

SCHISM, PLAGUE, AND LATE RITES IN THE FRENCH QUARTER: THE
STRANGE STORY BEHIND THE SUPREME COURT'S FIRST FREE EXERCISE
CASE

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On November 9, 1842, Father Bernard Permoli performed an open casket funeral in the church of St. Augustin in the French Quarter of New Orleans, Louisiana. He blessed the body and offered the prayers specified by the doctrines and forms of the Roman Catholic Church. For this performance of the priestly function, he was prosecuted by the City, criminally convicted, and fined \$50.¹ The ceremony violated a city ordinance, passed thirteen days before, prohibiting open casket funerals at all “Catholic Churches” of the city, other than a designated mortuary chapel on the outskirts of town.² After he was charged for the violation, Permoli filed an answer claiming the protection of the Free Exercise Clause of the First Amendment.

Thus began a case that went all the way to the United States Supreme Court. Under the name of *Permoli v. Municipality No. 1 of the City of New Orleans*,³ it was the first Supreme Court case in which a party invoked the protections of the Free Exercise Clause of the First Amendment. Unfortunately for Father Permoli, the Court rejected his argument, holding, in a unanimous opinion by Justice Catron, that the Free Exercise Clause does not apply to the acts of state and local governments. The case is now cited, along with *Barron v. Baltimore*,⁴ solely for the proposition that the Bill of Rights did not apply to the states prior to the Fourteenth Amendment. Except for that, the case has largely been forgotten.

That is a loss. Not only do the arguments in the case tell us a great deal about the state of free exercise jurisprudence in the antebellum period; the case itself is a darned good story.

¹ \$50 in 1842 was by no means an insignificant sum. According to the Consumer Price Index, \$50 adjusted for inflation would be about \$1100 in today’s dollars. See “Inflation Calculator,” <http://www.westegg.com/inflation/> (accessed March 25, 2010). Apparently, a parishioner, by the name of P.E. Crozat, agreed in advance to pay the fine if Father Permoli’s appeal were not successful. *Permoli v. Municipality No. 1*, 44 U.S. 589, 593 (1845).

² In its initial version, the ordinance provided: “Resolved that from the date of the promulgation of the present ordinance, it is forbidden to transport and to expose in any of the Catholic churches of this municipality, any dead body, under pain of a fine of fifty dollars . . . All dead bodies should be transported to the Obituary Chapel situated on *Rue des Ramparts*, where the funeral ceremonies will take place.” *Le Courier*, October 31, 1842. This publication was the official organ of the State of Louisiana.

³ *Permoli v. Municipality No. 1*, 44 U.S. 589, 600 (1845).

⁴ *Barron v. Baltimore*, 32 U.S. 243 (1833).

The constitutional arguments in the case

Legal scholars generally regard modern free exercise jurisprudence, and especially arguments over exceptions from generally applicable laws, as a product of the modern rights revolution. The arguments in *Permoli* contradict this. The lawyers for both sides raised arguments remarkably similar to what we might expect in a free exercise case today.

The principal bone of contention in the case (other than whether the First Amendment applied to the states) was the City's justification for its ordinance. Counsel for the city insisted that the ordinance was justified on the basis of its protection of public health. As he argued:

New Orleans is visited annually with the yellow fever, in either the sporadic or epidemic form, and strong sanitary measures are deemed indispensable there to check the range and prevalence of the pestilence when it comes.⁵

He noted that in 1827 the city council enacted a similar ordinance banning the exposure of dead bodies in the parochial church of St. Louis, the Catholic cathedral. The 1842 ordinance was essentially the same law, only now it applied to all Catholic churches instead of just the cathedral.⁶

This public health argument was not entirely implausible under the medical knowledge of the day. New Orleans was frequently wracked by yellow fever in the summer months, and the death toll was devastating. In 1832, a twin plague of yellow fever and cholera, one of the worst plagues in American history, killed one in six residents of the city.⁷ Another virulent epidemic struck just the year before Father Permoli performed his controversial funeral ceremony; it killed 1800 people, a new record.⁸ While today it is known that mosquitoes, not funerals, cause yellow fever, medical experts did not know that in 1842. The prevailing theory for the cause of yellow fever was "miasmata" or "atmospherics" -- noxious exhalations from putrescent organic matter, emanating from swamps, stagnant water, and decaying plant or animal material.⁹ In a world in which comets, sunrays, and other astrological activities were sometimes thought to contribute to the disease¹⁰ (and in which doctors were increasingly aware that

⁵ *Permoli v. Municipality No. 1*, 44 U.S. 589, 600 (1845).

⁶ *Id.* at 603.

⁷ A.E. Fossier; "Yellow Fever and It's Influence On the Development of New Orleans;" *Bulletin of the Medical Library Association*, Vol. 30. No. 4; July 1942; p. 324.

⁸ Jo Ann Carrigan; *The Saffron Scourge: A History of Yellow Fever in Louisiana, 1796-1905* 46 (University of Southwestern Louisiana 1994).

⁹ Carrigan, at 208.

¹⁰ *Id.*

yellow fever was not contagious),¹¹ it was not much of a stretch to think that “exhalation” from a dead human corpse could be a cause of the fever.¹²

But even so, the New Orleans funeral ordinances raise more questions than they answer. Why not simply require prompt burial during the summer months, which was a common measure of the time? Why allow funerals in private homes but forbid them in Catholic churches? Why allow the elaborate funeral processions through the streets? Why direct the prohibitions only at “Catholic” churches, and their penalties only at “priests”? Why exempt the mortuary chapel? Perhaps oddest of all, why pass the ordinances in late October and early November, just when the first frost removed all danger of the summer infestation?¹³ As we will see, there is reason to believe the City Council had motives besides public health.

