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Is Church Autonomy Jurisdictional?

Lael Weinberger[*]

The First Amendment's religion clauses create what courts have called "church autonomy doctrine," protecting the internal self-governance of religious institutions. But courts are divided as to whether this doctrine is simply an affirmative defense for religious institutions or a jurisdictional limitation on courts' ability to adjudicate internal religious matters. Scholars, meanwhile, have long debated whether church autonomy is jurisdictional at a higher level of abstraction, speaking of jurisdiction as a concept of authority rather than a technical term for civil procedure. This Article engages this multilevel debate with an argument for unbundling. First, it urges unbundling conceptual jurisdiction from judicial jurisdiction. Jurisdiction in the conceptual sense can be a helpful way of talking about institutional authority relevant to church autonomy. But church autonomy is not properly jurisdictional for purposes of civil procedure. Second, this Article proposes unbundling the array of procedural issues that could be resolved under the label of jurisdiction. This Article argues that it is a mistake to try to use the term jurisdiction to solve these interesting problems. It is better to disaggregate the issues that sometimes come under the label of jurisdiction and instead consider them one at a time. This Article concludes by looking to another quasi-jurisdictional body of law—sovereign immunity—for clues as to how to handle issues such as interlocutory appeals, waiver, and forfeiture in the church autonomy space.

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INTRODUCTION

The First Amendment's religion clauses protect religious institutions. Together, the Establishment Clause and the Free Exercise Clause create what courts have called church autonomy doctrine.[1] This doctrine protects the church's ability to govern its internal affairs free from state interference.[2] It is the paradigmatic case of distinguishing the church, as

1. *See, e.g.*, Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060–61, 69 (2020) (citing Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 188 (2012)).

2. *See id.* at 2061 (citing *Hosanna-Tabor*, 565 U.S. 171, 188 (2012)) (noting the Court foreclosed certain employment discrimination claims against religious organizations based on the "general principle of church autonomy" which the Court described as "independence in matters of faith and doctrine and in closely linked matters of internal government").

an institution, from the state, as an institution. In the court cases articulating and applying the church autonomy doctrine, many courts have described the church and the state as separate jurisdictions.[3] But that raises a number of questions: is it right to think of church and state as jurisdictionally separate? If so, *in what sense* are they separate jurisdictions?

Scholars are divided as to the merits of using jurisdictional concepts and language to understand the religion clauses and church autonomy in particular.[4] Some argue that the church autonomy cases are fundamentally about a jurisdictional division between church and state, and that this is a good thing for religious liberty and state order alike.[5] Others argue that the jurisdictional framing overstates the distinction and overprotects religious institutions, placing them above or outside of the law.[6]

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3. *See infra* Part I.A. (describing the impact of longstanding seminal cases in defining church autonomy and jurisdiction).

4. For broader arguments outside the church autonomy-specific context that free exercise was a kind of jurisdictional principle, *see* Vincent Phillip Muñoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 HARV. J.L. & PUB. POL'Y 1083, 1097–99 (2008); Vincent Phillip Muñoz, *Two Concepts of Religious Liberty: The Natural Rights and Moral Autonomy Approaches to the Free Exercise of Religion*, 110 AM. POL. SCI. REV. 369, 371–74 (2016).

5. *See, e.g.*, Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 NW. U. L. REV. COLLOQUY 175, 176 (2011) ("The civil authority—that is, the authority of a constitutional government—lacks ―'competence' to intervene in such questions, not so much because they lie beyond its technical or intellectual capacity, but because they lie beyond its jurisdiction."); Steven D. Smith, *The Jurisdictional Conception of Church Autonomy*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY, 19, 19–20, 24–25 (Micah Schwartzman, Chad Flanders, & Zoë Robinson eds., 2016) (describing church autonomy as a jurisdictional constraint on governmental authority in which religious liberty prevents judicial intervention in some intrachurch disputes); Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 274, 286–89, 292–93 (2008) (proposing an "infrastructural" approach to religious freedom claims which recognizes the "rights and independence" of religious institutions); Richard W. Garnett, *The Freedom of the Church*, 4 J. CATH. SOC. THOUGHT 59, 74–81 (2007) [hereinafter Garnett, *The Freedom of the Church*] (describing various church-autonomy doctrines as an extension of religious freedom, which is a "good to be promoted" rather than a function of government neutrality or incompetence with respect to religion); Richard W. Garnett, *"The Freedom of the Church": (Towards) An Exposition, Translation, and Defense*, 21 J. CONTEMP. LEGAL ISSUES 33, 34–38, 42–44 (2013) [hereinafter Garnett, *An Exposition, Translation, and Defense*] (grounding the "freedom of the church" in its historical, "original meaning" to "govern and order itself and the limits on the secular power to interfere with that governance"); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.–C.L. L. REV. 79, 118, 130 (2009) (advocating for the legal recognition of religious entities as First Amendment institutions, otherwise known as the sphere sovereignty approach); Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 48, 90 (2002) (advocating for a ministerial exception to civil rights laws based on associational freedom).

6. *See, e.g.*, Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 918–21 (2013) (rejecting religious institutionalism and finding individual rights of

The cases, for their part, are full of language that sounds jurisdictional when describing church autonomy.[7] Yet the courts split years ago as to whether church autonomy is jurisdictional in a more technical, procedural sense, leaving some basic procedural questions unsettled.[8] Which rule of civil procedure should be used to raise church autonomy?[9] Does a court have to decide a church autonomy claim at the earliest possible opportunity?[10] Can denial of church autonomy be raised in an immediate (interlocutory) appeal?[11] Can church autonomy be waived?[12] Must a court raise church autonomy on its own (sua sponte) if the parties failed

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conscience sufficiently protect free exercise and anti-establishment values); Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 1968 (2007) (observing that the ministerial exception to employment discrimination places religious institutions above the law); Jean L. Cohen, *Sovereignty, the Corporate Religious, and Jurisdictional/Political Pluralism*, 18 THEORETICAL INQ. L. 547, 549–51 (2017) (describing the modern jurisdictional political pluralism approach to religious sovereignty as "anachronistic and in need of reconceptualization"); Mary Anne Case, *Why "Live-and-Let-Live" Is Not A Viable Solution to the Difficult Problems of Religious Accommodation in the Age of Sexual Civil Rights*, 88 S. CAL. L. REV. 463, 473–76 (2015) (criticizing the "medieval" analysis of supporters of church autonomy for not being oriented to public good nor principles of democratic justice); *see also* Michael A. Helfand, *Religion's Footnote Four: Church Autonomy as Arbitration*, 97 MINN. L. REV. 1891, 1892–1901 (2013) (rejecting the jurisdictional account of church autonomy and arguing for a church autonomy doctrine modeled on arbitration); Mark D. Rosen, *Religious Institutions, Liberal States, and the Political Architecture of Overlapping Spheres*, 2014 U. ILL. L. REV. 737, 743 & n.26 (2014) (advocating for a middle ground between a broadly jurisdictional account of church autonomy, on one hand, and a purely individualist account of the legal treatment of religious institutions, on the other).

7. *See infra* Part I.A. (discussing how the language of "ecclesiastical jurisdiction" used in Watson v. Jones, 80 U.S. 679, 728–33 (1872) has carried on in future church autonomy cases).

8 *See infra* Part I.B. (explaining that some courts have approached church autonomy as a jurisdictional issue, whereas others have treated it as an affirmative defense).

9. *Compare* Gregorio v. Hoover, 238 F. Supp. 3d 37, 45–46 (D.C. 2017) (asserting that church autonomy is a jurisdictional defense to be raised under Rule 12(b)(1)), *with* Bollard v. California Province of the Soc'y of Jesus, 196 F.3d 940, 950–51 (9th Cir. 1999) (asserting that a church autonomy defense should be raised as a jurisdictional bar under Rule 12(b)(6)).

10. *Compare* McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc., 966 F.3d 346, 349–51 (5th Cir. 2020) (reversing dismissal for lack of jurisdiction based on church autonomy because "at this early stage of litigation" it was not clear whether the court would be required to consider purely religious questions), *with* McRaney v. N. Am. Mission Bd. of S. Baptist Convention, Inc., 980 F.3d 1066, 1074–75 (5th Cir. 2020) (Ho, J., dissenting from denial of rehearing en banc) ("[W]e have no right to condition application of the church autonomy doctrine on a religious institution's ability to produce 'evidence' that it had 'valid religious reasons' for its actions.").

11. *Compare* McCarthy v. Fuller, 714 F.3d 971, 974–76 (7th Cir. 2013) (allowing interlocutory review of a denial of church autonomy), *with* In re Roman Cath. Diocese of Albany, New York, Inc., 745 F.3d 30, 35–36 (2d Cir. 2014) (explaining that interlocutory review is not available for denial of a church autonomy defense).

12. *Compare* Conlon v. InterVarsity Christian Fellowship, 777 F.3d 829, 836 (6th Cir. 2015) (asserting that church autonomy is not waivable), *with* Petruska v. Gannon Univ., 462 F.3d 294, 308–09 (3d Cir. 2006) (assuming the issue of church autonomy could be waived).

to raise the issue?[13]

The Supreme Court tried to resolve the civil procedure debate with a simple, direct footnote announcing that church autonomy is an affirmative defense.[14] Yet, the issue has not gone away. The courts remain divided as to the procedural treatment of church autonomy.[15] Academics writing about church autonomy debate whether the concept of jurisdiction is the right way to think about the issue at a broader conceptual level.[16]

This Article revisits the civil procedure issues to describe what has been happening in the courts since the Supreme Court tried—and failed—to resolve the issue. It also considers their relationship to the broader theoretical debates about church autonomy's jurisdictional character. Part I describes the confusion about jurisdiction in the current case law on church autonomy. The Supreme Court addressed the issue in a footnote in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.[17] But the Supreme Court's footnote resolved less than it appeared. It has been construed very narrowly by some federal courts[18] and ignored by some state courts.[19]

Part II steps back to place the current case law in a broader analytical context. First, it considers the different senses in which the term "jurisdiction" is used in church autonomy jurisprudence and scholarship. It considers what it would mean to propound theories of church autonomy conceived along different jurisdictional axes: territorial, personal, and subject matter. It argues that the American principle of church autonomy is appropriately conceptualized as a way of sorting out the relative subject-matter authority of the state and of religious institutions. Jurisdiction properly describes the issues of institutional authority at play. In this way, the old cases used the term correctly. But that does not mean that church autonomy is or should be jurisdictional as that term is used in modern federal civil procedure. Church autonomy is best described as

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13. For an academic argument that the conceptual version of jurisdiction requires the procedural version of jurisdiction, see Gregory A. Kalscheur, *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject-Matter Jurisdiction, and the Freedom of the Church*, 17 WM. & MARY BILL RTS. J. 43, 51 (2008) (arguing the ministerial exception operates as a jurisdictional bar for civil courts).

14. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 195 n.4 (2012).

15. *See infra* Part I.B (comparing court decisions and analyses regarding the proper procedural methods to address jurisdictional problems in church autonomy cases).

16. *See supra* notes 5–6 (emphasizing the importance of religious freedom principles in church autonomy discussions).

17. *Hosanna-Tabor*, 565 U.S. at 195 n.4.

18. *See, e.g.*, Hubbard v. J Message Grp. Corp., 325 F. Supp.3d 1198, 1208–09 (D.N.M. 2018) (citing *Hosanna-Tabor*, 565 U.S. at 188 and other cases).

19. *See, e.g.*, In re Roman Cath. Diocese of El Paso, 626 S.W.3d 36, 42, 49 (Tex. App. 2021).

not jurisdictional under Federal Rule of Civil Procedure Rule 12—that is to say, it is not jurisdictional in the technical, procedural sense.

Part III then returns to the practical problems in civil procedure. This Article argues that it is best to disaggregate the array of issues that often appear under the label of jurisdiction and consider the issues one by one. It draws on the sovereign immunity cases as a comparable example of jurisprudence about the relative authority of different institutions, but not tied too closely to the jurisdictional label for procedural purposes (as used in Rule 12, for instance). Like sovereign immunity, church autonomy has many characteristics that appear jurisdictional. But not all. It concludes with arguments for how to use the sovereign immunity cases to suggest answers to practical issues that sometimes arise (unhelpfully) under the "jurisdiction" label: church autonomy must be resolved at the first possible opportunity, can be raised in an interlocutory posture, cannot be forfeited, but can be waived.

I. THE EVOLUTION OF THE CURRENT CONTROVERSY OVER JURISDICTION AND CHURCH AUTONOMY

The current case law is all over the map on whether, and in what way, church autonomy is jurisdictional. Likewise, scholars have a wide array of perspectives.

A. The Old Cases: Church Autonomy is About Jurisdiction

Especially in older cases, courts tended to describe church autonomy principles in terms of jurisdiction and authority.[20] The courts do not have "ecclesiastical jurisdiction," the Supreme Court said in its first church autonomy case, *Watson v. Jones*.[21] As such, a court "cannot revise or question ordinary acts of church discipline."[22] The Court wisely noted that jurisdiction was a word with many meanings: "There is, perhaps, no word in legal terminology so frequently used as the word jurisdiction, so capable of use in a general and vague sense, and which is used so often by men learned in the law without a due regard to precision in its application."[23] It noted that the church lacked jurisdiction in many regards—it gave as examples that the church had no authority to resolve civil disputes about property or to try and sentence a church member for

20. *See, e.g.*, Watson v. Jones, 80 U.S. 679, 728–33 (1872); Serbian E. Orthodox Diocese for U.S. of Am.& Can. v. Milivojevich, 426 U.S. 696, 713–14 (1976) (citing *Watson*, 80 U.S. at 728).

