil courts exercising jurisdiction over or inquiring into protected ecclesiastical matters would raise free-exercise and non-establishment concerns, and was, at the very least, not prudent.²⁸⁷

History and tradition suggest some helpful landmarks for navigating the specific, technical civil procedure questions that arise. First, civil courts consistently explained that over matters “purely ecclesiastical” (i.e., a “matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them”) they could exercise “no jurisdiction.”²⁸⁸ If a case was “purely ecclesiastical”—with no cognizable civil or property interest—then civil courts lacked authority to exercise “jurisdiction” over the case (e.g., excommunication—disconnected from civil interests).²⁸⁹ Second, even if a case was not “purely ecclesiastical”—and there was a cognizable civil or property interest that was downstream from an “ecclesiastical” interest—civil courts explained that they lacked jurisdiction to review or

284 See, e.g., *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1872) (collecting cases); see also *supra* note 192 (same).

285 See, e.g., *Palmer*, 72 F.4th at 79 (Richardson, J., concurring in judgment); cf. *Huntsman*, 127 F.4th at 793 (Bress, J., concurring in judgment).

286 See *Palmer*, 72 F.4th at 79 (Richardson, J., concurring in judgment).

287 See, e.g., *Watson*, 80 U.S. (13 Wall.) at 728–34 (collecting cases); see also, e.g., *supra* notes 149–51 (same).

288 *Watson*, 80 U.S. (13 Wall.) at 733; see *supra* sub-subsection I.C.2.b (canvassing federal and state cases).

289 *Watson*, 80 U.S. (13 Wall.) at 733.

inquire into the “ecclesiastical” matter, and were required to defer to the competent ecclesiastical authority (e.g., minister removal—even assuming emoluments civil).²⁹⁰ Civil courts wrestled with the ecclesiastical-civil line (and defined the cognizable civil and property interests with an eye to church-autonomy considerations; consider, for example, how to treat minister emoluments). But they generally agreed that (1) there was an ecclesiastical-civil line, (2) civil courts generally lacked authority over matters on the ecclesiastical side of the line, and (3) these limitations on civil courts authority were necessary to protect church-autonomy, free-exercise, and non-establishment principles.

These historical points suggest support for two concrete types of limitations in contemporary litigation. First, the church autonomy doctrine governs the permissibility of litigation—ruling certain suits out. When church autonomy’s substantive scope covers a particular ecclesiastical matter reserved to ecclesiastical authorities (e.g., whether to remove a pastor), the doctrine’s procedural implications suggest that the covered ecclesiastical matter should be insulated from suit (and from judicial review of that ecclesiastical matter). That limitation flows from the extent to which the church autonomy doctrine was traditionally understood to both limit judicial power (a non-establishment principle) and to protect church autonomy from interference by civil authorities (primarily a free exercise principle). One can debate where to draw the line between “ecclesiastical” (or perhaps “purely ecclesiastical”) and “civil” questions—and there is a much deeper debate to be had about where to draw the ecclesiastical-civil line, how neutral-principles doctrine interacts with the line, and what to make of civil-court inquiry into apparently “secular” matters (e.g., did the church commit fraud?) implicating broader “ecclesiastical” matters (e.g., assume the allegedly fraudulent speech took place in a call for tithes). But for now, the point is very modest: if an issue is on the “ecclesiastical” side of the line—wherever that line is drawn—the power of civil courts to review the decision should generally come to an end. Second, the church autonomy doctrine informs the mode of litigation—shaping how permitted suits may proceed. Even when the church autonomy doctrine does not bar suit outright, the doctrine’s procedural dimensions suggest that church autonomy should affect how litigation can and/or should proceed—counseling against certain modes of litigation and discovery as a matter of constitutional mandate (e.g., judicial review directed to ecclesiastical matters reserved to ecclesiastical authorities), and informing the conduct of the litigation and discovery as a matter of constitutional prudence (e.g., requiring courts to balance church-state interests in managing the timing, scope, and

290 See *id.* at 727; *supra* sub-subsection I.C.2.a (canvassing federal and state cases).

mode of litigation and discovery). While one can debate the exact substantive and procedural contours of the church autonomy doctrine, the basic point, for now, is quite modest: the church autonomy doctrine was deeply rooted in our history and tradition, and it imposes at least some limits on the power of civil courts to trudge into matters of church faith, government, and doctrine.

B. Specific Applications for Modern Civil Procedure

Beyond the general point that the church autonomy doctrine provides at least some limitations on the power of civil courts to exercise judicial power over ecclesiastical matters, church autonomy may have important lessons for specific civil procedure questions.²⁹¹ Here, the task of “procedural originalism” raises many complicated questions.²⁹² History and tradition do not resolve all contemporary questions, but they can offer at least some guidance—and this discussion seeks to “sketch[]” some of “the argumentative and conceptual moves” relevant to the civil procedure implications of church autonomy based on the general history and tradition above, with the goal of pushing the discussion along, flagging areas for further development, and identifying the analytical turning points to guide future work.²⁹³

1. Order of Operations

The first specific civil procedure issue is the order-of-operations question—must or should church autonomy issues be resolved at the threshold? Debate rages on this point—and judges and scholars debate the extent to which church autonomy should be treated as a “threshold” issue, either as a matter of constitutional mandate or judicial prudence, before civil courts trudge into the “merits” of the claim. The history and tradition of the church autonomy doctrine, as explained above, teach that (1) church autonomy protected church decisionmaking in matters of church government, faith, and doctrine, and limited civil authority over such matters; and (2) church autonomy generally prohibited civil courts from exercising jurisdiction over or inquiring into church matters reserved to church authorities—and such exercises of judicial review into shielded church matters raised free-exercise and non-establishment concerns. While future work is necessary to specifically interrogate the order-of-operations question in the historical and traditional doctrine—the sources above provide a

291 See Smith & Tuttle, *supra* note 11, at 1872–86; see also *supra* note 12 (collecting debate).

292 Sohoni, *supra* note 282, at 948.

293 *Id.* at 1006.

helpful survey for future work, but a more targeted drilling is likely necessary—the general lessons from the history and tradition surveyed above suggest at least two points. First, there are sound reasons to conclude that civil courts (bound to respect church autonomy as a matter of constitutional mandate) likely must assure themselves that civil-court adjudication will not violate the church-autonomy doctrine before proceeding—and must, in at least some circumstances, treat church autonomy as a threshold issue. Second, there are also sound reasons why civil courts (in the exercise of their discretion) may adjudicate church autonomy at the threshold as a matter of constitutional prudence—structuring the judicial order-of-operations to remain sensitive to church autonomy interests. One can debate what civil-court adjudication implicates church autonomy concerns (and settling on what counts as a matter of church government, faith, or doctrine is likely the ballgame here). But the point here is that where adjudication implicates matters of church government, faith, and doctrine, the church autonomy doctrine limits judicial review by civil courts.

a. Mandatory

The first order-of-operations issue: *must* the church autonomy doctrine be addressed at the threshold—before civil courts potentially inquire into matters implicating church faith, government, and doctrine? Contemporary order-of-operations doctrine generally requires resolving an issue at the threshold where first, the issue reflects protection against the litigation process (e.g., immunity), and second, the issue goes to the court's power to proceed (e.g., jurisdiction). Here, history and tradition provide qualified support for both rationales where judicial review implicates matters of church government, faith, and doctrine—and suggest that civil courts must assure themselves that civil-court adjudication will not violate the church autonomy doctrine (and involve civil courts in matters of church government, faith, and doctrine) before engaging in such adjudication, and that civil courts must, where civil-court adjudication involves judicial review of matters of church government, faith, and doctrine, treat church autonomy as a threshold issue. One basis for such order-of-operations rules may come from free exercise. History and tradition support the principle that the church autonomy doctrine provides a free exercise protection against interference by civil authorities—including by civil courts—in matters of church government, faith, and doctrine. In that vein, civil courts historically maintained that they lacked authority to exercise “jurisdiction” over or to “inquire” into ecclesiastical matters reserved to ecclesiastical authorities—and that these limitations on the exercise of judicial review were designed, *inter alia*, to protect the freedom of

churches from civil interference.²⁹⁴ Civil courts—articulating and elaborating this free-exercise principle—suggested that such jurisdiction over or inquiry into church matters shielded by the church autonomy doctrine would raise free exercise concerns for several reasons.²⁹⁵ Some explanations were formal—sounding in structural terms. Civil courts suggested that judicial review of such church matters—stepping over the line dividing church and state, and thrusting courts into the religious sphere—would violate the freedom of religious institutions and private religious ordering.²⁹⁶ Some explanations were more functional—sounding in practical terms. Civil courts suggested that judicial review of matters of church government, faith, and doctrine would improperly disrupt church authority over church matters and/or interfere with voluntary religious associational decisions.²⁹⁷ And some explanations sounded in broader and more general terms—opining that improper judicial review of matters of church government, faith, and doctrine would violate the religious institutional and associational freedoms secured by the free exercise of religion and by proper church-state relations under our system of laws, an idea which potentially encompassed a broader catch-all of important if sometimes under-articulated church-state concerns.²⁹⁸ Civil courts, in short, historically maintained that church-autonomy limitations on judicial power—including jurisdiction and inquiry—were designed to protect the free exercise right of religion, and the freedom of religious institutions over religious matters in particular.

Contemporary doctrine suggests several potential reasons for why the very process of inquiry by civil courts may raise constitutional concerns—and why church autonomy doctrine may, in some circumstances, “protect[] religious institutions from the litigation process itself where the dispute concerns ‘matters of church government as well as those of faith and doctrine.’”²⁹⁹ This free-exercise principle—church autonomy limits the very process of judicial review by civil courts, in at

294 See, e.g., *Watson*, 80 U.S. (13 Wall.) at 728–34 (collecting cases); see also, e.g., *supra* notes 192–96 and accompanying text (collecting cases).

295 See, e.g., *Watson*, 80 U.S. (13 Wall.) at 728–34 (collecting cases); see also, e.g., *supra* note 150 and accompanying text (collecting cases raising free-exercise principles).

296 See *supra* note 150 (collecting cases raising free-exercise principles); cf. *supra* note 151 (collecting cases raising non-establishment principles).

297 See *supra* note 150 (collecting cases raising free-exercise principles)

298 See, e.g., *supra* note 197 (collecting cases explaining limits on civil-court jurisdiction and inquiry as preserving free-exercise principles); see also Weinberger, *supra* note 88 (manuscript at 15–19); cf. Funk, *supra* note 91, at 278; *supra* note 202 (collecting cases focused on non-establishment principles).

