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Implied Consent to Religious Institutions: A Primer and a Defense

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Implied Consent to Religious Institutions: A Primer and a Defense

MICHAEL A. HELFAND

One of the recent fault lines over religious liberty is the scope of protections afforded religiously motivated institutions and corporations. Courts and scholars all seem to agree that such religious institutions deserve some degree of protection. But there remains significant debate over the principles that should guide judicial decisions addressing the circumstances in which religiously motivated institutions should, and in which circumstances they should not, receive the law's protection.

In this Article, I expound, and defend, my proposed "implied consent" framework for addressing religious institutional claims. Such a framework grounds the authority of religious institutions not in a degree of inherent religiosity, but in the presumed consent of their members. On such an account, consent can be assumed so long as members understood the unique religious objectives of the institution when they joined, thereby implicitly authorizing the institution to make rules and resolve disputes related to accomplishing these uniquely religious objectives. In this way, an implied consent framework focuses not on the objective religious quality and nature of religious institutions, but rather on the contextual indications of an implicitly consensual relationship between religious institutions and their members. In turn, an implied consent framework not only supports some of the religious liberty claims advanced by religious institutions, but also establishes important limits on religious institutional authority and autonomy.

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Implied Consent to Religious Institutions: A Primer and a Defense

MICHAEL A. HELFAND*

INTRODUCTION

How should we address conflicts between religiously motivated institutions and the law? Or, put differently, is there something special about religiously motivated institutions that should afford them unique protections from the law by virtue of their religious character? Answering these questions has increasingly become one of the central issues in navigating recent clashes between the aspirations of religion and the demands of the law. Indeed, in recent years, the Supreme Court has been asked to resolve a variety of such claims, including a house of worship alleged to have impermissibly discriminated against a purportedly ministerial employee;¹ for-profit and non-profit institutions which have refused to comply with regulations they believed violated their religious consciences;² and for-profit businesses that refused, on account of their respective owner's religious commitments, to provide services at same-sex weddings in violation of the state's public-accommodations law.³

All told, in a range of situations—from for-profits to non-profits to, even more specifically, houses of worship—religiously motivated institutions have argued that the law provides them with special protections flowing from their uniquely religious status. Are these arguments correct? Does the law provide, in the words of the Supreme Court's recent decision in *Hosanna-Tabor v. EEOC*, “special solicitude” to religious institutions?⁴

The most accurate answer to the question is “sometimes.” There is a general consensus that religious institutions are entitled to some set of exemptions from the law's demands. But courts and scholars continue to debate the contours of the doctrine. Should all religiously motivated

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¹ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 176–77 (2012).

² See *infra* notes 14–17, 23–28 and accompanying text (summarizing case law on this issue).

³ *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018).

⁴ See *Hosanna-Tabor*, 565 U.S. at 189 (explaining that the First Amendment gives “special solicitude to the rights of religious organizations”).

institutions receive such exemptions? And from which laws should these religious institutions be exempted? Answering these questions has invariably required courts and scholars to provide a theory for why religious institutions are entitled to such exemptions—again, assuming they are at all.

In a series of articles, I have advanced an “implied consent” theory for providing religious institutions with some measure of exemptions from the law’s demands.⁵ Critics responded with concerns about the implication of such a theory.⁶ In this Article, my goal is therefore to summarize my theory of implied consent institutionalism, correct some misconceptions, and

⁵ See generally Michael A. Helfand, *Religious Institutionalism, Implied Consent, and the Value of Voluntarism*, 88 S. CAL. L. REV. 539 (2015) [hereinafter Helfand, *Religious Institutionalism*]; Michael A. Helfand, *Religion’s Footnote Four: Church Autonomy as Arbitration*, 97 MINN. L. REV. 1891 (2013) [hereinafter Helfand, *Church Autonomy*]; Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493 (2013) [hereinafter Helfand, *Litigating Religion*]; Michael A. Helfand, *What is a “Church”?: Implied Consent and the Contraception Mandate*, 21 J. CONTEMP. LEGAL ISSUES 401 (2013) [hereinafter Helfand, *What is a “Church”?*].