Father Permoli’s lawyers offered three arguments in support of his claim that the funeral ordinances were unconstitutional. First, the ordinances applied only to “one denomination of worshippers” – Roman Catholics – thus demonstrating the “tyrannical nature” of the ordinances, which violated the principal of “equality before the law.”¹⁴ Today we would call this denominational discrimination; it is almost invariably deemed unconstitutional.¹⁵ Second, the ordinances “punish the performance of a religious function by individuals acting in their religious capacity;” they “legislate for the priest as priest.” The laws did not punish others who performed the same act of “transporting and exposing, or causing to be transported or exposed, any corpse.”¹⁶ Today we would say this singles out religion for a selective prohibition.¹⁷ Third, even if the ordinance were viewed “as a measure of quarantine precaution,” it could not be sustained because “such prohibitory legislation infringes rights more precious than mere animal health.”¹⁸ Even today, direct regulation of forms of worship entails close judicial examination.

Counsel for the City denied that the ordinance discriminated against Catholics, pointing out that most Protestants lived outside the old city and that Methodists, who were the only Protestants with a church in the French Quarter, performed funeral services

¹¹ *Id.* 208-211.

¹² According to the historical website for the mortuary chapel, the fear that yellow fever was caused by “exhalation” from the corpse inspired the ordinance confining open casket funerals to that facility. See *The History of Our Lady of Guadalupe Church*, <http://www.neworleanschurches.com/olguadalupe/history.htm> (accessed Nov. 21, 2009.).

¹³ November was the month when most residents who had fled the city would return from the countryside. It was widely understood that the yellow fever tended to disappear with the first frost. See Carrigan, *supra* n. 10, at 44.

¹⁴ *Permoli*, 44 U.S. at 597.

¹⁵ See *Bd. of Education of Kiryas Joel v. Grumet*, 512 U.S. 687 (1994); *Larson v. Valente*, 456 U.S. 228 (1982).

¹⁶ *Permoli*, 44 U.S. at 597-598.

¹⁷ See *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

¹⁸ *Permoli*, 44 U.S. at 600.

at the graveside rather than in the church.¹⁹ Additionally, counsel argued that religious free exercise rights could not have been violated because the performance of funeral rights in the church was not a matter of Catholic dogma but of “discipline.”²⁰ Most interestingly, counsel for the City observed that “a majority, and very frequently the whole”²¹ of the city council was composed of Catholics, which makes it unlikely the council was discriminating against the Catholic religion. “If Catholics are wronged,” he said, “Catholics have wronged them.”²²

The case thus raised a number of issues that would like be at the heart of a free exercise case today:

- How can courts tell whether legislation is neutral and generally applicable? Does it matter?
- Is it necessarily unconstitutional for a law to mention a particular religious denomination by name?
- How strong a governmental justification is required to override free exercise rights?
- Does the existence of major exceptions, or of substantial underenforcement, rebut the government’s claim of a compelling interest?
- Can the courts question whether the foundation of the government’s asserted interest is empirically valid?
- Does free exercise protect religiously motivated conduct, or only conduct compelled by religious doctrine?

A final decision on the merits would have established precedent on many issues the Court would not address for another 120 years.

Even more interesting than the legal arguments, however, are the facts of the case. What precisely was going on? Why would a predominantly Catholic city council pass an ordinance directed solely at Catholic priests, prohibiting the performance of a sacerdotal function according to Catholic rites? Why did the city council wish to confine funerals to the mortuary chapel on Rampart Street? Why did Father Permoli risk criminal punishment rather than conduct services in the mortuary chapel? Why was the case important enough to go all the way to the Supreme Court? Much of the behavior on both sides seems bizarre, and suggests that there must be a story behind the story.

You are about to read the author’s attempt to figure out what was going on behind the scenes in *Permoli*. Be aware that this account involves inference, “detective work,” and, admittedly, speculation. The thesis is that Father Permoli’s case had little or nothing to do with public health or yellow fever, let alone anti-Catholic oppression. It was a

¹⁹ *Id.* at 601.

²⁰ Cf. *Mack v. O’Leary*, 80 F.3d 1175 (7th Cir. 1996) (protecting religiously motivated as well as religiously mandated conduct).

²¹ *Permoli*, 44 U.S. at 601.

²² *Id.* at 602.

daring gambit in a civil war among Roman Catholics regarding how their hierarchical Church should be organized in the new democratic society of the United States – a fight about property, money, power, hierarchy, and ethnic status.

The Conflict Between Catholic Hierarchy and Laity Over Control of Church Property

Centrifugal and centripetal forces have always been in tension within the Roman Catholic Church. As a worldwide – a “catholic” – church, under the leadership of a single supreme pontiff, acting through bishops who in turn control the clergy and churches within their local dioceses, the Catholic Church is theoretically transnational, unified, and hierarchical. But throughout its history, this unified, transnational ideal has come into conflict with local centers of power, which wished to place a stamp of national identity on the church within their borders.

Consider, for example, the Investiture Controversy – probably the most famous instance of this conflict. In the eleventh century German princes had come to exercise the authority to appoint bishops. Pope Gregory VII, a reformer and centralizer, refused to countenance the practice.²³ This conflict led to fifty years of war, as subordinate German nobility used the religious issue as an excuse to resist imperial authority. Eventually the Concordat of Worms abolished the authority of secular authorities to determine the bishop, which meant, in reality, that they exercised their influence informally. Similar conflicts arose in England and France, with opposite results: after the fiasco with Becket, the Pope gained the upper hand in England until Henry VIII’s break with Rome, while in France powerful kings fashioned a Gallican Catholic Church largely under their own control.

If in Europe the Pope’s principal competitors for power were kings and nobles, in America the controversy took a democratic turn. In Protestant, democratic, and voluntaristic America, it seemed natural for Catholics to found their own congregations, elect their own leaders, and run their own affairs.

