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***Prescriptive Jurisdiction, Adjudicative Jurisdiction, and Church Autonomy***

Howard M. Wasserman\*

**Introduction**

The Freedom of the Church Doctrine, or Church Autonomy Doctrine, limits the reach of secular law, government, and courts into the internal workings of churches and religious organizations. The First Amendment prohibits secular law and secular institutions from influencing, reviewing, or controlling issues of faith, religious dogma and doctrine, theological pronouncements, ministerial and clergy decisions, or the structure and organization of religious institutions.

Church autonomy arises in three broad classes of cases. The first, and historically most prominent, are state-law disputes about ownership of Church property in the wake of schisms, either between competing factions of a congregational church or between a local congregation and the hierarchical Church. Second, more recently prominent, is the “ministerial exemption” from employment-discrimination laws (primarily, although not exclusively, federal laws), which prohibits clergy and other ministerial employees (broadly defined) from suing over adverse employment decisions. Third, somewhat unusual, involves attempts to directly legislate against religious organizations and their internal structure and governance, such as a bill proposed (although withdrawn) in Connecticut that would have required all churches in the state to establish boards of directors that include some congregants. In all three categories, judicial resolution of a claim under secular law would require federal or state courts to resolve issues of religious teaching, doctrine, or structure.

Top religious scholars continue to debate questions of the scope, origins, and constitutional rationale for this limitation. As controversial is the appropriate procedural characterization of Church Autonomy. I take the descriptive existence of Church autonomy as a given, regardless of its First Amendment origins or its normative correctness. The concern here is a procedural one: If the doctrine exists, how should it be understood and treated procedurally on the jurisdiction/substance line. Accepting its constitutional validity, does it reflect a First Amendment limitation on the scope and reach of substantive law or does it limit the adjudicative jurisdiction of the courts in which those disputes are to be resolved? Put differently, when Church Autonomy controls an issue before a secular court, does it defeat the claim for lack of judicial subject matter jurisdiction or does it defeat the claim on the substantive merits?

Church Autonomy presents a specific illustration and application of the broader and pervasive conflation of judicial jurisdiction and substantive merits and the need to identify and maintain clean and clear lines between them, a subject I have written on extensively.<sup>1</sup> There is a sharp circuit split over the

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<sup>1</sup> See Howard M. Wasserman, *Jurisdiction, Merits, and Non-Exant Rights*, 56 KANSAS L. REV. 227 (2008); Howard M. Wasserman, *Jurisdiction, Merits, and Procedure: Thoughts on a Trichotomy*, 102 NW. U. L. REV. 1547 (2008); Howard M. Wasserman, *Jurisdiction, Merits, and Substantiality*, 42 TULSA L. REV. 579 (2007); Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643 (2005).

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ministerial exemption and whether it is a limit on subject matter jurisdiction (and the basis for dismissal under Federal Rule of Civil Procedure 12(b)(1)) or a limit on the scope of applicable substantive law (and the basis for dismissal under Rule 12(b)(6) or summary judgment). Courts and commentators are similarly conflicted in property cases. The Court has described Church Autonomy as a limit on “civil jurisdiction;” scholars have described property cases as “jurisdictional bar” cases. Unfortunately, the word jurisdictional is thrown about too loosely and imprecisely, or at least without requisite specificity as to the type of jurisdiction at issue.

I argue that Church Autonomy is, and should be understood as, a purely merits doctrine. Church Autonomy reflects a First Amendment limitation on substantive law and the rights and duties established by substantive law; those limits on existing legal rules go to the fundamental merits question of “who can sue whom for what conduct and what remedy”.<sup>2</sup> The point of Church Autonomy is to prevent enactment of substantive legal rules that, by their terms or as applied to a set of facts, dictate, question, or control issues of faith, religious doctrine and teaching, ministerial choices, or the structure and governance of religious institutions. Legal rules (and the rights and duties established by legal rules) that do so are constitutionally invalid, thus any attempt to judicially enforce such rules (and rights and duties) must fail. But the failure is on the substantive merits—as a result of the First Amendment, this plaintiff could not sue this defendant for the conduct at issue. None of this affects the adjudicative jurisdiction of the federal courts—the raw authority to hear and resolve legal and factual issues in cases brought before it.

The nature and reasons for the confusion over the appropriate characterization of Church Autonomy reflect the nature and reasons for the general conflation of jurisdiction and merits. Unpacking that confusion in this class of cases sheds light on how we should understand and disentangle these distinct concepts.

### **I. A primer on Church Autonomy**

In practice, the Church Autonomy doctrine means secular courts and secular institutions, in the course of making and applying secular law, cannot review decisions by a Church on matters of religious faith and doctrine, nor can they resolve disputes through construction, analysis, or application of religious teaching and doctrine. Secular institutions cannot influence or control matters faith and religious teaching, theological pronouncements, ministerial and clergy decisions, or the structure, organization, and internal workings of religious institutions.

The notion of granting religious institutions this control is subject to some debate, both as to its provenance and its constitutional and theoretical validity. Some ground it in the Free Exercise Clause, as a type of religious liberty belonging to the religious institution and its internal operations in pursuit of its faith (as opposed to individuals acting on religious beliefs). Others ground it in the Establishment Clause

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<sup>2</sup> Harrison

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and structural notions of separation of Church and State in matters of governance. Still others view it as a hybrid of both clauses. The doctrine seeks to maintain structural balance between State and Church as competing institutions in American society, each sovereign in its sphere, ensuring the “penultimacy of the State” in areas in which the Church dominates.