21. *Watson*, 80 U.S. at 730 (quoting Shannon v. Frost, 42 Ky. 253, 258 (1842)) (referencing a state appellate court's ruling which limited judicial power in cases arising from disputes with religious institutions to "church property and the use of it").

22. *Id.*

23. *Watson*, 80 U.S. at 732.

a crime.[24] But it is quite a different thing for a church to exercise its jurisdiction over matters "purely ecclesiastical in character."[25] That was a domain "over which the civil courts exercise no jurisdiction."[26]

Decades later, the Supreme Court made the reasoning in *Watson* into a constitutional decision. Again, the Court described the matter as a question of "civil jurisdiction over church adjudications."[27] It reasoned that the common law principles in *Watson* fit with the Constitution's religion clauses.[28] It guaranteed churches "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."[29] The original language from *Watson* about jurisdiction was again quoted by the Supreme Court in its subsequent constitutional church autonomy decision, *Serbian Eastern Orthodox Diocese v. Milivojevich*.[30]

But one should be careful reading too much into casual remarks about jurisdiction in older cases. Courts (including the Supreme Court) were not always consistent in their usage of the term.[31] Just because they said that the church possessed its own jurisdiction separate from the state, did not necessarily clarify, for instance, whetherthe issue was one which the court needed to raise on its own motion, as it would a strict jurisdictional principle.

B. The More Recent Division: Is Church Autonomy Jurisdictional for Civil Procedure Purposes?

In more recent cases, one can find even more pointed references to jurisdiction—but with it, a nagging question about how far to take the idea that church and state are distinct jurisdictions. Maybe they are distinct authorities—in the broad sense of jurisdiction. But there is a more precise and technical meaning of the term in case law both on civil procedure and on the Article III powers of federal courts: in these contexts, jurisdiction refers to the power of courts to hear and decide a

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24. *Id.* at 733.
25. *Id.*
26. *Id.*; *but see* Gonzalez v. Roman Cath. Archbishop of Manila, 280 U.S. 1, 15–16 (1929), *abrogated by* Serbian E. Orthodox Diocese for U.S. of Am. & Can. v. Milivojevich, 426 U.S. 694, 713–14 (1976) (reasoning that a matter of chaplaincy is within the jurisdiction of the court, but that its spiritual character affects the way that the trust should be implemented).
27. Kedroff v. St. Nicholas Cathedral of Russ. Orthodox Church in N. Am., 344 U.S. 94, 114 (1952).
28. *Id.* at 115–16.
29. *Id*. at 115.
30. *Serbian E. Orthodox Diocese*., 426 U.S. at 714–15.
31. *See* Howard M. Wasserman, *The Demise of "Drive-by Jurisdictional Rulings,"* 105 NW. U. L. REV. 947, 950 (2011).

case.[32] We can call this procedural jurisdiction, to distinguish it from the broader sense of jurisdiction as referring to authority generally. Authority of church, authority of Congress, authority of the school board—all could in a sense be discussed as issues of jurisdiction, though none speak to Article III or the Federal Rules of Civil Procedure.[33] Does this mean that federal courts are in fact lacking in jurisdiction to hear cases *in the civil procedure sense*?

The issue has been litigated extensively in the ministerial exception cases.[34] The ministerial exception is best thought of as a subset of church autonomy cases, holding that religious institutions are constitutionally exempted from the application of Title VII antidiscrimination law in their employment decisions regarding ministers.[35] When litigating employment cases raising the ministerial exception, courts have had to repeatedly consider whether the issue can be raised as an objection to subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) or as an affirmative defense ("failure to state a claim") under Rule 12(b)(6).[36]

1. The First Ministerial Exception Circuit Split

For a while, the federal courts were split as to whether church autonomy should be raised as a jurisdictional challenge under Rule 12(b)(1) or as an affirmative defense under Rule 12(b)(6). Alongside the courts that agreed that church autonomy was jurisdictional were others that denied church autonomy fit the description of jurisdictional.

Some courts said yes, church autonomy issues are jurisdictional in the strict sense.[37] "The ministerial exception . . . precludes subject matter

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32. *See e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998) (internal citation omitted) (explaining that subject-matter jurisdiction refers to "the courts' statutory or constitutional power to adjudicate a case").

33. *See infra* Part II.

34. *See infra* Parts I.B.1, I.B.3 (comparing the split among courts on whether church autonomy is jurisdictional in both early and modern contexts).

35. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2055 (2020) ("Judicial review of the way in which religious schools" select ministers or teachers "would undermine the independence of religious institution in a way that the First Amendment does not tolerate"). *See also* Lael Weinberger, *The Limits of Church Autonomy*, 98 NOTRE DAME L. REV. 1253, 1255 n.4 (2023) [hereinafter Weinberger, *The Limits of Church Autonomy*].

36. *See infra* Part I.B.1.

37. *See*, *e.g.*, Rweyemamu v. Cote, 520 F.3d 198, 206–08 (2d Cir. 2008) ("Wherever its doctrinal roots may lie, the 'ministerial exception' is well entrenched; it has been applied by circuit courts across the country for the past thirty-five years. . . . In our view, the ministerial exception is constitutionally required by various doctrinal underpinnings of the First Amendment."); Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 225 (6th Cir. 2007), *abrogated by* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171 (2012); Tomic v. Cath. Diocese of Peoria, 442 F.3d 1036, 1037 (7th Cir. 2006), *abrogated by* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171 (2012).

jurisdiction over claims involving the employment relationship between a religious institution and its ministerial employees," the Sixth Circuit said.[38] It based this jurisdictional immunity "on the institution's constitutional right to be free from judicial interference in the selection of those employees."[39] "Federal courts are secular agencies," Judge Posner wrote in an opinion for a panel of the Seventh Circuit.[40] "They therefore do not exercise jurisdiction over the internal affairs of religious organizations."[41] He viewed this as a matter of judicial power under the Constitution: "Since the United States was not to have a national church, the federal judicial power was not envisaged as extending to the resolution of ecclesiastical controversies."[42]

Other courts said no, church autonomy is not jurisdictional. "[T]he question does not concern the court's power to hear the case," the Third Circuit explained.[43] "[I]t is beyond cavil that a federal district court has the authority to review claims arising under federal law," which is what was at issue in the ministerial exception claim.[44] All that was at stake was "whether the First Amendment bars [plaintiff's] claims."[45] The Ninth Circuit explained that there was a federal question, triggering the jurisdiction of the court.[46] The Tenth Circuit explained its view that the church autonomy issue was an affirmative defense appropriately raised "as a challenge to the sufficiency of plaintiff's claims under Rule 12(b)(6)."[47] It was not an objection to jurisdiction. It explained that a church autonomy defense was "similar to a government official's defense of qualified immunity, which is frequently asserted in a motion to dismiss under Rule 12(b)(6) or Rule 56."[48] In the view of these courts, a claim against a church was within the court's power, but the introduction of church autonomy as a defense could simply defeat the prima facie case. Discussing the relationship between merits and jurisdiction years earlier, the Supreme Court explained: "Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. . . . [T]he failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal

38. *Hollins*, 474 F.3d at 225.
39. *Id.*
40. *Tomic*, 442 F.3d at 1037.
41. *Id.*
42. *Id.*at 1038.
43. Petruska v. Gannon Univ., 462 F.3d 294, 302 (3d Cir. 2006).
44. *Id.*
45. *Id.*
46. Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 955 (9th Cir. 2004).
47. Bryce v. Episcopal Church in the Diocese of Colorado, 289 F.3d 648, 654 (10th Cir. 2002).
48. *Id.*

for want of jurisdiction."[49]

A number of state courts held that church autonomy should be raised as a jurisdictional defense. For instance, the Texas Supreme Court held that a church autonomy defense should be raised as a plea to the jurisdiction.[50] This is the state's equivalent of the federal motion to dismiss for lack of subject-matter jurisdiction. North Carolina's Supreme Court held in 1966 that "[c]ivil courts have no jurisdiction over, and no concern with, purely ecclesiastical questions and controversies."[51] For years since, the state's courts applied this principle to render invocations of church autonomy as objections to subject-matter jurisdiction.[52] Florida courts similarly treat the matter as one of subject-matter jurisdiction.[53] And Tennessee's high court has held that church autonomy is jurisdictional and can be raised at any time.[54]

2. The Supreme Court's Attempted Resolution

The Supreme Court, for its part, did not decide any cases in the church autonomy space in the last quarter of the twentieth century. It allowed the split over the right way to analyze church autonomy to deepen. The most important line of cases that developed in the lower courts involved the "ministerial exception" from employment antidiscrimination laws.[55] When the Supreme Court took its first ministerial exception case (unanimously affirming the existence of the exception), it addressed the split over the ministerial exception's jurisdictional character.[56] In a footnote, the Court announced that the ministerial exception is not jurisdictional but is instead an affirmative defense.[57]

But this did not settle the issue. The footnote was not necessary to the resolution of the case and so not technically binding precedent anyway. And as it turns out, the courts are still divided as to whether church

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49. Bell v. Hood, 327 U.S.678, 682 (1946).

50. *See, e.g.*, Westbrook v. Penley, 231 S.W.3d 389, 394 (Tex. 2007).

51. E. Conf. of Original Free Will Baptists of N.C. v. Piner, 147 S.E.2d 581, 583 (N.C. 1966).

52. *See, e.g.*, Emory v. Jackson Chapel First Missionary Baptist Church, 598 S.E.2d 667, 671 (N.C. App. 2004) ("As the trial court would be required to delve into 'ecclesiastical matters' regarding how the church interprets the 1991 Bylaws' notice requirements and types of meetings, the trial court properly dismissed plaintiffs' action for lack of subject-matter jurisdiction.").

53. *See, e.g.*, Bilbrey v. Myers, 91 So. 3d 887, 890–91 (Fla. Dist. Ct. App. 2012) ("To date, Florida courts have treated the prohibition [on adjudicating matters related to church autonomy] as a bar to subject-matter jurisdiction.").

54. *See* Church of God in Christ, Inc. v. L. M. Haley Ministries, Inc., 531 S.W.3d 146, 157–59 (Tenn. 2017) (" A challenge to subject matter jurisdiction cannot be waived and may be raised at any time. . . . As such, the ecclesiastical abstention doctrine may be raised at any time as a basis for dismissal of a lawsuit.").

55. *See supra* Part I.B.1.

56. *Hosanna-Tabor*, 565 U.S. at 195–96.

57. *Id.* at 195 n.4 ("We conclude that the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar.").

autonomy is jurisdictional. The Supreme Court has hardly lessened the disagreement.[58]

3. The New Split

State courts still often say that church autonomy is a jurisdictional matter.[59] The Supreme Court's pronouncements on federal civil procedure don't bind them.[60] More surprising, federal courts still disagree about the status of many church autonomy issues under federal civil procedure—the Supreme Court's attempted resolution notwithstanding.

State courts have had the least occasion to look to the Supreme Court's footnote opining on the procedural treatment of church autonomy. To be sure, many have cited the *Hosanna-Tabor* footnote and followed suit in holding that church autonomy is not jurisdictional.[61] But others have felt

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58. *See* Mark E. Chopko & Marissa Parker, *Still a Threshold Question: Refining the Ministerial Exception Post*-Hosanna-Tabor, 10 FIRST AMEND. L. REV. 233, 243 (2012) (noting that the *Hosanna-Tabor* footnote left open many "hard questions" and predicting extensive future litigation).

59. *See, e.g.*, Bilbrey v. Myers, 91 So. 3d 887, 891 (Fla. Dist. Ct. App. 2012) ("We agree that the issue is best treated as a matter of subject-matter jurisdiction, which is also reviewed de novo."); *Church of God in Christ, Inc.*, 531 S.W.3d at 149 (explaining the church autonomy "derives from the First Amendment . . . and prohibits civil courts from resolving church disputes on the basis of religious doctrine and practice").

60. *See* Peter N. Salib & David K. Suska, *The Federal–State Standing Gap: How to Enforce Federal Law in Federal Court Without Article III Standing*, 26 WM. & MARY BILL RTS. J. 1155, 1160, 1169 n.128 (2018) (citing ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989)) (discussing the inapplicability of Article III standing requirements to state courts which creates a "Federal-State Standing Gap").