299 *Belya v. Kapral*, 59 F.4th 570, 577 (2d Cir. 2023) (Park, J., dissenting from order denying rehearing en banc) (quoting *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020)).

least some circumstances—suggests both functional and formal reasons for civil courts to ensure that civil-court adjudication does not violate the church-autonomy doctrine, which are worth exploring (and to consider in light of the historical evidence—which didn't articulate precisely the same types of developed, contemporary doctrinal explanations of the religious burdens at stake), even if more work is necessary to map them out.

One free exercise principle driving church autonomy is practical—preventing functional interference. Church autonomy, as Judge Ho and Judge Park have suggested, arguably has a substantive and procedural dimension—with the point here being that functional interference with church decisionmaking can occur not only through ultimate judicial decisions (e.g., a court order directing the Catholic Church to reinstate a defrocked priest), but perhaps through the very process of judicial inquiry (e.g., a court adjudication asking whether the defrocking was permitted).³⁰⁰ Church autonomy—as a substantive matter—prevents civil courts from second-guessing religious decisions by religious authorities. But church autonomy—as a procedural matter—may also prevent civil courts from exercising judicial power to adjudicate suits challenging religious decisions by religious authorities, at least to the extent that such adjudication impermissibly burdens religious decisionmaking on matters of church government, faith, and doctrine. The process, in short, may be the punishment—and church autonomy, the argument goes, guards against that punishing process, in at least some circumstances.

The basic principle that civil court adjudication can interfere with religious decisionmaking seems intuitive. But it contains many nestled complications, which present rich areas for further development. One rich line concerns why (and when) the process of litigation burdens church autonomy. Perhaps the problem is the litigation target (church matter), the litigation process and burdens (probing discovery and litigation expenses), or a combination of these and other incidents of litigation directed to church matters (certainly, historic and contemporary cases have not sought to exhaustively catalogue the concerns—perhaps prudently, to leave the universe of harms open). Another rich line concerns when such procedural burdens are justified—after all, no one thinks churches are totally immune in all circumstances. Perhaps scrutiny tiers, proportionality review, historical analogues, or some other implementing doctrine could mediate the results. Or perhaps the church autonomy's safeguards could be defined with greater

300 See *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, 980 F.3d 1066, 1074 (5th Cir. 2020) (Ho, J., dissenting from denial of rehearing en banc); *Belya*, 59 F.4th at 577 (Park, J., dissenting from order denying rehearing en banc).

particularity (the ministerial exception might be different than a church-property dispute, for example). And yet another, related area for development—queued by Judge Bress’s *Huntsman* concurrence³⁰¹—is when civil-court inquiry is impermissible. Perhaps further civil-court adjudication is impermissible any time that a church autonomy defense, if meritorious, would require dismissal—whether or not the adjudication is directed to religious-sounding concerns (consider, in a ministerial exception case, if the suit turns on whether the minister stole money from the tithe box). Or perhaps church autonomy is merely offended if inquiry involves civil inquiry into matters of church government, faith, and doctrine (consider, in a ministerial exception case, if the suit turns on whether the minister was a good Christian). The point for present purposes is not to fully resolve these issues—which demand future work. Instead, it is to suggest that the functional argument—that the church autonomy doctrine protects churches from litigation concerning church matters because the very process of litigation risks imposing improper burdens as a functional matter—has a reasonable, if qualified and contested, foundation.

In particular, history, tradition, and precedent provide some supporting ideas for this type of functionally grounded church-autonomy protection—though hard questions remain. As an initial matter, civil courts historically explained that exercising judicial power to review matters committed to ecclesiastical authorities—i.e., matters of church government, faith, and doctrine—raised church autonomy concerns linked to functional free-exercise considerations. As noted above, these civil courts maintained that the exercise of judicial power to review such decisions would interfere with internal church governance—and they linked such concerns to worries about functional interference with church authorities over church matters and disruption of voluntary religious associational choices. The doctrine had nuances—for example, “ecclesiastical” matters required abstention, while matters with a “civil” hook generally required deference. And civil courts—which did not speak in contemporary doctrinal terms—did not always agree on where to draw the church autonomy boundary, what exactly motivated the doctrine, or how to work out its blackletter implications. But the core point is that civil courts broadly maintained that to review matters of church government, faith, and doctrine committed to church authorities would raise functional free exercise concerns—and civil courts structured their review to reduce intrusions by civil courts into matters of church government, faith, and doctrine. Moreover, even if early civil courts did not necessarily spell out the full

301 See *Huntsman v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints*, 127 F.4th 784, 792–800 (9th Cir. 2025) (Bress, J., concurring in judgment).

extent to which such review would raise free exercise concerns—no surprise: they weren't expressly ticking off contemporary order-of-operations boxes, or thinking in contemporary doctrinal terms—their recognition that such judicial review of church matters committed to church authorities would raise practical concerns is significant. It suggests an historical foundation for the extent to which contemporary doctrine—developing a generally consistent set of particularized explanations, either as a matter of legal development or specification—has embraced the view that the “very process of inquiry” may offend free exercise principles for similarly functional reasons. Contemporary precedent—as Judge Ho has explained—suggests that “inquiry” into ecclesiastical decisions may pose practical free exercise problems, particularly to the extent that such inquiry involves warping, “tax[ing],” or otherwise “burden[ing]” religious institutional rights—with close parallels to other contexts in which limitations on civil court review are designed to prevent the functional interference caused by civil court review (e.g., immunity doctrines).³⁰² Under this account, suits challenging church decisionmaking raise church autonomy concerns—and, apart from any formal impropriety, such litigation is improper on functional grounds: it serves no valid or at least sufficiently compelling civil interest, and it burdens ecclesiastical decisionmaking over ecclesiastical matters, among other things, by distracting church authorities, creating division within religious communities, sapping church energy and resources, and warping church decisionmaking.³⁰³ Not all litigation against a church is prohibited (e.g., a humdrum slip-and-fall case, which may be costly, indeed)—both because not all litigation implicates the church autonomy doctrine, and not all burdens on church autonomy are impermissible. But the point is that litigation that challenges ecclesiastical decisionmaking over matters of church government, faith, and doctrine at least implicates the church autonomy doctrine's procedural protections—and civil courts should ensure that they are clear to proceed, before plunging ahead.

Another free exercise principle driving church autonomy is formal—respecting the authority of churches or, at least, the formal sphere of voluntary and private religious ordering. The ministerial exception, as Judge Richardson has thoughtfully explained, may prevent the formal offense of civil courts trudging into church issues reserved to church authorities—and a similar point could be made about church autonomy, more generally, of which the ministerial exception is a component part (though perhaps not all church autonomy

302 See *McRaney*, 980 F.3d at 1074–75 (Ho, J., dissenting from denial of rehearing en banc).

303 See *id.*

doctrines are created equal—a debate for another time).³⁰⁴ Such civil court review, as Judge Richardson explains in the ministerial exception context, arguably “cheapens [the church’s] authority over ecclesiastical affairs” and violates the dignity and autonomy of religious institutions—with instructive if imperfect parallels to other contexts in which limitations on civil court review are designed to prevent the formal harm of civil courts treading into another entity’s domain (e.g., sovereign immunities).³⁰⁵ A similar point might be made that such civil court review violates the sphere sovereignty of private religious ordering protected by church-state relations under our system of laws—which impose at least some line dividing state power from private religious ordering and church authority. Drawing the line between church matters and ecclesiastical matters is challenging. And how a particular issue is characterized (e.g., is probing a secular-sounding reason for firing a religious minister an ecclesiastical matter?) is arguably the analytical turning point. But the point is that at least some matters are for churches, not courts—and civil-court intervention itself may threaten that church-state line.

History and tradition provide some related support for this formal free exercise idea—even leaving aside the “church sovereignty” principles of the “deep history,” which perhaps rested in some tension with early republicanism’s fear of *imperium in imperio* (even if that fear of divided sovereignty might have dwindled over time—and even if one can debate whether that fear was justified). As an initial matter, this formal principle—i.e., state incursion into religious affairs violates religious institutional and associational freedom—reflects the church-state jurisdictional principles discussed above, closely related to traditional notions of sphere sovereignty, that formed the backdrop of the church autonomy doctrine in early American thought and practice, and were viewed as necessary to properly respect the spheres of both church and state.³⁰⁶ Under this view, civil intrusion to interfere with church government, faith, and doctrine—even through civil courts—surpasses the proper role of the civil authority and infringes upon the proper sphere of religious institutions and private religious ordering. Civil intrusion—whatever its practical effect on churches—was viewed, when it went too far, as a formal violation of not only proper state authority, but proper religious freedom. Moreover, this formal principle also reflects the prevailing view in early American jurisprudence. American civil courts, as discussed above, explained that judicial

304 *Palmer v. Liberty Univ., Inc.*, 72 F.4th 52, 78 (4th Cir. 2023) (Richardson, J., concurring in judgment).

305 *Id.*

306 *See supra* Section I.A; *see also* Weinberger, *supra* note 11, at 476–77; Berg et al., *supra* note 11, at 177–79; Garnett, *The Freedom*, *supra* note 10, at 73–74.

intrusion into church matters would violate the proper church-state jurisdictional line protected by the free exercise of religion—violating the proper authority of churches over church matters and undermining the proper freedom of individuals to engage in private associational religious ordering.³⁰⁷ Civil courts—drawing on free exercise principles—consistently emphasized the limitations on judicial power as reflecting the proper roles of church and state in American law.³⁰⁸ And while civil courts certainly debated where and how to draw the line between church and state—it was a new principle they were working out, after all—they generally agreed that if a matter was on the ecclesiastical side of the line, it would be improper for the civil court to step over the line of civil authority and into the boundaries of church authority and private religious ordering.

i. Non-Establishment

Second, the history and tradition of the church autonomy doctrine also suggest that the doctrine provides structural limitations, often grounded in non-establishment principles, on the power of civil courts to exercise jurisdiction over matters of church faith, government, and doctrine. As an initial matter, as explained above, civil courts long maintained that they lacked “jurisdiction” or power to “inquire” into ecclesiastical matters reserved to ecclesiastical authorities—indeed, as *Watson* explained, over such ecclesiastical matters, civil courts could “exercise no jurisdiction.”³⁰⁹ Moreover, as explained above, civil courts long grounded such limitations on judicial review in non-establishment, structural principles—and, emphasizing that they generally lacked authority and/or competency over church matters reserved to church authorities, civil courts maintained that church autonomy limited civil court authority in order to keep civil government (and civil courts) in the appropriate zone of civil authority.³¹⁰ Consistent with the historical and traditional understanding of the doctrine, the contemporary church autonomy doctrine—and the ministerial exception in particular—reflects a “structural understanding” of the Religion Clauses: the church autonomy doctrine “does not protect the church alone; it also confines the state and its civil courts to their

307 See *supra* Section I.B.

308 See *supra* Section I.C.; see also *McRaney*, 980 F.3d at 1075–82 (Oldham, J., dissenting from denial of rehearing en banc).

