NOTE

A VISIBLE SOCIETY: THE IMAGINED DICHOTOMY IN CHURCH AUTONOMY DOCTRINE

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INTRODUCTION

Current First Amendment doctrine rests, in part, on a judge's ability to uncontroversially distinguish between types of religious institutions. Because "the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice," a civil court must "defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization."[1] Otherwise, "the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes."[2] As one example, the Supreme Court had to deal with the right of residency of St. Nicholas Cathedral, a Russian Orthodox Cathedral in New York City.[3] In that case, the Court provides a clear definition of a hierarchical church: "Hierarchical churches may be defined as those organized as a body with other churches having similar faith and doctrine with a common ruling convocation or ecclesiastical head."[4] When dealing with a hierarchical church, "whenever the questions of discipline, or of faith, . . . have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them."[5]

This note seeks to demonstrate that this conception of the relationship between the courts and church polities does not reflect the state of churches at the time of the Founding; even the most hierarchical churches, the Episcopal and Roman Catholic, had severe internal divisions in the Founding Era about who was competent to decide on religious matters. Current doctrine presumes an uncontested hierarchy with decision-making authority, which in some ways mirrors courts. Such a view was plausible at the time the foundational church autonomy cases were litigated; it is significant that Vatican I, the high-water mark of papal authority, was convoked by Pope Bl. Pius IX only a few years

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1. Jones v. Wolf, 443 U.S. 595, 602 (1979).

2. *Id.*

3. Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94 (1952) (holding that New York's Religious Corporations Law was unconstitutional).

4. *Id.* at 110.

5. *Id.* at 113 (quoting Watson v. Jones, 80 U.S. 679, 727 (1871)).

before *Watson v. Jones*. Under this model, secular courts look at the pronouncements of hierarchical bodies (or ecclesiastical heads) and defer to those purely religious decisions. During the Founding Era, a court would not be able to merely look at the decisions of the highest church authority to avoid traipsing through the doctrinal morass. This means that either no religious bodies were "hierarchical" at the time of the Founding, or there is some way for courts to be able to evaluate claims to religious authority without violating the First Amendment. Under a "history and tradition" analysis, the former hypothesis would be unworkable. Therefore, this note will gesture in favor of the latter.

CHURCH AUTONOMY DOCTRINE

"The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right."[6] James Madison believed, as did many of the Founders, that every man had a pre-political right to religion that was not limited or ceded with the Constitution.[7] Although rights were individual, the Constitution was made possible by the flourishing and freedom of religious institutions, as well as individual worship. As one scholar of religious liberty put it: "Constitutionalism relies . . . on the existence and the health of authorities and associations outside, and meaningfully independent of, the state. And, *our* tradition of constitutionalism was made possible . . . on the independence of the church from secular control."[8]

This independence of the government from state control is most apparent in cases dealing with law "respecting an establishment of religion."[9] For fear of government endorsement of religion, the government may not erect the Ten Commandments in courthouses.[10] The city government in Pittsburgh could not erect a standalone nativity scene with the words "*Gloria in Excelsis Deo*" ("Glory to God in the highest") on it.[11] The Rhode Island state government

6. James Madison, Memorial and Remonstrance Against Religious Assessments (1785), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/01-08-02-0163# [https://perma.cc/WN7J-WVKE].

7. *See* Vincent Phillip Muñoz, *James Madison's Principle of Religious Liberty*, 97 AM. POL. SCI. REV. 17, 23 (2003) ("The inalienable character of man's natural right to religion has a precise meaning and implication. Because man's religious right is inalienable, it does not become part of the social compact. Literally, it is not alienated; men retain what they possessed in the state of nature." (citation omitted)).

8. Richard W. Garnett, *Religious Freedom, Church Autonomy, and Constitutionalism*, 57 DRAKE L. REV. 901, 903 (2009).

9. U.S. CONST. amend. I.

10. *See* McCreary Cnty. v. ACLU of Ky., 545 U.S. 844 (2005). *But see* Van Orden v. Perry, 545 U.S. 677 (2005).

11. Cnty. of Allegheny v. ACLU, 492 U.S. 573 (1989). *But see* Lynch v. Donnelly, 465 U.S. 668 (1984).

could not reimburse the salaries of parochial school teachers.[12] School districts may not compose prayers and encourage their recitation, even if opt-outs are permitted.[13]

These are a mere fraction of the Supreme Court cases in the last century dealing with the First Amendment. They deal primarily with the government's own affairs (government buildings, public schools, etc.). There are, however, other kinds of cases, in which the government engages with religion not as a set of individual worshippers, but as corporate bodies. These are church autonomy cases. The First Amendment protects the internal governance structure of a religious organization.[14] It has been recognized as a constitutional principle that churches have power to "decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[15]

One way in which this governance structure is protected is under the "ministerial exemption." Under this doctrine, the First Amendment prohibits the application of laws to "claims concerning the employment relationship between a religious institution and its ministers."[16] If the government were to be able to regulate the employment of ministers, that would "deprive[] the church of control over the selection of those who will personify its beliefs."[17]

The Supreme Court has also applied this principle of autonomy to intra-religious disputes. When there are disputes that cannot be resolved "without extensive inquiry by civil courts into religious law and polity," the Court defers to the "highest ecclesiastical tribunal within a church of hierarchical polity."[18] This is because permitting the "civil courts to probe deeply enough . . . so as to decide . . . religious law . . . would violate the First Amendment in much the same manner as civil determination of religious doctrine."[19] Put another way, church autonomy "does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to

12. Lemon v. Kurtzman, 403 U.S. 602 (1971) (the source of the much derided "*Lemon* test," under which (1) a law must have a secular legislative purpose, (2) its primary effect may neither advance nor inhibit religion, and (3) it must not result in an excessive government entanglement with religion). *See also* Groff v. DeJoy, 600 U.S. 447, 460 (2023) ("Just over three weeks later, the Court had handed down its (now abrogated) decision in *Lemon* v. *Kurtzman* . . . ." (citation omitted)).

13. Engel v. Vitale, 370 U.S. 421 (1962).

14. *See* Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n, 605 U.S. 238, 255 (2025) (Thomas, J., concurring) ("The First Amendment's guarantee of church autonomy gives religious institutions the right to define their internal governance structures without state interference.").

15. Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94, 116 (1952).

16. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S 171, 188 (2012).

17. *Id.*

18. Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich, 426 U.S. 696, 709 (1976).

19. *Id.*

internal management decisions that are essential to the institution's central mission."[20]

This is true of property disputes as well. In property disputes involving two parties that do not belong to the same organization, the government can regulate the parties as any other. The boundary line between the local Baptist and Presbyterian churches need not be resolved with reference to the divine law. What happens, however, when an internal church dispute is brought to court to be adjudicated? As the Supreme Court said in *Watson v. Jones*, "[t]his case belongs to a class, happily rare in our courts, in which one of the parties to a controversy, essentially ecclesiastical, resorts to the judicial tribunals of the State for the maintenance of rights which the church has refused to acknowledge, or found itself unable to protect."[21] These kinds of cases create a thornier problem, as both parties have a legitimate claim of religious rights. They both claim a benefice, or building, or right to legal recognition as successors to other organizations.