It also is not without controversy, at least as to its parameters. To the extent it derives from Free Exercise, there was some question whether it survived the Supreme Court’s decision in *Employment Division v. Smith*, which held that the First Amendment is not violated by a neutral law of general applicability that burdens the exercise of religion. Church Autonomy means neutral secular law of general applicability cannot apply to religious institutions when that would implicate core religious teachings on matters of faith, theology, and Church structure. But *Smith* itself identified religious authority and dogma as areas that are not subject to state control, including matters of institutional structure. Lower courts have acknowledged that *Smith* does not limit the absolute control Churches exercise over internal matters of faith. The doctrine also is criticized to the extent it permits religious organizations, alone among all social institutions and entities, to discriminate or to engage in conduct the law otherwise proscribes.

Church autonomy is broadly in play in three categories of cases.

Historically, the most prominent application of Church Autonomy involves disputes about ownership of church property in the wake of schisms, either between competing local factions in a congregational church or between a local congregation and the hierarchical church. In the course of deciding who owns the property under state property law, courts would be forced to decide which is the “true” church or taking sides in controversies over religious authority or dogma, determinations that only can be made by reference to sectarian doctrine. Courts may resolve these disputes only by reference to “neutral principles” or “secular principles” of property law, looking solely to secular issues such as where title rests. Otherwise, courts must defer to the Church’s views on underlying matters of religious teaching and structure. This category includes claims under a range of state law besides property, including contract law and torts such as defamation, to the extent resolution would require consideration and analysis of religious doctrine. The jurisdictional label is regularly applied to these cases, often described as “jurisdictional bar” cases or limits on “civil jurisdiction.”

A second, more recently prominent situation, involves the so-called “ministerial exemption” from Title VII and other employment discrimination laws as a narrow application of Church freedom.<sup>3</sup> Anti-discrimination laws do not apply to ministerial positions and employees, broadly defined to include anyone directly or indirectly responsible for religious doctrine and teaching—including clergy, religion and theology teachers and scholars, lay teachers, and supporting persons such as organists and chorale leaders; such individuals are unable to recover for adverse employment action, even if based on race,

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<sup>3</sup> Some state courts have adopted this exemption as to common law employment law governing wages, wrongful termination, etc. *See*

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religion, national origin, disability, age, or other statutorily protected class. At a minimum, this ensures that the Catholic Church or an Orthodox synagogue cannot be compelled to ordain women. More generally, the exemption avoids inevitable secular judicial second-guessing of Church decisions as to who is qualified to minister or otherwise lead the religious institution or as to the quality of an individual's work ministering, teaching, and speaking on sectarian and theological matters.

Consider a blatant example. A priest is fired; he alleges that he was fired because of race, while the Church insists it was because he did a bad job teaching and ministering to his flock. Title VII is violated only if he was fired "because of" race. In order to decide that, a court would have to conclude that the Church's stated reasons for its decision were false or wrong, which obviously turns on a judicial assessment of the plaintiff-priest's ministering and teaching and the propriety of the church's evaluation of his ministering—all questions of faith, doctrine, and Church teaching that the First Amendment places beyond secular purview. The key question then becomes who qualifies as a ministerial employee for which the Church enjoys the exemption.<sup>4</sup>

There is a wide circuit split as to whether the ministerial exemption reflects a limitation on judicial subject matter jurisdiction or on the merits of the underlying federal anti-discrimination claim. And the merits half of the circuit split further divides into three approaches to the merits question. Some courts hold that the ministerial exemption, as part of the First Amendment, renders anti-discrimination laws unconstitutional as applied. Others treat the exemption as an implicit exception in the statute itself, a construction of the statutory language designed to save its constitutionality. And others treat the exemption as an affirmative defense, under which the statute has been violated but the Church is insulated from liability on an outside legal rule raised by the defendant.

A third, somewhat unusual situation, involves direct attempts to legislate on religious organizations and their internal structure, organization, and governance.

One recent proposal was Connecticut Raised Bill No. 1098, introduced in the General Assembly in 2009. That would have required all religious organizations, or congregations of religious organizations such as individual Catholic parishes, to organize and govern themselves through a board of directors, with between seven and thirteen of the directors elected by the congregation. The board would possess broad power, similar to those possessed by the board of any secular corporation, including oversight of the pastor of the congregation on matters of finance. The measure was widely criticized as anti-Catholic, an obvious conclusion given the bill's stated purpose to "revise the corporate governance provisions applicable to the Roman Catholic Church and provide for the investigation of the misappropriation of funds by religious corporations." The bill ran counter to the hierarchical, Papal and Episcopal control that is central to Catholic dogma and a source of longstanding debate within Christianity. One group of

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<sup>4</sup> Ave Maria

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Catholic legal scholars called the bill an attempt to “impose a Protestant form of organization on the Catholic Church.” Church structure and governance are products of faith and religious teaching and law. The idea of Church Autonomy is that the State no more can dictate a Church’s internal structure or organization (which itself is a matter of sectarian doctrine) than it can dictate the meaning of sacred text.