309 *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1872) (collecting cases); see also *supra* notes 192–96 and accompanying text (collecting cases).

310 *Watson*, 80 U.S. (13 Wall.) at 728–35 (discussing the “establishment of no sect”); see *supra* notes 202–06 (collecting cases expressing non-establishment principles—including authority and competency).

proper roles.”³¹¹ It reflects “constitutional limits on judicial authority”—limits that require civil courts to “stay out” of ecclesiastical matters that are beyond their “ken” and “authority.”³¹²

This structural principle similarly favors civil courts ensuring that civil-court adjudication would not interfere with matters of church government, faith, and doctrine—and, where such civil-court adjudication would unduly trudge into church matters reserved to church authorities, treating church autonomy as a threshold issue. To the extent the doctrine is “jurisdictional”—in the “civil-procedure sense”—then the requirement that church autonomy must be addressed at the threshold is relatively clear. And there is some support—despite *Hosanna-Tabor*’s footnote that “part of the ecclesiastical-autonomy doctrine ‘operates as an affirmative defense’”—for the view that, even today, the “ecclesiastical-autonomy doctrine carries jurisdictional consequences,” though courts split on this issue even today, as Judge Oldham has explained.³¹³ But even if the church autonomy doctrine is “jurisdictional” not in the civil procedure sense, but in the “authority sense” (i.e., competency and authority to speak to the issue), as Professor Weinberger has suggested, then church autonomy should still be treated as threshold issue because, subject-matter jurisdictional or not, it still limits the very power of civil courts to exercise judicial power over ecclesiastical matters that are generally beyond the authority of civil courts and within the power of religious institutions.³¹⁴ One can debate—as Judge Bress’s *Huntsman* concurrence thoughtfully illustrates—where to draw the church autonomy doctrine’s procedural boundaries (i.e., what adjudication actually offends church autonomy principles).³¹⁵ But that basic point here is that, under the church autonomy doctrine, civil courts must mind their authority—and they have an independent obligation to “stay[] in [their] proper lane.”³¹⁶

311 *Billard v. Charlotte Cath. High Sch.*, 101 F.4th 316, 325–26 (4th Cir. 2024); see *supra* notes 10–11 and accompanying text (collecting literature).

312 *Billard*, 101 F.4th at 325–26 (first quoting *Lee v. Sixth Mount Zion Baptist Church*, 903 F.3d 113, 118 n.4 (3d Cir. 2018); then quoting *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020); and then quoting *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328, 331 (4th Cir. 1997)); see *McRaney.*, 980 F.3d at 1081 (Oldham, J., dissenting from denial of rehearing en banc).

313 *McRaney*, 980 F.3d at 1081 & n.3 (Oldham, J., dissenting from denial of rehearing en banc) (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 195 n.4 (2012)); see also, e.g., Weinberger, *supra* note 11, at 481.

314 See Weinberger, *supra* note 11, at 487–95.

315 See *Huntsman v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints*, 127 F.4th 784, 792–800 (9th Cir. 2025) (Bress, J., concurring in judgment).

316 *Billard*, 101 F.4th at 326.

b. Prudential

The second order-of-operations issue: *should* the church autonomy doctrine be addressed before civil courts may inquire into matters of church faith, government, and doctrine? Perhaps the most famous articulation of this prudential church autonomy view comes from Judge Richardson’s influential *Palmer* concurrence (which focuses on the ministerial exception specifically, but might have lessons for church autonomy more generally).³¹⁷ He acknowledged the mandatory church autonomy view: that the “very process of inquiry” into matters shielded by the ministerial exception is, in appropriate circumstances, unconstitutional.³¹⁸ But in his view, courts “need not say that a court’s inquiry into a minister’s employment is *unconstitutional* in order to say that it is—as a prudential matter—a bad idea for us to become so entangled.”³¹⁹ For example, in the context of a church firing a pastor, inquiring into the church’s motives would both “entangle[]” civil courts in “matters of faith,” and “cheapen[]” the church’s authority over its domain because the “mere act of questioning the institution’s motives—even if the court ultimately decides that those motives are ‘pure’—cheapens its authority over ecclesiastical affairs.”³²⁰ One could add additional prudential concerns—and expand such concerns beyond the ministerial exception. Ultimately, the determination of whether a court should exercise its discretion to adjudicate the church autonomy doctrine at the threshold is a prudential determination—requiring the court to consider both case-specific considerations (e.g., party diligence, comparative party burdens, and case administration) and systemic considerations (e.g., the nature of the church autonomy defense, the scope, nature, and effect of civil court inquiry on constitutional values).³²¹

History and tradition provide some support for exercising judicial prudence to avoid judicial intervention in matters of church government, faith, and doctrine. Two points—which warrant further exploration—stand out. First, civil courts historically articulated prudential or practical reasons for declining to exercise jurisdiction over or to

317 *Palmer v. Liberty Univ., Inc.*, 72 F.4th 52, 75–79 (4th Cir. 2023) (Richardson, J., concurring in judgment).

318 *Palmer*, 72 F.4th at 75 (Richardson, J., concurring in judgment) (quoting *NLRB v. Cath. Bishop of Chi.*, 440 U.S. 490, 502 (1979)).

319 *Id.* at 78.

320 *Id.* (emphasis omitted).

321 *Compare id.* (ministerial exception), with *Billard*, 101 F.4th at 325–29 (same). Of course, extending the logic beyond the ministerial exception to church autonomy more generally raises doctrinal and practical questions—and perhaps one might consider the relationship between church-autonomy’s breadth and its substantive and procedural protections.

review matters of church government, faith, and doctrine³²²—explaining, inter alia, that doing so would generate “mischiefs”³²³ and be “utter impolicy.”³²⁴ That suggests, at the very least, that prudential considerations are a relevant and valid part of the prudential calculus—even if we can debate what those prudential considerations were historically (or should be today). Second, identifying the scope of these prudential and practical concerns—i.e., what harms church autonomy protects against, and specifying what prudential or practical safeguards follow—raises more challenging questions, particularly given that the historical church-autonomy cases were not expressly focused on today’s precise doctrinal questions—though, if anything is clear, it is that inquiry into matters of church government, faith, and doctrine by civil courts were generally understood to raise such prudential and practical concerns. Some courts and scholars have suggested a few prudential considerations, which appear broadly consistent with church autonomy principles, at least at a high level of generality, that favor threshold adjudication in some circumstances, or at least resolving the church autonomy issue to ensure that a civil court is clear to proceed without burdening church-autonomy concerns—as a matter of prudence.

One set of prudential considerations is closely tied to the free exercise underpinnings of the church autonomy doctrine. These include, as explained above, the extent to which civil court inquiry can practically interfere with church decisionmaking (by warping or “tax[ing]” it),³²⁵ and can violate the sphere reserved for churches to govern their own affairs (by “cheapen[ing]” or violating the church’s authority over matters of church government, faith, and doctrine).³²⁶ While the history of the doctrine, as explained, leaves several points unclear, there is some historical and precedential support for these

322 See, e.g., *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1872) (discussing “evils”); *Ministers, Elders and Deacons of the Reformed Protestant Dutch Church v. Bradford*, 8 Cow. 457, 504 (N.Y. 1826) (discussing “mischiefs”); *German Reformed Church v. Commonwealth ex rel. Seibert*, 3 Pa. 282, 291 (1846) (describing the “sea of uncertainty and doubt, which would do any thing but improve either religion or good morals” that would result from civil courts’ oversight); *State ex rel. Watson v. Farris*, 45 Mo. 183, 197–201 (1869) (discussing “utter impolicy” of civil court review, *id.* at 197); *Pounder v. Ash*, 63 N.W. 48, 50 (Neb. 1895) (arguing that civil courts refraining reviewing ecclesiastical courts’ judgments as the “best policy”); *Satterlee v. United States ex rel. Williams*, 20 App. D.C. 393, 416–17 (D.C. Cir. 1902) (discussing this “established principle and settled policy,” *id.* at 417); see also notes 283–87 and accompanying text.

323 *Bradford*, 8 Cow. at 504.

324 *Farris*, 45 Mo. at 197.

325 *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, 980 F.3d 1066, 1074 (5th Cir. 2020) (Ho, J., dissenting from denial of rehearing en banc).

326 *Palmer*, 72 F.4th at 78 (Richardson, J., concurring in judgment).

types of free exercise prudential considerations—including, *inter alia*, the extent to which civil courts, as the doctrine developed, suggested that the process of exercising jurisdiction over or inquiring into ecclesiastical decisions would undermine the church's authority over church matters, cheapen the church's sovereignty in its ecclesiastical domain, and create other "mischiefs" as civil courts reviewed church doctrine, deposed sources of church teaching, second-guessed church authorities, and became bogged down in ecclesiastical disputes—and it is telling that, even when civil courts intervened in church disputes, they articulated their reluctance to get involved and the delicate nature of such limited intervention. Additionally, even courts (particularly early courts) that took a freer hand to reviewing religious questions (consider, for example, the famous *German Reformed* case thoughtfully studied by Professor Funk³²⁷) often explained that while they had the power to take cognizance of religious matters in some circumstances, they recognized that doing so could create problems—mischiefs and harms that, under contemporary doctrine, civil courts can reasonably take account of in the exercise of their discretion in particular circumstances (e.g., order-of-operations doctrine—and perhaps other areas of case management).³²⁸ These prudential considerations suggest a free exercise variable for civil courts to weigh in determining when to adjudicate church autonomy defenses—while history and tradition do not appear to completely resolve the question or specify the full scope of such prudential caution, such prudential considerations have at least some basis in historical church-autonomy concerns (perhaps as a specification or elaboration of such concerns, or perhaps as a response to translating church autonomy concerns into contemporary civil-procedure practice) that plausibly favor, as a matter of prudence, threshold adjudication, at least as a general (if defeasible) rule.