⁶ For three of the most sustained critiques of the implied consent framework, see B. Jessie Hill, *Change, Dissent, and the Problem of Consent in Religious Organizations*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 419, 421 (Chad Flanders, Zoe Robinson & Micah Schwartzman eds., 2016) (critiquing the premise of implied consent theory as seeing “voluntariness and exit as talismanic protections against overreaching by religious institutions”); Ira C. Lupu & Robert W. Tuttle, *The Mystery of Unanimity in Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 20 LEWIS & CLARK L. REV. 1265, 1299–1302 (2017) (arguing that implied consent theory is “flawed foundationally” due to, inter alia, its mischaracterization of the ecclesiastical employment relationship, its misreading of *Hosanna-Tabor*, and its failure to establish a coherent methodology and application); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1471–74 (2015) (criticizing implied consent theorists, who “articulate . . . religious liberty claims by invoking *Lochner*’s central premises,” for framing exemption issues in contractual terms). In these critical responses, my work has often been grouped together with the excellent work of Christopher Lund and his article *Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor*, 108 NW. U. L. REV. 1183 (2014). Lund, however, is a reluctant bearer of the implied consent label and his article somewhat eschews the principle as a useful category. See *id.* at 1200 (“Now maybe implied consent is not the best phrase for this; this is probably more analogous to assumption of risk. But of course it is true that implied consent is not consent, nor even a proxy for consent. Implied consent is a fiction used to operationalize the constitutional right of churches to have control over their own decisions.”).

For other, more limited, discussions of my implied consent framework, see Thomas C. Berg, *Partly Acculturated Religious Activity: A Case for Accommodating Religious Nonprofits*, 91 NOTRE DAME L. REV. 1341, 1370–71 (2016) (expressing sympathy for the framework, but proposing that the standards for an employer conveying its religious mission ought to be relaxed); Caroline Mala Corbin, *Corporate Religious Liberty*, 30 CONST. COMMENT. 277, 301–02 (2015) (arguing in reference to my proposal, among others, that “some of the more thoughtful corporate religious liberty supporters have acknowledged the importance of voluntariness, [but] [n]onetheless, they tend to be too quick to assume its presence”); Marc O. DeGirolami, *Free Exercise by Moonlight*, 53 SAN DIEGO L. REV. 105, 115–17 (2016) (criticizing the implied consent framework because it opens the possibility of revoking that consent, which raises a number of practical and theoretical problems).

respond to these criticisms.⁷ In a nutshell, an implied consent theory contends that religious institutions deserve protection because they are created through the voluntary choices of individuals to join together in the pursuit of collective religious objectives, such as faith and salvation. In so doing, these individuals implicitly authorize their religious institutions to make rules and develop doctrine that can promote these shared religious objectives. And in this way, an implied consent theory of religious institutionalism is grounded in a core commitment to the principle of *voluntarism*—that is, valuing the decisions of individual members of religious institutions when those decisions are the result of voluntary choices to join a religious collective in pursuit of shared religious objectives.

Importantly, the membership's grant of authority to a religious institution is conveyed implicitly—it is inferred from the very act of joining an institution that is openly and obviously seeking to pursue religious objectives collectively.⁸ Thus, the Supreme Court has referred to this form of consent as “implied consent,” and it empowers the religious institution to promulgate rules that promote shared religious values.⁹ In this way, the creation of a religious institution represents the voluntary free exercise of religion on the part of many individuals, each granting a religious institution authority over internal religious life among the membership in order to promote shared religious objectives.

Grounding the authority of religious institutions in the implied consent of its membership has a wide range of implications for the law, some of which are detailed below. For example, it provides guidance as to which institutions should be entitled to some degree of protection from the law. It also provides guidelines for when religious institutions should be stripped of those protections. My implied consent theory of religious institutionalism has also been subject to some criticism to which I provide some responses below.¹⁰ The theory, to be sure, is far from perfect. But it provides a workable framework that both explains why religious institutions should be shielded at times from legal liability and makes sure that those protections do not run roughshod over other core values embodied in the law.