61. *See, e.g.*, Exec. Bd. of Missouri Baptist Convention v. Missouri Baptist Univ., 569 S.W.3d 1, 12 (Mo. Ct. App.2019) (internal citations omitted) ("We further observe that in *Hosanna-Tabor* the ministerial exception was held to operate 'as an affirmative defense to an otherwise cognizable claim' for employment discrimination, and that lower courts were not jurisdictionally barred from considering discrimination claims involving religious institutions."); Trinity Christian Sch. v. Comm'n on Hum. Rts. & Opportunities, 189 A.3d 79, 83 n.4 (Conn. 2018) (noting the court's decision in *Hosanna-Tabor* overruled the state's previous holding that the ministerial exception operated as a jurisdictional bar as opposed to an affirmative defense); Kirby v. Lexington Theological Seminary, 426 S.W.3d 597, 607 (Ky. 2014) ("The Supreme Court, in a *Hosanna–Tabor* footnote, was rather clear in its estimation that the exception is an affirmative defense."); Winkler v. Marist Fathers of Detroit, Inc., 901 N.W.2d 566, 574–75, 75 n.6 (Mich. 2017) (observing that other jurisdictions have clarified that the ministerial exception operates as an affirmative defense consistent with *Hosanna-Tabor*); Temple Emanuel of Newton v. Massachusetts Comm'n Against Discrimination, 975 N.E.2d 433, 437 (Mass. 2012) ("To the extent that we had held under the First Amendment that courts are without subject matter jurisdiction to decide employment disputes involving a minister and a church, the Court's decision in *Hosanna-Tabor* overruled that holding."); Pfeil v. St. Matthews Evangelical Lutheran Church of Unaltered Augsburg Confession of Worthington, 877 N.W.2d 528, 535 (Minn. 2016) ("The U.S. Supreme Court's holding in *Hosanna–Tabor* leads us to conclude that the ecclesiastical abstention doctrine is not a jurisdictional bar.").

free to go their own way in deciding matters of state civil procedure.[62] A number of state courts continue to treat church autonomy as jurisdictional. The North Carolina Court of Appeals reasserted that church autonomy claims go to subject-matter jurisdiction.[63] Texas courts continue to say that a church autonomy defense should be raised as an objection to jurisdiction "when religious-liberty grounds form the basis for the jurisdictional challenge."[64]

Sometimes, the decision to treat the church autonomy issue as jurisdictional in the face of the Supreme Court's disagreement has been controversial. One judge on the Texas Court of Appeals dissented in a recent case on precisely this issue.[65] The court majority issued a writ of mandamus to stop a district court from deciding a dispute about a priest's pay, when the matter involved examining the decision making of a religious authority over a minister.[66] In dissent, Chief Justice Yvonne Rodriguez argued that church autonomy is not jurisdictional and thus cannot be the basis for mandamus.[67] She noted that the Texas Supreme Court had held that church autonomy issues were jurisdictional in its 2007 case, *Westbrook v. Penley*.[68] But since then, the United States Supreme Court had declared in *Hosanna-Tabor* that the First Amendment is not a "substantive restraint on jurisdiction in religious liberty cases," at least when it comes to "employment discrimination."[69] The United States Supreme Court trumps state law on issues of federal constitutional law, and Chief Justice Rodriguez argued that the status of church autonomy was a matter of substantive federal law, not state procedural

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62. *See, e.g.*, In re Roman Cath. Diocese of El Paso, 626 S.W.3d 36, 49 n.9 (Tex. App. 2021) (internal citations omitted) ("The United States Supreme Court, resolving a circuit split on the interpretation of Federal Rule of Civil Procedure 12(b)(1) and (6), concluded that the ministerial exception did not raise a jurisdictional bar, but was instead an affirmative defense that should be resolved as would other affirmative defenses. Because that holding deals with how federal courts apply Federal Rule of Civil Procedure 12(b)(1), (6), and is not premised on federal constitutional law, it does not bind a Texas court.").

63. Nation Ford Baptist Church Inc. v. Davis, 866 S.E.2d 11, 15 (N.C. Ct. App. 2021) (noting that church autonomy issues are jurisdictional but holding that the dispute at issue about church property does not raise church autonomy issues).

64. Mosby v. Kleinguetl, No. 14-19-00594-CV, 2021 WL 824779, at *2 (Tex. App. Mar. 4, 2021) (internal citation omitted).

65. In re Roman Cath. Diocese of El Paso, 626 S.W.3d at 50–57 (Rodriguez, J., dissenting).

66. *Id.* at 39–40 (majority opinion) ("Because the application of [age discrimination law and common law fraud], under the unique facts of this case, runs head-long into church doctrine we conclude the claims are barred by ecclesiastical abstention.").

67. *Id.* at 50 (Rodriguez, J., dissenting) ("I believe that this mandamus should be summarily denied because a First Amendment religious liberty defense to an employment discrimination lawsuit does not deprive a district court of jurisdiction to resolve an antidiscrimination lawsuit brought against a religious entity by a former employee.").

68. *Id.* at 51–52 (Rodriguez, J., dissenting) (citing Westbrook v. Penley, 231 S.W.3d 389, 394 (Tex. 2007)).

69. *Id.* at 51 (Rodriguez, C.J., dissenting).

law.[70] A Connecticut court similarly concluded that the Supreme Court's analysis in *Hosanna-Tabor* is not just a matter of federal civil procedure, but a "characteriz[ation of] the essence and substantive nature of the claim."[71] A counterargument is that the characterization of church autonomy as affirmative defense is better understood as a matter of civil procedure, not of constitutional law. If the courts want to treat state civil procedure as dealing with a constitutional right in a way that is *more protective* of the right than federal courts, they are welcome to do that.

One might think that the federal courts would at least be paying more attention to the Supreme Court's instructions on civil procedure and church autonomy. But it turns out thereis disagreement among the federal courts too.

The Eleventh Circuit has said, "Civil courts lack jurisdiction to entertain disputes involving church doctrine and polity."[72] How can the federal courts so flagrantly ignore the Supreme Court's view of the matter? Multiple federal courts have cabined the *Hosanna-Tabor* footnote to ministerial exception cases while treating other church autonomy cases as unaffected.[73] The distinction is questionable, to say the least, given the Supreme Court's clarification that church autonomy is the larger category within which the ministerial exception fits.[74] But there is now quite a bit of caselaw trying to subdivide the field of church autonomy into segments with different procedural rules—ministerial exception cases treated as affirmative defenses, but other church autonomy cases treated as jurisdictional.

A decision from the Southern District of New York started by observing, "It is somewhat unclear whether the First Amendment serves as jurisdictional bar or an affirmative defense to claims that require courts to review ecclesiastical decisions."[75] Citing pre-*Hosanna-Tabor*

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70. *Id.* at 52 (Rodriguez, C.J., dissenting) ("When the Texas Supreme Court and the U.S. Supreme Court both speak on an issue of federal constitutional law, the opinion of the U.S. Supreme Court controls.").

71. McKnight v. Old Ship of Zion Missionary Baptist Church, No. HHDCV156061558S, 2016 WL 4507398, at *4 (Conn. Super. Ct. July 28, 2016); *see also* Mis v. Fairfield Coll. Preparatory Sch., No. FBTCV166057613, 2017 WL 3174422, at *3–4 (Conn. Super. Ct. June 20, 2017) (rejecting that the "ministerial exception implicates subject matter jurisdiction" in consideration of the "persuasive analysis in *McKnight*" and the *Hosanna-Tabor* indication that the doctrine is appropriately raised as an affirmative defense).

72. Rutland v. Nelson, 857 F. App'x 627, 628 (11th Cir. 2021) (affirming sua sponte dismissal for lack of subject-matter jurisdiction based on ecclesiastical abstention doctrine).

73. *See, e.g.*, Kavanagh v. Zwilling, 997 F. Supp. 2d 241, 248 n.7 (S.D.N.Y. 2014) (collecting cases) ("Most district courts to consider the question have treated it as jurisdictional.").

74. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060–61 (2020) ("The constitutional foundation for [*Hosanna-Tabor*] was the general principle of church autonomy to which we have already referred: independence in matters of faith and doctrine and in closely linked matters of internal government").

75. Kavanagh v. Zwilling, 997 F. Supp. 2d 241, 248 n.7 (S.D.N.Y. 2014).

decisions, it noted that "[m]ost district courts to consider the question have treated it as jurisdictional."[76] It suggested that these decisions survived after *Hosanna-Tabor* on the theory that matters implicating "ecclesiastical decisions" outside of the employment context could be treated differently from the "ministerial exception" in the employment context of *Hosanna-Tabor*.[77] Similarly, the District of D.C. followed circuit precedent predating *Hosanna-Tabor* that treated matters of ecclesiastical governance outside the employment context as a distinct doctrine, "ecclesiastical abstention."[78] It said that this body of cases was "'related' to but 'distinct' from the ministerial exception."[79] It noted that circuit precedent had treated ecclesiastical abstention as jurisdictional under Rule 12(b)(1).[80] "[W]ithout definitive guidance otherwise from the Supreme Court or the D.C. Circuit," the district court continued to treat the matter as jurisdictional.[81] And the District of New Mexico noted the growing split: "While *Hosanna-Tabor* unquestionably confirmed that the ministerial exception is an affirmative defense, courts continue to take opposing positions on the issue of whether the broader, and far older church autonomy doctrine operates as an affirmative defense or a jurisdictional bar."[82]

This disagreement has practical consequences. A South Carolina appellate court concluded that, because the ministerial exception was not jurisdictional, a church could forfeit church autonomy arguments by failing to raise them in the trial court.[83] By contrast, several federal courts have concluded that church autonomy defenses cannot be forfeited[84] and cannot even be waived.[85] Courts can similarly extrapolate from views about church autonomy's jurisdictional character to make decisions about interlocutory review. For example, the Second Circuit has opined that church autonomy cannot "fall within the small class of decisions excepted from the final-judgment rule."[86] But several other federal and state courts

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76. *Id.*
77. *Id.*
78. Gregorio v. Hoover, 238 F. Supp. 3d 37, 45–46 (D.D.C. 2017).
79. *Gregorio*, 238 F. Supp. 3d at 45–46.
80. *Id.* at 46.
81. *Id.* at 45–46.
82. Hubbard v. J Message Grp. Corp., 325 F. Supp. 3d 1198, 1208 (D.N.M. 2018).
83. Jenkins v. Refuge Temple Church of God in Christ, Inc., 818 S.E.2d 13, 17 (S.C. Ct. App. 2018).
84. *See* E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 581–82 (6th Cir. 2018).
85. *See* Conlon v. InterVarsity Christian Fellowship, 777 F.3d 829, 836 (6th Cir. 2015); Tomic v. Cath. Diocese of Peoria, 442 F.3d 1036, 1042 (7th Cir. 2006).
86. In re Roman Cath. Diocese of Albany, N.Y., Inc., 745 F.3d 30, 36 (2d Cir. 2014); *see also* Tucker v. Faith Bible Chapel Int'l, 36 F.4th 1021, 1037–38 (10th Cir. 2022) ("Generally, any error

have reached the opposite conclusion.[87]

C. Jurisdiction-Adjacent Ideas

Even courts that don't treat church autonomy as jurisdictional for civil procedure purposes have recognized on occasion that it is a unique kind of affirmative defense. The key point is that church autonomy in some way insulates properly ecclesiastical functions from interference by the state, including the state's judiciary.

Some federal courts have held that, even though church autonomy is not jurisdictional for purposes of Rule 12, it still has a uniquely structural character. One line of cases, starting with the Tenth Circuit's decision in *Bryce v. Episcopal Church*,[88] analogizes church autonomy to the field of qualified immunity.[89] This is not exactly jurisdictional, but it is a defense to be raised at the earliest possible opportunity: "If the church autonomy doctrine applies to the statements and materials on which plaintiffs have based their claims, then the plaintiffs have no claim for which relief may be granted."[90] This is "similar to a government official's defense of qualified immunity, which is frequently asserted in a motion to dismiss under Rule 12(b)(6) or Rule 56."[91] Qualified immunity is, the court pointed out, "a question of law to be resolved at the earliest possible stage of litigation."[92] Likewise, in church autonomy cases, "[b]y resolving the

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a district court makes in failing to apply an affirmative defense foreclosing liability can be reviewed and corrected after final judgement has been entered in the case.").

87. *See, e.g.*, Whole Woman's Health v. Smith, 896 F.3d 362, 368 (5th Cir. 2018), *as revised* (July 17, 2018) (internal citations omitted) ("[T]his court has reaffirmed its precedent holding that interlocutory court orders bearing on First Amendment rights remain subject to appeal pursuant to the collateral order doctrine."); Kirby v. Lexington Theological Seminary, 426 S.W.3d 597, 609 n.45 (Ky. 2014) ("[T]he denial of a religious institution's assertion of the ministerial exception . . . is appropriate for interlocutory appeal"); United Methodist Church, Balt. Ann. Conf. v. White, 571 A.2d 790, 792–93 (D.C. 1990) (internal citations omitted) ("In short, [the church]'s immunity claim can be exercised, if at all, only before trial, and must be reviewed pretrial or it can never be reviewed at all."); Dayner v. Archdiocese of Hartford, 23 A.3d 1192, 1199–200 (Conn. 2011) (internal citations omitted) ("[T]he very act of litigating a dispute that is subject to the ministerial exception would result in the entanglement of the civil justice systems with matters of religious policy, making the discovery and trial process itself a first amendment violation.").

88. Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 654 (10th Cir. 2002) (noting the crucial element in challenge the sufficiency of the plaintiffs' claim is the substance of the motion and not whether it is labeled a Rule 12(b)(1) motion rather than a 12(b)(6)).

89. *See also* Skrzypczak v. Roman Cath. Diocese of Tulsa, 611 F.3d 1238, 1242 (10th Cir. 2010) ("Thus, the ministerial exception, like the broader church autonomy doctrine, can be likened 'to a government official's defense of qualified immunity. . . .'").

90. *Bryce*, 289 F.3d at 654.

91. *Id.*

92. *Id.* (quoting Medina v. Cram, 252 F.3d 1124, 1131 (10th Cir. 2001)); *see also* Kirby v. Lexington Theological Seminary, 426 S.W.3d 597, 609 n.45 (Ky. 2014) (internal citations omitted) ("The denial of qualified immunity under our case law is ''subject to prompt appellate review.' Interlocutory appellate review is available—even in the absence of a final judgment—

question of the doctrine's applicability early in litigation, the courts avoid excessive entanglement in church matters."[93]

A related point that sometimes appears in the cases is that, whatever it might mean for jurisdiction per se, church autonomy is in some sense structural.[94] It is not just about personal rights; it is about the extent of government authority. This was clear in the Supreme Court's *Hosanna-Tabor* opinion: "Both Religion Clauses bar the government from interfering with the decision of a religious group . . . ."[95] This has civil procedure implications. As such, a number of courts have held that church autonomy is not waivable.[96]

* * *

Church autonomy's status in civil procedure remains unsettled on the basic and important point of whether it is jurisdictional. Despite the Supreme Court's effort to resolve the problem with a simple footnote, lower courts have not let that stand in the way of charting their own disparate courses on how to treat church autonomy.