Another set of prudential considerations is closely linked to non-establishment—and these considerations include, among other things, the risk of civil courts becoming entangled in matters of faith. Several non-establishment principles—some more grounded in history, others more firmly planted in precedent—provide some support favoring civil courts ensuring that they are clear of church autonomy concerns before proceeding. These include, *inter alia*, non-establishment limitations (1) on civil court *competency* to adjudicate religious questions (a subject-matter consideration),³²⁹ and (2) on civil court *authority* to review religious decisions made by religious authorities (an institutional

327 See Funk, *supra* note 91, at 273–79; Weinberger, *supra* note 10, at 1276 & n.127.

328 See, e.g., *Bradford*, 8 Cow. at 504.

329 *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728–35 (1872) (collecting cases); see *supra* notes 309–16 and accompanying text.

consideration),³³⁰ in addition to (3) the dangers associated with civil courts becoming otherwise entangled in religious issues and institutions (based on either the religious nature of the issue at stake or the downstream effects flowing from civil court review and monitoring).³³¹ In the historical and traditional doctrine—which, to be sure, permitted broader civil court inquiry into religious questions than contemporary doctrine might, as explained above—civil courts drew upon these principles to explain why they abstained from becoming entangled in religious disputes or why they deferred to religious authorities.³³² Such civil courts tied the prohibitions on judicial review over ecclesiastical matters to civil court expertise, civil court competence, and general limitations on civil authority over religious institutions and matters.³³³ These considerations—which plausibly favor mandatory limits, as explained above—also suggest, at the very least, non-establishment, prudential reasons for civil courts to consider in determining when to adjudicate church autonomy issues. Civil courts, to expand Judge Richardson’s point from the ministerial exception context to the church autonomy doctrine more generally, need not say that “inquiry into a minister’s employment is *unconstitutional* in order to say that it is—as a *prudential* matter—a bad idea for [civil courts] to become so entangled.”³³⁴ So too with church autonomy more generally—prudence may demand structuring judicial review to avoid involvement in matters of church government, faith, and doctrine.

2. Interlocutory Appeals

The second specific civil procedure issue is the collateral order issue—is the denial of a church autonomy defense subject to interlocutory appeal? Under contemporary doctrine, an issue is subject to interlocutory appeal when the district court’s disposition of the issue “(1) is conclusive; (2) resolve[s] important questions separate from the merits; and (3) is effectively unreviewable on appeal from the final judgment.”³³⁵ Such “effective[] unreviewab[ility]” occurs where delaying review until final judgment would “imperil a substantial public

330 *Watson*, 80 U.S. (13 Wall.) at 728–35 (collecting cases); see *supra* notes 216–27 (collecting cases).

331 See *Bradford*, 8 Cow. at 502.

332 See Weinberger, *supra* note 88 (manuscript at 15–19).

333 *Id.*

334 *Palmer v. Liberty Univ., Inc.*, 72 F.4th 52, 78 (4th Cir. 2023) (Richardson, J., concurring in judgment) (second emphasis added).

335 *Belya v. Kapral*, 59 F.4th 570, 576 (2d Cir. 2023) (Park, J., dissenting from order denying rehearing en banc) (first citing *Swint v. Chambers Cnty. Comm’n*, 514 U.S. 35, 42 (1995); and then citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)).

interest” or “some particular value of a high order.”³³⁶ Although the class of claims subject to interlocutory appeals is “narrow and selective,” courts—which focus on the “entire category to which a claim belongs,” and don’t engage in “individualized jurisdictional inquir[ies]”—have permitted interlocutory appeals in several contexts.³³⁷ These include the well-known “immunity-from-suit” doctrines—including sovereign immunity, speech-and-debate immunity, double-jeopardy immunity, absolute immunity, and qualified immunity.³³⁸ These also include “orders that do not involve immunity defenses at all, much less immunity from suit”—including many that “involve interests that are less weighty than the constitutional value[s]” implicated by the church autonomy doctrine.³³⁹ The questions are hard—but the history, tradition, and precedent of the church autonomy doctrine provide some support for the view that an order denying a church autonomy defense likely should be subject to interlocutory appeal,³⁴⁰ though more work is necessary here and there are reasonable arguments in both directions based on the limited history and tradition here.³⁴¹

One consideration favoring interlocutory appeals focuses on practical interference. Interlocutory appeals in several contexts have often been allowed where two conditions are satisfied. The first condition is that the right protects a publicly valuable good—in many contexts, this is a “foundational constitutional interest[.]”³⁴² The second condition is that the right provides “protections against the burdens of litigation”—which are necessary to preserve that publicly valuable good (which distinguishes them from the ordinary litigation burdens that any defendant always faces).³⁴³ History, tradition, and precedent provide some qualified support for both rationales.

Start with the easier step. The church autonomy doctrine is “rooted in foundational constitutional interests”—and reflects a compelling public good.³⁴⁴ While the doctrine was originally grounded in

336 *Id.* (quoting *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009)).

337 *Id.* (first quoting *Will v. Hallock*, 546 U.S. 345, 350 (2006); and then quoting *Mohawk*, 558 U.S. at 107).

338 *See, e.g., id.* at 578–80; *see also, e.g.,* Weinberger, *supra* note 11, at 485–86, 495–510.

339 *Graber v. Doe II*, 59 F.4th 603, 611–12 (3d Cir. 2023) (Hardiman, J., dissenting).

340 *See Belya*, 59 F.4th at 573 (Park, J., dissenting from order denying rehearing en banc); Weinberger, *supra* note 88 (manuscript at 48 & n.365) (collecting circuit split).

341 For an examination of the interaction of the church autonomy doctrine and interlocutory appeals, see Lael Weinberger & Branton Nestor, *Church Autonomy and Interlocutory Appeals*, 102 NOTRE DAME L. REV. (forthcoming 2027), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6073729.

342 *Belya*, 59 F.4th at 579 (Park, J., dissenting from order denying rehearing en banc).

343 *Id.*

344 *Id.*

a “broad and sound view of the relations of church and state,” the Supreme Court has clarified that it is now constitutional in character.³⁴⁵ There are two sets of such foundational constitutional interests here. One is the free exercise interest—as explained, the church autonomy doctrine was historically and traditionally understood to shield religious institutions from review and inquiry by civil authorities (including courts) in order to protect the freedom of the church.³⁴⁶ The other constitutional interest is the non-establishment interest—as explained, the church autonomy doctrine was long understood to prohibit civil courts from exercising jurisdiction over and examining ecclesiastical decisions in order to prevent civil authorities from establishing religious doctrine and becoming entangled in ecclesiastical disputes.³⁴⁷ There were, to be sure, some questions over the precise original nature of the church autonomy doctrine—for example, was it a defeasible, common law rule or an indefeasible, constitutional rule (and one wonders whether the intersection of natural rights and general law might provide a path forward)? But, today, there is little dispute that the church autonomy doctrine reflects foundational constitutional interests and compelling public values—and that view is supported by the extent to which the historical doctrine was traditionally grounded in free exercise and non-establishment principles, and the extent to which the contemporary doctrine is expressly grounded in the Free Exercise Clause and the Establishment Clause.

Next turn to the harder step. The church autonomy doctrine has also historically and traditionally been understood in ways that suggest it plausibly provides at least some “protections against the burdens of litigation itself.”³⁴⁸ The historical cases did not run the analysis through the contemporary interlocutory appeals doctrine—it is perhaps no surprise that the Taney Court did not cite *Mohawk*, or that the Marshall Court did not analyze *Cohen*. And a more targeted analysis of interlocutory-appeal analogues, in future work, would greatly benefit the analysis. But the point here, based on the history and tradition surveyed above, is that the historical conception and application of the church autonomy doctrine as it developed in middle to late nineteenth century practice (and the principles that can be derived from the doctrine’s underlying commitments) provide some support for the view that the church autonomy doctrine, as applied today, should provide at least some limits on the “very process of inquiry” by civil courts³⁴⁹

345 *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 113, 116 (1952) (quoting *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1872)); see *supra* notes 264–69 and accompanying text.

346 See *supra* note 150.

347 See *supra* note 151.

348 *Belya*, 59 F.4th at 579 (Park, J., dissenting from order denying rehearing en banc).

349 *NLRB v. Cath. Bishop of Chi.*, 440 U.S. 490, 502 (1979).

and offer at least some “protections against the burdens of litigation itself.”³⁵⁰

The history and tradition of the church autonomy doctrine linked limitations on judicial power to protections for religious institutions. As an initial matter, civil courts maintained that they could not exercise “jurisdiction” over or review protected ecclesiastical decisions—and, as noted above, they explained that the very process of exercising such “jurisdiction” over ecclesiastical decisionmaking would, in addition to raising non-establishment problems, violate free exercise and voluntary-association principles.³⁵¹ It would do so by infringing on the church’s formal authority over its ecclesiastical decisions (by making such church decisions subject to final approval by civil courts), by undermining the church’s practical power to govern itself and its flock (by permitting aggrieved members to turn to civil courts), and by permitting civil courts to go through church doctrine, processes, and decisionmaking to review the validity of the church’s decisions (a distinct—but serious—type of mischief).³⁵² Moreover, in a similar vein, civil courts maintained that they could not inquire into or “interfere” with protected ecclesiastical decisions³⁵³—raising many of the same free exercise principles just explained, and highlighting the “mischiefs” if civil courts conducted probing inquiries into or exercised judicial review over the protected ecclesiastical decisions of church authorities.³⁵⁴ The church autonomy doctrine, as it developed in later twentieth-century judicial practice, broadly confirmed these principles and elaborated upon them—instructing that the “very process of inquiry” could infringe upon religious autonomy by warping religious decisionmaking, interfering with religious institutional control over its mission, and otherwise raising free exercise and non-establishment concerns that counseled against judicial review of ecclesiastical decisionmaking.³⁵⁵

Such historical, traditional, and precedential limitations on judicial review are broadly consistent with the most prominent reasons offered for allowing interlocutory appeals of church autonomy defenses under contemporary doctrine—including those offered most famously by Judge Park’s *Belya* dissent and Judge Ho’s *McRaney* dissent, which both explain why “the very process of inquiry” into ecclesiastical

350 *Belya*, 59 F.4th at 579 (Park., J., dissenting from order denying rehearing en banc).

351 Weinberger, *supra* note 88 (manuscript at 15–23); *see supra* notes 149–51.

352 *See supra* notes 149, 197, 202.

353 *Ministers, Elders and Deacons of the Reformed Protestant Dutch Church v. Bradford*, 8 Cow. 457, 508 (N.Y. 1826).

354 *Bradford*, 8 Cow. at 504; *see supra* note 322 and accompanying text.