Generally, the Supreme Court has been reticent to adjudicate intra-religious disputes, on the grounds that "[i]ntrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses."[22] The Court has approved of "neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded."[23] Courts may not, however, settle cases where "church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice."[24]

While courts in religious matters will defer to the highest decision-making body in a hierarchical church polity, what to do when the religious organization is not hierarchical is less clear. Justice Brennan opined that there are three possible options. The first is to follow the decision of *Watson v. Jones*, and "enforce the property decisions made within a church of congregational polity 'by a majority of its members or by such other local organism as it may have instituted for the purpose of ecclesiastical government.'"[25] For a hierarchical church, deference to a church body will occur "only if the appropriate church governing body can be determined without the resolution of doctrinal questions and without extensive inquiry into religious polity."[26] Alternatively, one can

20. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 591 U.S. 732, 746 (2020).

21. Watson v. Jones, 80 U.S. 679, 713 (1871).

22. Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 715 (1981).

23. Jones v. Wolf, 443 U.S. 595, 599 (1979) (quoting Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969)).

24. Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969).

25. Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 368 (1970) (Brennan, J., concurring).

26. *Id.* at 370.

apply "[n]eutral principles of law, developed for use in all property disputes."[27] A third option would be to pass "special statutes governing church property arrangements in a manner that precludes state interference in doctrine."[28]

Questions about the role of courts and the preservation of church autonomy continue to surface. In a recent Ninth Circuit case, a member of the Church of Jesus Christ of Latter-Day Saints sued over supposed misrepresentation by church authorities regarding expenditures of tithing funds.[29] In a concurrence, Judge Bumatay emphasized the limitations of the First Amendment: "Because Huntsman's claims involve court interference in matters of religious truth, the church autonomy doctrine bars reaching their merits."[30] He further emphasized that church autonomy may not "be assumed away, considered an afterthought, or serve as a convenient alternative ruling. Rather, it's a *threshold* structural bar that must be reckoned with. Otherwise, we violate the restraints the Constitution places on our power."[31] Similarly, the United States Conference of Catholic Bishops (USCCB) sought to bar a complaint regarding its administration of Peter's Pence on church autonomy grounds.[32] In another case, religious autonomy was cited (unsuccessfully) in a case in which government funding prohibited groups from discriminating on the basis of religion.[33] The D.C. Circuit recently explained that "[t]he church autonomy doctrine protects against judicial interference in ecclesiastical matters; it does not provide religious organizations with a blanket immunity from suit, discovery, or trial."[34] One's view of religious bodies' historical liberties would naturally inform one's sympathy to the above quotes. Therefore, it is important, given the Court's endorsement of history and tradition, to carefully examine the historical record for clues as to how our Founders understood ecclesiastical autonomy.

BRUEN AND THE FIRST AMENDMENT

In *New York State Rifle and Pistol Ass'n' v. Bruen*,[35] the Supreme Court elaborated at some length on its "history and tradition" analysis in the context of the Second Amendment. Justice Thomas, writing for the majority, explained that "'examination of a variety of legal and other sources to determine *the*

27. *Id.* (quoting *Presbyterian Church*, 393 U.S. at 449).

28. *Id.*

29. *See* Huntsman v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints, 127 F.4th 784 (9th Cir. 2025).

30. *Id.* at 800 (Bumatay, J., concurring).

31. *Id.*

32. *See* O'Connell v. U.S. Conf. of Cath. Bishops, 134 F.4th 1243, 1250 (D.C. Cir. 2025).

33. *See* Youth Five Ministries v. Williams, 153 F. 4th 704, 725 (9th Cir. 2025) ("[W]e are aware of no court of appeals that treats the religious-autonomy doctrines as the basis for standalone claims challenging legislative or executive action, rather than as defenses against or limits upon plaintiffs' invocation of *judicial* authority.")

34. *O'Connell*, 134 F.4th at 1258.

35. 597 U.S. 1 (2022).

public understanding of a legal text in the period after its enactment or ratification' [i]s 'a critical tool of constitutional interpretation.'"[36] Justice Thomas then recognized four types of legal sources: (1) "founding-era legal scholars [who] interpreted the Second Amendment in published writings," (2) "19th-century cases that interpreted the Second Amendment," (3) "the discussion of the Second Amendment in Congress and in public discourse after the Civil War," and (4) "how post-Civil War commentators understood the right."[37]

Nor is the Court's renewed interest in history and tradition limited to the Second Amendment. Justice Thomas compared the Court's treatment of the Second Amendment with its treatment of speech protections: "In some cases, that burden includes showing whether the expressive conduct falls outside of the category of protected speech . . . . [T]o carry that burden, the government must generally point to *historical* evidence about the reach of the First Amendment's protections."[38] Indeed, several weeks prior to *Bruen*, the Supreme Court applied history and tradition analysis to a free speech case: "When faced with a dispute about the Constitution's meaning or application, '[l]ong settled and established practice is a consideration of great weight.' Often, 'a regular course of practice' can illuminate or 'liquidate' our founding document's 'terms & phrases.'"[39] Like other areas of constitutional law, it is plausible that the Court will continue to look to practices to inform their view of the Religion Clauses.[40]

One difficulty with this analysis is that there is little pre-incorporation federal case law that squarely addresses the issue of church autonomy. Happily for the viability of this note, the Court in recent years has been perfectly willing to look beyond case law to flesh out the contours of historical rights. In sequential paragraphs in a single case, Justice Roberts references both a letter of James Madison to John Carroll and his message accompanying a veto of the

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36. *Id.* at 20 (quoting District of Columbia v. Heller, 554 U.S. 570, 605 (2008)).

37. *Id.* at 21 (punctuation omitted).

38. *Id.* at 25 (citation omitted). For a more thorough analysis of the impact of *Bruen* on free speech analysis, see Clay Calvert & Mary-Rose Papandrea, *The End of Balancing? Text, History & Tradition in First Amendment Speech Cases After Bruen*, 18 DUKE J. CONST. L. & PUB. POL'Y 1 (2023).

39. Hou. Cmty. Coll. Sys. v. Wilson, 595 U.S. 468, 474 (2022) (quoting The Pocket Veto Case, 279 U.S. 655, 689 (1929)). For a view skeptical of history and tradition as applied to the First Amendment, see Jacob M. Shriner-Briggs, *Against First Amendment Traditionalism*, 114 KY. L.J. (forthcoming 2026) (manuscript at 52–53).

40. *See* Marc DeGirolami, *Establishment as Tradition*, 133 YALE L.J.F. 372, 373 (2023) ("The future of the Establishment Clause is likely to be traditionalist . . . . [T]he Supreme Court last term officially announced a doctrinal change. The Court's new approach in this area is part of a broader methodological transformation across constitutional law toward what I have called 'traditionalism.' Traditionalism is a constitutional theory that takes concrete political and cultural practices, and the endurance of those practices before, during, and after the ratification of the Constitution, as the presumptive determinants of constitutional meaning and constitutional law." (footnotes omitted)).

incorporation of a Protestant Episcopal church in the District of Columbia.[41] It seems that the Court would welcome further historical research in these veins.