⁷ This Article therefore incorporates significant portions of my previous work, see *supra* note 5, updating that work in order to respond to legal developments as well as criticism of the implied consent framework.

⁸ It is worth noting that in this way, implied or tacit consent is different from hypothetical consent. For a useful discussion, see A. John Simmons, *Tacit Consent and Political Obligation*, 5 PHIL. & PUB. AFF. 274, 282 (1976).

⁹ See *infra* Part II.

¹⁰ See *infra* Part III.

I. ARE RELIGIOUS INSTITUTIONS DIFFERENT?

The answer is, as noted above, sometimes. To appreciate the breadth of these tensions, consider some of the recent examples of conflict between the commitments of religiously motivated institutions and the requirements of the law. In a 2012 case, *Hosanna-Tabor v. EEOC*, the Court considered the constitutionality of the “ministerial exception,” which exempts religious institutions from complying with various antidiscrimination statutes in the hiring and firing of “ministers.”¹¹ In affirming the ministerial exception, the Court unanimously held that the First Amendment grants “special solicitude to the rights of religious organizations.”¹² Thus, the defendant—a church-operated primary school—could not be held liable under the Americans with Disabilities Act for terminating the plaintiff—a fourth-grade teacher—because she was a “called” minister.¹³

Other cases of conflict stem from religious liberty claims advanced by religiously motivated for-profit organizations. For example, for-profit employers made such claims in the litigation over the Affordable Care Act’s contraception mandate, which requires employers who provide health insurance to also cover FDA-approved contraceptives or face significant financial penalties.¹⁴ A wide range of religiously motivated for-profit institutions brought suit against the mandate, arguing that providing employees with insurance coverage for contraception made them complicit in conduct they believe to be sinful—therefore, complying with the mandate required them to violate their religious consciences.¹⁵ Because religious for-profit institutions were not exempted from the mandate, these institutions asserted religious liberty claims pursuant to the Religious Freedom Restoration Act¹⁶—claims that were ultimately vindicated by the Supreme Court’s landmark decision in *Burwell v. Hobby Lobby*, albeit on somewhat limited grounds.¹⁷

¹¹ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 180–81 (2012).

¹² *Id.* at 189.

¹³ *Id.* at 178, 190.

¹⁴ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014). *But see* Marty Lederman, *Hobby Lobby Part III—There is No “Employer Mandate”*, BALKINAZATION (Dec. 16, 2013), <http://balkin.blogspot.com/2013/12/hobby-lobby-part-iii-theres-no-employer.html> [<https://perma.cc/GR85-JVD7>] (arguing that employers are not mandated to provide contraception and have other alternatives such as not providing an employee healthcare plan).

¹⁵ For a list of cases brought against the contraception mandate, see *HHS Case Database*, BECKET, <http://www.becketlaw.org/research-central/hhs-info-central/hhs-case-database/> [<https://perma.cc/V9T2-ZAEM>] (last visited Feb. 25, 2018).

¹⁶ *E.g.*, *Ass’n of Christian Schs. Int’l v. Burwell*, 75 F. Supp. 3d 1284, 1286 (D. Colo. 2014).

¹⁷ *See Burwell*, 134 S. Ct. at 2759 (“[T]he regulations that impose this obligation violate RFRA, which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest.”).