355 *See NLRB v. Cath. Bishop of Chi.*, 440 U.S. 490, 502 (1979); *supra* notes 302–05 and accompanying text.

decisions “may impinge on rights guaranteed by the Religion Clauses.”³⁵⁶ The point is not that civil courts articulated the same interlocutory-appeal factors in the current doctrine, though future work should drill down on any relevant interlocutory-appeal analogues to see what other lessons we may ferret out. Instead, the point is that the rules and principles embraced by these early courts are broadly consistent with and supportive of the primary contemporary doctrinal reasons for permitting interlocutory appeals today—even if, to be sure, they are not a precise fit, and interpretation, construction, and analogizing are required in order to close the relevant doctrinal gaps. A few ideas—proposed in contemporary courts—stand out.

First, denying church autonomy risks “interfering” with church decisionmaking. Such civil court review undermines the freedom of religious institutions by subjecting church decisions to civil review and supervision (undermining the church’s power over church matters), and by permitting aggrieved members to subject church authorities to civil court superintendence (undermining the church’s final authority over its body in ecclesiastical matters). These concerns have some historical foundation—civil courts, as explained above, generally maintained that judicial review and inquiry would undermine church authority by placing churches under civil court superintendence and by undermining the authority of churches to have the authoritative word on church doctrine and the authoritative power over church discipline and government.

Second, in a related vein, denying church autonomy risks warping, “taxing,” and “chilling” the church’s decisionmaking, in addition to distracting it from its central mission. According to some scholars and judges, the “very process” of inquiry into church decisionmaking is problematic because it “tax[es] . . . religious liberty” and risks “‘chill[ing]’ the group’s activities.”³⁵⁷ The warping and chilling concerns are serious, particularly *ex ante*. “[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious”—and fear of such civil court inquiry “might affect the way an organization carry[es] out what it underst[ands] to be its religious mission.”³⁵⁸

356 *Belya v. Kapral*, 59 F.4th 570, 577 (2d Cir. 2023) (Park, J., dissenting from order denying rehearing en banc) (quoting *Cath. Bishop*, 440 U.S. at 502); *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, 980 F.3d 1066, 1074 (5th Cir. 2020) (Ho, J., dissenting from denial of rehearing en banc) (quoting *Cath. Bishop*, 440 U.S. at 502).

357 *McRaney*, 980 F.3d at 1074 (Ho, J., dissenting from denial of rehearing en banc) (first quoting *Cath. Bishop*, 440 U.S. at 502; and then quoting *Whole Woman’s Health v. Smith*, 896 F.3d 362, 373 (5th Cir. 2018)).

358 *Id.* at 1074–75 (alterations in original) (quoting *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 336 (1987)).

The “taxing” concerns, too, are serious—it is also a significant burden on a religious organization to be exposed to the travails of litigation over religious disputes. That burden risks “‘undermin[ing]’ its ability to ‘conduct frank internal dialogue and determinations,’”³⁵⁹ threatens to drain church resources and embroil church communities in divisive and distracting litigation over religious disputes, and poses “grave problems for religious autonomy,” particularly as “witnesses [are called] to testify about the importance and priority of [a] religious doctrine . . . , with a civil factfinder sitting in ultimate judgment of what the accused church really believes, and how important that belief is to the church’s overall mission.”³⁶⁰

While the historical doctrine did not necessarily identify such warping, “taxing,” and “chilling” concerns as consistently or expressly as contemporary doctrine, there is a reasonably strong case for crediting these concerns—even if construction and interpretation may be necessary. As an initial matter, the historical and traditional doctrine identified similar types of concerns—including the mischiefs to church governance and church decisionmaking from inviting civil court review and superintendence (though much of the analysis here turns on the appropriate level of generality for reading these old decisions and translating their concerns to contemporary civil-procedure).³⁶¹ Moreover, to the extent that translating from historical practices to contemporary doctrine requires, as some have suggested, deriving historic “principles” and applying them through “implementing” doctrines, there remains a case for interlocutory appeals—and for crediting contemporary practical concerns as consistent applications, elaborations, or specifications of historical functional concerns that drove church autonomy doctrine, though that turns on how one divines such “principles” and “translates” them to the present.³⁶² There is, however, something to be said here. The historical doctrine was concerned with protecting the freedom of religious institutions to enjoy freedom over matters of church government, doctrine, and discipline—and the historical doctrine explained the limitations on judicial review as flowing from these free exercise concerns. To the extent that civil court review warps, chills, or taxes such religious decisionmaking, church autonomy doctrine—as implemented, translated, particularized, and developed today—may plausibly take account of such concerns, particularly when applying old church autonomy principles to a new set of problems (a puzzle similar to that faced by early American judges).

359 *Id.* at 1074 (quoting *Whole Woman’s Health*, 896 F.3d at 373).

360 *Id.* (alterations in original) (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 205–06 (2012) (Alito, J., concurring)).

361 *See* Weinberger, *supra* note 88 (manuscript at 43).

362 *See infra* subsection III.A.2.

Another consideration favoring interlocutory appeals for church autonomy denials focuses on formal authority—a point raised above and briefly reiterated here. One line of argument that potentially suggests this approach comes, as noted above, from Judge Richardson’s *Palmer* concurrence, which opined that it was improper to “[s]kirt[] the ministerial exception by dismissing an employment-discrimination claim on its merits” because doing so would infringe on the church’s authority over its sphere.³⁶³ Because “the church’s decision is intrinsically bound up in religious doctrine,” to “subject such a decision to the scrutiny of temporal courts threatens the church’s ‘power to decide for themselves, free from state interference, matters of . . . faith.’”³⁶⁴ As Judge Richardson further explained, “the sort of ‘inquiry’ that entangles us in matters of faith encompasses more than just digging through a religious institution’s employment files and deposing its leaders”—and “the mere act of *questioning* the institution’s motives—even if the court ultimately decides that those motives are ‘pure’—cheapens its authority over ecclesiastical affairs.”³⁶⁵ Under this account (and to expand to church autonomy more generally), civil court inquiry and review of ecclesiastical decisions—even apart from its practical effect—is a formal, if “metaphysical,” violation of the separation of church and state, a violation of the jurisdictional sphere-sovereignty principles recognized by leading advocates of church autonomy in our history and tradition.³⁶⁶ Such a limitation provides an additional reason for viewing the church autonomy doctrine as imposing at least some limitations on the power of civil courts to entertain suits implicating matters of church government, faith, and doctrine. By asserting jurisdiction over church matters and inquiring into ecclesiastical decisions, the civil courts cross the line—stepping into the church’s domain in violation of its formal zone of religious decisionmaking. It is the assertion of power itself by the civil court—and not merely how it is used—that presents the church autonomy harm.

III. CONCERNS AND RESPONSES

There are several weighty concerns regarding the conclusion that the church autonomy doctrine limits the exercise of judicial power over ecclesiastical matters reserved to ecclesiastical authorities.

363 *Palmer v. Liberty Univ., Inc.*, 72 F.4th 52, 78 (4th Cir. 2023) (Richardson, J., concurring in judgment).

364 *Id.* at 78 (omission in original) (quoting *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952)).

365 *Id.*

366 *Id.*

A. *Methodological and Historical Concerns*

The first set of objections are methodological and historical—challenging the relevance of history and tradition, and what such history and tradition show. But there are compelling reasons for interpreting church autonomy by reference to history and tradition. And such history and tradition show that church autonomy limited judicial power in at least some important ways.

I. Methodological Concern

Start with the methodological concern. It is hard to argue that history and tradition should have *nothing* to do with contemporary church autonomy doctrine. As Professor McConnell points out, “[e]ven opponents of originalism generally agree that the historical understanding is relevant, even if not dispositive.”³⁶⁷ And historical practices and understandings have been an important, enduring, and ecumenical feature of much of our jurisprudence here—in the context of church autonomy doctrine specifically and the Religion Clauses more generally (and, constitutional law, even more generally).³⁶⁸ First, the church autonomy doctrine is expressly grounded in history and tradition. In its leading church autonomy cases, the Supreme Court expressly grounded its jurisprudence in an extensive analysis of the centuries-old “background” against which “the First Amendment was adopted,” as well as the historical and traditional understanding of the Religion Clauses that emerged in American practices.³⁶⁹ Second, the Court has generally looked, at least in part, to such historical practices and understandings in interpreting the Religion Clauses more generally—particularly in the context of the Establishment Clause.³⁷⁰ While history has not been the only game in town,³⁷¹ historical practices and understandings have always been among the “standard grounds for constitutional decisionmaking”³⁷² in interpreting the Religion

367 McConnell, *supra* note 58, at 1415.

368 *Id.* at 1503–11; *see also, e.g.*, Marc O. DeGirolami, *First Amendment Traditionalism*, 97 WASH. U. L. REV. 1653, 1657–61 (2020); Weinberger, *supra* note 10, at 1292–305; Haun, *supra* note 281, at 440–42.

369 *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 183, 182–187 (2012); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2061 (2020) (quoting *Hosanna-Tabor*, 565 U.S. at 183).

370 *See, e.g.*, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022) (collecting cases).

371 *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), *overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022); *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *overruling recognized by Kennedy*, 142 S. Ct. 2407.

372 *Dobbs*, 142 S. Ct. at 2244-61, 2271.

Clauses³⁷³ (as they are for other constitutional provisions³⁷⁴)—such that the Court in *Kennedy* could explain that, at least in the Establishment Clause context, the Constitution “must be interpreted by ‘reference to historical practices and understandings,’” and “[a]n analysis focused on original meaning and history . . . has long represented the rule rather than some ‘exception’ within the ‘Court’s Establishment Clause jurisprudence.’”³⁷⁵ And third, while reasonable minds can differ on the proper role of history and tradition in analyzing constitutional text,³⁷⁶ this much is clear—the reasons for considering history and tradition are serious, and Justices of all stripes have recognized that history and tradition should have at least some role in how we read the Constitution and its Religion Clauses.³⁷⁷

The question, then, is less “does history matter”—and more “how does history matter.” The theory is contested—and debate ensues over whether history and tradition are best used as, inter alia, (1) “evidence of original meaning and purpose,” (2) “modalities of constitutional argument within a constitutional pluralist framework,” (3) sources of “[h]istorical [t]raditionalism,” or (4) “implementing doctrine[s].”³⁷⁸ The application, too, is contested—and debate unfolds over, inter alia, what was an “establishment” of religion,³⁷⁹ how is that prohibition “incorporated,”³⁸⁰ what types of evidence are most probative,³⁸¹ what time period is most relevant,³⁸² and what these answers mean for the church autonomy doctrine.³⁸³ The church autonomy doctrine has generated many such methodological questions—particularly regarding, inter

373 See, e.g., *Kennedy*, 142 S. Ct. at 2428.

374 See, e.g., *Dobbs*, 142 S. Ct. at 2244–61, 2271; *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997); *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2125–34 (2022).