Further, the Court has used history to guide its decisions in other Establishment and Free Exercise cases. In 2019, Justice Alito, writing for the majority in *American Legion v. American Humanist Ass'n*, explains this methodological turn: "While the *Lemon* Court ambitiously attempted to find a grand unified theory of the Establishment Clause, in later cases, we have taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance."[42] This can be seen most clearly in the legislative prayer cases (as explained by Justice Alito himself). In discussing legislative prayer, which was clearly permitted at the Founding but could plausibly be described as an establishment of religion, the Court points to its historical pedigree as dispositive: "[I]t is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers . . . ."[43] As with legislative prayer, so too with church/state relations. If our rule cannot be gleaned from our history, then that is a defect of the rule.

HIERARCHICAL CHURCHES IN EARLY AMERICA

A note on the aptness of the comparison between the Episcopal and Catholic Churches in America: it is one that Bishop Carroll, the first Catholic bishop in America, himself makes. In a letter to Cardinal Antonelli dated February 27, 1785, Carroll discusses the burden on Catholics, because of "how hateful all foreign jurisdiction is to these people [Americans]."[44] Because of this

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41. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 184 (2012) ("After consulting with President Jefferson, then-Secretary of State Madison responded that the selection of church 'functionaries' was an 'entirely ecclesiastical' matter left to the Church's own judgment. Letter from James Madison to Bishop Carroll (Nov. 20, 1806) . . . . The second episode occurred in 1811, when Madison was President. Congress had passed a bill incorporating the Protestant Episcopal Church in the town of Alexandria in what was then the District of Columbia.").

42. Am. Legion v. Am. Humanist Ass'n, 588 U.S. 29, 60 (2019). The Court in *American Legion* was not clear on the methodology employed in pursuit of this traditionalism. *See* Marc DeGirolami, *First Amendment Traditionalism*, 97 WASH. U. L. REV. 1653, 1660 (2020) ("*American Legion* is a fragmented and perplexing decision, in part because though a majority of the justices expressed some support for an Establishment Clause methodology that looks to history and tradition, they could not reach consensus either about the method's details or its justifications. The plurality emphasized the age of the specific monument, symbol, or practice being reviewed. Justices Kavanaugh and Thomas would have combined an inquiry about coercion with history and tradition to conclude that state-sponsored religious monuments and symbols are not coercive and therefore constitutional. Justice Gorsuch argued that what matters is not a particular monument's age, but whether the monument—old or new—fits within a broader tradition of enduring practice." (footnotes omitted)).

43. Town of Greece v. Galloway, 572 U.S. 565, 577 (2014).

44. JOHN CARROLL, THE JOHN CARROLL PAPERS 171 (Thomas O'Brien Hanley ed., 1976).

hatefulness, "in many of these colonies, or States as they are now called, Catholics are excluded from government."[45] He compares the situations of Catholics with the "Sect of the Anglicans whose ministers were dependent in religious matters on the Pseudo-Bishop of London . . . . They want their religion to be called and treated as national, to the point where they now admit no Superior from another place."[46] They are of course not identical: the Church of England was the established church in numerous colonies, especially in the South. Catholics had tenuous religious liberty in a handful of states. After the war, however, the Episcopalians and the Catholics had a unique status as a function of their international organization. Even if the fear of the Holy See was more acute in the minds of Americans, Episcopalians are the only other church with a plausible, extra-national church structure. This would make it conceptually easier for it to stand outside regulation by the state. If there were a principle of church autonomy present at the Founding, it would be applied to these churches most clearly, and so the evidence should be most readily available to the scholar searching for it.

AMERICAN CATHOLICS

At the time of the American Revolution, almost every state had some limitation on Catholic religious practice.[47] Maryland, for example, initially extended religious toleration to all Christians.[48] With the overthrow of King Charles I in England after the English Civil War, the new government was significantly more anti-Catholic. It replaced Maryland's 1649 Toleration Act with one that excluded Catholics: "[I]t guaranteed religious freedom to all Christians except those who profess and Exercise the Popish Religion commonly known by the Name of the Roman Catholick Religion."[49]

Many Americans implicitly hold the same view of the Catholic Church in America as the most fearful colonial Protestant—that Catholics were fanatically obedient to their despotic ecclesiastical superiors.[50] Nevertheless, it was not

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45. *Id.* at 170.

46. *Id.* at 171.

47. *See* James E. Wood Jr., *"No Religious Test Shall Ever Be Required": Reflections on the Bicentennial of the U.S. Constitution*, 29 J. CHURCH & STATE, 199, 202 (1987) ("'Every colonial government demanded tests for office' and 'in every American colony . . . specific test laws ensured the exclusion of Catholics from public life.'").

48. *See* Scott D. Gerber, *Law and Catholicism in Colonial Maryland*, 103 CATH. HIST. REV. 465, 476 (2017) ("That said, the Act Concerning Religion, enacted on April 21, 1649, was almost certainly the most famous law in Maryland's colonial history. The operative provision of the Act provided: "noe person or psons . . . professing to beleive in Jesus Christ, shall from henceforth bee any waies troubled, Molested or discountenanced for or in respect of his or her religion.").

49. *Id.* at 481 (internal quotations omitted).

50. For an example of a typical Protestant polemic, see LYMAN BEECHER, A PLEA FOR THE WEST, 3 (1835) ("[T]o the pope belongs the right of interference with the political concerns of nations, enforced by his authority over the consciences of Catholics and his power to corroborate or cancel their oath of allegiance and to sway them to obedience or insurrection by the power of life

merely Americans Protestants that objected to pretended foreign jurisdiction. American Catholics bucked Bishop Carroll's authority as well, for precisely this reason. This is important methodologically because much of the church autonomy principle rests on a court's ability to discern easily between authoritative bodies in hierarchical churches and congregationalist bodies. If the hierarchical church par excellence is in fact no such thing, then courts would need to develop tools for judging the true nature of religious authority. Such tools seem to approach the "resolution by civil courts of controversies over religious doctrine and practice" proscribed by the Court.[51]

In a letter to Pope Pius VI, Carroll described unruliness among Catholics in New York while petitioning for the establishment of a diocese in the United States. Carroll had been appointed a Mission Superior in 1784, which was under the jurisdiction of the Sacred Congregation for the Propaganda of the Faith, the Church's missionary arm.[52] This was done as part of trilateral negotiations between the United States, France, and the Holy See, without the participation of an American priest.[53] Carroll himself preferred "an ordinary national bishop, in whose appointment Rome shall have no share."[54] A Bishop Vicar Apostolic "would give great umbrage here, on acct [sic] of his entire dependence, both for his station and conduct, on a foreign jurisdiction."[55] This has been described as a "veiled warning" to the Curia, deployed as "a tool Catholics seeking to shape the church used."[56] It is for this reason that we are told, in a letter to Pope Pius VI, that Catholics in New York denied oversight of John Carroll, owing to the fact that he was "a simple priest who has only delegated authority, such as is forbidden by our laws . . . the authority of the ecclesiastical superior put over us by the Sacred Congregation was illegal, because it was set up by a foreign tribunal and was dependent on this tribunal."[57] Catholics in New York would only accept a superior chosen by American Catholics.

After the Revolution, the legislature of Maryland passed bills securing the rights of Catholics in Maryland. A 1792 bill titled "An Act For Securing Certain Estates and Property, For the Support and Uses of the Ministers of the Roman Catholic Religion" provided that "Ministers of the Roman catholic religion within this state, citizens thereof, exercising their ministerial functions agreeably to the rules and discipline of their church . . . and the said ministers,

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or death eternal . . . still unrepealed and still acted upon in the armed prohibition of free inquiry and religious liberty and the punishment of heresy wherever her power remains unbroken.").

51. Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*,* 393 U.S. 440, 449 (1969).

52. James Hennesey, *An Eighteenth-Century Bishop: John Carroll of Baltimore*, 16 ARCHIVUM HISTORIAE PONTIFICIAE 171, 180 (1978).

53. *Id.* at 188 (Benjamin Franklin apparently "enjoyed his brief interlude as ecclesiastical counselor.").

54. CARROLL, *supra* note 44, at 146.

55. CARROLL, *supra* note 44, at 157.

56. Catherine O'Donnell, *John Carroll and the Origins of an American Catholic* Church, 68 WM. & MARY Q. 101, 114 (2011).

57. CARROLL, *supra* note 44, at 279.

or a majority of them, so met, shall then and there choose from their own body, certain persons."[58]

This seems to represent a principle of self-government for churches in Maryland, as the ministers themselves are wholly subject to the rigors and disciplines of the Catholic Church. The selection of ministers is not encroached upon.[59] Further, there were no regulations prescribed by the legislature. The ministers who were meeting were free to organize as they wished. On the other hand, there is a level of implicit congregationalism that is required by this act. After all, by 1792, Bishop Carroll was already consecrated as bishop. Yet the ministers had decision-making powers, rather than it being solely placed in the hands of the bishop. One might argue that this enshrines a congregationalist polity on a church which is most hostile to it.[60] Of course, a court could always defer to decisions of the hierarchy. As we will see later, this itself was contested in a way that would require a court to adjudicate.

Further, it is again a mistake to read back into American Catholicism the ultramontanism of late reactionary Italy and later Vatican I. Many American Catholics were influenced by conciliar ideas, such as French Gallicanism, where national churches held much sway, despite spiritual authority being vested in the pope.[61] In 1783, after the Revolution, the ex-Jesuits in America met at White Marsh Farm and drew up a constitution for themselves. They elected John Carroll their Superior.[62] In this "Constitution of the Clergy," the Procurator General of the body of clergy was to be elected by the majority of the clergy.[63] As stated above, John Carroll vehemently believed in an administratively independent national church, not one tied at the hip to the Roman Curia. One way that this would be secured would be in decisions vested in American priests. If this is true, then the legislature of Maryland acted in accordance with Carroll's wishes. It is at least plausible that this structure was preferred by the priests themselves, having already been organized in 1783. So, it is not clear whether the congregationalism was an imposition by the Maryland legislature, or merely the confirmation of the governance of Roman Catholic priests in Maryland. This is itself helpful to the historical analysis, as it would further

58. *Archives of Maryland Online*, 644: 49–50 (2003 ed.).

59. *See also James Madison to Bishop Carroll*, 20 RECORDS OF THE AM. CATHOLIC HIST. SOCIETY 63 (1909) (Bishop Carroll asked for the President's approval for the appointment of priests to the Louisiana Territory. The President responded that this would violate the First Amendment.).

60. *See also* Sarah Barringer Golden, *The First Disestablishment: Limits on Church Power and Property Before the Civil War*, 162 U. PENN. L. REV. 307, 328 (2014) (noting that in Maryland, all sales or donations of land to religious organizations had to be approved by the legislature).

61. *See* Michael D. Breidenbach, *Conciliarism and the American Founding*, 73 WM. & MARY Q. 467, 499 (2016) ("These Catholics were in turn granted religious liberty, not in spite of holding views the state considered intolerable but because they rejected the great threat to American independence—*imperium in imperio*—that Catholics were otherwise presumed to espouse.").

62. *See* Raymond A. Schroth, *Death and Resurrection*, 128 AM. CATH. STUD. 51, 61 (2017).

63. CARROLL, *supra* note 44, at 71.

point to the Catholic Church as a non-hierarchical institution in America at this time.

A persistent problem in early American Catholic Church governance was the relation between the laity and clerics. Although Bishop Carroll was appointed in 1790, by this point many American Catholics had organized themselves, aided by

> American legal structures—particularly laws regarding the incorporation of voluntary societies. American law recognized the churches as voluntary associations. The 'prevailing' legal policy during the first third of the nineteenth century, one historian has noted, was based on the idea that 'the civil power should treat all the religious organizations alike by doing as little as possible for any of them and forcing all to conform to one procedure.[64]

American Catholics also often believed that their religion had to be made compatible with the American Republic: "They argued that just as the European Catholic Church had for centuries conformed itself to the political maxims of monarchical government, so also should the American church harmonize with American republican institutions."[65] Moreover, in many cases, the laity had already assumed responsibility for their local parishes. At the time of Bishop Carroll's installation, there were perhaps 35,000 Catholics, stretching from Maine to Georgia.[66] And yet, there were only about fifty-six parishes, with about thirty priests ministering to them.[67] As a result, the laity were the default leaders of their parish communities.[68]

In 1787, a group of German Catholics in Philadelphia presented a petition to then-Fr. Carroll. In it, they express their gratitude that "by the late glorious revolution in this part of the globe Heaven has blessed with liberty and free and uninterrupted exercise of our most holy Religion, and is the more fully confirmed by the new Federal Constitution."[69] They sought the approval of then-Fr. Carroll for the approval of plans for a new church, so that they might "keep up their respective nation and Language."[70]

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64. Patrick Carey, *The Laity's Understanding of the Trustee System, 1785–1855*, 64 CATH. HIST. REV. 357, 363–64 (1978).

65. PATRICK W. CAREY, PEOPLE, PRIESTS, AND PRELATES: ECCLESIASTICAL DEMOCRACY AND THE TENSIONS OF TRUSTEEISM 158 (1987).

66. John P. Beal, *It's Deja Vu All Over Again: Lay Trusteeism Rides Again*, 68 JURIST: STUD. CHURCH L. & MINISTRY 497, 499 (2008).

67. CAREY, *supra* note 65, at 107.

68. Beal, *supra* note 66, at 500 ("The elected lay leaders assumed responsibility for the temporal affairs of the community and, when a priest was unavailable, often 'became spiritual supervisors of their communities, leading Catholics in prayer meeting, Bible readings, and other quasi-liturgical services and helping to organize the religious education of their children.'").

69. Martin Griffin, *The Church of the Holy Trinity, Philadelphia. Its First Pastor, Rev. John Baptist Charles Hebron. The First Opposition to Ecclesiastical Authority*, 21 RECS. OF THE AM. CATH. HIST. SOC'Y OF PHILA. 9 (1910).

70. *Id.* at 9–10.

They appointed a Rev. Helbron to serve as their pastor, claiming a right to appoint their own pastor. This led to a long disagreement with Bishop Carroll, culminating in a letter to the congregation on Dec. 2, 1789:

> The undersigned Ecclesiastical Superior in the United States of America is called on by the Sacred respect, which, he owes to the lawful administration of the Sacraments, to the preservation of discipline, & the tranquility of the consciences of the faithful under his charge . . . that in virtue of his authority derived from the Holy See, he has restrained the Rev. Mr. J.C. Helbron from exercising any functions whatever.[71]

This might help contextualize the Gallican tendencies of American clergy. Although Bishop Carroll supported the national character of the American Catholic Church, he still maintained the hierarchical structure of the Church, with authority from the Holy See.[72] This does not solve the interpretive quandary, supra, relating to Maryland's law allowing Roman Catholic priests to elect their head. Nevertheless, it is clear that Bishop Carroll opposed a congregationalist model.