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because the denial of immunity is a 'substantial claim[ ] of right which would be rendered moot by litigation and thus [is] not subject to meaningful review in the ordinary course following a final judgment.' Likewise, the denial of a religious institution's assertion of the ministerial exception, *i.e.,* trial court finding the employee not to be a ministerial employee, is appropriate for interlocutory appeal.").

93. *Bryce*, 289 F.3d at 654 n.1; *see also* Middleton v. United Church of Christ Bd., 483 F. Supp. 3d 489, 495–96 (N.D. Ohio 2020) (describing the ministerial exception as an affirmative defense that defendants should assert in a motion to dismiss under Fed. R. Civ. P. 12(b)(6) as defendants would for other affirmative defenses).

94. Carl H. Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J.L.& POL. 445, 452–57 (2002) (noting the Supreme Court has applied the Establishment Clause as a "structural restraint on government power"); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 42–51 (1998) [hereinafter Esbeck, *Restraint on Governmental Power*] (describing the Supreme Court's rulings in seminal Establishment Clause cases as a "consequence of conceptualizing the Establishment Clause as structural rather than . . . the Court's concern for individual free exercise rights"); Carl H. Esbeck, *An Extended Essay on Church Autonomy*, 22 FED. SOC. REV. 244, 244–45 (2021) [hereinafter Esbeck, *An Extended Essay*] (describing church autonomy as "not a personal right rooted in an individual's religious beliefs, but a zone of protection for an entity's internal governance that is derived from the organization's religious character").

95. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 181 (2012).

96. *See, e.g.*, Conlon v. InterVarsity Christian Fellowship, 777 F.3d 829, 836 (6th Cir. 2015); Billard v. Charlotte Catholic High Sch., No. 3:17-CV-00011, 2021 WL 4037431, at *12 (W.D. N.C. Sept. 3, 2021). The Sixth Circuit had previously held that the ministerial exception was waivable in *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007), but in *Conlon* it held that this previous decision was abrogated as to the possibility of waiver in light of *Hosanna-Tabor*. *See also* Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1042 (7th Cir. 2006), which held that "the ministerial exception . . . is not subject to waiver or estoppel" on the grounds that church autonomy is jurisdictional. The jurisdictional point was, of course, abrogated by *Hosanna-Tabor*. But the Sixth Circuit concluded that its previous holding about waiver was wrong because of *Hosanna-Tabor*'s language about church autonomy's structural character. *Conlon*, 777 F.3d at 836.

II. DIFFERENT WAYS TO TALK ABOUT JURISDICTION

A first step toward answering the question of whether church autonomy is jurisdictional is to sort out the various ways in which the term is being used.[97] Jurisdiction can be used in an abstract way for talking about authority generally.[98] This is quite different from jurisdiction in the more technical sense—jurisdiction as a matter of civil procedure. The trend in the Supreme Court's jurisdiction cases is toward tightening the definition—the Court has very sensibly insisted on more rigor in the use of "jurisdiction" in its procedural sense.[99] Figuring out the different senses in which the term can be used is essential to deciding whether church autonomy is jurisdictional.

A. Conceptual Jurisdiction

First, jurisdiction can be used simply as shorthand for authority to speak to an issue.[100] We can call this "conceptual jurisdiction." Jurisdiction is not a term we usually call "colloquial," but if there is a way to use the term colloquially, this is it. This is evident in the word's etymology and usage outside the field of lawyer's law. Juris refers to law.[101] Diction refers to speech (to say or declare).[102] Jurisdiction is the right to speak authoritatively—to speak law, as it were—to a particular issue, area, or situation. Courts have jurisdiction, but so too (in this broad sense) do school boards, bar associations, university accreditation agencies, governing bodies in sports, state legislatures, county boards, Congress—and the list could go on. Jurisdiction at this broad level helpfully describes the distinct authority-spheres of church and state.[103]

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97. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 90 (1998) ("'Jurisdiction,' it has been observed, 'is a word of many, too many, meanings.'") (citation omitted).

98. *See infra* Part I.A.

99. *See, e.g.*, Union Pac. R. Co. v. Bhd. of Locomotive Eng'r & Trainmen Gen. Comm. of Adjustment, Cent. Region, 558 U.S. 67, 81 (2009) ("[W]e have cautioned, in recent decisions, against profligate use of the term [jurisdiction]."); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 91 (1998) (cautioning against reliance on casual, "drive-by" jurisdictional pronouncements in older cases).

100. *See, e.g.*, Oxford English Dictionary (2d ed. 1989) (offering "Power or authority in general" as one possible definition of jurisdiction).

101. Oxford English Dictionary (2nd ed. 1989, update 2021).

102. Oxford English Dictionary (2nd ed. 1989, update 2021); *see also* Justin B. Richland, *Jurisdiction: Grounding Law in Language*, 42 ANNUAL REVIEW ANTHROPOLOGY 209, 212 (2013) ("Generally speaking, the conventional meanings given to jurisdiction involve questions concerning the scope of a legal institution's power vis-a-vis other institutions in the system to which it belongs, or between one state's legal system and another.").

103. *See* Weinberger, *The Limits of Church Autonomy*, *supra* note 35, at 1301, 1318 (discussing the subject matter differences which belong to the church and state in which the state's laws may intrude on church operations); Lael Weinberger, *The Relationship between Sphere Sovereignty and Subsidiarity*, *in* GLOBAL PERSPECTIVES ON SUBSIDIARITY 49, 59–61 (Michelle Evans & Augusto

In the older cases, courts often used "jurisdiction" in this broad, conceptual sense—to describe the fact that church and state have different spheres of authority.[104] The courts generally accept that church autonomy is jurisdictional in the broad, colloquial, and prescriptive sense.[105] The judicial splits are about technical, procedural jurisdiction in the courts.[106]

Among scholars, there is debate about whether jurisdiction is the right way to think about the doctrine. Some argue that church autonomy is best thought of in precisely these terms: it is about institutional authorities.[107] Some argue that this is normatively desirable,[108] while others agree that church autonomy is about institutions and (broadly) jurisdiction while maintaining more ambivalence as to just how far this is normatively desirable.[109] Others argue that "jurisdiction" is just the wrong way to think of church autonomy.[110] Some would root church autonomy in individual religious liberty and object to the focus on the *religious institution as such* as the holder of a distinctive autonomy right different from that based on the individual rights-holder.[111]

1. Jurisdiction as a Concept Is a Useful (and Correct) Way to Think About Church Autonomy

There are several reasons that institutional jurisdiction is an appropriate way of thinking about church autonomy.[112] The key arguments can be summarized under three headings.

Zimmermann ed., 2014) (observing that the church and state have different spheres of authority where the "church has the responsibility for dealing with the standards for its own members" and "[t]he state does not have a good reason for interfering with the internal standards of a separate sphere"); *see generally* Robert Renaud & Lael Weinberger, *Spheres of Sovereignty: Church Autonomy Doctrine and the Theological Heritage of the Separation of Church and State*, 35 N. KY. L. REV. 67, 71 (2008); Nicholas Wolterstorff, *Abraham Kuyper on the Limited Authority of Church and State*, 7 GEO. J.L. & PUB. POL'Y 105, 112–13 (2009); Horwitz, *supra* note 5, at 89.

104. *See* discussion *supra* Part I.A.

105. *See* discussion *infra* Section II.A.1.

106. *See* discussion *infra* Part II.B.

107. *See* sources cited in *supra* note 5.

108. *See, e.g.*, Steven D. Smith, *The Jurisdictional Conception of Church Autonomy*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 20 (Micah Schwartzman, Chad Flanders, & Zoë Robinson eds., 2016).

109. *See, e.g.*, Frederick Mark Gedicks, *The Recurring Paradox of Groups in the Liberal State*, 2010 UTAH L. REV. 47, 52 (2010).

110. *See, e.g.*, Cohen, *supra* note 6, at 548–51, 575.

111. *See, e.g.*, Schragger & Schwartzman, *supra* note 6, at 969–74; Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L.J. 981 (2013); Cohen, *supra* note 6, at 575; MARCI A. HAMILTON, GOD VS. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY 312–13 (2d ed. 2014).

112. This Article is devoted to untangling the issues rather than making the broader normative case, so for this Article's purposes, I will simply summarize what I take to be the key arguments in the literature for why an institutional (and hence, broadly jurisdictional) account of church autonomy is important.

First, as a textual matter, the First Amendment's religion clauses speak in terms of government authority.[113] The amendment limits government authority to regulate or otherwise interfere with religion, in different forms under the Establishment and Free Exercise clauses.[114] There is some debate among scholars as to which of the two clauses is doing the work in church autonomy, or if they both work together.[115] But if we assume that the religion clauses do protect some level of internal religious operations, then it makes sense to talk in terms of institutional authority. In other words, this brings us to jurisdiction in the conceptual sense.

Second, there are good historical reasons to see the relative authority of religious institutions and civil government as key issues in their institutional forms. Again, there is debate about where precisely to find the right historical reference points.[116] But the analytical point does not hinge on whether one looks at medieval history episodes, like Magna Carta or the investiture controversies,[117] or to nineteenth century American regulations on the corporate form of religious institutions.[118] The point is simply that in each case, it was not just a debate about discrimination against religious minorities or the like, but a concrete

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113. U.S. CONST. amend I, cl. 1; U.S. CONST. amend I, cl. 2.

114. *Id*.

115. For defenses of the Establishment Clause as the more important source of protection, *see* Esbeck, *Restraint on Governmental Power*, *supra* note 94, at 42–51; Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. CIN. L. REV. 151, 210–11, 218–19 (2003); Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789, 1808 n.58 (2004); Schleicher v. Salvation Army, 518 F.3d 472, 475 (7th Cir. 2008). For arguments that the Free Exercise Clause is the more important source, *see generally* 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); Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of* Smith, 2004 BYU L. REV. 1633 (2004); *see also* Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV, 1, 19–20 (2000); Douglas Laycock, *Church Autonomy Revisited*, 7 GEO. J.L. & PUB. POL'Y 253, 263–64 (2009). The courts have generally taken the position that both clauses together create the church autonomy doctrine. *See* Our Lady of Guadalupe Sch. V. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020); *see also* Thomas C. Berg, *Ministers, Minimum Wages, and Church Autonomy*, 9 ENGAGE 135, 136 (2008); Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 12 (2011).

116. *See, e.g.*, Garnett, *The Freedom of the Church*, *supra* note 5, at 63–64; Garnett, *An Exposition, Translation, and Defense, supra* note 5, at 37; STEVEN D. SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM 31–34 (2014); Kalscheur, *supra* note 13, at 61.

117. *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 182 (2012); McRaney v. N. Am. Mission Bd. of S. Baptist Convention, Inc., 980 F.3d 1066, 1076–77 (5th Cir. 2020) (Oldham, J., dissenting from denial of rehearing en banc); Garnett, *The Freedom of the Church*, *supra* note 5, at 59–61 (2007); Garnett, *An Exposition, Translation, and Defense*, *supra* note 5, at 35–36 (2013); SMITH, *supra* note 116, at 31–34; Kalscheur, *supra* note 13, at 61.

118. *See* Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Power and Property Before the Civil War*, 162 U. PENN. L. REV. 307, 320 (2014) ("Attention to this extensive legal record reveals the tracks of religious life left in law, as well as the state's imposition of discipline on religious actors. Vibrant religious communities flourished . . . in these highly regulated and even brittle institutions.").

discussion about the relative authority of the state and of religious institutions in making their own internal decisions.[119]

Third, and relatedly, there are sociological reasons to see institutions as distinct from individual relationships. Institutions are not just the sum of their parts. People working together in social institutions affect each other.[120] It is appropriate for the law to take this into account, and one way to do this is to talk about the relative authority of institutions.[121]

2. Three Different Conceptions of Jurisdictional Church Autonomy

There are at least three ways that church autonomy could be jurisdictional. We can call the three different models territorial, personal, and subject matter. These are all categories familiar from civil procedure. But for the moment, I am not addressing these as technical categories under American law. I want to take a step back to think about ways that the concept of authority—jurisdiction—can capture different kinds of jurisdiction.

Territorial jurisdiction asks *where*.[122] A state exercises jurisdiction within its territory, not outside of it. As such, the United States enforces its criminal law within its borders and not in Canada.[123] A property owner has a kind of territorial jurisdiction: I can decide to cut down or plant a tree on my side of the property line, not on my neighbor's land.

Personal jurisdiction asks *who*. The law deals with people. It can reach people within its territory (the overlap of personal and territorial jurisdiction).[124] Or it can reach people who are not within a particular territory but otherwise have become subject to the law in some way (such

119. *See* Renaud & Weinberger, *supra* note 103, at 89 ("Turning from the theory to the practice, the central concern of the theologian-framers of jurisdictional theory was to preserve the freedom of church government from secular interference.").

120. *See, e.g.*, LUKE C. SHEAHAN, WHY ASSOCIATIONS MATTER: THE CASE FOR FIRST AMENDMENT PLURALISM 34–80 (2020); MARY ANN GLENDON, RIGHTS TALK 109–44 (1991).

121. *See generally* PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS (2013); Horwitz, *supra* note 5, at. 79; *see also* Gedicks, *supra* note 109, at 52 ("Rather, [the sphere sovereignty approach] see[s] a profusion of organically developed institutions and associations, including both church and state, operating within their own realms.").