In a similar vein, religiously motivated for-profit institutions clashed with prevailing antidiscrimination laws in a series of cases where vendors—including a baker, a florist, and a photographer—have refused to provide their services at same-sex weddings and commitment ceremonies.¹⁸ In those cases, the vendors argued that, as religiously motivated institutions, their right to religious liberty was being abridged by the prevailing public-accommodations laws—laws that prohibited them, as commercial enterprises, from discriminating on the basis of sexual orientation in the provision of services—notwithstanding the fact they believed that providing services at a same-sex ceremony violated their religious consciences.¹⁹ In each case, state courts found the vendors liable, ultimately determining that the religious liberty protections afforded these religiously motivated institutions were insufficient to shield them from liability under the relevant public accommodations law.²⁰ The Supreme Court overturned two such state court decisions on narrow grounds,²¹ likely ensuring that debates over such clashes persist going forward.²²

And finally, institutions falling between houses of worship and for-profit institutions—various non-profit entities—have also tangled with the law. The most recent big-ticket example of this phenomenon again stems from the contraception mandate litigation, culminating in the Supreme Court's decision in *Zubik v. Burwell*.²³ In *Zubik*, religiously motivated non-profit employers—including hospitals, charities, and universities—challenged the contraception mandate.²⁴ These non-profits had been exempted from the mandate,²⁵ but they argued that the process for securing the accommodation, which requires some non-profits to self-certify as religious institutions, violated their religious liberty rights. The argument: filing the paperwork

¹⁸ See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (holding that the Colorado Civil Rights Commission (CCRC) violated the Free Exercise Clause when it ruled that the baker violated a state antidiscrimination act because the CCRC's treatment of the baker's case displayed prohibited hostility towards his religious beliefs); *Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018) (granting the petition for certiorari, vacating the Washington Supreme Court's opinion denying the florist's Free Exercise claims and remanding for further consideration in light of *Masterpiece Cakeshop*); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 60 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014) (rejecting RFRA defense in a case dealing with a photographer).

¹⁹ See *id.*

²⁰ *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 276 (Colo. App. 2015) (baker); *Washington v. Arlene's Flowers, Inc.*, 389 P.3d 543, 548 (Wash. 2017) (florist); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 59 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

²¹ See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018).

²² Indeed, litigation over the conduct and policies of the Masterpiece Cakeshop persists. See Complaint, *Masterpiece Cakeshop v. Elenis* (D. Colo. 2018) (No. 1:18-cv-02074), <http://www.adfmedia.org/files/MasterpieceCakeshopComplaint.pdf> [<https://perma.cc/HQY6-JENP>].

²³ 136 S. Ct. 1557 (2016).

²⁴ *Id.* at 1559.

²⁵ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

that confirms they are religious institutions, and thereby secures their religious exemption, triggers contraceptive insurance coverage for their employees.²⁶ And, in turn, triggering such coverage—even if paid for and provided by a third party and not the objecting institution—makes them complicit in conduct they believe to be sinful. Although this argument was rejected by nearly all the federal courts of appeals,²⁷ the Supreme Court chose to vacate the non-profit cases and remand them to the federal courts of appeals, postponing resolution of these non-profit institutional claims.²⁸

All such cases have pressed courts to determine when institutions—from for-profit business to conventional houses of worship—should be shielded from legal requirements on account of the institution’s religious commitments. And in all of them, courts have struggled somewhat to provide a framework to analyze these questions.

Contemporary questions surrounding the legal treatment of religious institutions start, in many ways, from the Supreme Court’s decision in *Employment Division v. Smith*.²⁹ In *Smith*, the Court did not address the claims of a religious institution. Instead, it addressed the claims of two individuals—Al Smith and Galen Black—who had been terminated from their employment for ingesting peyote.³⁰ When Smith and Black attempted to collect their unemployment benefits, they were informed that they were not eligible because they had been terminated for cause.³¹ Smith and Black, however, countered that they had ingested peyote as part of a sacramental Native American ceremony—therefore, denying their request for unemployment benefits violated their rights under the First Amendment’s Free Exercise Clause.³²

In ruling against the plaintiffs, the Court held that they were not entitled to a constitutionally mandated religious exemption.³³ In so doing, the Court held that the Free Exercise Clause only protects against laws that target or

²⁶ For an up-to-date list of cases filed by non-profits over the self-certification process, see *HHS Case Database*, *supra* note 15.