In the early days of the American republic, Catholics were so few in number -- about 30,000, barely one percent of the population²⁴ -- and so distrusted by the wider population that issues of internal organization could be overlooked. There was no bishop until 1790. Well into the next century, the bishop could not exert practical authority over much of the nation. As Catholic immigrants swarmed into the United States from Germany, France, and especially Ireland in the early part of the nineteenth century, they did not wait for the central church authorities to establish churches for them, as canon law might seem to require. They did this for themselves. And as they founded churches,

²³ For the Investiture Controversy generally, see Loffler, K., *Conflict of Investitures* in *New Advent Catholic Encyclopedia*, <http://www.newadvent.org/cathen/08084c.htm> (accessed November 15, 2009); see also *The New Encyclopedia Britannica* vol. 6, 363a (15th ed., Encyclopedia Britannica, Inc. 1994).

²⁴ Robert T. Handy, *A Christian America: Protestant Hopes and Historical Realities* 58 (Oxford U. Press 1971).

Catholic Americans understandably borrowed from the legal frameworks available to churches in their states, which were based on a Protestant model of church governance. In this model, the temporal affairs of the church and often the powers of appointment of clergy are vested in a board of laypersons elected by the congregation, called variously a board of elders, wardens, trustees, or vestry. This model suited the hardy individuals on the American frontier, who (even if they were Catholics) tended to make decisions for themselves.

Thus began the practice commonly known as “Trusteeism.” One church historian has described trusteeism as:

a form of ecclesiastical democracy that asserted the rights of an American National church vis-à-vis the Roman Church, a separation of spiritual and temporal roles within the church itself, ultimate lay control over ecclesiastical temporalities, lay participation in selection of the clergy, the rights of the local clergy to due process in the church, and the establishment of some written constitutional instrument that would define and limit the relative prerogatives and duties of all individuals within the ecclesiastical community.²⁵

As these references to democracy, due process, written constitutions, and lay control suggest, trusteeism was in large part an attempt to refashion the Catholic Church in accordance with the democratic mores of the American culture. Yet trusteeism was not only driven by American principles; it also had roots in European traditions of resistance to the centralizing tendencies of Rome. Trustees appealed not only to American laws and values, but also to Old World precedents of lay and localized management and patronage.

As the American Catholic governing structure matured, and as the authority of trustees began to conflict with that of priests and bishops, the hierarchy became concerned. At the First Provincial Council of Baltimore, in 1829, the Church adopted new rules requiring that title to property be vested in the name of the bishop, where possible, and denying that trustees in the United States could exercise any of the traditional powers of patronage – especially the power to name the parish priest.²⁶

Despite the Council, local church leaders often were reluctant to relinquish power over institutions that they had created and for which they had paid. Bitter conflicts erupted over this issue in a number of American cities, notably New York, Philadelphia, Baltimore, Norfolk, Charleston, New Orleans, and Buffalo. This set of conflicts is known as the “Trusteeship Controversy.”²⁷

²⁵ Patrick W. Carey, *People, Priests, and Prelates: Ecclesiastical Democracy and the Tensions of Trusteeism 2* (U. Notre Dame Press 1987).

²⁶ See Fanning, W., *Provincial Councils of Baltimore in New Advent Catholic Encyclopedia*, <http://www.newadvent.org/cathen/02239a.htm> (accessed November 15, 2009).

²⁷ See, e.g., Comeau *supra* n. 4 at 897-898 nn. 1-3.

American constitutionalism had something to offer both sides in this conflict. Advocates of the trustees liked to invoke notions of republicanism and democracy in church governance, but the separation of church and state in the United States enabled the hierarchy to assert its authority without governmental influence. As one scholar has explained:

Unlike the European Catholic Church, which had lost its freedom because of the involvement of state governments in ecclesiastical affairs and because Rome had reluctantly and unwisely accepted these conditions through various concordats, the American Catholic Church was free to assert ecclesiastical authority and discipline unencumbered by governmental or lay restraints.²⁸

As a cultural matter, Americanism may have strengthened the trustees' hand, but as a legal matter, the separation of church and state meant that the Catholic Church could be as hierarchical and un-republican as it pleased.

The Early History of the Catholic Church in New Orleans

New Orleans, where our story unfolds, was the only place in the United States where the Catholic Church predominated. New Orleans thus had a different history, but the trusteeship controversy erupted just the same.

France settled New Orleans in 1718 and ceded the Louisiana territory to Spain in 1763. By 1793, the city had become sufficiently populous and important to be made the See of a new Diocese of New Orleans and the Floridas, within the Archdiocese of Santo Domingo.²⁹ The Church of St. Louis, which became the cathedral church, was founded as a parish in 1720. The building was completed in 1728 with the help of private donors. The early clergy were members of the Capuchin order, which requires that its members take a vow of poverty precluding them from owning property. Accordingly, the first pastor deeded all the property and income of the church in the name of a lay board of trustees.³⁰

In 1788 the building burned down. It was rebuilt between 1789 and 1794 through the generosity of Don Andres Almonester y Roxas, a public official, major urban landowner, and philanthropist. Under the Spanish law governing New Orleans at that time, the king possessed the right to name the bishops, priests, and prelates of Catholic churches in the New World, subject to papal approval.³¹ In recognition of Don Almonester's generosity, the King of Spain granted Almonester the right of patronage –

²⁸ Carey, *supra* n. 33 at 197.

²⁹ See Marie Louise Points, *New Orleans in New Advent Catholic Encyclopedia* <<http://www.newadvent.org/cathen/11005b.htm>> (accessed November 15, 2009).

³⁰ Comeau, *supra* n.4 at 900.

³¹ *Wardens of the Church of St. Louis v. Blanc*, 8 Rob. 51, 1844 WL 1490, *1 (La. 1844).

that is, the right to nominate clergy – in the St. Louis Cathedral.³² The City Council and the Spanish governor held title to the property of the church building itself.