122. *See, e.g.*, RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 17 (AM. L. INST. 1965); Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 921 (D.C. Cir. 1984) ("[T]erritoriality-based jurisdiction thus allows states to regulate the conduct or status of individuals or property physically situated within the territory.").

123. Difficult questions arise about the extent to which a state can regulate based on extraterritorial effects. *See generally*, RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 18 (1965); for a critical perspective, see Péter D. Szigeti, *The Illusion of Territorial Jurisdiction*, 52 Tex. Int'l L.J. 369 (2017). .

124. *See, e.g.*, Pennoyer v. Neff, 95 U.S. 714, 724 (1878) ("Where a party is within a territory, he may justly be subjected to its process, and bound personally by the judgment pronounced on such process against him.").

as by having sufficient minimum contacts with a particular territory).[125] Conversely, it's also possible to be within a territory yet not subject to the legal rules of that territory. As an illustration, think of diplomatic immunity. A diplomat living in a foreign country need not comply with that country's laws insofar as they interfere with his official duties.[126] But even better, think of some examples outside the American setting such as ancient Roman law's principle that Roman citizens were accorded a different kind of treatment from, say, a Jewish resident of first-century Jerusalem.[127] Readers of the New Testament will recall that the Apostle Paul could invoke a particular kind of Roman jurisdiction by virtue of his Roman citizenship.[128] This was not based on territory, in the sense that Romans applied one kind of imperial jurisdiction to govern and try subjects in the far-flung empire, and a different kind of set of laws and procedures over citizens.[129] Which kind of jurisdiction was triggered depended on the status of the person.[130] Similarly, think of the millet system in the Ottoman empire. The Ottomans governed a large and religiously diverse empire.[131] The substantive law applied in many domains depended on the person's religious status.[132] A "millet" was an

125. *See, e.g.*, Int'l Shoe Co. v. Wash, 326 U.S. 310, 319 (1945) ("But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations . . . .").

126. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 465 (AM. L. INST. 1987) ("(1) A consular officer of a state, commissioned to and accepted by another state, is immune (a) from an exercise by the receiving state of jurisdiction to prescribe that interferes with the officer's official functions, and… . . . (b) from arrest, detention, and criminal or civil process in respect of acts or omissions in the exercise of the officer's official functions.").

127. Access to citizenship evolved over the course of Roman imperial history. *See* GEOFFREY W. BROMILEY, THE INTERNATIONAL STANDARD BIBLE ENCYCLOPEDIA 965 (1979); Myles Lavan, *The Foundation of Empire? The Spread of Roman Citizenship from the Fourth Century BCE to the Third Century CE*, *in* IN THE CRUCIBLE OF EMPIRE: THE IMPACT OF ROMAN CITIZENSHIP UPON GREEKS, JEWS AND CHRISTIANS 21–54 (Katell Berthelot & Jonathan Price eds., 2019) (explaining how Roman citizenship was incredibly exclusive at the founding of the Republic and initial ascendance to power. However, as Roman territory grew, access to citizenship became more readily available such as through military service, or general grants by the Emperors).

128. *See Acts* 22:25–29 (recounting how the Apostle Paul was being prepared to be flogged when he told his Roman captors that he was a Roman Citizen, promoting his quick release and their horror at having restrained a Roman citizen).

129. *See* Lavan, *supra* note 127, at 26–28.

130. *See* Lavan, *supra* note 127, at 49.

131. *See generally* Karen Barkey & George Gavrilis, *The Ottoman Millet System: Non-Territorial Autonomy and its Contemporary Legacy*, 15 ETHNOPOLITICS 24 (2016); Efrat Aviv, *Millet System in the Ottoman Empire*, OXFORD BIBLIOGRAPHIES, https://www.oxfordbibliographies.com/view/document/obo-9780195390155/obo-9780195390155-0231.xml [https://perma.cc/CX3Q-X89H] (Nov. 28, 2016).

132. *See generally* Barkey & Gavrilis, *supra* note 131, at 24; Aviv, *supra* note 131 ("Among the most important features of the millet arrangement was the intermediary role of community leaders. The state gave up its control of the internal dynamics of the community in return for regular taxation and cohesive and obedient administration.").

autonomous religious court that decided matters of personal law for adherents of a particular religious community.[133]

Finally, subject-matter jurisdiction asks *what*. The law governs the subjects that fall within a relevant institution's authority (such as that of a court to adjudicate a dispute).[134] One can often distinguish federal jurisdiction from state jurisdiction based on subject matter. The state has general police powers, but the federal government does not.[135] Federal subject-matter jurisdiction arises when the dispute is based on federal law[136] or when it is between citizens of diverse states.[137]

Church autonomy principles can be understood—or misunderstood—through each of these frames. In medieval English common law, the "benefit of clergy" was a form of church autonomy as a matter of personal jurisdiction: members of the clergy were exempt from felony prosecution before the king's courts, by virtue of their personal status as clergy.[138] English law eventually abandoned this understanding of clergy, viewing it as protecting wrongdoing.[139]

Some critics of contemporary American church autonomy charge that church autonomy will shield whatever takes place inside a church.[140] They are effectively acting as though church autonomy is a kind of territorial jurisdiction for religious institutions. But it is not. A murder committed in a church is no more shielded from the criminal authority of the state than is a murder committed in the privacy of one's home.[141]

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133. *See* Barkey & Gavrilis, *supra* note 131, at 24, 26–28 (stating the millet arrangement "fostered a sense of localism" which included provisions for ecclesiastical courts that could be used for personal and community disputes); Aviv, *supra* note 131 (noting the courts varied from community to community, and applied their respective local laws).

134. Kontrick v. Ryan, 540 U.S. 443, 454–55 (2004).

135. United States v. Morrison, 529 U.S. 598, 618 (2000).

136. U.S. CONST. Art. III, § 2; 28 U.S.C. § 1331.

137. U.S. CONST. Art. III, § 2; 28 U.S.C. § 1332.

138. *See* Weinberger, *The Limits of Church Autonomy*, *supra* note 35, at 1295–96 (noting that the difference in treatment was not related at all to the subject of the crime, but who the defendant was and their relationship to the clergy).

139. *See id.* at 1302–03 ("[B]y roughly the start of the seventeenth century, the benefit of clergy had lost all meaningful connection to the church. It also had many significant subject matter-specific exclusions.").

140. *See, e.g.*, Corbin, *supra* note 6, at 1982–85, 1995 ("According to these courts, *Smith* limited free exercise protection of religious individuals, but left intact the free exercise autonomy of religious institutions. If that is true, the free exercise right of autonomy for religious institutions is broader than the free exercise protection for individuals."); Schragger & Schwartzman, *supra* note 6, at 920–23, 970–74 (alleging that church autonomy will insulate the church from outside involvement, thereby allowing the internal affairs of the religious organizations to become de facto laws).

141. *See* Weinberger, *The Limits of Church Autonomy*, *supra* note 35, at 1318 ("One must recognize that the state is the one to primarily address civil harms, and the church has the authority to address specific spiritual and relational aspects of this in its formative and corrective

In a recent article, I explained that church autonomy should be thought of as a question of subject-matter jurisdiction.[142] (And again, I mean this in the conceptual sense, not the procedural sense.) Articulating the subject matter covered by church autonomy is essential for deciding what is in and what is out—and for recognizing that church autonomy, even a jurisdictional conception of church autonomy, is not some kind of blank check for religious institutions to do whatever they like.

* * *

The concept of jurisdiction is a helpful one for thinking through the relative authority of different institutions, including church and the state. The fact that jurisdictional concepts at a certain level of abstraction can and should be used does not mean that the issue is jurisdictional in the technical sense used in civil procedure. It is to that subject that we turn next.

B. Judicial Jurisdiction

Jurisdiction can refer to a more technical and procedural meaning. When lawyers use the term, it is often aimed specifically at the judicial system: does a court have the prima facie right to speak authoritatively to a given matter? We can call this "judicial jurisdiction."[143]

There may still be reasons that the court would be unable to reach the merits of an issue. But those are not all jurisdictional. Think of a run-of-the-mill tort case. A sues B in New York state court for battery, alleging that B punched him in the face. The court could dismiss for want of jurisdiction if, say, the battery took place in Georgia and both parties actually are residents of Georgia. The court simply has no authority over any part of the proceeding. But if the court had jurisdiction and the plaintiff hadn't alleged all the elements of the tort, the court will dismiss. Or suppose everyone is domiciled in New York, but it turns out that the blow was struck in a fair boxing fight to which both parties had consented; the case could be dismissed because there is an affirmative

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discipline."); Watson v. Jones, 80 U.S. 679, 733 (1872) ("If the General Assembly of the Presbyterian Church should undertake to try one of its members for murder, and punish him with death or imprisonment, its sentence would be of no validity in a civil court or anywhere else.").

142. *See* Weinberger, *The Limits of Church Autonomy*, *supra* note 35, at 1318 ("Its [the church] jurisdiction goes to subject matter, not territory and not person. The subject matter of the church is religious. The subject matter of the state is civil conduct."); *see also* Esbeck, *An Extended Essay supra* note 94, at 266 ("The idea that church autonomy is 'jurisdictional' goes all the way back to *Watson v. Jones*, and the confusion of church autonomy being jurisdictional rather than structural carries forward in the Court's later cases.").

143. I base this terminology on Howard M. Wasserman, *Prescriptive Jurisdiction, Adjudicative Jurisdiction, and the Ministerial Exemption*, 160 U. PA. L. REV. PENNUMBRA 289, 298 (2012) [hereinafter *Prescriptive Jurisdiction*].

defense: consent. This is not about the court's power to hear the case.[144]

There is a powerful argument that the church autonomy cases are best thought of in the same way, as the courts have analyzed jurisdiction. As Howard Wasserman has explained at length, the *Hosanna-Tabor* Court's footnote makes perfect sense as part of the contemporary Supreme Court's effort to end loose language about jurisdiction in its civil procedure cases.[145] The church autonomy cases arise from standard issue claims, generally against churches: tort, employment discrimination, property, and occasionally contract.[146] The courts have prima facie adjudicative jurisdiction over these issues. The First Amendment then comes in as a defense to this claim. The First Amendment limits the ability of the government to issue substantive laws interfering with religion, what Wasserman calls the "prescriptive jurisdiction" or authority of the government to prescribe laws in a given subject area.[147] As Wasserman explains, "a court's jurisdiction to adjudicate a case under existing substantive law is different from Congress's jurisdiction to bring that substantive law into existence in the first place."[148]

Conflating these two different jurisdictional limits—one on courts, another on Congress—can lead to confusion about where jurisdiction is limited and where it is not. The First Amendment strips Congress of prescriptive jurisdiction. But it does not limit the adjudicative jurisdiction of the courts. Rather, First Amendment arguments usually come up in the courts as a defense to another claim that is within the court's jurisdiction.[149] Church autonomy's textual foundation is the First

144. *See, e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S.83, 89 (1998) ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.,* the courts' statutory or constitutional *power* to adjudicate the case.").

145. *See* Wasserman, supra note 143, at 295; *see also* Wasserman, *supra* note 31 ("Permitting overlap between jurisdiction and merits is generally inconsistent with the federal procedural system); Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 350 (2012) (referencing *Hosanna-Tabor* as an example of the Court "continuing its drive to clarify the line between jurisdiction and merits"); Scott Dodson, *Jurisdiction and Its Effects*, 105 GEO. L.J. 619, 626 (2017) (describing the Court's "recent effort to bring thoughtfulness to jurisdictional characterizations" as "commendable" and "revolutionary").

146. *See* Weinberger*, The Limits of Church Autonomy*, *supra* note 35, at 1255 n.4; *see also* Esbeck, *An Extended Essay*, *supra* note 94, at 21.

147. U.S. CONST. amend. I; Wasserman, *supra* note 143, at 304 ("The First Amendment disables all secular law and all secular institutions from regulating the church's actions on matters of faith, structure, and membership, placing these matters entirely beyond the authority of the state.").

148. *Prescriptive Jurisdiction, supra* note 143, at 303.

149. One exception is that a court recently recognized that a government institution's infringement on a church autonomy right can provide the basis for an affirmative action for denial of civil rights under 42 U.S.C. § 1983. InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ., 534 F. Supp. 3d 785, 807 (E.D. Mich. 2021); *but see* Bus. Leaders in Christ v. Univ. of Iowa, 360 F. Supp. 3d 885, 904–05 (S.D.Iowa 2019), aff'd *in part, rev'd in part and*

Amendment. It is hard to see why it should be treated differently from other First Amendment doctrines as a matter of judicial power. Federal and state courts can adjudicate lots of issues and then deal with constitutional defenses.[150] That doesn't mean that every constitutional defense, or even just every First Amendment defense, goes to the court's jurisdiction to hear the case. At some level it might be a semantic game—what gets labeled as jurisdictional for purposes of civil procedure depends on exactly how one sets the parameters for the kinds of issues that go to the merits as opposed to the court's ability to hear the case to begin with. Be that as it may, it's a semantic game that matters and goes to the very basics of how the American procedural system is set up. Church autonomy simply does not go to the ability of courts to hear a prima facie case in the same way as does, for instance, diversity of citizenship or federal question as the prerequisites for federal subject-matter jurisdiction.

When it comes to Federal Rule of Civil Procedure 12, motions to dismiss a suit for lack of jurisdiction are separate from motions to dismiss for failure to state a claim. The Supreme Court's footnote in *Hosanna-Tabor* makes sense in light of the current jurisprudence on jurisdiction.