A succession of pastors served this German community: Rev. John Baptist Charles Helbron, October, 1789 to November, 1791; the Rev. Peter Helbron, August, 1791 to August, 1796; and Rev. John H. Goetz, November 16, 1796, to June 12, 1797.[73] Rev. Goetz was initially appointed to be the assistant rector to Rev. Helbron, but soon was made rector without the approval of the bishop: "I licensed and appointed him to be an assistant clergyman . . . . But a subordinate station therein soon became too humiliating for him; and being encouraged by some laymen . . . he was not ashamed of co-operating with them to dismiss their lawfully appointed Pastor."[74] This was irregular, according to Rev. Leonard Neale, Vicar General of Bishop Carroll (and later second archbishop of Baltimore): "Why then did you not apply to his superior, the Bishop, whose conscience was charged to redress the grievance? Why did you arrogate to yourselves the power of discharging him? Who gave you this power?"[75] According to Neale, in response to the claim by the trustees of Holy Trinity to the *jus patronatus* (right of the patron) to appoint their bishop, "Doctor Carroll . . . speaks thus: 'Their pretended *jus patronatus* must be resolutely resisted and is absolutely untenable.' Besides though you really possessed the

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71. CARROLL, *supra* note 44, at 396.

72. *See also* O'Donnell, *supra* note 56, at 119 ("Carroll accepted lay participation in church finances but resisted the laity's efforts to control priests; his position was consonant with his distinction between temporal practices, which might benefit from change, and the church's inner life and doctrine, which had to be preserved intact.").

73. William J. McCallen, *Temporary Schism over the Election of Father William Elling: To the Pastorate of Holy Trinity Church, Philadelphia 1797-1806,* 24 RECS. OF THE AM. CATH. HIST. SOC'Y OF PHILA. 193, 194 (1913).

74. Martin I. J. Griffin, *The Reverend John Nepomucene Goetz, Third Pastor, and the Reverend William Elling, Assistant of Holy Trinity Church, Philadelphia*, 23 RECS. OF THE AM. CATH. HIST. SOC'Y OF PHILA. 94, 105 (1912).

75. *Id.* at 97.

jus patronatus it would entitle you merely to present, and not to appoint or discharge your pastor."[76]

In 1797, the trustees of Holy Trinity, of their own authority, decided to dismiss Father Goetz, and replace him with a Father Elling, without the approval of the bishop: "[T]he Trustees deemed it opportune to *elect* Father Elling sole pastor of the parish: until least, they could import a priest from Europe with authority (so they vainly conceived it) supplanting the jurisdiction of Bishop Carroll."[77] The Trustees denied the jurisdiction of Bishop Carroll: "the Trustees resolved, again, to seek a priest having 'Papal or Episcopal powers'; thus obdurately persisting in their determination not to recognize the jurisdiction of Bishop Carroll."[78]

John Carroll believed this to be in clear opposition to the rights afforded Catholics in the Constitution:

> Nor is it fit that even then I should submit to refer to others a case in which by the express decrees of the Council of Trent and the terms of the Brief establishing the See of Baltimore my decision is final and conclusive. Indeed the Court would decide explicitly that the Roman Catholics have a right in common with other Religious Societies to govern themselves by their own regulations and discipline.[79]

Rather than sharing the republican sentiment of many lay trustees, Carroll thought that the Constitution affirmed his authority as bishop.

Interestingly, this did become a legal dispute. In a letter dated November 7, 1801, Bishop Carroll writes about his experience in court in Philadelphia: "I had scarce arrived when I was attached by a writ and brought into Court to hear from your lawyers the foulest abuse of our Church, its laws, doctrines and government, Pope and the Holy Council of Trent, etc."[80] The counsel for the Holy Trinity "denied on your behalf that I was your Bishop: (saying) that Trinity Church was out of my jurisdiction."[81] We know from a letter of a Holy

76. *Id*. at 97–98.

77. McCallen, *supra* note 73, at 197.

78. *Id*.

79. *Id.* at 200. The relevant quote for the Brief of Pius VI can be found in CARROLL *supra* note 44, at 111 ("We declare, by our Apostolic authority, all the faithful of Christ, living in Catholic communion, as well ecclesiastics as seculars, and all the clergy and people dwelling in the United States of America, though hitherto they may have been subject to other Bishops of other dioceses, to be henceforward subject to the Bishop of Baltimore in all future times; and to this Bishop and his successors we impart power to curb and check, without appeal, all persons who may contradict or oppose their orders; to visit personally, or by deputies, all Catholic churches; to remove abuses; to correct the manners of the faithful; and to perform all things which other Bishops in their respective dioceses are accustomed to do and perform.").

80. McCallen, *supra* note 73, at 201; *see also Bishop Carroll and the Trinity Trustees*, 3 THE AM. CATH. HIST. RESEARCHES 39, 39 (1887).

81. McCallen, *supra* note 73, at 201.

Trinity trustee, James Oellers, that there were lawsuits over the control of the Church (he proposed a settlement which included the withdrawal of lawsuits).[82]

Fr. William Elling, the allegedly improperly elected priest, frames the rights of the trustees in a letter to Bishop Carroll: "Subject to nothing but the laws of God & the land where they live, on which account they surely have the same power of choosing & rejecting what other most Christian, most Catholic, most Apostolic & most faithful nations or their Kings & parliaments have chosen or rejected."[83] It is unclear exactly what this means, but presumably he is claiming a traditional right of independence in ecclesiastical matters from the Holy See. After all, there have been many Concordats with various countries which permit the selection of priests and bishops. It should be noted, however, that these are done with the approval of the Holy See.[84]

This vignette ends with the withdrawal of the lawsuits, the confirmation of Fr. Elling as rector of Holy Trinity, and the submission to the canonical authority of Bishop Carroll. The formal submission of Father Elling included the following text: "I the undersigned profess and promise canonical obedience to the Right Reverend Bishop of Baltimore & his Successors . . . I hold myself subject to the authority & jurisdiction of the said Bishop in such manner."[85]

It appears that concurrently one of the previous pastors of Holy Trinity was suing the trustees for being improperly replaced: one of the points of dispute was "whether it was canonical to remove him of their own (congregational) authority; the laws of Pennsylvania maintaining all churches in the exercise of their special government and discipline unless these conflicted with the constitution and the laws of that State or of the United States."[86]

Nor was Holy Trinity the only place with lay-clerical disagreement. Bishop Carroll had to resolve disputes in at least four parishes during his bishopric: "Carroll first tangled with trustees in 1786, when he tried to settle such a dispute in St. Peter's parish in New York City. From 1787 to 1797, he contended with the trustees of Holy Trinity in Philadelphia and St. John's in Baltimore, and from 1802 to 1815 with those of St. Mary's in Charleston."[87] These episodes are much less fully treated in the historical literature than Holy Trinity, likely because of the exceptionally strong work of the American Catholic Historical Society of Philadelphia. In one letter to the trustees of St. Peter's, New York, Bishop Carroll explained that "the church's theology also prohibited lay appointments or dismissals of the clergy. He asserted that if the trustees' claims were acknowledged, 'the unity and catholicity of our church would be at an end.' Their demand flowed more from the polity of the

82. *Id.* at 202.