The first two categories typically involve neutral, generally applicable legal rules that run into potential First Amendment problems when applied to religious organizations and to controversies implicating religious doctrine, structure, and governance. Here, by contrast, secular government directly and explicitly controls some matters to Churches involving their structure, organization, and practice. The Connecticut bill specifically targeted religion; it dictated the form and structure of religious institutions and how they must organize and govern themselves, even if the imposed structure violated Church dogma. Moreover, there was no possibility of a saving construction, an interpretation of the statutory language or common law rule (such as the neutral principles doctrine) that avoids Church Autonomy concerns of secular judicial inquiry into matters of teaching and doctrine. The bill’s core stated purpose was to “regulate the structure of the Catholic Church.” The only question could be whether it could survive a direct First Amendment challenge. The Connecticut proposal was pulled in the wake of strong objections from legal and religious scholars, including a letter signed by twelve prominent First Amendment scholars highlighting the constitutional problems with the measure. We thus never had the opportunity for courts or commentators to describe the resulting constitutional controversy as jurisdictional or otherwise.

I take the descriptive existence of Church autonomy as a given, regardless of its First Amendment origins or its normative correctness. The concern here is a procedural one: If the doctrine exists, how should it be understood and treated procedurally on the jurisdiction/substance line.

## **II. Adjudicative Disabilities, Regulatory Disabilities, and the Many Forms of Jurisdiction**

Church autonomy often is characterized as imposing an “adjudicative disability” on courts. It is described as a First Amendment rule that disables courts from hearing and resolving cases in which the application of secular law would dictate or influence matters of religious doctrine, faith, and teaching. The First Amendment is said to impose a “jurisdictional bar” or a limit on “civil jurisdiction.”

But this characterization is erroneous, because Church autonomy is broader than a limitation on courts or on adjudication. It is, instead, a “regulatory disability” on secular government, disabling all secular institutions from enacting legal rules to control certain conduct by Churches and religious organizations. It narrows the issues and actors into which secular law can inquire or control. It prohibits secular legal rules from controlling churches on issues of faith, teaching, doctrine, and organization. It invalidates legal rules that dictate or override church decisions as to matters of faith, teaching, doctrine, organization, and governance.

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In Hohfeldian terms, Church Autonomy limits the rights that can be created, and the duties that can be imposed, by secular legal rules as to certain matters of religion and faith. Alternatively, it recognizes a broad liberty or privilege in the Church itself to act as it sees fit on such matters, and the absence of any duty to refrain from acting as it sees fit on those matters. Thus, there is no federal secular statutory right in ministerial employees (such as clergy) not to be discriminated against for reasons of race, gender, or disability, and there is no corresponding secular duty on the Church to refrain from engaging in such discrimination. Instead, the Church retains a liberty or privilege to make decisions as to ministerial employees on its own faith-based terms, without reference to federal secular law and unencumbered by any secular duty not to discriminate. Moreover, the constitutional origins of that privilege or liberty mean the State cannot impose such a duty. Similarly, the State is disabled from dictating to the Catholic Church how to organize or govern its parishes; the Church retains the liberty or privilege to organize and structure itself as its dogma dictates, free from secular intervention.

There is a jurisdictional component to this, such that speaking about Church Autonomy as a limit or bar to “civil jurisdiction” is accurate. The problem is the failure to specify whose civil jurisdiction (which part of civil government) and civil jurisdiction to do what (regulate or adjudicate) is barred under the Church Autonomy rubric. This misses one of the fundamental distinctions in the jurisdiction/merits puzzle: The difference between prescriptive or legislative jurisdiction on the one hand, and judicial or adjudicative jurisdiction on the other. Prescriptive jurisdiction is the power of secular government rulemakers (primarily, although not exclusively, the legislature) to prescribe legal rules to regulate real-world conduct and actors; it is the authority to establish Hohfeldian rights and impose Hohfeldian duties on certain actors as to certain conduct. It is the legitimate authority to prescribe rules of substantive law, determining the ultimate merits issue of “who can sue whom for what conduct and what remedy.” Any authorized secular rulemaker may possess prescriptive jurisdiction. The legislature and executive most obviously wield prescriptive jurisdiction in creating general rules of prospective applicability. But so do courts, in the course of resolving a case or controversy, by establishing common law rules governing prospective conduct beyond the parties before the court.

Prescriptive jurisdiction contrasts with judicial adjudicative jurisdiction, the root power or legitimate authority of courts to adjudicate—to hear and resolve legal and factual issues in cases or controversies arising under substantive law. It is the authority to provide the adjudicative and remedial forum to resolve allegations that Hohfeldian duties, prescribed by some institution with prescriptive jurisdiction, have been ignored, and correlative Hohfeldian rights violated.

The Constitution is primarily about limits on prescriptive jurisdiction. It imposes both internal limits on power to prescribe substantive legal rules (e.g., the limits on congressional power under § 5 of the Fourteenth Amendment) and external limits on that power (most notably, the limitation against

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abridgements of the freedom of speech under the First Amendment or Equal Protection under the Fifth and Fourteenth). Such limits all operate as what Matthew Adler and Michael Dorf call constitutional “existence conditions.” In order for a legal rule to come into existence as valid and enforceable “law,” it must satisfy certain constitutional conditions, notably consistency with these internal and external limits. Any purported legal rule that does not satisfy applicable existence conditions is “nonlaw” and does not “exist” as law. Where a purported law has not satisfied an internal or external constitutional limit on prescriptive power, the legal rule it would impose never comes into existence as law, never becomes a valid and enforceable rule as to some actors and conduct. And neither does the Hohfeldian right/duty correlative to be imposed by such a rule.