III. UNBUNDLING PROCEDURAL ISSUES FROM THE CONCEPT OF JURISDICTION (WITH HELP FROM SOVEREIGN IMMUNITY CASES)

There are practical consequences to labeling an issue as jurisdictional in the procedural sense. But in the church autonomy context, the issues that really matter need not necessarily turn on whether they are *labeled* jurisdictional. Sovereign immunity is a helpful analog. Like church autonomy, sovereign immunity is best thought of as an affirmative defense under the tighter definition of "jurisdiction" employed by the Supreme Court in recent years. But, like church autonomy, it has characteristics that appear jurisdictional. In church autonomy, as in sovereign immunity, it is best to unbundle the issues labeled as jurisdictional and consider them one at a time—issues such as whether church autonomy can be raised in an interlocutory posture, whether it can be waived, and so on.

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remanded, 991 F.3d 969 (8th Cir. 2021) (declining to apply the ministerial exception in a motion for summary judgment filed by a religious institution because the church's claim did not arise from a "live internal dispute within the group" but instead between the religious group and the public university).

150. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 451 (2011) ("The Free Speech Clause of the First Amendment . . . can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress.").

A. The Bundle of Issues

The reason that the jurisdiction label matters in civil procedure is really because it answers a number of practical questions. There are five that I will emphasize:

1. Must the issue be resolved at the earliest possible opportunity in the litigation?
2. May the issue be the subject of an interlocutory appeal?
3. Can the issue be forfeited if not raised at the outset of the proceedings?
4. Can the issue be waived?
5. Can the issue be raised on the court's own initiative (sua sponte)?

If the issue is jurisdictional, then there's a ready answer—yes—to all of these questions. In other words, if an issue is jurisdictional, it is always possible to raise the issue and very difficult to ignore a defect.

So far, I have argued that church autonomy is best described as a distinctive doctrine about institutional authority. It can be appropriately described as jurisdictional, if jurisdiction is used as a conceptual category, rather than as referring to judicial jurisdiction (that is, the technical sense of jurisdiction in the courts). Jurisdiction as a judicial or procedural concept is a different matter. For purposes of Rule 12, it is better to think of church autonomy as an affirmative defense than as jurisdictional in the technical, procedural sense.

But this resolves less than it might seem. For while each of the five questions I mentioned can be answered "yes" when the issue is classified as jurisdictional, it does not follow that they will simply be answered "no" if the issue is *not* labeled as jurisdictional. Or to put it another way, the "jurisdiction" label is sufficient to produce "yes" answers to these questions, but not necessary to produce "yes" answers.[151] If church autonomy is not jurisdictional, the answer to any number these specific five questions may still be yes.

Sovereign immunity can provide some hints as to how to approach these issues. Sovereign immunity is a doctrine with similar characteristics to church autonomy. Both are jurisdictional in the conceptual sense, trying to sort out the authority relationships between distinct institutions. Both sovereign immunity and church autonomy have a structural character—they speak to the authority of government (the federal government in the sovereign immunity context, either federal

151. *See* Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1, 4 (2008) ("A greater appreciation for nonjurisdictional rules with jurisdictional attributes can alleviate blind adherence to the false dichotomy and potentially be a powerful tool for a richer understanding of both complex and everyday doctrines.").

or state in the church autonomy context) to exercise its authority over a distinct and autonomous authority (the state government in the sovereign immunity context, the religious institution in the church autonomy context). But sovereign immunity, like church autonomy (in at least the views of the *Hosanna-Tabor* court), is not strictly jurisdictional in the judicial or procedural sense.

B. Sovereign Immunity as a Structural, but Not Necessarily Jurisdictional, Defense

Sovereign immunity comes in a few varieties. Under the Eleventh Amendment, federal courts are prohibited from entertaining suits against any state by citizens of any other state.[152] The Supreme Court extends sovereign immunity of American states to any suits filed against them without their consent (even if by citizens of a state and even if in federal question cases).[153]

There is also foreign sovereign immunity. Foreign states enjoy immunity from suit in the United States except for certain exceptions. This principle emerges from international law[154] but is applied in American courts almost exclusively on the basis of federal statutes.[155]

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152. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

153. *See generally* Hans v. Louisiana, 134 U.S. 1 (1890); *see also* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996) ("For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'"); Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1494–95 (2019) ("The Constitution's use of the term 'States' reflects both of these kinds of immunity [common law and the law of nations]."); PennEast Pipeline Co., LLC v. New Jersey, 141 S. Ct. 2244, 2258 (2021) ("States retain their immunity from suit regardless of the citizenship of the plaintiff."). For defenses of the basics of the doctrine, see William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1, 2–9 (2017) ("The 'backdrop' theory of sovereign immunity not only explains the path of state sovereign immunity so far, but it also provides direction for the future."); William Baude & Stephen E. Sachs, *The Misunderstood Eleventh Amendment*, 169 U. PA. L. REV. 609, 613 (2021) (arguing that the "Supreme Court has arrived at mostly right answers in its sovereign immunity cases, most of the time," though without a clear theory); *see also* Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1869 (2012) ("Some argue that this restriction, by its terms, didn't extend to other suits—such as those by a state's own citizens 'arising under th[e] Constitution, [or] the Laws of the United States.' The Supreme Court has rejected that argument . . . .").

154. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 451 (AM. L. INST. 1987) ("Under international law, a state or state instrumentality is immune from the jurisdiction of the courts of another state, except with respect to claims arising out of activities of the kind that may be carried on by private persons.").

155. *See* Foreign Sovereign Immunities Act of 1976 (FSIA), Pub. L. No. 94-583, § 4(a), 90 Stat. 2892 (codified at 28 U.S.C. § 1602 et seq. (1976)) ("The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts.").

The statutes, in turn, generally make the matter jurisdictional in the technical and procedural sense.[156] Because church autonomy is not statutory but constitutional, we'll focus more on the similarly constitutional (or quasi-constitutional) sovereign immunity between state and federal government, rather than on the largely statutory jurisprudence around foreign sovereign immunity.

The Supreme Court specifically rejected the argument "that the Eleventh Amendment, like the grant of Article III, § 2, jurisdiction, is cast in terms of reach or competence, so the federal courts are altogether disqualified from hearing certain suits brought against a State."[157] If this were so, the Court noted, a state would not be able to waive its immunity—which it can do. "The Amendment, in other words, enacts a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary's subject-matter jurisdiction."[158]

Sovereign immunity defenses are close enough to jurisdiction that courts have taken different approaches in explaining sovereign immunity's status as jurisdictional or not. Some state courts hold that sovereign immunity is a jurisdictional defense.[159] Most federal courts hold that "sovereign immunity is a waivable affirmative defense."[160]

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156. *See* 28 U.S.C. § 1604 ("Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as excepted elsewhere in the statutory framework."); *see also* Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1318 (2017) ("Foreign sovereign immunity is jurisdictional in this case because explicit statutory language makes it so.").

157. Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 267 (1997).

158. *Id.*

159. *See, e.g.*, Coosa Valley Tech. Coll. v. West, 682 S.E.2d 187, 190 (Ga. App. 2009) (holding that the trial court erred by reviewing a sovereign immunity defense under the standards that apply "to a motion to dismiss for failure to state a claim upon which relief can be granted" rather than as "a motion to dismiss for lack of subject matter jurisdiction"); *accord* Dep't of Transp. v. Dupree, 570 S.E.2d 1, 5 (Ga. App. 2002) ("Where the determination of subject matter jurisdiction and waiver of sovereign immunity [are] so factually intertwined with . . . the merits of the case, it is not error for the trial court to defer final determination of such issues until trial . . . .").

160. Sung Park v. Ind. Univ. Sch. of Dentistry, 692 F.3d 828, 830 (7th Cir. 2012); *see also* Murphy v. Smith, 844 F.3d 653, 656–57 (7th Cir. 2016) (describing Eleventh Amendment defense as an affirmative defense and holding that it was waived), aff'd, 138 S. Ct. 784 (2018); Meyers v. Oneida Tribe of Indians of Wis., 836 F.3d 818, 822 (7th Cir. 2016) ("[T]his circuit has clearly held that the question of sovereign immunity is not a jurisdictional one."); Aholelei v. Dep't of Pub. Safety, 488 F.3d 1144, 1147 (9th Cir. 2007) (quoting Demshki v. Monteith, 255 F.3d 986, 989 (9th Cir. 2001)) ("Eleventh Amendment immunity is an affirmative defense . . . ."). Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ., 466 F.3d 232, 237–39 (2d Cir. 2006) (treating Eleventh Amendment immunity "as akin to an affirmative defense"); *see also* Gragg v. Ky. Cabinet for Workforce Dev., 289 F.3d 958, 963 (6th Cir. 2002) ("[T]he entity asserting Eleventh Amendment immunity has the burden to show that it is entitled to immunity, i.e., that it is an arm of the state."); Skelton v. Camp, 234 F.3d 292, 297 (5th Cir. 2000) (holding that the party seeking immunity "bear[s] the burden of proof in demonstrating that [it] is an arm of the state entitled to Eleventh Amendment immunity");

Other state courts have followed the lead of the federal courts. Texas courts, for instance, used to say that sovereign immunity issues were jurisdictional, but have more recently been careful to note that sovereign immunity issues necessarily mean "a lack of subject-matter jurisdiction for all purposes."[161] The United States Supreme Court has sometimes given mixed signals as to its own views.[162] As Wright and Miller note in their standard work on federal courts, "In some ways, [the Supreme Court] has treated the defense as jurisdictional and in others it has not. It is aware of this fact, and has forthrightly recognized that it has not definitively resolved the question."[163] Court majorities have not taken up recent opportunities to clarify the status of sovereign immunity, while scholars and dissenters proposed a more precise analytical framework in which certain sovereign immunity issues are viewed as fully jurisdictional (when arising under the Eleventh Amendment) while others (arising from constitutional background principles) are not.[164]

For present purposes, I will not take a position on the best way to theorize sovereign immunity. My objective is rather to offer practical suggestions for lower courts. First of all, sovereign immunity shows that the absence of a jurisdictional status does not necessarily resolve the important questions. A structural immunity may not be labeled as jurisdictional but may still require aspects of jurisdiction-like treatment. This is highly relevant for judicial treatment of church autonomy.

Christy v. Pa. Turnpike Comm'n, 54 F.3d 1140, 1144 (3d Cir. 1995) ("[T]he party asserting Eleventh Amendment immunity (and standing to benefit from its acceptance) bears the burden of proving its applicability."); U.S. *ex rel.* Oberg v. Pa. Higher Educ. Assistance Agency, 745 F.3d 131, 147 (4th Cir. 2014) (Traxler, C.J., concurring in the judgment in part and dissenting in part) ("Although this court has not addressed the issue, the circuits that have considered similar assertions of arm-of-state status have uniformly concluded that it is an affirmative defense to be raised and established by the entity claiming to be an arm of the state.").

161. *See, e.g.*, Engelman Irrigation Dist. v. Shields Bros., Inc., 514 S.W.3d 746, 751 (Tex. 2017).

162. *See generally* Katherine Florey, Comment, *Insufficiently Jurisdictional: The Case against Treating State Sovereign Immunity as an Article III Doctrine*, 92 CAL. L. REV. 1375 (2004); *see also* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1609–11 (2002) (noting that the Court's sovereign immunity doctrine exhibits a "hybrid nature" in which some aspects resemble personal jurisdiction while others resemble subject-matter jurisdiction; Springfield Hosp., Inc. v. Guzman, 28 F.4th 403, 415–16 (2d Cir. 2022) (holding that sovereign immunity implicates a court's subject-matter jurisdiction, but distinguishing between jurisdictional questions of a statutory nature or constitutional nature).

163. 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3524.1 (3d ed. 2021); *see also* Dodson, *supra* note 151, at 15–34 (observing the Supreme Court has never categorically defined state sovereign immunity as jurisdictional).

164. *See* PennEast Pipeline Co., LLC v. New Jersey, 141 S. Ct. 2244, 2263–65 (2021) (Gorsuch, J., dissenting) (finding that "States have two distinct federal-law immunities from suit," one being "structural immunity" and the other being "Eleventh Amendment immunity," where "Eleventh Amendment sometimes does less than structural immunity"); Baude & Sachs, *supra* note 153, at 614 (calling for an analysis of the "postulates" behind the Eleventh Amendment to determine the scope of sovereign immunity); Nelson, *supra* note 162, at 1615 (outlining a "two track system of jurisdictional immunities").

C. Unbundling the Issues

Let's now return to the five issues that I noted at the outset of this section and see how they have been handled in the sovereign immunity context. The sovereign immunity cases demonstrate that it is possible to deal with structural protections in litigation without relying on the jurisdictional label to sort out the correct answers. For each of the issues, I will offer brief arguments for what I think is the best way to translate the sovereign immunity approaches into the context of the church autonomy cases.

1. Must the Issue Be Resolved at the Earliest Opportunity?

Many courts have concluded there are good reasons that sovereign immunity ought to be resolved at the earliest opportunity.[165] The Seventh Circuit has noted that one of the key characteristics of sovereign immunity is that it is not just a defense, but is also an "immunity from trial and the attendant burdens of litigation"—in this way, functioning "like qualified immunity."[166] The court concluded, "[N]o matter whether we give sovereign immunity the label 'jurisdictional' or not, it is nevertheless a 'threshold ground[ ] for denying audience to a case on the merits.'"[167]

Some courts have concluded that it is permissible to decide a merits issue first. Consider a scenario where the merits issue is a clear loser but sovereign immunity might pose a close question (as to whether, perhaps, immunity has been abrogated or waived). In this scenario, it would be much easier for the court to dismiss based on the weakness of the merits rather than to resolve the more challenging sovereign immunity issue.[168]

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165. *See also* PennEast Pipeline Co., LLC v. New Jersey, 141 S. Ct. 2244, 2265 (2021) (Gorsuch, J., dissenting) (instructing federal courts to not "entertain" a suit brought by a citizen against a state).