83. *Id*. at 205.

84. *See Concordat of 1801*, ENCYCLOPEDIA BRITTANICA (last visited Mar. 1, 2026), https://www.britannica.com/event/Concordat-of-1801 [https://perma.cc/2S6T-FZ2U].

85. McCallen, *supra* note 73, at 208.

86. *Id*. at 199–200.

87. Patrick Carey, *Two Episcopal Views of Lay-Clerical Conflicts: 1785-1860*, 87 RECS. OF THE AM. CATH. HIST. SOC'Y OF PHILA. 85, 86 (1976).

'congregational Presbyterians [sic] . . . of New England' than from that of the Catholic Church."[88] Here, Carroll expounds a view not dissimilar from the ministerial exemption rule: "Moreover, Carroll, as did his successors, equated conferring the power of orders with appointing pastors to their parishes. Both were spiritual functions, in Carroll's opinion, and, therefore, both were derived 'not from human authority, or institutions of civil government, but from the same divine origin as the apostles themselves.'"[89]

In 1798, there was a state-level lawsuit titled *Lessee of the Executors of Theodorus Browers v. Franciscus Fromm* in Westmoreland County, Pennsylvania.[90] Browers was a Catholic priest who left, in his will, land to "a Roman Catholic priest that shall succeed me . . . to his successors."[91] In 1773, Franciscus Fromm, a German priest, was given permission by the Archbishop of Mentz to serve mission in America, as at that time there was no bishop. When John Carroll was made bishop of Baltimore, he granted Fromm permission to minister in York and Lancaster counties in Pennsylvania.[92] Without Carroll's permission, he went to Westmoreland country, and took possession of Fr. Bower's estate.[93]

Here, there is a dispute between the bishop of Baltimore and the Archbishop of Mentz. Bishop Carroll suspended Fr. Fromm for leaving his congregation without Carroll's permission, as no priest can exercise faculties in bishop's jurisdiction without permission.[94] The Archbishop of Mentz, by contrast, argued that "although [the sacrament of Mass] be interdicted to the priest . . . if masses of this kind be founded, by such celebration, the foundation and obligation may be validly satisfied."[95] The court here adjudicated in language very similar to Justice Brennan's concurrence in *Sharpsburg Church*, applying different standards to hierarchical and non-hierarchical churches.[96] The judge writes that if this had "been an independent congregation acknowledging no superior authority . . . his priest's office, and the assent of the congregation might have been a sufficient introduction."[97] However, since the Catholic Church is one of those "other Christian Churches" which have "grades of jurisdiction," Fromm required the approval of his bishop.[98] Therefore,

88. *Id.* at 87 (quoting PETER GUILDAY, THE LIFE AND TIMES OF JOHN CARROLL (1954) (quoting John Carroll, *Carroll to New York City Trustees, January 25, 1786*)).

89. *Id*.

90. Alexander Addison, *Reports of Cases in the County Courts of the Fifth Circuit, and in the High Court of* Errors *& Appeals, of the State of Pennsylvania* 362 (1800).

91. *Id.*

92. *Id.* at 363.

93. *Id.*

94. *Id.* at 364.

95. *Id.*

96. Md. & Va. Eldership of Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 368 (1970) (Brennan, J., concurring).

97. Addison, *supra* note 90, at 371.

98. *Id.*

Fromm could not validly take possession of Brower's estate, as he did not have the valid faculties.

We see from this record that a court in the period immediately after the Founding would have to do some digging to find someone to whom they could defer. Lay Catholics challenged the authority of John Carroll, first as Mission Superior, and then as bishop. His authority over local priests was by no means unquestioned, even by other bishops. It is not clear that deference here would be deference so much as an adjudication in favor of Bishop Carroll.

THE EPISCOPAL CHURCH AFTER THE REVOLUTION

The Church of England is a particularly interesting example in the context of church autonomy and church property because it was the established church in much of early America. It was the established church in the five southern colonies (though Maryland was originally a haven for Catholics), and locally established elsewhere.[99] The Church of England was disestablished firstly in Maryland in 1776, and lastly in Virginia in 1784.[100] While most church property disputes were between members of a denomination, the Episcopal Church claimed land that would otherwise be state property. This puts church autonomy doctrine in high resolution, because courts necessarily had to adjudicate the legal continuity with the pre-Revolution Church of England.

Samuel Seabury was the son of a Congregationalist minister who converted to Anglicanism as part of a movement at Yale College.[101] After the Revolution, he traveled to England to seek consecration from the Archbishop of Canterbury. There was a long delay, for historically, Anglican ministers swore oaths of allegiance to the King. In 1784, Parliament passed an act to dispense with this requirement.[102] Nevertheless, the Church of England proved too indecisive for Seabury. Instead, he went to the bishops of the Scottish Episcopal Church. That church was a remnant of the Established Church suppressed in 1689 for refusing to swear an oath of allegiance to William III and Mary II, on the grounds that this would violate their prior oath to James II.[103] On November 14, 1784, Samuel Seabury was consecrated by the Primus and two other bishops of the Scottish Episcopal Church as bishop of Connecticut.[104]

99. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2110 (2003).

100. Frederick V. Mills, Sr., *The Protestant Episcopal Churches in the United States 1783–1789: Suspended Animation or Remarkable Recovery?*, 46 HIST. MAG. OF THE PROTESTANT EPISCOPAL CHURCH 151, 160.

101. William Warren Sweet, *The Role of Anglicans in the American Revolution*, 11 HUNTINGTON LIBR. Q. 51, 57 (1947).

102. Gerald B. Hertz, *Bishop Seabury*, 26 ENG. HIST. REV. 57, 68 (1911).

103. Walter Herbert Stowe, *The Scottish Episcopal Succession and the Validity of Bishop Seabury's Orders*, 9 HIST. MAG. OF THE PROTESTANT EPISCOPAL CHURCH 322, 329 (1940).

104. Gerald B. Hertz, *Bishop Seabury*, 26 ENG. HIST. REV. 57, 69 (1911).

This consecration was not universally recognized among Episcopalians, however. At the General Convention of 1786, there was a unanimous motion to reject any minister who was ordained by "any Bishop residing in America," as there was an application pending for consecration by the English episcopate, rather than the Scottish.[105] This was an implicit reference to Seabury, the only man to whom that phrase could have possibly applied. Although he was recognized at the next convention, this is an example of non-adjudicable disagreement within a hierarchical church.[106] There were multiple bishops, consecrated by different national churches (who themselves were in conflict), with no real way to internally adjudicate. By happenstance, this did not degenerate into schism; Samuel Seabury eventually became Presiding Bishop.[107] Nevertheless, the Episcopal Church had internal factionalism that would make it not the kind of hierarchical church envisioned in *Watson v. Jones*.

Connecticut, a Congregationalist state, was one of the last American states to disestablish, maintaining its church until 1818 (only Massachusetts disestablished later).[108] This meant that Anglican ministers were significantly poorer and less influential than elsewhere in America.[109] Despite its strong and persistent Puritanism, Connecticut passed an Act of Toleration in 1784. Part of this regulation was that to "religious bodies recognized by law permission was given to manage their, [sic] temporal affairs as freely as did the churches of the Establishment."[110] So, here too, although the Congregationalist church was privileged, there was a permission granted for Episcopalians to freely manage their own affairs.