375 *Kennedy*, 142 S. Ct. at 2428 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 575–76 (2014)).

376 Compare, e.g., *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2087 (2019) (plurality opinion), with *id.* at 2094 (Kagan, J., concurring in part).

377 See, e.g., *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 181–87 (2012); see also Haun, *supra* note 281, at 444–55.

378 Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs*, Bruen, and *Kennedy: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 440, 445–454 (2023); see also, e.g., Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1117 (1990); Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477, 1479–1518 (2023). See generally Haun, *supra* note 281.

379 See, e.g., *Kennedy*, 142 S. Ct. at 2428.

380 See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 51 (2004) (Thomas, J., concurring in judgment).

381 See, e.g., *Firewalker-Fields v. Lee*, 58 F.4th 104, 122 n.8 (4th Cir. 2023) (Richardson, J.) (collecting cases).

382 See, e.g., *id.* (collecting cases).

383 See, e.g., *id.*; see also *Palmer v. Liberty Univ., Inc.*, 72 F.4th 52, 76 (4th Cir. 2023) (Richardson, J., concurring in judgment) (collecting cases).

alia, whether the “deep history” of the church autonomy doctrine is relevant, whether the pre-eighteenth century English history matters, and whether the mid-to-late-nineteenth century American cases come too late—methodological questions that this Article acknowledges but leaves for future work.³⁸⁴ Ultimately, this Article, recognizing that “[o]pen questions abound,”³⁸⁵ attempts to offer an ecumenical account of the history and development of the church autonomy doctrine—seeking to put more historical pieces on the board for the discussion moving forward.³⁸⁶

2. Historical Concern

Next take the “historical concern”—which asks whether imposing limitations on civil court review of ecclesiastical decisions is consistent with the history and tradition of the doctrine.³⁸⁷ The exceptions and qualifications to the church autonomy doctrine—identified by many thoughtful scholars—suggest a richer and more nuanced understanding of church autonomy. But they do not—for the reasons explained above—require rejecting the general historical and traditional rule that “civil courts exercise no jurisdiction” over matters “strictly and purely ecclesiastical,” and that civil courts must “accept such [ecclesiastical] decisions as final, and as binding” when resolved by “church judicatories.”³⁸⁸ As explained, these exceptions have several potential explanations—including, *inter alia*, that they often had mixed historical receptions, reflected the attempt to work out a new doctrine in new legal contexts by borrowing from related areas of law, reflected the internal logic of church autonomy, and reflected the external interests of states and of civil courts. And, just to underscore the point, civil courts that embraced these exceptions also embraced broader church autonomy principles. All this suggests, at most, that the doctrine was richer and more complicated than modern readers might expect—but it does not show that the doctrine was fabricated or invented.

But there is a related historical point that warrants comment—the extent to which early states, during disestablishment, interacted with religious institutions through corporate law (and many other

384 See, e.g., *Firewalker-Fields*, 58 F.4th at 122 n.8 (Richardson, J.).

385 *Id.*

386 See, e.g., Weinberger, *supra* note 10, at 1256–57.

387 Historical views vary—as explained above. See, e.g., Funk, *supra* note 91, at 282–84; Gordon, *supra* note 91, at 310–12; Helfand, *supra* note 11, at 1912–18; Weinberger, *supra* note 10, at 1292–94.

388 *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 723, 727 (1872); see also, e.g., Weinberger, *supra* note 11, at 477–85.

blackletter doctrines to the list).³⁸⁹ As others have explained, one key feature of colonial and state establishments was limiting incorporation—and its many temporal benefits (including perpetual existence, perpetual property holding, and liability limitations)—to favored, established churches.³⁹⁰ During disestablishment, states enacted corporate law rules that expanded incorporation—and its many temporal benefits—to religious institutions generally.³⁹¹ In particular, they

- (1) gave religious institutions the right to incorporate (a major benefit); but
- (2) attached some strings to such incorporation benefits, including rules governing
 - (a) how the religious institution's corporate body and governance would be structured (states favored lay control), and
 - (b) how much property religious institutions could hold under their corporate form (states limited concentrated property holdings).

Debate swirls over what to make of such incorporation—and much of the debate reflects tension between American republicanism's embrace of religious institutional autonomy and fear of concentrated private power (even by religious institutions).³⁹² For some—such as Professor Funk and Professor Weinberger—incorporation was a major means of furthering non-establishment and free exercise principles—empowering churches with the significant gift of corporate status.³⁹³ For others—such as Professor Gordon—incorporation was more of a mixed bag, a means for spreading rights to religious institutions while also protecting republican values, such as furthering lay control over religious power and combatting the risk of *imperium in imperio*.³⁹⁴ Such corporate forms—unlike many of the rules apparently governing unincorporated associations—often invited judicial review, and courts were often tasked to determine how to apply corporate law rules consistently with broadly acknowledged church autonomy principles.³⁹⁵

There are a few considerations that may ease some of the potential tensions here—though more work is required, and the discussion here merely floats some potential ideas. First, civil courts that engaged in such corporate-law-style review nevertheless maintained fidelity to

389 See, e.g., Gordon, *supra* note 91, at 316; Funk, *supra* note 91, at 263; Weinberger, *supra* note 11, at 489.

390 Gordon, *supra* note 91, at 312.

391 Weinberger, *supra* note 88 (manuscript at 34–35).

392 Gordon, *supra* note 91, at 319; Weinberger, *supra* note 88 (manuscript at 34–35).

393 Weinberger, *supra* note 10, at 1274; Funk, *supra* note 91, at 263.

394 Gordon, *supra* note 91, at 320.

395 Funk, *supra* note 91, at 281.

church autonomy principles: they said as much, they applied the law to reflect such church autonomy concerns, and while they sometimes recognized the potential tensions between judicial review and church autonomy, they accepted such tensions as an inevitable feature of how blackletter church autonomy necessarily operated in the real world.

Second, corporate law was generally viewed as empowering—rather than limiting—religious institutions.³⁹⁶ It provided, as Professor Funk has explained, a “positive liberty”—a “liberty that certain institutions could act in the world of property and contract in meaningful ways.”³⁹⁷ In this sense, church autonomy reflected a “corporate freedom, the right of an aggregate to see its institutional rules and actions validated in state courts.”³⁹⁸ While that corporate freedom had doctrinal limits and historical wrinkles, the courts that combined church autonomy law and corporate law (and other forms of blackletter law) broadly embraced, as *Watson* explained, rules of abstention and deference over competent church decisionmaking—explaining that, whatever room there might be for marginal civil court review in narrow circumstances, they generally lacked judicial power to review or reverse ecclesiastical decisionmaking in ecclesiastical matters.³⁹⁹

Third, the church autonomy doctrine was potentially originally a general law or common law rule—not a constitutional law rule.⁴⁰⁰ This analytical turn is part of a much richer and much more complicated historical and doctrinal debate that demands future work.⁴⁰¹ In the context of the church autonomy doctrine—where the puzzle is that courts often purported to engage in abstention and deference, but legislatures were often quite involved in the temporal corporate structure and property rights of religious institutions, which had the effect of hauling courts into ecclesiastical-sounding disputes—thinking of the right in general law terms may have some benefits. One view is that the doctrine was a “[j]udicial [d]efault [r]ule of [c]hurch [a]utonomy.”⁴⁰² In other words, “[w]hat the courts recognized as the default setting was to try to ascertain the unique jurisdiction of the church’s

396 *Id.* at 278.

397 *Id.*

398 *Id.*

399 *See, e.g.,* *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1872); *supra* notes 247–54 and accompanying text; *see also, e.g.,* Funk, *supra* note 91, at 283 (describing the rise of the deference regime); Weinberger, *supra* 88 (manuscript at 36–37).

400 Weinberger, *supra* note 10, at 1276; Garnett, *The Freedom*, *supra* note 10, at 75.

401 *See, e.g.,* William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185 (2024); Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246 (2017).

402 Weinberger, *supra* note 88 (manuscript at 36) (emphasis added).

internal affairs and leave them as untouched by civil law as possible. But this was not a binding determination on the legislatures.”⁴⁰³

Fourth, the church autonomy doctrine did not come preassembled or set in stone. There was broad agreement on the church autonomy “principle[,]” but reasonable disagreements over its “application” or “specification” in practice.⁴⁰⁴ That should not be surprising—church autonomy was, in many ways, a developing legal doctrine based on new legal and constitutional commitments. As the doctrine evolved over time, civil courts sought to respect its principles while working out its application in various corporate law, property law, and tort law contexts (and not without difficulty)—with broad agreement on the church autonomy principle, but significant disagreement over how to implement it in practice.⁴⁰⁵ And civil courts had several major variables to consider—including, *inter alia*, (1) what to do with establishment-era English precedents in disestablishment-era American practice, and (2) how to balance fears of *imperium in imperio* against the broadly recognized freedom of religious institutions (a problem that Professor Funk explains was largely remedied by the fact that churches, generally limited in their temporal power, were no longer considered *imperio* by the mid-nineteenth century).⁴⁰⁶ The critical point, for present purposes, is that essentially all of the prevailing, historical civil court decisions—despite disagreement on some of the doctrine’s application—broadly maintained fidelity to church autonomy principles and maintained that it limited judicial review over ecclesiastical decisions in important ways.

B. Normative Concerns

A second set of objections are normative—arguing that providing procedural protections to religious institutions under the church autonomy doctrine improperly privileges religious institutions.

1. Neutrality Concern

Start with the “neutrality concern”: the contention that religious institutions should not be afforded procedural protections from suit because doing so awards improper special protections to religious

403 *Id.*

404 *Id.* (manuscript at 35–36, 47); see CHAPMAN & MCCONNELL, *supra* note 53, at 173–85; cf. Campbell, *supra* note 400, at 313–18.

405 See CHAPMAN & MCCONNELL, *supra* note 53, at 173–85; Weinberger, *supra* note 88 (manuscript at 32–36).

406 Funk, *supra* note 91, at 273.

institutions.⁴⁰⁷ While there is a fruitful debate over whether religion (and religious institutions) are “special” compared to secular conscience (and secular institutions), several reasons support maintaining the longstanding limits on judicial review over ecclesiastical decisions.