166. Meyers v. Oneida Tribe of Indians of Wis., 836 F.3d 818, 822 (7th Cir. 2016) (quoting Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 667 (7th Cir. 2012)) ("Sovereign immunity is part of a class 'of cases [that] involve claims of immunity from the travails of a trial and not just from an adverse judgment.'" (citing Herx v. Diocese of Fort Wayne–S. Bend, Inc., 772 F.3d 1085, 1089 (7th Cir. 2014))) ("[Q]ualified immunity 'is both a defense to liability and a limited entitlement not to stand trial or face the other burdens of litigation.'" (citing Ashcroft v. Iqbal, 556 U.S. 662, 672 (2009))). For a critique of the immunities created by sovereign immunity and qualified immunity alike, *see* Katherine Mims Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*, 71 DUKE L. J. 1701, 1737 (2022) ("[Q]ualified immunity grew out of a constitutional-tort framework based on sovereign immunity and bolstered by the Supreme Court's concerns about defense-side expenses and federal-court docket.").

167. *Meyers*, 836 F.3d at 822 (quoting Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 585 (1999)).

168. Floyd v. Thompson, 227 F.3d 1029, 1034–35 (7th Cir. 2000) (internal citation omitted) (stating the "Eleventh Amendment analysis is complex," where the "question is whether . . . we must consider federal subject matter jurisdiction before assessing whether a claim has been

But even in this scenario, the most appealing case for reaching merits first, other federal courts have rejected the easy way out and insisted on deciding the immunity issue first.[169] Some courts have used the term "jurisdiction" in this setting, but in a peculiar way: they have recognized that the court itself has no duty to raise the issue of sovereign immunity, which instantly distinguishes it from normal jurisdiction issues.[170] But once the issue is raised, some courts say that it then *becomes* jurisdictional.[171]

In short, despite the diversity of ways of expressing the point, the sovereign immunity cases recognize that it is better to decide the sovereign immunity issue at the outset.[172] The Seventh Circuit was right to emphasize the key reason for this rule: the immunity guaranteed to sovereign entities is compromised if they have to litigate through the

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stated."); Strawser v. Lawton, 126 F. Supp. 2d 994, 999–1000 (S.D.W.Va. 2001) (noting the Eleventh Amendment analysis is "complex and somewhat enigmatic"); *see also* Florey, *supra* note 162, at 1418–22 ("The question of whether a court must address state sovereign immunity issues before considering a case's merits illustrates the potentially steep costs of a strict jurisdictional view."). This would not be permissible under Supreme Court precedent on strictly jurisdictional issues. There, the Supreme Court has rested its rationale on constitutional considerations: "The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94–95 (1998) (quoting Mansfield, C. & L.M.R. Co. v. Swan, 111 U.S. 379, 382 (1884)).

169. *See* Harris v. Owens, 264 F.3d 1282, 1288–89 (10th Cir. 2001) ("Though it is generally our practice to avoid difficult constitutional questions when a case can be resolved on simpler statutory grounds, we decline to follow the Seventh Circuit's *Floyd v. Thompson*."); Cardenas v. Anzai, 311 F.3d 929, 934 (9th Cir. 2002) (affirming the district court's dismissal of plaintiff's claims under Eleventh Amendment immunity without considering the merits).

170. *See Harris*, 264 F.3d at 1288 ("Once effectively raised, the Eleventh Amendment becomes a limitation on our subject-matter jurisdiction . . . ."); Jones v. Courtney, 466 Fed. Appx. 696, 698–99 (10th Cir. 2012) (internal citations omitted) ("While we are not obligated to raise an issue of Eleventh Amendment immunity sua sponte, we may do so in our discretion.").

171. *See Harris*, 264 F.3d at 1288 ("Once effectively raised, the Eleventh Amendment becomes a limitation on our subject-matter jurisdiction, and we may not then assume 'hypothetical jurisdiction' to reject a platinff's claim on the merits."); *Jones*, 466 Fed. Appx. at 698 (internal citations omitted) ("The Supreme Court has characterized the Eleventh Amendment defense as 'partak[ing] of the nature of a jurisdictional bar," meaning that the defense 'may be raised at any point of the proceedings,' and 'even on appeal for the first time.").

172. The handful of cases holding otherwise generally stand for the proposition that it is permissible to resolve an easier statutory question allowing a dismissal, rather than resolving a harder question of sovereign immunity. *See* Florey, *supra* note 165, at 1418–22. But even this laxer view of the obligations of courts to resolve the issue at the outset is quite protective of the party claiming immunity: that party is still getting an adjudication of dismissal promptly, rather than putting off the resolution to late in the litigation if in fact there is a plausible claim of immunity. This was part of the dispute in McRaney *v.* N. Am. Mission Bd. of the S. Baptist Convention, Inc., 966 F.3d 346, 350 (5th Cir. 2020), in which six of the Fifth Circuit's judges criticized the panel opinion for taking an inappropriately relaxed view of when the district court could sort out the applicability of a church autonomy defense. *See* McRaney v. N. Am. Mission Bd. of S. Baptist Convention, Inc., 980 F.3d 1066, 1074–75 (5th Cir. 2020) (Ho, J., dissenting from denial of rehearing en banc).

case.[173] A win at the end on the basis of sovereign immunity is a hollow win. As the Supreme Court explained, "[T]he value to the States of their Eleventh Amendment immunity, like the benefit conferred by qualified immunity to individual officials, is for the most part lost as litigation proceeds past motion practice."[174]

In the church autonomy setting, the same argument applies. Protecting against interference with the internal processes of the church is the objective of church autonomy. If a religious institution is entitled to this protection and moves to dismiss, and its motion is wrongfully denied, then the church must undergo the intrusion and imposition of litigation. Many cases have recognized that the burdens of litigation are inherently entangling of church and state.[175] Religious institutions then must conduct their internal affairs with an eye to the risks of exposure in civil court. Courts then have the opportunity to scrutinize the conduct of religious affairs.[176] As the Supreme Court has noted, "It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs."[177] Giving civil courts the opportunity to engage in "detailed review" of internal religious matters is itself "impermissible under the First and Fourteenth Amendments."[178] These intrusions themselves burden religious exercise.[179] If we are to take these reasons for church autonomy

173. Meyers v. Oneida Tribe of Indians of Wis., 836 F.3d 818, 822 (7th Cir. 2016).

174. P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 145 (1993).

175. *See, e.g.*, N.L.R.B. v. Cath. Bishop of Chi., 440 U.S. 490, 502 (1979) (noting that any N.L.R.B. inquiry into the "good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission . . . may impinge on rights guaranteed by the Religion Clauses"); Presbyterian Church (U.S.A.) v. Edwards, 566 S.W.3d 175, 179 (Ky. 2018) (affirming the denial of discovery because "the church should not be subjected to the broad-reaching discovery allowed under the trial court's order prior to an immunity determination"); Dayner v. Arch. of Hartford, 23 A.3d 1192, 1199–1200 (Conn. 2011), *overruled on other grounds by* Hosanna-Tabor Evangelical Lutheran Church & Sch. V. E.E.O.C., 565 U.S. 171 (2012) ("[T]he very act of litigating a dispute that is subject to the ministerial exception would result in the entanglement of the civil justice system with matters of religious policy, making the discovery and trial process itself a [F]irst [A]mendment violation."); United Methodist Church v. White, 571 A.2d 790, 793 (D.C. 1990) (finding any intrusion on a church employment decision "infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments").

176. *See* Skrzypczak v. Roman Cath. Diocese of Tulsa, 611 F.3d 1238, 1245 (10th Cir. 2010) ("The types of investigations a court would be required to conduct in deciding Title VII claims brought by a minister 'could only produce by [their] coercive effect the very opposite of that separation of church and State contemplated by the First Amendment.'") (quoting McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir.1972)).

177. Mitchell v. Helms, 530 U.S. 793, 828 (2000).

178. Serbian E. Orthodox Diocese for U.S. of Am. & Can. v. Milivojevich, 426 U.S. 694, 718 (1976); *see also* Watson v. Jones, 80 U.S. 679, 731 (1871) (holding that decisions by religious associations regarding their internal affairs are not reviewable by civil courts).

179. *See Milivojevich*, 426 U.S. at 721 ("We will not delve into the various church constitutional provisions relevant to this conclusion, for that would repeat the error of the Illinois Supreme Court.").

seriously, then it is evident that church autonomy is not just an affirmative defense, but is best conceived as an immunity from suit. As other scholars have argued at length, refusing to decide the applicability of church autonomy at the earliest opportunity results in courts interfering with the internal affairs of the church.[180]

2. May the Issue be the Subject of an Interlocutory Appeal?

Ordinarily, only final orders are appealable. For example, a ruling at the motion to dismiss stage is not a final order. But when the order denies sovereign immunity (or, relatedly, qualified immunity), it is subject to an immediate (interlocutory) appeal. Under the "collateral order doctrine," an order is appealable when "the order . . . [1] conclusively determine[s] the disputed question, [2] resolve[s] an important issue completely separate from the merits of the action, and [3] [is] effectively unreviewable on appeal from a final judgment."[181] The Supreme Court has clearly held "that States and state entities that claim to be 'arms of the State' may take advantage of the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity."[182] Sovereign immunity, it explained, is not just a defense to liability but a protection from suit itself.[183]

This is not controversial among the courts: "If the state immunity is intended to shield a governmental entity or official from suit rather than just liability, its denial in an interlocutory order is also 'effectively unreviewable after trial.'"[184] "[W]hen the jurisdictional issue is one of *immunity,* including sovereign immunity, appeal from final judgment cannot repair the damage that is caused by requiring the defendant to litigate."[185] "The entitlement is an immunity from suit rather than a mere defense to liability; it is effectively lost if a case is erroneously permitted to go to trial."[186] The same analysis is applied to foreign sovereign

180. See Peter J. Smith & Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 Fordham L. Rev. 1847, 1872–82 (2018); Chopko & Parker, *supra* note 58, at 289–94 (explaining that the ministerial exception requires a prompt threshold determination to avoid constitutional injury).

181. P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993) (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978)).

182. *Id.* at 147.

183. *Id.* at 145.

184. Parker v. Am. Traffic Sols., Inc., 835 F.3d 1363, 1367–68 (11th Cir. 2016) (quoting Griesel v. Hamlin, 963 F.2d 338, 340 (11th Cir. 1992)).

185. Rein v. Socialist People's Libyan Arab Jamahiriya, 162 F.3d 748, 756 (2d Cir. 1998).

186. Compania Mexicana De Aviacion, S.A. v. U.S. Dist. Ct. for Cent. Dist. of Cal., 859 F.2d 1354, 1358 (9th Cir. 1988) (citing Mitchell v. Helms, 530 U.S. 793, 828 (2000)).

immunity claims[187] and to state law immunity claims.[188]

These same reasons apply in the church autonomy cases, elaborated in more detail by Professors Smith and Tuttle.[189] Interference with the internal operations of the religious institution is precisely the harm that the church autonomy doctrine is supposed to protect against.[190] If a church autonomy defense is erroneously denied and litigation allowed to proceed, there is no way to undo the interference with the religious institution that occurs simply by virtue of the litigation itself.[191] The very process of inquiry would be an imposition on the religious liberty of the religious institution.[192] Once the court has intruded on religious affairs, the religious institution—and religious adherents who rely upon that institution—has suffered a wrong that is not likely to be easy to undo. As the Seventh Circuit noted:

> Suppose the religious question on which the jury was (wrongly) allowed to rule turned out not to be germane to the appeal, or that there was no appeal. Then there would be a final judgment of a secular court resolving a religious issue. Such a judgment could cause confusion, consternation, and dismay in religious circles. The commingling of religious and secular justice would violate not only the injunction in Matthew 22:21 to "render unto Caesar the things which are Caesar's, and unto God the things that are God's," but also the First Amendment, which forbids the government to make religious judgments. The harm of such a governmental intrusion into religious affairs would be

187. *See, e.g.*, Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 91 (D.C. Cir. 2002) (explaining that the denial of a motion to dismiss based on foreign sovereign immunity is immediately appealable); Kilburn v. Socialist People's Libyan Arab Jamahiriya, 376 F.3d 1123, 1126 (D.C. Cir. 2004) (finding that sovereign immunity is a protection against the burdens of litigation); *Rein*, 162 F.3d at 755–56 (arguing that sovereign immunity entitles the sovereign to appeal the assertion of jurisdiction before litigating the merits of a case).

188. *Parker*, 835 F.3d at 1367–68 ("[A]n order denying state official or sovereign immunity is immediately appealable if state law defines the immunity at issue to provide immunity from suit rather than just a defense to liability.").

189. *See* Smith & Tuttle, *supra* note 180, at 1878–81 (describing the parallels between qualified immunity and the ministerial exception with regard to the collateral-order doctrine); *see also* McRaney v. N. Am. Mission Bd. of S. Baptist Convention, Inc., 980 F.3d 1066, 1067, 1074–75 (5th Cir. 2020) (Ho, J., dissenting from denial of rehearing en banc) (arguing that the government does not have the authority to demand and weigh evidence regarding the internal affairs of religious institutions).

190. *See* Smith & Tuttle, *supra* note 180, at 1880–81 (explaining that the Establishment Clause limits the ability of the government to resolve purely religious questions including ministerial fitness).

191. *See id*. ("If a trial court denies a motion for summary judgment invoking the ministerial exception, but the trial court turns out to have erred in that conclusion, the absence of an avenue for immediate appeal will require the court not only to permit discovery about, but to resolve, quintessentially religious questions.").