Shortly after completion of the new cathedral building, in 1800, Spain ceded the vast Louisiana territory back to France. In 1803, before the French could assert authority, Napoleon sold the territory to the United States. The transfer disrupted the life of the Church in New Orleans. Catholic, French-speaking population was generally hostile to the American annexation and feared for survival in English-speaking, Protestant America. The bishopric had been vacant for two years, and all but four of the twenty-six clergy in the province fled in anticipation of American control.³³ No one knew who was in charge. The Archiepiscopal See of Santo Domingo, which had jurisdiction over the New Orleans Diocese under the Spanish, was vacant, and the bishops of the Spanish provinces refused to exercise any authority in U.S. territory.

It was a time of chaos and anxiety for the Church. One indication of the panic is a letter written by the remaining members of the Ursuline Sisters in New Orleans to President Thomas Jefferson, asking in effect whether they would be permitted to continue their orphanage, school, and convent. Jefferson wrote back:

The principles of the Constitution of the United States are a sure guaranty to you that it will be preserved to you sacred and inviolate, and that your institution will be permitted to govern itself according to its own voluntary rules without interference from the civil authority.

Jefferson went on to tell the Ursuline sisters that their school would enjoy “patronage” from the territorial government and that they might “be assured that it will meet with all the protection [his] office [could] give it.”³⁴

Shortly after the United States assumed authority over Louisiana in 1805, the congregation of the Church of St. Louis assembled and assumed control of the cathedral. In addition to the usual factors supporting lay or trustee authority over Catholic churches in the United States, factors peculiar to New Orleans strengthened the congregation’s resolve to take the reins: recent French revolutionary legislation permitting the popular election of clergy, the absence of a Catholic hierarchy after the Spanish withdrawal, and reluctance to suffer subordination to an American bishop. The congregation elected a lay committee of trustees, also called “wardens” or “marguilliers,” to handle cathedral affairs. The city council and former Spanish governor transferred their former authority over patronage and church property to this committee,³⁵ making the wardens the legal successors to the donor, the Spanish king, and the prior city government with respect to

³² *Id.* at 902.

³³ Points, *supra* n. 29.

³⁴ The original of this letter is in the archives of the Ursuline sisters in New Orleans; a copy is on file with the author. It will be published in the new edition of the complete papers of Thomas Jefferson.

³⁵ Points, *supra* n. 37; Blanc 1844 WL at *3; Comeau, *supra* n. 4 at 904.

powers over the church. The congregation also elected Father Antonio de Sedella, a Spanish Capuchin, better known as “Pere Antoine,” as parish priest.

Pere Antoine was quite a character. Although a Spaniard, the French-speaking Catholics of New Orleans adored him and he continues to be venerated to this day. He was brilliant, charitable, and much loved by the poor. His portrait hangs in the museum of the Cabildo. He is dressed simply in the brown robe of a Capuchin friar, with a rope for a belt; his expression looks somewhat crazed. In many ways, Pere Antoine’s character typifies the local ethos. Antoine was caring and devout, but he was also not afraid to defy authority or challenge accepted notions. Though the people of New Orleans loved Pere Antoine, the Church hierarchy was less enthralled.

Antoine had a shady history, and much is uncertain. He arrived in New Orleans in 1779 and first became curate of the Church of St. Louis in 1787. At one point, he was taken from New Orleans to Spain in chains (some say because of the Spanish Inquisition; others because Antoine allegedly killed a man in a fight over a woman). Not setting much store by conventional morality, Antoine lived more or less openly with a mulatto concubine in the Catholic rectory. He was an enthusiast of the French Revolution, a supporter of Free Masonry, a critic of the excesses of slavery, and an antagonist toward papal and episcopal authority. When the Vatican appointed a new bishop after the War of 1812, Pere Antoine reportedly stated that he had “nothing to do with the Pope nor with the latter’s Bishops of his making.”³⁶ When he died in 1829, thousands of people attended his funeral.³⁷

The vicar general, a Father Walsh, who had remained in New Orleans after the Spanish withdrawal, objected to the congregation’s assertion of power – both to their appointment of a priest and to their election of wardens to run the cathedral. On March 27, 1805, Father Walsh issued a pastoral letter warning the congregants that any priest who exercised sacerdotal functions under the conditions then present was irregular and guilty of schism. After the wardens continued with their ordination of Pere Antoine, Father Walsh took the matter to court, seeking legal control of the Cathedral. The territorial court, however, ruled against him and gave possession to the wardens.³⁸ Happily for the wardens, the vicar general soon died, and the immediate controversy abated.

After Walsh’s death, Vatican officials transferred jurisdiction over the Louisiana diocese to John Carroll, Bishop of Baltimore. Carroll, the first Catholic bishop in the United States, had close personal and family ties to the Founders. He was friends with Benjamin Franklin. His brother Daniel served as a delegate to the Constitutional Convention from Maryland; as a member of the First Congress Daniel Carroll championed the Free Exercise Clause. Carroll’s first move upon learning of the situation

³⁶ Comeau, *supra* n. 4 at 905.

³⁷ Comeau at 906.

³⁸ Comeau, *supra* n. 4 at 904; Roger Baudier, *The Catholic Church in Louisiana* 257 (New Orleans 1939).

in New Orleans was to write to James Madison, in his capacity as Secretary of State, recommending several possible names as bishop. Madison refused to intervene, saying the matter was purely ecclesiastical.³⁹

Bishop Carroll promptly named a new vicar general to replace Father Walsh, but appointment of a bishop was delayed for almost five years while Napoleon held Pope Pius VII prisoner. In fact, New Orleans would not receive a new bishop until 1815. Meanwhile, the new vicar general allowed Pere Antoine to perform the duties of curate at the Church of St. Louis in New Orleans, and recognized the marguilliers within the limits of canon law. Thus the hierarchy and the lay wardens reached an uneasy truce.