First, religion *is* special under our constitutional tradition. While this point has been debated elsewhere—and the debates could fill libraries—it is worth reiterating the view articulated by Professor McConnell that religion is “special” in America because, among other things, the text, history, and tradition of the First Amendment make it so.⁴⁰⁸ The Religion Clauses prohibit making laws “respecting an establishment of religion, or prohibiting the free exercise thereof.”⁴⁰⁹ The Free Exercise Clause singles out religious exercise for special protection—and, as explained above, civil courts expressly relied upon “free exercise” interests in articulating limits on their judicial authority.⁴¹⁰ And the Establishment Clause singles out religious establishments for special prohibition—and, as explained above, civil courts also expressly drew upon “non-establishment” interests in explaining the limits of their authority over ecclesiastical matters.⁴¹¹ Certainly, the early church autonomy cases discussed above—which recognized that ecclesiastical institutions had some similarities to secular institutions—recognized the unique free exercise and non-establishment considerations that necessarily influenced the scope of their judicial review over church decisionmaking.⁴¹² It is no surprise that the unanimous Supreme Court in *Hosanna-Tabor*—after explaining that “[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers”—expressly *rejected* the neutrality view.⁴¹³ It explained that it was “untenable” that “the First Amendment analysis should be the same, whether the association in

407 See, e.g., Michael W. McConnell, *Why Protect Religious Freedom?*, 123 YALE L.J. 770 (2013) (reviewing BRIAN LEITER, *WHY TOLERATE RELIGION?* (2013)); Andrew Koppelman, *Is It Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571; Christopher C. Lund, *Religion Is Special Enough*, 103 VA. L. REV. 481 (2017); Mark Storslee, *On Religion's Specialness*, 81 REV. POL. 656 (2019); Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111 (2011); LEITER, *supra*, at 7; William P. Marshall, *What Is the Matter With Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193, 193 (2000); Micah Schwartzman, *What if Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1427 (2012).

408 See, e.g., McConnell, *supra* note 378, at 1114–27. Thoughtful scholarship debates this point. See *supra* note 407.

409 U.S. CONST. amend. I.

410 See *supra* note 150 and accompanying text.

411 See McConnell, *supra* note 378, at 1132; *supra* note 151 and accompanying text.

412 See *supra* notes 150–51.

413 *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 181 (2012).

question is the Lutheran Church, a labor union, or a social club.”⁴¹⁴ That is because “the text of the First Amendment itself . . . gives special solicitude to the rights of religious organizations.”⁴¹⁵

Second—to turn to the judicial review question—the historical and traditional understanding of the church autonomy doctrine supports providing special protection for religious institutions over matters of church government, faith, and doctrine. As an initial matter, judicial review of ecclesiastical institutions (e.g., the Lutheran church) is not like judicial review of secular institutions (e.g., labor unions and social clubs). Civil courts historically and traditionally recognized that while interfering with secular institutional decisions could raise associational liberty concerns (and that religious and secular institutions could often come “in the same attitude” in important respects), civil court interference with religious institutions’ internal management decisions raised additional and heightened constitutional concerns—rooted in free exercise and non-establishment principles (which had little to say about social clubs or labor unions, but much to say about churches).⁴¹⁶ Moreover, judicial review of ecclesiastical matters (e.g., minister selection) is not like judicial review of secular institutional matters (e.g., president of the Laguna Beach Lawn Bowling Club). Civil courts historically and traditionally recognized that religious institutional questions (e.g., ecclesiastical matters related to internal church governance and procedure) were different from secular institutional questions (e.g., matters related to internal governance and procedure of voluntary associations)—and courts had a special lack of “authority” or “competence” to exercise “jurisdiction” over or “inquire” into such religious questions shielded by the church autonomy doctrine.⁴¹⁷ In short, while civil courts often declined to engage even in secular-institutional matters, they recognized that religious institutional questions raised special constitutional problems.

2. Institutional Concern

Next take the “institutional concern”: the contention that religious institutions should not be afforded special procedural protections from suit because it is improper to provide safeguards to religious institutions qua religious institutions.⁴¹⁸ While there is a longstanding debate over whether church autonomy should have an institutional component, the history, tradition, and precedent of the church

414 *Id.* at 189.

415 *Id.*

416 *See supra* notes 150–51 and accompanying text.

417 *See supra* notes 150–51 and accompanying text.

418 *See, e.g.,* Garnett, *Do Churches*, *supra* note 10, at 294.

autonomy doctrine suggest that any non-institutionalist attack on church autonomy's limitations on judicial review is, even if thoughtful and serious, likely unpersuasive.

First, the church autonomy doctrine's history, tradition, and precedent provide substantial support for the institutional view of church autonomy doctrine—and for protecting church autonomy as the “positive liberty” and “corporate freedom” of a religious “aggregate to see its institutional rules and actions validated” in courts.⁴¹⁹ Religion is not, as Professor Garnett has explained, a “solitary” experience—it requires an “infrastructure,” it is exercised by “groups,” and the “freedom of religion is not only lived and experienced through institutions, it is also protected and nourished by them.”⁴²⁰ Under the church autonomy doctrine, the state generally lacks power over ecclesiastical decisions—and our legal tradition instead reflects an effort to “disaggregate (and protect) religious institutions and authorities from those of government.”⁴²¹ In doing so, the “right of church autonomy,” as Professor Laycock explained, protects the “right of churches to make for themselves the decisions that arise in the course of running their institutions”⁴²²—and, to borrow from Professor Garnett and others, a “freedom of the church.”⁴²³ The history and tradition of the church autonomy doctrine provide substantial support for an institutional understanding of the church autonomy doctrine. Perhaps the best summary of this point comes from Professor Funk's influential study of church corporations.⁴²⁴ As he explains, historical church-state law did not maintain that “religious freedom” merely consists of “rights held by an individual to be asserted only against the state.”⁴²⁵ Instead, it recognized that “there can exist an alternative legal order to the legal order of one or another American state”—and “state judges respected these alternative legal systems enough to actually enforce their rules in American courts.”⁴²⁶ That is broadly consistent with the history and tradition of the church autonomy doctrine described above.

As an initial matter—supporting Professor Funk's institutional explanation—civil courts indeed treated religious institutions as reflecting a positive, corporate experience. Civil courts recognized that the

419 Funk, *supra* note 91, at 278.

420 Garnett, *Do Churches*, *supra* note 10, at 274.

421 Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837, 862 (2009).

422 Laycock, *supra* note 1, at 1394, 1396.

423 Garnett, *The Freedom*, *supra* note 10.

424 See Funk, *supra* note 91, at 278; see also Weinberger, *supra* note 88 (manuscript at 34–35).

425 Funk, *supra* note 91, at 278.

426 *Id.*

“full and free right” to religious exercise included “[t]he right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government.”⁴²⁷ They explained that

it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.⁴²⁸

To respect such institutional decisionmaking, civil courts deferred to the “principle of government” selected by the religious institution—and explained that

whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.⁴²⁹

And civil courts, as explained, had no power to exercise “jurisdiction” over or to “supervise” or “examine” such ecclesiastical matters reserved to competent ecclesiastical authorities—doing so would, in addition to overstepping the proper bounds of judicial authority, “subver[t] . . . such religious bodies” and “deprive these bodies of the right of construing their own church laws.”⁴³⁰

Moreover, civil courts—echoing Professor Garnett’s institutional explanation⁴³¹—recognized that religious exercise, to reiterate the points just made, included (1) “[t]he right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine” (i.e., religion was a group right);⁴³² and (2) to “create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general

427 *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728–29 (1872); *see also, e.g., supra* notes 192–96 and accompanying text (collecting cases); Funk, *supra* note 91, at 279–80 (collecting cases).

428 *Watson*, 80 U.S. (13 Wall.) at 729.

429 *Id.* at 727.

430 *Id.* at 729, 733; *see supra* notes 292–96.

431 *See* Garnett, *The Freedom*, *supra* note 10, at 73–74.

432 *Watson*, 80 U.S. (13 Wall.) at 728–29.

association” (i.e., religion was a positive right—with an infrastructure).⁴³³ The upshot of all this—to return to Professor Funk’s point—is that

[r]eligious freedom was not purely a negative freedom, a freedom to be left undisturbed in one’s conscience. It was also a positive liberty, a liberty that certain institutions could act in the world of property and contract in meaningful ways. In this sense religious freedom was a corporate freedom, the right of an aggregate to see its institutional rules and actions validated in the state courts.⁴³⁴

Second, even assuming the “non-institutional” view of the church autonomy doctrine, such as the view articulated in the thoughtful work of Professors Schragger and Schwartzman,⁴³⁵ there are still good reasons for limiting judicial review of ecclesiastical decisions—even if those limitations might warrant adjustment. The noninstitutional account of the church autonomy doctrine does *not* maintain that religious institutions matter not. Instead, it maintains that (1) the proper focus is on “individual rights of conscience” and (2) religious institutional rights are “derivative” of such individual interests.⁴³⁶ Even under the noninstitutional account, there are good reasons for respecting the limitations on judicial review of ecclesiastical decisions.

As an initial matter, the church autonomy doctrine’s limitations on judicial review maintain a strong foundation in free exercise principles—even if those principles are ultimately tied to individuals, rather than institutions. One core feature of Religion Clauses doctrine is, under the noninstitutional account, preventing the state from picking sides in theological disputes (consider the church property cases), from asserting “state control of the ministry,” and from “lending its power to one or the other side in controversies over religious authority over dogma” (consider the ministerial exception cases).⁴³⁷ Under this account, the state may not interfere with “religious voluntarism,” which, as explained, leaves to “individuals the right to determine the appropriate form of a religious belief and practice,” including “rules adopted to govern their common participation in associations.”⁴³⁸

The historical and traditional doctrine provides a similar account. Civil courts—sensitive to individual religious interests—maintained that improper judicial review would interfere with the free exercise and voluntary-association interests of individuals who formed together

433 *Id.* at 729 (collecting cases); *see supra* notes 292–96.

434 Funk, *supra* note 91, at 278.

435 *See, e.g.*, Schragger & Schwartzman, *supra* note 10, at 920.

436 *Id.* at 921.

437 *Id.* 975–76 (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012)).

438 *Id.* at 976.

to create religious institutions and who agreed to common rules to govern their common, positive participation in such religious associations.⁴³⁹ Such voluntary associational interests might, as explained above (and as Professor Helfland has suggested),⁴⁴⁰ inform the scope of the “marginal civil court” review that is permitted—but they are broadly consistent with maintaining limits on the power of civil courts to trudge into ecclesiastical matters where such interference would interfere with common, shared, positive, religious, associational interests.