192. *See* N.L.R.B. v. Cath. Bishop of Chi., 440 U.S. 490, 502 (1979) ("It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.").

> irreparable, just as in the other types of case in which the collateral order doctrine allows interlocutory appeals.[193]

The protection from liability is *also* an important component of church autonomy, so it is not the case that there would be *nothing* left to protect on an appeal in the absence of interlocutory review.[194] Still, the protection from internal interference with church matters should not be minimized. Interlocutory appeals from church autonomy are necessary to protect interests at the heart of the church autonomy doctrine.

3. Can the Issue Be Forfeited?

Suppose that the parties failed to raise an issue about sovereign immunity early in the case. Can they raise the issue later on?

At the outset, it is important to distinguish waiver from forfeiture.[195] Waiver is an intentional relinquishment of a known right.[196] Forfeiture is a failure—likely accidental or inadvertent—to assert a right.[197] Sovereign immunity is waivable but not easy to forfeit. That is, the state can waive the right with full consciousness that it is doing so. But if a state fails to assert a right, it can still raise the defense at any point. If the state never raises the issue, it can have the effect of forfeiture.[198]

A sovereign immunity issue is not forfeited even if the state fails to raise the issue at trial. Sovereign immunity can be raised for the first time on appeal.[199] Indeed, it can even be raised for the first time at the

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193. McCarthy v. Fuller, 714 F.3d 971, 976 (7th Cir. 2013).

194. *See* Smith & Tuttle, *supra* note 180, at 1881 ("[A] decision denying summary judgment based on the ministerial exception is not effectively unreviewable after a final judgment. That is, the ministerial exception, at bottom, is still a defense to liability rather than a comprehensive immunity from suit.").

195. *See* United States v. Adigun, 703 F.3d 1014, 1021 (7th Cir. 2012) ("Though waiver and forfeiture are related, the terms have sometimes been used interchangeably, which can lead to confusion."); Freytag v. Comm'r, 501 U.S. 868, 895 n.2 (1991) (Scalia, J., concurring in part) (noting that the Supreme Court has used the terms "interchangeably" even though "[t]he two are really not the same").

196. *See, e.g.,* United States v. Olano, 507 U.S. 722, 733 (1993); *Adigun*, 703 F.3d at 1021.

197. *See, e.g.*, *Olano*, 507 U.S. at 733.

198. Patsy v. Bd. of Regents of State of Fla., 457 U.S. 496, 515 n.19 (1982) ("The District Court is in the best position to address in the first instance the competing questions of fact and state law necessary to resolve the Eleventh Amendment issue . . . ."). This is also probably the best context for reading a footnote in *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 785 n.3 (1991). The Ninth Circuit read this footnote as suggesting that it was possible to forfeit sovereign immunity, *see* ITSI TV Prods., Inc. v. Agric. Ass'ns, 3 F.3d 1289, 1291 (9th Cir. 1993), but this is inconsistent with the language used by the Supreme Court in the footnote (waiver, not forfeiture) and with other precedents discussed in this section allowing a state to assert sovereign immunity for the first time on appeal.

199. 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3524.1 (3d ed. 2008) (citing Edelman v. Jordan, 415 U.S. 651, 679 (1974)).

Supreme Court.[200] As the Supreme Court explained, "The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court."[201] The Court has said that "the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court."[202] Note that it did not say that the sovereign immunity defense was a jurisdictional issue, but simply that it partakes of a jurisdictional character or "nature."

In other words, sovereign immunity is virtually impossible to forfeit. This follows from its status as a structural limit on the authority of the federal government. The federal government is restricted in its ability to hale a distinct government into court without its consent. Waiver provides a form of consent. But forfeiture does not. Sovereign immunity thus generally can't be forfeited.

Similarly, church autonomy should not be subject to forfeiture. It too relies on a limitation on the government (in this case, state or federal). The government is restricted in its ability to interfere with the internal affairs of a religious institution. Just because a church is late to raise the issue doesn't mean that the government can plow ahead once the church properly makes its defense.[203]

4. Can the Issue be Waived?

Waiver is voluntary, unlike forfeiture. In contrast to forfeiture, there are many ways that a state can waive its sovereign immunity. It can consent to suit by an express statutory or constitutional provision.[204] Or,

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200. *See Edelman*, 415 U.S. at 677–78 (confirming that an Eleventh Amendment defense is not barred if the State fails to raise it at the trial or appellate level); Ford Motor Co. v. Dep't of Treasury of Ind., 323 U.S. 459, 467 (1945) ("The objection to petitioner's suit as a violation of the Eleventh Amendment was first made and argued by Indiana in this Court. This was in time, however.").

201. *Ford Motor Co.*, 323 U.S. at 467, *overruled on other grounds by* Lapides v. Bd. of Regents of Univ. Sys. of Ga., 535 U.S. 613, 614 (2002).

202. *Edelman*, 415 U.S. at 678.

203. Conlon v. InterVarsity Christian Fellowship, 777 F.3d 829, 836 (6th Cir. 2015), and Lee v. Sixth Mount Zion Baptist Church of Pittsburgh, 903 F.3d 113, 118–19 n.4 (3d Cir. 2018), reasoned that because church autonomy principles are structural, they cannot be waived. While I think that there is a case for allowing waiver, *see infra* Part III.C.4, the Sixth and Third Circuit's arguments based on structure are good reasons to not allow church autonomy to be forfeited.

204. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 n.1 (1985) (requiring an "unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment"); Clark v. Barnard, 108 U.S. 436, 447 (1883) ("The immunity from suit belonging to a state, which is respected and protected by the constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a state had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction."); *see generally* 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3524.4 (3d ed. 2008).

more commonly, it can consent by taking intentional action in litigation that consents to federal jurisdiction—such as by filing suit in federal court or voluntarily removing a suit to federal court.[205] Voluntary participation in each case is the key.[206] "It has been held that the [Eleventh] Amendment immunity from suit is generally not waived by a state's defending on the merits in district court," which is just the other side of the coin from the forfeiture principles discussed a moment ago—failure to raise an immunity defense at the trial court doesn't preclude raising the defense later, on appeal.[207] It "sufficiently partakes of the nature of a jurisdictional bar that it need not be raised in the trial court . . . ."[208]

The same line would make sense in the church autonomy cases: church autonomy should be difficult to forfeit. But it should be waivable. This makes sense of the idea that church autonomy has a structural character. Scholars debate whether Free Exercise Clause or the Establishment Clause is the more important foundation for church autonomy.[209] The more one views the right as arising from the Establishment Clause, the more one is likely to see this structural limitation on government power as central to church autonomy. If we take this limitation seriously, church autonomy should—like sovereign immunity—be easy to raise and hard to forfeit. Taking a cue from the sovereign immunity cases, allowing the issue to be raised at any point is one way to make sure that the government does not transgress its constitutional limitations.

Some would say that the structural character of church autonomy makes it inappropriate to allow waiver.[210] The Seventh Circuit said that this is just not something that a court could adjudicate, regardless of how clearly the parties stipulated to it: "A federal court will not allow itself to get dragged into a religious controversy even if a religious organization

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205. *See* Lapides v. Bd. of Regents of Univ. Sys. of Ga., 535 U.S. 613, 619 (2002) (finding that Georgia's voluntary removal to federal court constituted waiver of its Eleventh Amendment immunity).

206. *See id*. (quoting Gunter v. Atl. Coast Line R. Co., 200 U.S. 273, 284 (1906)) ("And the Court has made clear in general that 'where a State *voluntarily* becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment.'").

207. 1 CYC. OF FED. PROC. § 2:92 (3d ed.), Westlaw (updated July 2022).

208. *Id.*

209. For defenses of the Establishment Clause as the more important source of protection, see Esbeck, *Restraint on Governmental Power, supra* note 94, at 43–51; Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. CIN. L. REV. 151, 210-11, 218–19 (2003); Lupu & Tuttle, *supra* note 115, at 1808 n.58. For arguments that the Free Exercise Clause is the more important source, see Laycock, *supra* note 115, at 1373–74; Brady, *supra* note 115, at 1636; McConnell, *supra* note 115, at 19–20; Laycock, *supra* note 115, at 263–64.

210. *See, e.g.*, Esbeck, *supra* note 94, at 48 ("But the nature of the church autonomy doctrine is that it can never be waived. This is because church autonomy is not a personal right, but is structural in nature, keeping two centers of authority, church and state, in their right relationship.").

wants it dragged in."[211] But I don't think that necessarily follows, at least if one takes seriously a couple points about how church autonomy works. It starts with the observation that the scope of church autonomy is calibrated to protect the usual affairs of religious institutions—protecting such issues as teaching and instruction, admonition and correction, internal decision-making processes, and forms and structures of self-governance. We can think of these standard church autonomy protections as default settings or presumptions about what kinds of issues will need to be protected. And they are for the most part sensible defaults in light of the religious history and experience of the United States. But one can imagine cases in which a religious institution might have practices that don't fit neatly into the preset categories of church autonomy doctrine. And for these minority religious groups, express consent to membership and participation in the religious institution would be key to defining the scope of church autonomy (as I've argued in other work).[212] Consent has long been a part of church autonomy doctrine,[213] though more contemporary cases have not devoted much attention to it.[214]

If one accepts this version of consent as a part of the church autonomy analysis, then it follows that if some religious institutions want less autonomy than that given by the default settings in church autonomy, they should have a way to do this. Imagine a church that affirmatively wants to be bound by Title VII nondiscrimination principles in hiring its ministers, even though ordinarily it would be exempt from Title VII's application by the ministerial exception. But it is hardly necessary that a church be forced out of the coverage of employment law if by its own lights it believes that the employment law is positive good. Rather, the better approach would be to allow that church to expressly opt into the coverage of Title VII. Or to put it in other words, the church should be

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211. Tomic v. Cath. Diocese of Peoria, 442 F.3d 1036, 1042 (7th Cir. 2006), *abrogated on other grounds by* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 194 n.4 (2012).

212. *See* Weinberger, *The Limits of Church Autonomy*, *supra* note 35, at 1313 ("Where consent comes in is to solve the problem of when to treat particular conduct as religious that does not easily fit the categories that have become classic instances of church governance in the case law.").

213. *See, e.g.*, Watson v. Jones, 80 U.S. 679, 728–29 (1871) (explaining that the members of a religious organization impliedly consent to its governance and are required to abide by it).

214. *See* Weinberger, *The Limits of Church Autonomy*, *supra* note 35, at 1285–86 (arguing that recent court decisions have failed to explicitly define the role of consent in resolving disputes related to church autonomy). For other accounts that suggest (to varying degrees) a role for consent (some arguing for a greater and some a lesser role for consent than I have advocated), *see* Helfand, *supra* note 6, at 1901–1902 (2013); Michael A. Helfand, *Implied Consent to Religious Institutions: A Primer and a Defense*, 50 CONN. L. REV. 877, 880-881 (2018); Lawrence Sager, *Why Churches (and, Possibly, the Tarpon Bay Women's Blue Water Fishing Club) Can Discriminate* 77, 78 (2016), *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 78 (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016); Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor*, 108 NW. U. L. REV. 1183, 1203 (2014).)

able to waive church autonomy protections.

5. Can the Issue Be Raised by the Court on Its Own Initiative?

While sovereign immunity can be raised by the state party at any time, like a jurisdictional issue, the court is under no obligation to raise the issue on its own: "Unless the State raises the matter, a court can ignore it."[215] This can be seen as another way in which the courts leave the state with the initiative to assert sovereign immunity or waive it. "[A] state defendant retains broad discretion over whether a court must hear an Eleventh Amendment argument that may end the litigation."[216]

How to apply this point to the church autonomy context is debatable. To the extent that one accepts my argument that church autonomy gives the church a discretion to waive or assert its church autonomy—similar to that possessed by states in the sovereign immunity context—then it would make sense to follow the sovereign immunity cases here too: courts would not have the obligation to raise church autonomy sua sponte.[217]

CONCLUSION

The question, "is church autonomy jurisdictional?," is not really one that should be answered yes or no. It depends very much on the sense in which "jurisdictional" is being used. Church autonomy is jurisdictional in the broad, conceptual sense: it speaks to the relative authority of institutions, church and state. Church autonomy is not jurisdictional in the technical, procedural sense of jurisdiction—it is not jurisdictional for purposes of the Federal Rules of Civil Procedure. On this point, the footnote in *Hosanna-Tabor* was right.[218] But concluding that the issue is not jurisdictional for civil procedure purposes does not answer the concrete questions about how to treat church autonomy for civil procedure purposes. Sovereign immunity provides a point of reference. It is, like church autonomy, a structural limit on government power. Like church autonomy, sovereign immunity is not fully jurisdictional in the strictest, technical sense. But in practice, sovereign immunity is treated very much like a jurisdictional principle for most purposes—except on issues of waiver. Church autonomy doctrine could take some cues from the sovereign immunity cases. Among other things, the courts should

215. Wis. Dep't of Corr. v. Schacht, 524 U.S. 381, 389 (1998).

216. U.S. *ex rel*. Burlbaw v. Orenduff, 548 F.3d 931, 941–44 (10th Cir. 2008).

217. If one disagrees with my conclusions about the waivability of church autonomy, thinking that it is a structural limit on the civil government regardless of the wishes of any religious institution, then it would make sense for courts to be able to raise church autonomy on their own initiative.

218. Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C., 565 U.S. 171, 195 n.4 (2012).

resolve church autonomy issues as soon as possible and review denials of a church autonomy defense on interlocutory appeal. And they should allow, in very specific circumstances, waiver of church autonomy.