After Pere Antoine's death in 1829, the wardens swallowed their objection to episcopal appointment of the curate when the Bishop nominated a candidate of whom they approved: Father Jean Aloysuis.⁴⁰ The uneasy truce between the wardens and the Catholic hierarchy thus continued for some time more.

During this time of relative peace, the wardens constructed a mortuary chapel on Rampart Street, dedicated to St. Anthony of Padua. The chapel is now the Church of Our Lady of Guadalupe; it is the oldest church building in New Orleans. Conveniently situated near Cemetery No. 2 and on the outskirts of the old quarter, the chapel was originally used exclusively for funerals, then later for marriages and baptisms as well. The wardens held the title to the property of the mortuary chapel, as they did the Church of St. Louis.⁴¹ The city council enacted a police regulation in 1827 confining all funerals in the old city to the mortuary chapel.⁴² The ordinance apparently excited no controversy.

Tensions Between Bishop Antoine Blanc and the Wardens

In 1835, Father Antoine Blanc, a French priest, was appointed and consecrated as Bishop of New Orleans. Born near Lyons, in France, he had been one of the first ecclesiastical students to begin studies after the restoration of the Catholic Church in France.⁴³ During the French Revolution, the state had seized and sold Church lands, and the Civil Constitution of the French Clergy had placed the Church under state control and imposed democratizing principles on the Catholic hierarchy.⁴⁴ A number of French Catholic clerics immigrated to the United States, where they often nursed a hatred for democracy, which they associated with the Terror. These French clerics stiffened the

³⁹ Points, *supra* n. 37.

⁴⁰ Blanc, 1844 WL at *4.

⁴¹ See *The History of Our Lady of Guadalupe Church*, <http://www.neworleanschurches.com/olguadalupe/history.htm> (accessed Nov. 21, 2009.)

⁴² *Permoli*, 44 U.S. at 591.

⁴³ See Meehan, T., *Anthony Blanc* in New Advent Catholic Encyclopedia <<http://www.newadvent.org/cathen/02592b.htm>> (accessed November 21, 2009).

⁴⁴ See John Merryman, *A History of Modern Europe: From the Renaissance to the Present* (New York 1996) 513-514.

spine of hierarchical resistance to the democratization implied by trusteeism.⁴⁵ Blanc, who entered seminary in the first class under the Bourbon Restoration, likely brought similar attitudes with him to America.

Soon upon his arrival in New Orleans, Bishop Blanc came into conflict with the wardens of St. Louis Cathedral. The Catholics of New Orleans were not pleased with the appointment of an outsider and a stranger. And as enthusiasts for the Revolution, most were unhappy with a counterrevolutionary bishop.

Ethnic conflict heightened the tension. By the second quarter of the Nineteenth Century, new immigrants flooded New Orleans: Germans, Anglo-Americans, and, most numerous of all, Irish Catholics. The Irish Catholics represented a serious threat to the French Creole establishment's resistance to Americanization and attempt to maintain a distinctive, French-speaking culture. The French Creole population was relatively wealthy; the Irish were poor. The Creoles were anti-authoritarian, even anti-clerical in their religious attitudes. The president of the wardens was even a Grand Master of a lodge of Freemasons.⁴⁶ The Irish of New Orleans tended toward Tridentine strictness in their religious observance and berated the Creoles for their laxness in religious matters. Unlike their fellow countrymen in Norfolk and Charleston, and partly in response to the anticlericalism of the Creole establishment, the Irish of New Orleans made a special point of accepting ecclesiastical authority.⁴⁷

Language was also an issue. The non-liturgical portions of the services at the Church of St. Louis, still the only Catholic Church in the City (except for the mortuary chapel), were conducted in French, which the Irish could not understand. The Irish clamored for new parishes, with English-speaking priests. The wardens of St. Louis opposed creating new parishes, which would reduce the population and influence of their own church and free the Irish, German, and Anglo-American congregations from Creole control. Bishop Blanc sided with the immigrants and planned to erect new parish churches in the city. In accordance with the dictates of the Provincial Council of Baltimore, title to these new properties would be vested in the Bishop.⁴⁸

In 1833, in defiance of the French Creole establishment, the Irish people of New Orleans purchased a property outside the city limits and constructed a small frame church, which they named St. Patrick's. The Bishop obliged by appointing Irish priests

⁴⁵ Carey, *supra* n. 33, at 17-18; Miller, *supra* n. 31, at 28.

⁴⁶ Patrick Dignan, *A History of the Legal Incorporation of Catholic Church Property in the United States (1784-1932)*, in *Catholic University of America Studies in American Church History* (Catholic U. of Am. Press 1933) 172.

⁴⁷ Carey, *supra* n. 33, at 111, 141.

⁴⁸ Fanning, *supra* n. 34.

to serve the new church.⁴⁹ This became the first English-speaking parish in greater New Orleans.⁵⁰

Money became another point of contention between the Bishop and the wardens. Blanc insisted that in addition to the salary paid to him by the wardens from the revenues of the Church of St. Louis, he was entitled to what was known as Cuarta Episcopal – one fourth of the perquisites (casual) of the church. This was important not only because of the sum, but because it would be a source of income independent of the wardens' control. A bishop dependent on a lay committee for his sustenance was a bishop unable to exert full Episcopal authority. The wardens refused to recognize Blanc's right to the Cuarta Episcopal, and in retaliation, reduced Bishop Blanc's salary, claiming that he never preached in the cathedral church and thus did not render services commensurate with his pay.⁵¹