Church autonomy doctrine must be informed by *Terret v. Taylor*, an early case testing church-state relations. This case dealt with the church lands which had been granted to the Episcopal Church in the 1660's.[111] In 1784, the

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105. Stowe, *supra* note 103, at 323.

106. *Journal of a Convention of the Protestant Episcopal Church in the States of New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, and South Carolina* (1789) ("Upon reading the said letters, it appearing that Bishop Seabury lay under some misapprehensions concerning an entry in the minutes of a former Convention, as intending some doubt of the validity of his consecration, *Resolved unanimously*, That it is the opinion of this Convention, that the consecration of the Right Rev. Dr. Seabury to the episcopal office is valid.").

107. *Samuel Seabury*, The Episcopal Church, https://www.episcopalchurch.org/glossary/seabury-samuel/ [https://perma.cc/D78X-DNDA].

108. John K. Wilson, *Religion Under the State Constitutions, 1776–1800*, 32 J. CHURCH AND STATE 753, 754 (1990); *see also* Sarah Barringer Golden, *The First Disestablishment: Limits on Church Power and Property Before the Civil War*, 162 U. PENN. L. REV. 307 (2014).

109. *See* John Corbin Raibolt, *The Struggle to Define Religious Liberty in Maryland*, 17 J. CHURCH AND STATE 443, 446 (1975) ("[L]argest Maryland parishes had the potential to yield 'an income little inferior to many English bishoprics.'").

110. M. Louise Greene, *The Development of Religious Liberty in Connecticut* 99 (1901).

111. Terret v. Taylor, 13 U.S. (9 Cranch) 43, 46 (1815) ("By the statutes of 1661, ch. 1, 2, 3, 10, and 1667, ch. 3, provision was made for the erection and repairs of churches and chapels of ease; for the laying out of glebes and church lands, and the building of a dwelling-house for the minister; for the making of assessments and taxes for these and other parochial purposes").

legislature of Virginia turned the minister and vestries of each Episcopal church into a corporation. Each church controlled the church property, vestments, and other requirements for service.[112] In 1786, this was modified so that denominations could appoint trustees "according to the rules of their sect."[113] According to Justice Story, this was repealed in 1798 "as inconsistent with the principles of the constitution and of religious freedom," and by 1801 the legislature of Virginia was asserting its right to all the property of the Episcopal Church in the state.[114]

This case was in federal court because it was brought by trustees of what is now Christ Church in Alexandria.[115] Justice Story explains that "the free exercise of religion cannot be justly deemed to be restrained, by aiding with equal attention the votaries of every sect to perform their own religious duties . . . . And that these purposes could be better secured and cherished by corporate powers, cannot be doubted."[116] According to Story, the change brought about by the American Revolution was the denial of the supremacy of any one sect.[117] It went no further: "Beyond these we are not prepared to admit the justice or the authority of the exercise of legislation."[118] While Justice Story was to a greater degree focused on the preservation of property rights than religious liberty, this provides a useful data point in the early American view of church autonomy.[119]

A similar decision was made in *Town of Pawlet v. Clark*. In 1805, the assembly of Vermont granted Church of England lands granted in colonial times by the King to towns in which they were located.[120] This was in spite of fact

112. *Id.* at 47 ("It expressly made the minister and vestry, and in case of a vacancy, the vestry of each parish, respectively, and their successors for ever, a corporation, by the name of the Protestant Episcopal church, in the parish where they respectively resided, to have, hold, use and enjoy all the glebes, churches and chapels, burying-grounds, books, plate and ornaments appropriated to the use of, and every other thing, the property of the late Episcopal church, to the sole use and benefit of the corporation.").

113. *Id.* at 47–48 ("[W]ith a proviso saving to all religious societies the property to them respectively belonging, and authorizing them to appoint, from time to time, according to the rules of their sect, trustees, who should be capable of managing and applying such property to the religious use of such societies.").

114. *Id.* at 48.

115. Michael W. McConnell, *The Supreme Court's Earliest Church-State Cases: Windows on Religious-Cultural-Political Conflict in the Early Republic*, 37 TULSA L. REV. 7, 13 (2001).

116. *Terret*, 13 U.S. at 49.

117. *Id.* at 50 ("The revolution might justly take away the public patronage, the exclusive cure of souls, and the compulsive taxation for the support of the church.").

118. *Id.*

119. *Id.* at 50 ("It has been asserted as a principle of the common law that the division of an empire creates no forfeiture of previously vested rights of property . . . And this principle is equally consonant with the common sense of mankind and the maxims of eternal justice.") (Internal citation removed); *see also* Morgan D. Dowd, *Justice Joseph Story*: *A Study of the Legal Philosophy of a Jeffersonian Judge*, 18 VAN. L. REV. 643, 644 (1965).

120. Town of Pawlet v. Clark, 13 U.S. (9 Cranch) 292, 293 (1815).

that there existed an organized society of Episcopalians under a minister.[121] The Supreme Court decided that, for legal purposes, the Episcopalians were not the legal successors to the Church of England in America: "Individuals and societies may profess the same creed, have the same mode of worship, and the same ordinances administered in the same manner, and submit to the same discipline . . . But this constitutes, in the view we are now taking of the subject, similarity, not identity."[122] The "view" in question was the right of inheritance of a freehold. The grant was made by the King "for a glebe for the Church of England, as by law established."[123] Since there was no such church established in Vermont, this land was never granted to a parson, and so the land remained the king's; after the revolution, the state of Vermont took the place of the king.[124] In towns where there were legally erected Episcopal churches, the legislature could not remove them.[125] Nevertheless, it seems that Story had little hesitation in wading into the true nature of the Church of England, even as he broadly upheld their property rights.

ANALYSIS

There is a fear motivating the church autonomy doctrine that the Court will adjudicate intrareligious disputes. Not only do courts lack any special competence to distinguish *homoousios* and *homoiousios*, but they would be infringing on Arian religious liberty if they did.[126] There is also a fear that this judicial reticence will allow religious organizations to be a law unto themselves, functionally outside of the state's police power.[127] The desire to not oppress

121. *Id.* at 292.

122. *Id.* at 297 ("It furnishes no ground for legal derivation of civil or legal connection. In every political, civil and legal view, and in all the civil and legal consequences, the dissolution of the Church of England, as by law established, was, in the United States, as total and complete, on the revolution, as that of the civil power of the British government.).

123. *Id* at 299.

124. *Id.* at 298.

125. *Id.* at 336.

126. Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 715–16 (1981) ("Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses . . . [T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.").

127. Emp. Div. of Or. v. Smith, 494 U.S. 872, 879 (1990) ("Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself"); *see also Belya v. Kapral*, 45 F.4th 621, 630 (2nd Cir. 2022) ("Thus, simply having a religious association on one side of the 'v' does not automatically mean a district court must dismiss the case or limit discovery.").

religion while also not creating a heckler's veto for religion is a fine needle to thread.

This note has not displaced much of church autonomy doctrine, nor was it intended to. Many key limitations of our courts are not disturbed in the slightest. In questions of church governance where the hierarchical authority is undisputed, as in *Milivojevich*, courts should not second-guess the decisions of those authorities.[128] When it is a question of church supervision of its ministers, courts should continue to defer.[129] What this note has attempted to prove is that our doctrine must take into account the fact that church polities were messier in the Founding period, and judges were more willing to analyze the nature of those polities.