Existence conditions sound entirely in prescriptive jurisdiction—they deprive government of legitimate authority to prescribe (bring into existence as law) legal rules that would be inconsistent with some condition, such as the First Amendment. The legal rule purportedly created—and the statutory right/duty correlative it would establish—does not exist as law because, as a matter of the legislature’s constitutional power, it cannot exist as law. This is how Church Autonomy functions as a part of the First Amendment, as a constitutional limitation on the prescriptive lawmaking jurisdiction of civil government (legislative, executive, or judicial) in areas touching on faith, church doctrine, theology, and internal church organization and governance. It limits the legal rules (and the right/duty correlatives) that any branch of secular government, exercising its prescriptive rulemaking power, can create (bring into existence) as law. The “jurisdiction” that Church Autonomy “bars” is the prescriptive jurisdiction of all civil rulemaking institutions and their authority to bring into existence legal rules (and right/duty correlatives) that influence, review, or control issues of faith, religious dogma and doctrine, theological pronouncements, ministerial and clergy decisions, or the structure and organization of religious institutions

With the prescriptive/adjudicative distinction in mind, it becomes easy to conceptualize all three categories of Church Autonomy cases as a regulatory disability on civil government based on constitutional limits on prescriptive jurisdiction. For example, the ministerial exemption applied to Title VII means Congress never enacted the legal rule imposing a duty on churches not to discriminate against ministerial employees because of race or sex and it did not enact a legal rule creating a right in such employees not to be discriminated against on these bases by churches. Congress lacked prescriptive jurisdiction—the legitimate power or authority—to enact such a rule (to bring such a rule into existence as law). The First Amendment (whether Free Exercise, Establishment Clause, or some combination) limits Congress’ authority to prescribe a legal rule creating a right/duty correlative as to churches and church employees on employment matters, where such a rule would interfere with church decisions on matters of religious teaching and who is qualified to teach and minister on matters of faith. The First

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Amendment, acting as an existence condition, precludes such a legal rule from existing as constitutionally enforceable law. Note that it does not matter whether we understand the ministerial exemption as a saving construction reading an implicit limit on the language of the statute, as a statutory affirmative defense, or as the unconstitutionality of the underlying law. All three lead to the same end point that the plaintiff's claim-right (Title VII) does not exist as law as to these actors and this conduct, because such a right exceeds the external limits (the First Amendment) on Congress' secular jurisdiction to prescribe such a rule.

This characterization is more obvious in direct attempts to regulate Church organization, such as the Connecticut proposal. The legal rule requiring the Catholic Church to organize itself in a particular way does not exist as law because it cannot exist as law; it violates First Amendment limits on the authority of secular government to enact legal rules regulating internal structure, organization, and governance of religious bodies. Churches possess the privilege or liberty, derived from the First Amendment, to organize themselves as their canon law commands, free from any state-imposed duty to operate in some way. Secular government lacks the power to prescribe a legal rule that would impose such a duty.

And the same is true for common law property rules. They do not and cannot exist as law to the extent they incorporate, in given circumstances, resolution of religious-doctrinal disputes or require the court to take sides in disputes over dogma and religious authority by determining the "true" church. Such a rule cannot exist as law because it exceeds external First-Amendment-imposed limits on the State's secular prescriptive jurisdiction. Here, that prescriptive jurisdiction rests in the court in the exercise of its common law rulemaking, but the basic point is the same. There is no existing secular rule identifying the "true" church or resolving religious questions of property ownership.

The existence or not of a substantive legal rule establishing right/duty correlatives as to particular actors and conduct drives the core merits question of who can sue whom for what conduct. The non-existence as law of a rule or right/duty correlative means this plaintiff cannot sue this defendant for this conduct, a defect entirely about the substance the plaintiff's claim of right. The non-existence of a violated legal rule does not deprive the court of judicial jurisdiction to hear and resolve the claim under appropriate law; it merely defeats the claim on the merits because there is no existing legal rule (and right/duty correlative) to be violated on these facts or to be enforced in court.

Consider again our blatant ministerial-exemption case involving the fired priest. Title VII, as substantive law, cannot regulate Church hiring practices as to clergy and other ministerial employees, where such regulation would limit Church control over who should teach and minister on matters of faith and dogma. Congress lacked the prescriptive jurisdiction to enact a statute that did so, because such a law violates the external limits that the First Amendment imposes on congressional prescriptive authority; any such legal rule does not exist as law because it cannot exist as law. A claim to recover for a violation of

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such a non-existent right fails on the merits—under the First Amendment, a priest cannot sue the Church for firing him.

There is some adjudicative disability at work, of course. Church Autonomy comes into play when resolving secular legal and factual issues requires resolution of sensitive questions of religious doctrine or review of Church decisions on matters of faith. The First Amendment places such determinations beyond secular judicial inquiry. But it is beyond the ken of the secular court because of the limit on the regulatory reach of secular law. That limit plays out as a limit on the court's adjudicative authority only because courts are the forum in which purported secular law is applied in actual controversies between actual parties, potentially implicating church governance and religious faith; courts are where the parties go for a determination of whether, on the facts, rights were violated and duties ignored and, prior to that, whether any rights and duties exist as law. The restrictions on the court are incidental to the broader restriction on the reach and scope of substantive secular law from regulating the Church on matters of faith, doctrine, and governance. Courts are limited because there is no existing substantive law and no rights to be enforced.