The Bishop also clashed with the wardens on the contentious issue of Free Masonry. Under church law, masons were barred from taking the holy sacraments, but in New Orleans, under practice established by Pere Antoine, they were welcome. In fact, masons often served as wardens, and the president of the Board of Trustees was a Grand Master of the Masonic Lodge. In 1843, the wardens authorized construction of a tomb in Cemetery No. 2 exclusively for the use of Catholic members of the Masonic Lodge. Since church law forbade the burial of Freemasons in Catholic cemeteries, this was a flagrant act of defiance. Indeed, Abbe Napoleon Joseph Perche, a subordinate of Blanc, publicly declared the erection of the tomb "Scandalous Profanation" and a ceremony unveiling it "slovenly and scurrilous mockery of Catholicism."⁵²

The conflict between the Bishop and the wardens was therefore:

- Political – The Bishop was a European-style conservative, distrustful of democracy. The wardens tended to side with the French Revolution.
- Ethnic – The Bishop sided with the immigrants to New Orleans at the expense of the French Creole aristocracy.
- Moral – The Bishop wished to instill greater moral discipline, which was not exactly consistent with the moral traditions of the City.
- Theological – The wardens favored Free Masonry and verged on anti-clericalism.
- Financial – A key issue was who would control the money.

But more than anything, it came down to a struggle over power.

⁴⁹ Miller, *supra* n. 31, at 33.

⁵⁰ For more on St. Patrick's New Orleans see *Our History*, <http://www.oldstpatricks.org/ourhistory.htm> (accessed November 21, 2009).

⁵¹ *Blanc*, 1844 WL at *4.

⁵² Caryn Cosse Bell, *Revolution, Romanticism, and the Afro-Creole Tradition in Louisiana, 1718-1868* (Louisiana St. U. Press 2004) 150.

Surprisingly, one aspect of antebellum New Orleans society that was not central to the dispute was race. In general, the Catholic Church in the antebellum South supported slavery. The French Creole elite, who embraced the French Revolution and Free Masonry but had deep economic ties to the slavery-dominated economy of the South, may have been more ambivalent about the peculiar institution. One might therefore expect this dispute over control of the Church to connect with a deeper divide over race and slavery, but in New Orleans this was not the case. The one subject on which Pere Antoine, Bishop Blanc, and the wardens were compatible was race.

Many mixed-race “free persons of color” in New Orleans attained positions of wealth and power. Indeed, some of them owned slaves – the only place in the United States where descendants of Africans could be slaveowners. Catholic church life reflected this unusual racial heterogeneity. For example, Pere Antoine insisted upon non-segregated worship services.⁵³ As one historian has put it: “In Creole New Orleans, an intermediate class of free people of color had gained a measure of acceptance under Latin European influences. Until the 1830s, the city’s liberal religious culture helped to delay the imposition of a sharply-defined, two-tiered racial hierarchy.”⁵⁴

Although Bishop Blanc was generally conservative with respect to both ecclesiology and morality, he maintained the liberal religious culture with regards to race. Blanc took two actions that anywhere else in the South would have been anathema. First, he obtained authorization from the Vatican to create the Sisters of the Holy Family, a religious order of free women of color which founded schools, orphanages, and other institutions for the benefit of slaves and poor persons of color.⁵⁵ At a time when teaching slaves to read was in most places in the South a crime, this act was remarkable.⁵⁶ Second, Blanc founded a parish church for free persons of color, reportedly the first predominantly African-American Catholic church in the United States.⁵⁷

This church, St. Augustin, is where Father Permoli performed his illegal funeral. While it is interesting that the locus of the *Permoli* conflict was a church for persons of color, racial issues do not appear to have contributed to the dispute. The significance of St. Augustin for our story is that the Bishop, not the wardens, owned the property.

Open Rupture, Schism, and Litigation

⁵³ *Id.* at 68.

⁵⁴ *Id.* at 67.

⁵⁵ *Id.* at 131.

⁵⁶ The foundress of the Sisters of the Holy Family, Henriette Delille, a close associate of Bishop Blanc, has been proposed for canonization. If canonized, she would be the first American-born black saint. For more on her life, *see* <http://sistersoftheholymfamily.com/AboutHenrietteDelille.html> (accessed November 21, 2009).

⁵⁷ *See Summary of Church History*, <http://www.staugustinecatholicchurch-neworleans.org/hist-sum.htm> (accessed November 21, 2009).

Tensions between the Bishop and the wardens came to a boil upon the death of Pere Antoine's later successor as curate, Father Moni, in August 1842. Bishop Blanc wished to appoint a priest from France who would "take charge of the congregation." Indeed, Blanc's fellow bishops had encouraged him not to "let the opportunity slip out of your hands."⁵⁸ Blanc did seize the opportunity, by appointing Father Etienne Rousselon, against the wishes of the wardens, who sought the appointment of a local favorite, Father M.B. Anduze.⁵⁹ The wardens accused the Bishop of appointing Rousselon on the basis of "favoritism," not "merit."⁶⁰ Rousselon, they alleged, was Blanc's "personal friend – a foreigner, a priest unknown to the wardens, ... who had no claim on their confidence."⁶¹

Relations skidded downhill from there. In late August, the wardens declared that they "denied the authority and jurisdiction of the Sovereign Pontiff; treated with scorn and contumely the authority of the Bishop of New Orleans; ... [stated they] do not belong to the Catholic Church." The wardens thus put the Church of St. Louis into open schism. Newspapers recorded continuing vitriolic rhetoric between the two sides.⁶²

The parties reached a temporary compromise with the appointment of a new curate, Father Constantius Maenhaut. The wardens seemed willing to give Maenhaut the benefit of the doubt, since Blanc had obliged by removing Rousselon. But Father Maenhaut quickly showed his true colors as a supporter of episcopal authority, and the wardens withdrew their consent. Bishop Blanc tried again the following year with the appointment of one Father Bach, but he too proved unsatisfactory to the wardens.