Moreover, even under the noninstitutional account, the church autonomy doctrine’s limitations on judicial review also maintain a strong foundation in non-establishment principles. One non-establishment principle avoids the institutional debate. Whether or not church autonomy is institutional, the church autonomy doctrine imposes an independent, structural restraint on civil courts that prevents civil courts from establishing ecclesiastical answers—and from trudging into matters of church government, faith, and doctrine.⁴⁴¹ That independent limitation on civil court authority was, as explained, a longstanding feature of the historical and traditional non-establishment roots of the church autonomy doctrine—and it appears to maintain whether religious institutions have derivative or nonderivative religious rights. In addition to this independent, structural explanation for limitations on judicial review, the non-establishment interests of individuals (to the extent individuals do have such interests—a hotly contested issue)—namely, in avoiding having the state control their religious associational interests and from having the state lend its support to one side or another in matters of ecclesiastical dispute—similarly counsel against permitting state interference (including by civil courts) over matters of ecclesiastical doctrine, governance, and structure that are controlled by religious voluntarism principles (and are prohibited, under non-establishment doctrine, from resolution by state authorities).

There are, to be sure, important ways in which the “non-institutional” view of the church autonomy doctrine affects how we conceptualize and apply the church autonomy doctrine’s procedural protections—and there are plausible arguments (perhaps right, perhaps wrong) that this view of the church autonomy doctrine supports somewhat narrower types of procedural protections for religious institutions (perhaps permitting civil courts to review whether religious

439 See *supra* Part I; see also Weinberger, *supra* note 88 (manuscript at 14); Helfland, *supra* note 11, at 1921.

440 See Helfland, *supra* note 11, at 1906–12; *cf.* Funk, *supra* note 91, at 281–82.

441 See *supra* notes 322–28 and accompanying text.

institutional decisions are “arbitrary” or “irregular” in some circumstances) and support rejection of the formal, jurisdictional protections for religious institutions (but perhaps maintaining a functionally similar set of adjudicative disabilities on civil court power).⁴⁴² But the bottom line is that, for those committed to the noninstitutional account of the church autonomy doctrine, there remain some reasonably strong reasons for continuing to honor at least some of the church autonomy doctrine’s traditional protections.

3. Practical Concern

Last take the “practical concern”: the contention that religious institutions should not be afforded procedural protections from suit and discovery because doing so would improperly shield religious institutions from adequate supervision and governance by civil authorities—with deleterious consequences for important public interests linked to, *inter alia*, preventing improper discrimination, stopping physical abuse, and preventing religious institutions and other actors from engaging in behavior that the state might, save for the church autonomy doctrine, have a compelling interest in preventing.⁴⁴³ While there is a lively and important debate over where to set the substantive contours of the church autonomy doctrine—that is, which “internal” affairs are shielded from civil regulation and supervision (related to the discussion above regarding the church autonomy doctrine’s interaction with criminal law, contract law, property law, and the like), and what the nature and extent of that shield from civil power ought to be (perhaps a balancing test, perhaps a *per se* rule)—there are at least two reasons for rejecting the conclusion that “practical concerns” require withholding procedural protections long afforded by the church autonomy doctrine.

First, the practical concerns are manageable—controlled by the limits on the church autonomy doctrine’s substantive and procedural limitations.⁴⁴⁴ The church autonomy doctrine has not historically provided *carte blanche* immunity for religious institutions to do whatever they want, free from civil regulation and supervision, as long as it is plausibly related to their “internal” affairs—and the critiques of those that worry about runaway and unaccountable church authorities is well-taken (no one thinks that everything a church does should be

442 See Helfand, *supra* note 11, at 1942–51; see also sub-subsection I.C.3.b.

443 For discussions of the normative and practical questions, see, for example, Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L.J. 981, 983–84 (2013); Weinberger, *supra* note 10, at 1307–15; and Lund, *In Defense*, *supra* note 10, at 64–71.

444 See, e.g., Weinberger, *supra* note 10, at 1270–87 (articulating the doctrine’s limits); *supra* Section I.C.

shielded). Instead, as explained above, it has provided an important—but bounded—protection for religious institutions.⁴⁴⁵ It provides bounded substantive safeguards (e.g., protection for certain ministerial removal decisions—but not immunity for certain types of torts or contract decisions). And it provides bounded procedural protections (e.g., protection from discovery directed to divining the “true doctrine” of the church—but not from all civil discovery).

Practical concerns are nothing new. Civil courts—cognizant of the republican worries of runaway religious power (and of *imperia in imperio*)⁴⁴⁶—generally responded to practical concerns by, inter alia, clarifying church autonomy’s limits. They explained that it applied to matters “strictly and purely ecclesiastical”—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.”⁴⁴⁷ They also eventually came to explain that religious institutions did not exercise temporal, sovereign powers—such that, over time, they were not considered *imperia* at all, as Professor Funk explains.⁴⁴⁸ Civil courts explained that church-state relations were a two-way street: “The structure of our government has, for the preservation of [C]ivil [L]iberty, rescued the [T]emporal [I]nstitutions from religious interference. On the other hand, it has secured [R]eligious liberty from the invasion of the [C]ivil [A]uthority.”⁴⁴⁹ While civil courts could not exercise “jurisdiction” over or “inquire” into “purely ecclesiastical” matters covered by the church autonomy doctrine, they would exercise adjudicative authority over cases involving “property” and other civil rights that fell outside of the church autonomy doctrine’s scope—with the church autonomy doctrine’s procedural protections (i.e., what adjudicative disabilities applied) reflecting the doctrine’s substantive scope (i.e., what prescriptive disabilities applied).⁴⁵⁰ In doing so, these civil courts addressed the practical argument by, inter alia, respecting the careful balance entrenched by the church autonomy doctrine itself.

Second, even were the practical concerns more compelling, those practical concerns are mediated by constitutional imperative and counterbalanced by jurisprudential prudence—particularly for those committed to interpreting the church autonomy doctrine by reference

445 See *supra* Section I.C; see also Weinberger, *supra* note 10, at 1270–87.

446 Funk, *supra* note 91, at 278; Gordon, *supra* note 91, at 311.

447 *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1872); Funk, *supra* note 91, at 273.

448 Funk, *supra* note 91, at 270.

449 *Watson*, 80 U.S. (13 Wall.) at 730 (quoting *Harmon v Dreher*, 17 S.C. Eq. (Speers Eq.) 87, 120 (Ct. App. 1843)) (quote corrected).

450 *Id.* at 733; see *supra* notes 217–26 (collecting cases).

to historical practices and understandings.⁴⁵¹ Civil courts sometimes recognized countervailing considerations that cut against deference to religious authorities on matters covered by the church autonomy doctrine. But civil courts—despite such concerns—still extended protections for religious institutional decisionmaking and governance, grounding such protections in a “broad and sound view of the relations of church and state under our system of law.”⁴⁵² Such defenses for church autonomy sometimes sounded in constitutional command (e.g., respecting the “separation of state and church,” and “principles of religious freedom”),⁴⁵³ and other times sounded in jurisprudential prudence (e.g., preventing “mischiefs”).⁴⁵⁴ In explaining these limits, civil courts—well-aware of the republican *imperium in imperio* fears—maintained that they generally lacked judicial power to exercise “jurisdiction” over or to “examine” ecclesiastical decisions reserved to ecclesiastical institutions—and they explained that any other course

would open a door to untold evils in the administration of church affairs, not consistent with the principles of religious freedom as recognized in this country, where there is no established church or religion, where every man is entitled to hold and express with freedom his own religious views and convictions, and where the separation of state and church is so deeply entrenched in our constitutions and laws.⁴⁵⁵

The church autonomy doctrine’s substantive and procedural protections were deeply rooted and broadly acknowledged—and civil courts, as explained above, consistently invoked, inter alia, free-exercise and non-establishment principles in explaining the limitations on civil authority and the autonomy for religious institutions.⁴⁵⁶ Under this account, the legal imperative of the church autonomy doctrine—which, like other foundational limitations on governmental action, plausibly reflects a judgment that the benefits of its protections outweigh its costs⁴⁵⁷—necessarily outweighs any lingering nonconstitutional

451 See, e.g., *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022); see also *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2244–61, 2271 (2022); *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2125–34 (2022). Of course, the relationship between the practical and the constitutional is rich—and warrants further exploration.

452 *Watson*, 80 U.S. (13 Wall.) at 727; see *supra* notes 150–51.

453 *Hundley v. Collins*, 32 So. 575, 578, 578–79 (Ala. 1902); see also *supra* notes 150–51 and accompanying text (collecting cases).

454 *Ministers, Elders and Deacons of the Reformed Protestant Dutch Church v. Bradford*, 8 Cow. 457, 504 (N.Y. 1826); see also *supra* sub-subsection II.B.1.b.

455 *Hundley*, 32 So. at 578; see *supra* notes 197–201.

456 See, e.g., *Watson*, 80 U.S. (13 Wall.) at 728–35; see also *supra* notes 150–51.

457 See, e.g., *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2131 (2022) (explaining that constitutional protections are “the very product of an interest balancing by the people” and “this balance—struck by the traditions of the American

practical concerns that remain unaddressed by the proper scope of the church autonomy doctrine and inadequately rebuffed by the normative value of church autonomy, at least for those committed to interpreting the church autonomy doctrine by reference to history and tradition.⁴⁵⁸ Practical concerns might inform how implementing doctrines work in practice—perhaps a broader church autonomy doctrine favors shallower procedural protections, or perhaps a narrower church autonomy doctrine favors broader procedural protections—but all this suggests that the practical concerns, whatever their weight, are no reason for denying the basic principle that a “broad and sound view of the relations of church and state under our system of laws” requires that “whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them.”⁴⁵⁹

CONCLUSION

In conclusion, the history and tradition of the church autonomy doctrine best support the view that the church autonomy doctrine limited the exercise of judicial power over matters of church government, faith, and doctrine. The historical and traditional church autonomy doctrine maintained that civil courts broadly lacked power to exercise jurisdiction over or to inquire into matters of church government, faith, and doctrine reserved to church authorities. Such limitations were viewed as necessary to preserve both free exercise and non-establishment principles. And while the church autonomy doctrine had important substantive and procedural limits, the upshot is that the doctrine, viewed in light of its history and tradition, provided important limitations on the exercise of judicial power over ecclesiastical matters in order to protect “the right of religious institutions ‘to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.’”⁴⁶⁰ Church autonomy, in short, limited judicial power in important ways.

people . . . demands our unqualified deference” (emphasis omitted) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)).

458 See *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022).

459 *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1872).

460 *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020) (quoting *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952)).