Back to our Title VII ministerial exemption case. It would be a court that, if the case went forward, would have to evaluate the priest's qualifications and ability as a religious teacher and minister, which turns on a proper understanding of Catholic doctrine. Title VII also provides for reinstatement as a remedy—here meaning a secular court telling the Catholic diocese who it must hire and retain to teach and preach on religious matters. So while the exemption blocks the courts from this inquiry, that block results from the non-existence of legal rules that, if applied on these facts, would immerse secular law in such inquiries. The court is limited only because no existing secular legal rule (and no right/duty correlative) was violated by the firing, only because the First Amendment stripped Congress of its authority to prescribe such a right, create such a right, or impose such a duty that would immerse secular law in sectarian questions.

Of course, limits on the reach of substantive law inevitably reduce the amount of adjudicating (or at least the granting of relief) that courts do. When there are no existent legal rules imposing rights and duties on particular actors and conduct, the court can do nothing but reject claims attempting to assert those rights because there is nothing for the court to enforce. Courts issue fewer judgments in favor of plaintiffs, grant less relief, and impose few remedies. Courts are limited only because they are the fora in which existent substantive rights (created by Congress or common law) are enforced; absent existent substantive rights, there is nothing for the court to do. But that does not reflect a limit on courts' adjudicative jurisdiction, in the sense of raw, root legitimate authority a court possesses to hear and resolve legal and factual issues; it reflects only a limit on the opportunities to wield that power.

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Descriptively, this can be understood in light of the current jurisdictional scheme. An unsuccessful claim—even one defeated because the asserted legal rule is constitutionally prohibited—does not deprive the court of adjudicative jurisdiction, nor should it. In a Title VII claim implicating the ministerial exemption, the federal court had adjudicative jurisdiction because our plaintiff-priest’s claim “arose under” the laws of the United States. The claim ultimately lacked merit because, in light of the First Amendment, Church Autonomy, and the ministerial exemption, Title VII does not and cannot regulate the actors and conduct at issue. But adjudicative jurisdiction was established because the plaintiff sought relief “created by,” or “made possible by,” or “brought under,” or seeking relief under a provision of federal law, a fact apparent from the plaintiff’s pleading. Everything else is about the merits of the substantive claim.

This conclusion becomes more obvious in church-property cases, which typically are based on state law. State courts, of course, are courts of general jurisdiction, vested with legitimate adjudicative authority over all claims purported to be brought under any law (regardless of source). Failure of the claim does not strip the court of jurisdiction. Alternatively, to the extent there is diversity of citizenship that lands a church-property case in federal court, the court has statutory jurisdiction so long as the parties are citizens of different states.<sup>5</sup> The ultimate equities of the case do not affect such party-based jurisdiction, which is why it makes no sense to read the First Amendment as a limit on § 1332. Regardless of the outcome or what the court must do to avoid issues of faith and doctrine in its secular legal analysis, the parties still are from different states, placing the civil action squarely within the district court’s statutory adjudicative authority. A state-law church property case limited by Church Autonomy thus resembles a state-law defamation case, where the First Amendment similarly limits the scope of state defamation law.<sup>6</sup> No one suggests that the First Amendment limits on defamation law—which circumscribe the scope of rights and duties existing under state law—deprives either a state court or federal court (in a diversity action) of their respective adjudicative jurisdiction, as opposed to limiting the scope of the applicable substantive rule to determine whether duties were breached and rights violated and whether the injured party is entitled to a remedy.

Some confusion may arise when the underlying right/duty correlative at issue in a state-law case derives from common law rule rather than from a legislative pronouncement. In such cases, both types of jurisdiction may be in play here. The court must possess adjudicative jurisdiction, which we determine by resort to the diversity statute in federal court or by the state court’s general jurisdiction established under state law. We then get to whether the courts possesses prescriptive jurisdiction to create a particular common law rule and any external limits on that prescriptive jurisdiction, such as from the First

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<sup>5</sup> And the amount in controversy exceeds \$ 75,000. 28 U.S.C. § 1332(a).

<sup>6</sup> *Cf.* *New York Times v. Sullivan*, 376 U.S. 264 (1964).

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Amendment's religion clauses. Thus, in a property dispute between competing factions of a congregational church, a state trial court of general jurisdiction has adjudicative power to hear and adjudicate the dispute brought before it, but it may have no existing law to apply to resolve the dispute because state common law (created by the judges of the state), as limited by the First Amendment, cannot resolve sectarian questions of which is the true "church," apart from neutral principles. The court is the limited institution here, but in its prescriptive jurisdiction to make the applicable rules, not its adjudicative authority to hear and resolve cases.

Finally, it is significant that many cases implicating Church Autonomy could arise in both federal courts and the courts of general jurisdiction of the several states. Limitations on adjudicative jurisdiction typically do not eliminate claims entirely, but merely shift them between federal and state court. If some class of cases is not within the limited jurisdiction of federal courts, the expectation is such cases will be brought in state court. If Congress pulls some federal issues out of state court, it is because Congress wanted federal courts to be the exclusive forum for litigating those issues—but clearly Congress wanted there to be some forum.<sup>7</sup> By contrast, limits on prescriptive jurisdiction, and thus on the legal rules that can be brought into existence, eliminate Hohfeldian rights and duties entirely, leaving nothing to enforce or vindicate in any court.

Our fired priest can no more sue the Catholic Church in state court than he could in federal court. This suggests it is not the authority of courts to adjudicate discrimination claims that has been limited, but the authority of Congress to prescribe a legal rule that would require review of sectarian determinations as to who should minister to a Catholic parish. Similarly, our disgruntled congregational faction cannot bring its claim for property in state court or federal court, again suggesting that what has been limited is the authority of common law courts to prescribe the legal rules to resolve disputes of who owns church property.