For almost three years, a dispute raged over the curacy of St. Louis. Bishop Blanc twice appealed to Rome for support. In turn, the wardens lobbied the state legislature to enact a law that would confirm their power of patronage.⁶³ The wardens enjoyed widespread support among the Catholic people of the city. In the parish election of September 1842, held in the midst of the dispute over Rousselon, the warden's slate won by a margin of two to one over the Bishop's slate, with nearly three times the ordinary turnout of electors.⁶⁴

As the conflict continued, Blanc decided to raise the stakes. On November 2, 1842, he ordered all priests (except one) to leave the Church of St. Louis.⁶⁵ He was able to do this because less than one month before, on October 8, the diocese had dedicated a new church: St. Augustin. In addition to being (in all likelihood) the first Catholic church in America with a largely non-white congregation, St. Augustin was the first church within the city limits with to which the Bishop had clear legal title. Importantly, the 1827

⁵⁸ Comeau, *supra* n. 4, at 908.

⁵⁹ *Id.* at 909.

⁶⁰ *Id.* at 911.

⁶¹ *Blanc*, 1844 WL at *4.

⁶² Comeau, *supra* n. 4., at 911-912.

⁶³ Carey, *supra* n. 33, at 270.

⁶⁴ *Id.* at 123; Comeau, *supra* n. 4, at 913.

⁶⁵ Comeau at 919.

city ordinance forbidding funerals at St. Louis did not extend to the new church. Priests could therefore conduct services, including funerals, at St. Augustin without submitting to any authority on the part of the wardens. Perhaps more importantly, any revenues from these services would accrue to the diocese and not to the wardens. While Catholic churches did not charge fees for performing the final sacrament at a funeral, they did charge a fee, called “casual,” for the optional services of going to a home where the body was laid out and accompanying it in procession to the church and cemetery where further words would be said.⁶⁶ There was an elaborate schedule of fees for these actions, with the fees going to whoever controlled the churches in which the services were performed. Removing the priests from St. Louis thus left the parishioners bereft of the holy sacrament (unless they were willing to attend a church under episcopal control), but also deprived the wardens of revenues from religious services.

The wardens responded with a lawsuit against Bishop Blanc in state court. They alleged that their right to nominate a curate to St. Louis was a protected property right, enforceable in law, and that the Bishop’s attempt to frustrate that right by blocking religious services in the church had injured them to the extent of \$20,000⁶⁷ in damages. The wardens also sued for libel, on account of the Bishop having called them “schismatics.”⁶⁸ (If that was libel, it would get worse. In the United States Supreme Court the bishop’s lawyers would call them “notorious schismatics.”⁶⁹)

The wardens claimed the right of appointment on several grounds: as incidental to their ownership of the church, as successors to the right of patronage under French and Spanish law, under articles of incorporation, and by virtue of thirty years of uninterrupted possession. Their best argument, made on petition for rehearing, was that at the time the church was constructed, their predecessors (particularly Don Andres Almonester y Roxas), had a legally enforceable property right to nominate the curate. To take away this right would violate the “vested rights” doctrine of *Dartmouth College v. Woodward*.⁷⁰

While this litigation proceeded, the Bishop of Baltimore, in consultation with Bishop Blanc, called upon Chief Justice Roger B. Taney, a Roman Catholic from Maryland, to obtain his legal advice. Taney declined on the ground that the case might come before him.⁷¹

The Supreme Court of Louisiana dismissed the warden’s suit in an impressive and eloquent opinion, resting on the principle that a civil court has no authority to intermeddle in ecclesiastical affairs. The court held that the Spanish ecclesiastical laws

⁶⁶ See Thurston, H.; *Christian Burial*, in *New Advent Catholic Encyclopedia*, <http://www.newadvent.org/cathen/03071a.htm> (accessed November 21, 2009).

⁶⁷ Approximately \$441,000 in today’s dollars.

⁶⁸ *Blanc*, 1844 WL at *21.

⁶⁹ *Permoli*, 44 U.S. at 599 (argument of counsel).

⁷⁰ *Blanc*, 1844 WL at *25 n. *. For the *Dartmouth College* case see 17 U.S. 518 (1819).

⁷¹ Letter from Archbishop Samuel Eccleston to Bishop Anthony Blanc, 13 December 1842.

regarding church governance “have ceased to exist by their absolute repugnance to the fundamental principles of our American governments.”⁷² The court had no basis in civil law to determine how a church should be organized: “By what standard are we to ascertain the orthodoxy of the corporation, or of the bishop?”⁷³ The court ruled that the entire matter was one to be resolved by the church itself:

The Legislature has not, and could not in our opinion, authorize the wardens to interfere in matters of mere church discipline and doctrine. It could not constitutionally declare what shall constitute a curate in the Catholic acceptance of the word, without interfering in matters of religious faith and worship, and taking a first step towards a church establishment by law.⁷⁴

All this accords with modern constitutional doctrine, and upheld the legal position espoused by Bishop Blanc in the litigation. But the court did not leave the wardens without leverage in their dispute:

The charter does not give to the [wardens] a right to appoint, in the theological sense of the word, a curate, but only to provide for his salary; and we do not doubt their perfect right to withhold all salary from any person whatsoever, and even to prevent any person claiming to be curate, to enter the church belonging to the corporation.⁷⁵

In other words, the wardens could refuse to pay Father Maenhaut’s salary, and even the salary of the Bishop, and they could lock the Bishop’s men out of the church. The court would not lift a hand to help the wardens, but it would not help the Bishop either.

The parties thus returned to ecclesiastical battle without judicial succor. The Church of St. Louis was closed (other than one low mass on Sunday morning), and services – including funerals – were conducted at St. Augustin. The wardens refused to pay Father Maenhaut’s salary, and because of the church closure, the wardens were starved of revenue.