Many religious organizations in the Founding Era, especially the American Catholic Church, defy the easy categorization of later periods.[130] The claim that a court ought to defer to the highest ecclesiastical body appears, at first blush, an eminently reasonable one when applied to the Catholic Church. And yet, as is hopefully clear from the protracted dispute between Bishop Carroll and the trustees of Holy Trinity, it was not clear at the dawn of the American Republic that Catholic bishops had control over lay trustees. Certainly, many lay trustees themselves thought that they had control over their priests, akin to the right of election of a feudal lord. I am not aware of the Curia resolving these disputes. Therefore, the highest authority involved was presumably Bishop Carroll himself. A court which defers to Bishop Carroll would be adjudicating the very dispute that is brought into court. And yet a valid history and tradition view of the First Amendment would have to apply to these situations. Not every religious group will obey the injunctions of St. Paul to not bring their lawsuits.[131]

If this is correct, then judges have at least a limited role in adjudicating intrareligious disputes. A judge must ask him or herself: "How would I decide a lawsuit between Bishop Carroll and the trustees of Holy Trinity?" This answer might still entail a deference to Bishop Carroll as the highest ecclesiastical authority, but that would have to be derived from a judgment about the authority of a Catholic bishop. Similarly, if in a way, this note has been attempting to show a kind of Morton's Fork implicit in the Court's articulation of church autonomy doctrine. In early America, for various reasons, there was not a hierarchical body that all parties to disputes assented to, even in the Catholic Church. Therefore, there is no easy out for judges which allows them to avoid decisions on religious doctrine. Even in the case of Fr. Fromm, there is an (albeit German) archbishop who takes the opposite position as Bishop Carroll. To defer

128. Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich, 426 U.S. 696, 709 (1976) (refusing to adjudicate the procedural and substantive defects of a proceeding of the Holy Synod of the Serbian Orthodox Church).

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

130. The 1983 Code of Canon Law, for example, does lay out the juridical rights of parishes with regards to bishops. 1983 CODE OF CANON LAW, bk. II, pt. II, sec. II, title III, chap. VI.

131. 1 *Corinthians* 6:1 ("If any of you has a dispute with another, do you dare to take it before the ungodly for judgment instead of before the Lord's people?").

to Bishop Carroll is to make a judgment about authority, as is deciding in favor of the trustees. There is no option in which the judge does not judge.

How a judge should adjudicate questions of authority in a religious tradition is not solved definitively by this note. The idea that religious organizations should be free to manage their internal affairs is certainly present at the Founding. Even states with an established religion granted minority religions the ability to conduct their own affairs; this is true in the cases of both Seabury and Carroll. Special acts were made in both of their cases to allow for their denominations to organize themselves, even in places that had been historically hostile to them. The actions of state legislators here might be grist for the mill of history and tradition analysis. Over the course of their ministries, neither Seabury nor Carroll interacted with the courts enough to be particularly useful examples of church autonomy doctrine. At best, they are useful examples of how attempting to insulate religious institutions from legal judgment is a more difficult task than our caselaw implies. Even in the two most hierarchical churches in America, there is disagreement over the limits of authority. There was disagreement over the validity of Samuel Seabury's orders, and the historic privileges in the Catholic Church.[132]

One possible way to articulate the view of *Jones v. Wolf* that coheres with the evidence provided is that courts are able to evaluate doctrine insofar as it tells them to whom they should defer. That way, a court would not have been helpless if Holy Trinity happened to be located in the District of Columbia. Arguably, this is what the Court did in *Milivojevich*. This might be a great rule, but it does not seem to accord with a deep suspicion with courts making heretics, present in other parts of our caselaw. If a court can adjudicate the historic privileges of Catholic churches, why can't it evaluate the right to schism?[133] The distinction seems to be predicated on it being self-evident which religious organizations were hierarchical, with adjudicative bodies, and which were not. At least in the early Republic, this was not an obviously true claim.

Whether these authority claims are susceptible to litigation is an important live issue. This decade, there have been legitimacy fights over denominations in schism, including the Episcopal Church. There, the Texas Supreme Court applied the same "neutral principles of law" approach approved by the Supreme Court.[134] In order to avoid making judgments on authority, the Texas Supreme Court distinguished the judgment of membership in the Episcopal Church from

132. JOURNAL OF A CONVENTION OF THE PROTESTANT EPISCOPAL CHURCH IN THE STATES OF NEW YORK, NEW JERSEY, PENNSYLVANIA, DELAWARE, MARYLAND, VIRGINIA, AND SOUTH CAROLINA 51 (1789).

133. *But see* Watson v. Jones, 80 U.S. 679, 725 (1871) ("In such cases where there is a schism which leads to a separation into distinct and conflicting bodies, the rights of such bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations.").

134. Episcopal Diocese of Ft. Wor. v. Episcopal Church, 602 S.W.3d 417 (Tex. 2020) ("what happens to property following a religious entity's disassociation from a hierarchical church is a nonecclesiastical issue to be determined based on the same neutral principles of law applicable to other entities").

what happens to a diocese's property.[135] Churches continue to assert courts' inability to delve into their internal affairs during litigation.[136] In a case pending at the time of writing, the USCCB has claimed that the courts have no subject-matter jurisdiction over fraud claims relating to tithing, because of the church autonomy doctrine.[137]

In one particularly interesting example, the Fifth Circuit has recently dealt with a dispute within the Baptist tradition. The majority and dissent disagreed on whether the North American Mission Board of the Southern Baptist Convention fell under the aegis of the church autonomy doctrine.[138] The majority uses the Episcopal Church as an example of a clearly hierarchical organization whose internal disputes are protected by the church autonomy doctrine.[139] Most importantly for this note, the majority emphasizes the denominational neutrality of the First Amendment and the "freedom that radiates from *Watson*" as a reason for courts to respect the internal decisions of a church, "regardless of what denominational name appears on its door."[140] The dissent instead emphasized the more structural arguments from *Watson*: "Because there is no unified 'Baptist Church,' there can be no 'intra-church dispute' or dispute about 'church government' in this case."[141]

These cases will continue to arise; with the Court's abiding interest in history and tradition, we should look to the early Founding to see how these problems were dealt with.

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135. *Id*. at 429 ("That is, what happens to the *relationship* between a hierarchical religious organization and a subordinate unit after a vote to disassociate is an ecclesiastical matter over which civil courts generally do not have jurisdiction. But what happens to the property **is not**, *unless the [local entity's] affairs have been ordered so that ecclesiastical decisions effectively determine the property issue*.") (Internal quotations omitted).

136. Huntsman v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints, 127 F.4th 784, 792 n.6 (2025) ("Throughout this appeal, the Church has maintained the position that this Court can, and should, hold only that the fraud claim fails to state a claim on the merits.").

137. O'Connell v. U.S.C.C.B., 134 F.4th 1243, 1248 (D.C. Cir. 2025) ("USCCB contended that the court had no subject matter jurisdiction because O'Connell's action was barred by the church autonomy doctrine. Without in any way addressing the merits of the parties' claims, the District Court denied the motion to dismiss.").

138. McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc., 155 F.4th 415, 435 (5th Cir. 2025).

139. *Id.*

140. *Id.* (emphasis omitted).

141. *Id.* at 446 (Ramirez, J., dissenting).