## **II. Rendering unto Caesar: Church Autonomy, Sovereign Immunity, and Adjudicative Jurisdiction**

Greg Kalscheur has best articulated the core argument about the ministerial exemption as a limit on adjudicative jurisdiction, although that is grounded on the basic structural underpinnings of Church Autonomy. Religious organizations, the argument goes, are unique institutions, operating within broader American society as a sovereign entity. Church Autonomy seeks to maintain distinct respective sovereign spheres for Church and State, ensuring the penultimacy of the State to the Church on matters within the latter's prescriptive purview. Enabling Churches to maintain their theological autonomy free from influence or control by secular law serves the command to "render unto Caesar the things which are Caesar's, and unto God the things that are God's."<sup>8</sup>

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<sup>7</sup> And, at least on some theories of Article III or due process, must be some other, arguably federal, forum.

<sup>8</sup> Matthew 22:21.

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Church Autonomy reflects similar imperatives of dual sovereignty and the need to carve out distinct spheres that drive sovereign immunity. It is, Kalscheur argues, analogous to immunity as between secular sovereigns—States as to federal law under the Eleventh Amendment, the United States as to federal law, and foreign sovereigns as to all domestic law. Descriptively, sovereign immunity (and waivers of sovereign immunity) generally is treated as a limit on adjudicative jurisdiction. Thus, the argument goes, Church Autonomy must similarly be understood as limited adjudicative jurisdiction. Only then can Church Autonomy receive its fullest scope and Churches the necessary respect as sovereign institutions with externally unfettered power to control those matters within its domain.

This argument fails for several reasons. At bottom, however, the premise of the argument—that Church Autonomy needs a judicial-adjudicative-jurisdiction hook to receive its fullest scope—is wrong.

First, normatively, sovereign immunity is better understood as a limit on prescriptive, rather than adjudicative, jurisdiction. Sovereign entities hold regulatory or remedial immunity, immunity from application of legal rules or from being subject to liability and remedy under those legal rules. Immunity does not merely close one courthouse door (as adjudicative-jurisdiction limits tend to do), but prevents liability from attaching to the sovereign in any court.<sup>9</sup> In merits language, individuals cannot sue States or the Federal government for most conduct seeking any remedy.

State sovereign immunity limits the real-world duties that federal law can impose on a State or the judicially enforceable legal consequences (liability to private individuals) to which it can be subject if it ignores those duties. And those limits apply whether the action is filed in federal or state court. Take, for example, *Board of Trustees v. Garrett*, where the Supreme Court held that States were not subject to private suit under the employment provisions of the Americans With Disabilities Act. In other words, a private individual could not sue a State for an employment decision that adversely affected an individual with a disability for damages or injunctive relief. There was no federal statutory rule imposing a duty on a State to refrain from discriminating in its employment decisions based on disability or granting an individual a right not to be discriminated against, at least by the State. Internal limits on Congress' legislative power under § 5, functioning as an existence condition, stripped Congress of prescriptive jurisdiction to create a federal legal rule imposing duties on the States, enforceable through private suit and remedy. This merits view of sovereign immunity is driven home by the fact that the plaintiff's claim would have failed, because of sovereign immunity and § 5's limits on Congress' prescriptive authority, even if he had gone to state court.

So understood, it is beside the point that Churches are competing sovereigns with a similar relationship as states have to the federal government. Even if the purpose and function of Church

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<sup>9</sup> Vazquez, *supra* note \_\_\_\_, at 1744.

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Autonomy is akin to sovereign immunity, both are best understood as limits on prescriptive jurisdiction and a substantive merits inquiry.

Second, it is argued that churches gain the maximum insulation from secular interference with matters of faith, theology, religious teaching, and church structure only if the Church Autonomy doctrine is given the incidents of adjudicative-jurisdiction limits—primarily 1) non-waivability and the possibility of the issue being raised at any time in litigation and 2) an independent judicial obligation to *sua sponte* raise and consider the issue. Sovereign immunity, judicially treated as going to adjudicative jurisdiction, is accorded both of these incidents. So, Kalscheur argues, should Church Autonomy defenses, such as the ministerial exemption.

This argument conflates the definition of adjudicative jurisdiction with its incidents. Non-waivability and independent judicial consideration are associated with adjudicative-jurisdiction defenses, primarily because those defenses have been deemed to require those incidents to function as intended. Subject matter jurisdiction is a core structural limitation on federal judges and federal judicial power—a court without jurisdiction is not a court and judge without jurisdiction “might as well be any common person on the street.” It could not be an effective structural limitation if it were waivable.

These characteristics are not limited only to adjudicative-jurisdiction issues, however; non-jurisdictional defenses might receive similar incidents, if deemed necessary for a non-jurisdictional defense to be fully effective. For example, in *John R. Sand & Gravel v. United States*, the Supreme Court held that the statute of limitations on actions against the United States in the Court of Claims (where the United States had waived sovereign immunity) is non-waivable, although statutes of limitations typically are treated as non-jurisdictional merits issues. The Court deliberately declined to define the limitations period as jurisdictional, but only as a “more absolute[] kind of limitations period.” Understanding the defense as more absolute lent greater protection and offensiveness to the U.S.’s underlying sovereign immunity; immunity could not be waived easily or lightly or by government’s litigation strategy (or error), but only if a claimant complies with rigid timing obligations. In other words, non-waivability gave the limitations defense its fullest effect, even if that defense was not an adjudicative-jurisdiction rule in the sense of being tied to the court’s base structural authority to hear and resolve legal and factual issues.