Father Permoli’s Case

This brings us to *Permoli* itself. In response to the Bishop’s closure of St. Louis and the failure of the courts to come to their aid, the wardens turned to local politics. As representatives of the dominant French Creole majority, the wardens and their allies held effective control over government of the First Municipality – the jurisdiction that encompassed the French Quarter.⁷⁶ Indeed, one member of the board of wardens was also

⁷² *Blanc*, 1844 WL at *23.

⁷³ *Id.* at *21.

⁷⁴ *Id.* at *20.

⁷⁵ *Id.*

⁷⁶ *Carey*, *supra* n. 33, at 137-138.

on the city council.⁷⁷ This member obtained passage of the ordinances quoted at the beginning of this essay, prohibiting the conduct of funerals in churches other than the mortuary chapel, and imposing substantial fines on priests – and priests only – who officiated at funerals elsewhere in the city. Importantly, these ordinances extended the ban on funerals, which previously had applied only to the cathedral church, to all “Catholic churches” in the city. This included St. Augustin.

Under the ordinances, the only lawful church venue for funerals within the city limits was the mortuary chapel, which was subject to the wardens’ ownership and control. If it were the venue for all funerals in the City, this would constitute a significant source of revenue for the Bishop’s schismatic antagonists. Consequently, the Bishop forbade any priest to conduct funerals in “a building in the possession of notorious schismatics, who might tax them to virtual prohibition, or apply the proceeds, at their own discretion, to the subversion of religion itself.”⁷⁸

From 1827 until 1842, the cathedral and the mortuary chapel were the only two Catholic churches in the First Municipality, and for fifteen years the 1827 regulation had ensured that funerals took place in the mortuary chapel. This had elicited no opposition from the Catholic clergy or population.⁷⁹ Presumably this was because both St. Louis and the mortuary chapel were under control of the wardens, so the Catholic hierarchy had no alternatives.⁸⁰ That all changed when the Church of St. Augustin was dedicated on October 9, 1842.⁸¹ Now, for the first time, there was a Catholic church in the First Municipality that the wardens did not control. Now the Catholic hierarchy had a location to conduct funerals without granting the revenue to the wardens. This was where Father Bernard Permoli performed the illegal funeral rites that precipitated the first Free Exercise Clause case in the Supreme Court.⁸²

This suggests why the funeral ordinance passed in the fall, after all danger from yellow fever had subsided. The council enacted the ordinance to counter Bishop Blanc’s plan to gain control over worship services, and especially the “casual” fee for optional funeral services, by extending the ban on funerals to the church the bishop controlled.

⁷⁷ Points, *supra* n. 37.

⁷⁸ *Permoli*, 44 U.S. at 599.

⁷⁹ *Id.* at 591.

⁸⁰ St. Patrick’s, the first English-speaking church in New Orleans was not under control of the wardens, but St. Patrick’s was not within the boundaries of the First Municipality either. Therefore neither the 1827 nor the 1842 ordinances applied to St. Patrick’s. *See* “Our History,” <http://www.oldstpatricks.org/ourhistory.htm> (accessed March 7, 2010). Moreover, it would not have been a practical alternative venue for French Quarter funerals because services there were conducted in English.

⁸¹ *See* <http://www.staugustinecatholicchurch-neworleans.org/hist-sum.htm> (accessed March 7, 2010).

⁸² *Permoli*, 44 U.S. at 590.

Consider the course of events. St. Augustin was dedicated October 8; the priests threatened to leave St. Louis October 19;⁸³ the city council amended the police ordinance to include St. Augustine October 31; Blanc removed the priests from St. Louis November 2; the city council again amended the ordinance, applying it only to priests November 7;⁸⁴ and Father Permoli violated the ordinance November 9.

This power struggle explains why Father Bernard Permoli, on that fateful day in November 1842, defied the law and performed funeral services in the Church of St. Augustin. He was ordered to do so by Bishop Blanc, who sought to use the new church as a means of circumventing the legal pretensions of the wardens. This also explains why he was prosecuted for performing this priestly function. The wardens controlled the city government, and sought to use municipal authority to confine funeral services and their attendant revenues to a church under their own ownership and control. It explains why a putative health ordinance relevant only to the summer months was enacted at the end of October. It explains why this seemingly trivial affair was appealed all the way to the United States Supreme Court, and argued so passionately as an instance of religious “tyranny.”⁸⁵ Finally, it explains why it was no answer to the charge of intentional religious discrimination that “[i]f Catholics are wronged, Catholics have wronged them.”⁸⁶

Who committed “tyranny” and who was wronged is a matter for the reader to decide. What is certain is that the trusteeship question had divided the city of New Orleans, as it had divided many American Catholics before and after.

As noted at the beginning, the United States Supreme Court declined jurisdiction. The First Amendment does not apply to the states, and so there was no federal question for the Court to decide. The wardens won the legal skirmish; Father Permoli’s fine was upheld. The underlying dispute, however, continued. Ultimately, with no assistance from the courts, Bishop Blanc gained the upper hand. As non-French Catholics migrated to New Orleans, popular opinion eventually turned against the wardens, who ultimately relented and recognized the Bishop’s right of appointment of a priest to the cathedral. Although the wardens retained the power of property until 1883, they no longer attempted to use that power to control ecclesiastical governance.

All over the United States, the Catholic hierarchy defeated trusteeism and vindicated the authority of bishops. In New Orleans, by the 1850s, the Irish comprised more than half of the Catholic population,⁸⁷ parish churches proliferated, and the old system of French Creole control, represented by the wardens, became history. Father Permoli’s performance of last rites in the French Quarter, which was a dramatic flashpoint in its day, no longer is remembered.

⁸³ See Comeau, *supra* n.4, at 917.

⁸⁴ *Permoli*, 44 U.S. at 590.

⁸⁵ *Id.* at 597.

⁸⁶ *Id.* at 602.

⁸⁷ Miller, *supra* n. 31, at 36-37.