Similarly, Church Autonomy may require non-waivability to be fully effective, to accord maximum protection to the Church from application of secular rules that impinge its control over matters of faith, doctrine, and religious structure. The First Amendment bar on secular interference with church freedom cannot be surrendered by litigation choice. But as in *John R. Sand*, we could recognize Church Autonomy as such without having to define it as an adjudicative-jurisdictional limit on the courts’ power.

Moreover, Kalscheur’s conception of non-waivability may be more consistent with a substantive-merits understanding of Church Autonomy. Sovereign immunity, of course, can be waived in an

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individual case should a State consent to appear in court. But if Church Autonomy is read as a First-Amendment existence condition on secular law, the doctrine could not be waived even by consent in an individual case. At least on some understandings of the doctrine. For example, if the ministerial exemption functions as an implicit textual exception to the Title VII claim right, the statute by its (interpreted) terms cannot reach employment decisions as to clergy and other ministerial employees. There is nothing for a defendant-Church to waive; the statute simply does not reach Church conduct. If the goal is a more-absolute protection, this arguably better achieves it.

The third argument is that the ministerial exemption is a defense not only against Church liability, but against the Church having to litigate in secular courts and having to bear the cost, burden, and hassle of answering and defending a civil action that inquires into matters of faith, teaching, and doctrine. The First Amendment grants immunity from suit, an immunity that is effective only if the Church can get out of a case at the earliest possible point. And jurisdictional defenses famously are structured to be raised and resolved early in the process.

This does not get us very far, however, because many non-jurisdictional defenses are structured as protection from having to be party to an action, to be presented and resolved early in the process. Chief among these are the individual officer immunity in § 1983 and *Bivens* constitutional claims—absolute legislative, prosecutorial, and judicial immunities, as well as executive qualified immunity. The latter is significant, because both the Third and Tenth Circuits have adopted a merits understanding of Church Autonomy and the ministerial exemption by likening them to qualified immunity. These all are immunities, defined as defenses against having to litigate, not just to liability. But all are treated as defenses to the merits of plaintiffs' constitutional claims. They are limitations on the rights and duties established by the Constitution and its enforcement mechanisms for any violations; they do not affect the court's authority to hear and resolve the action.

Nor does the fact that Church Autonomy is constitutionally derived matter. The source of a defense (Constitution v. statute v. common law) does not tell us anything about its nature, quality, or characterization. In fact, federal legislative immunity is constitutionally grounded—in the Speech or Debate Clause of Art. I—but always is treated as a limit on and defense to the substantive merits of the claim.

Ultimately, the label we place on a defense—(judicial) jurisdiction or merits—does not speak to the underlying importance of that defense. The question is what the defense seeks to achieve or protect and what is necessary to make that defense fully effective. Church Autonomy perhaps demands certain incidents, such as non-waivability or early assertion, to be fully effective. But the defense still is doctrinally significant even if seen as a limit on substantive law and not adjudicative authority.

**III. Direct regulation of Churches and merits understanding**

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In characterizing Church Autonomy, it is important to find a singular characterization. The defense cannot go to judicial jurisdiction in some instances and to the merits and the scope of underlying substantive law and rights in other instances. With that in mind, the third category of Church Autonomy cases—direct regulations of Church organization, structure, and practice—demonstrates why the doctrine is best analyzed as one of substantive merits.

Suppose Connecticut Raised Bill No. 1098 had been enacted; the Catholic Church wants to challenge its validity under the First Amendment and Church Autonomy.<sup>10</sup> This challenge might occur through two distinct procedures, either of which shows the merits (or non-jurisdictional) nature of Church Autonomy.

First, Connecticut might bring an enforcement action against the Catholic Church, likely in state court, to compel the Church to comply with the duties imposed by the legislation; the Church would defend by challenging the constitutionality of the law under the First Amendment, asserting its liberty (and freedom from duty) to control its structure and governance as products of faith and Church doctrine.<sup>11</sup> There is no jurisdictional concern here; Connecticut courts certainly have adjudicative to hear and resolve an action by the State of Connecticut to enforce its own law. The First Amendment/Church Autonomy issue now is squarely presented to the court for resolution. Procedurally, this case is identical to any action in which a plaintiff attempts to enforce state legal rules in the face of a federal constitutional defense. If the court accepts the validity of the First Amendment arguments, it reflects a judicial determination that the legal rule creating the claim-right does not and cannot exist as law and there can be no secular legal rule imposing any duties against the Church as to its organization and governance; the Church thus prevails on the merits because the First Amendment renders invalid (non-existent) the law to be enforced. If the court decides the law is constitutional, then state law exists imposing duties on the Church that the State can enforce in court and the State will prevail on the merits.

Alternatively, the Church could bring a pre-enforcement action in federal court under § 1983 and *Ex Parte Young*, seeking to enjoin future enforcement of the statute as violating the First Amendment. The same issues are again presented to the court—it must decide whether the Connecticut statute is constitutional (thus whether it exists as enforceable law) and whether, in light of Church Autonomy, Connecticut can regulate churches in this way.

The case now resembles any pre-enforcement constitutional challenge to state law. Adjudicative jurisdiction is obvious; the Church asserts a right arising under the Constitution and laws of the United States (the First Amendment and the § 1983 cause of action) and the Church's action is "made possible" only because of those provisions of federal law. The jurisdictional inquiry does not touch on the validity

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<sup>10</sup> The Catholic Church almost certainly would be the party to bring the challenge, because the bill was expressly directed at the Catholic Church and sought to impose on the Catholic Church the organization and governing structure of Protestant denominations.

<sup>11</sup> The bill did not specify how it was to be enforced, for example, whether a member of a parish could sue the Church if it failed to comply with its duties.

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of the Church’s First Amendment argument or the validity and enforceability of the state law. Those questions go to the merits of the Church’s constitutional challenge and whether the court should enjoin enforcement of the (non-existent) state law.

This split between the jurisdictional and merits inquiries would be unquestioned in a non-Church Autonomy case. Thus, in *Church of the Lukumi*, a church and a member of the faith brought a pre-enforcement challenge under § 1983 to a city ordinance that prohibited conduct (killing of animals) central to plaintiffs’ religious practices of ritual animal sacrifice; the case’s procedural history made clear that the district court recognized that it had original jurisdiction because the case arose under federal civil rights laws and treated the First Amendment question as going to the merits.<sup>12</sup> The only difference between this case and our hypothetical challenge to the Connecticut statute by the Catholic Church is that the latter involves direct regulation of church structure and a Church Autonomy argument, while the former involved a general regulation of conduct that some wanted to engage in for religious reasons. But that should not make a difference for purposes of jurisdiction/merits characterization; both reflect First Amendment limits on the right/duty correlatives that can exist as enforceable substantive secular law and the constitutional validity of the state law is the question at the heart of the merits of the federal claim.

Church Autonomy is a singular doctrine—a prohibition on secular rules that attempt to influence, review, or control questions of faith and religious teaching, theological pronouncements, ministerial and clergy decisions, or the structure, organization, and internal workings of religious institutions—which should be characterized and treated the same across all three categories of cases. Thus, if Church Autonomy is a limit on prescriptive jurisdiction as applied to direct attempts to regulate Church organization and governance, it similarly must be a limit on prescriptive jurisdiction as applied to state property law and federal employment-discrimination law. If it is clear that the Church’s Freedom of the Church challenge (offensive or defensive) to Raised Bill No. 1098 will be a merits question, it should be equally clear that the question of whether the ministerial exemption precludes Church liability under Title VII for firing a priest or other ministerial employee also will go to the merits.

#### **IV. Church Autonomy and Abstention**

A final judicial-jurisdictional argument, particularly as to ministerial-employee cases, likens Church Autonomy to the *Rooker-Feldman* Abstention Doctrine. As the Court most recently enunciated the doctrine, *Rooker-Feldman* requires federal courts to abstain from “cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.”<sup>13</sup> District courts lack appellate jurisdiction over state-court judgments; review of state-court judgments is vested solely in the

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<sup>12</sup> *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 723 F. Supp. 1467, 1469 (S.D. Fla. 1989), *rev’d on other grounds*

<sup>13</sup> *Exxon Mobile Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005).

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Supreme Court. District courts thus lack adjudicative power to hear claims that functionally ask them to review state-court decisions, even if framed not as appeals but as claims otherwise within district court original jurisdiction, such as claims that the state-court judgment violated the Constitution.

Arguably, a Title VII claim by a fired priest functionally asks the district court to review the Church's religiously grounded determinations as to the quality of the priest's performance as a teacher and minister, as a by-product of deciding whether the firing was for a statutorily prohibited reason. While the priest-plaintiff alleges the firing was because of race, the Church insists it was because he did a poor job ministering to his flock; in deciding whether the firing was because of race, the district court would be reviewing the Church's decision that he did a poor job ministering. The district court must abstain for reasons akin to *Rooker-Feldman*, which is plainly a jurisdictional bar—because of the First Amendment, federal district courts lack appellate jurisdiction to review decisions by Ecclesiastical authorities in the guise of resolving questions of federal law. The same is true for a property dispute following a schism; the decision by religious authorities as to which is the “true” Church entitled to control the property should not be subject to appellate review in district court.

This argument is wrong for several procedural reasons. First, *Rooker-Feldman* is a product of the connection between jurisdictional grants to the various courts within the Article III judiciary; the district courts lack jurisdiction because another federal court, the Supreme Court, has appellate jurisdiction over final state-court judgments. But that alternative forum is absent here; the Supreme Court has not been granted adjudicative authority over Church decisions. Thus the textual rationale for *Rooker-Feldman* is missing. Second, the *Rooker-Feldman* analogy does not explain the jurisdictional characterization in state court.

Third, the ministerial exemption does not limit the court because the decision requires review of the Church decision, but because the review requires the court to decide issues of religious doctrine and dogma as part of the review. The nature of the required judicial decision, not its procedural posture, drives Church Autonomy and immunizes its decisions from control by secular law. The First Amendment kicks-in because the underlying decision being challenged went to a matter of Church teaching, doctrine, and structure.

Fourth, and more fundamentally, *Rooker-Feldman* is a product of judicial federalism—the relationship between federal government and state government and the power of states to establish their own judicial systems and it assumes judicial processes in the state below. But a priest or other ministerial employee who has been fired has not necessarily received judicial process, even if he had some review of the initial decision. Thus, the attempted Title VII claim really is challenging an administrative decision, not the type of judicial decision that *Rooker-Feldman* assumes. Indeed, the Supreme Court in *Feldman*

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recognized that only judicial decisions, not legislative (or, we could assume, administrative) decisions fall outside the court's jurisdiction.