²⁷ *Geneva Coll. v. Sec’y U.S. Dep’t of Health & Human Servs.*, 778 F.3d 422, 442 (3d Cir. 2015), *vacated*, 136 S. Ct. 1557 (2016); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 613–16 (7th Cir. 2015), *vacated*, 136 S. Ct. 2007 (2016); *Priests for Life v. U.S. Dep’t of Health & Human Servs.*, 772 F.3d 229, 237 (D.C. Cir. 2014), *vacated*, 136 S. Ct. 1557 (2016); *Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 755 F.3d 372, 388–90 (6th Cir. 2014), *vacated*, 135 S. Ct. 1914 (2015). *But see* *Sharpe Holdings, Inc. v. U.S. Dep’t of Health & Human Servs.*, 801 F.3d 927, 936–37 (8th Cir. 2015) (reaching the opposite result and finding in favor of the religiously motivated non-profit), *vacated*, 2016 WL 2842448 (U.S. May 16, 2016).

²⁸ *Zubik v. Burwell*, 136 S. Ct. 1557, 1561 (2016).

²⁹ *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

³⁰ *Id.* at 874.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 882.

discriminate against religion.³⁴ By contrast, the Free Exercise Clause does not provide any protection against laws that are facially neutral and “generally applicable”—that is, those that have legitimate secular objectives and only incidentally burden religion.³⁵

The Supreme Court’s interpretation of the Free Exercise Clause represented somewhat of a departure from precedent. While the Court’s free exercise precedent had been doctrinally uneven, the Court’s overall framework prior to *Smith* afforded far broader religious liberty protections.³⁶ Under prior decisions, the Free Exercise Clause required courts to grant exemptions from laws that substantially burdened religiously motivated conduct, unless applying the law was necessary to achieve a compelling government interest.³⁷ The Court’s new jurisprudence discarded this substantial-burden framework, only providing constitutional protection against laws that targeted religiously motivated conduct.³⁸

The Court’s holding in *Smith* raised the following question for religious institutions: Would they also only be afforded exemptions from laws where those laws were not facially neutral and generally applicable? Or would the law provide religious institutions some measure of protection beyond the protections afforded individuals? The question was complicated by significant precedent indicating that religious institutions were entitled to some degree of autonomy,³⁹ allowing them to arrange their own internal affairs in a manner that did not conform to various legal obligations.⁴⁰

As an example of this autonomy, consider the long-standing “ministerial exception,”⁴¹ which exempts religious institutions from complying with

³⁴ *Id.*

³⁵ *Id.* at 885–86.

³⁶ See Helfand, *Religious Institutionalism*, *supra* note 5, at 556–63 (discussing the tensions and ambiguities that have plagued free exercise doctrine).

³⁷ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (“[E]xposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and . . . substantially interfering with the religious development of the Amish child . . . contravenes the basic religious tenets and practice of the Amish faith”); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (requiring a compelling state interest to justify infringement on the Free Exercise Clause). Again, as noted above, Supreme Court decisions were not wholly consistent on this issue, especially in the decade prior to the *Smith* decision.

³⁸ See, e.g., Alan E. Brownstein, *Constitutional Wish Granting and the Property Rights Genie*, 13 CONST. COMMENT. 7, 45 (1996) (explaining how the Court’s framework changed in this circumstance).

³⁹ Even *Smith* contained such language, though it was ambiguous. See *Smith*, 494 U.S. at 882 (“And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns.”).

⁴⁰ Maybe the most prominent precedent is the Supreme Court’s statement in *Kedroff* that articulates “a spirit of freedom for religious organizations, an independence from secular control or manipulation,” which, according to the Court, entailed a “power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952).

⁴¹ See generally Gregory A. Kalscheur, *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject-Matter Jurisdiction, and the Freedom of the Church*, 17 WM. & MARY BILL RTS. J. 43 (2008) (explaining the logic and application of the ministerial exception).

various employment statutes in the hiring and firing of “ministers.”⁴² The ministerial exception was first announced by the Fifth Circuit Court of Appeals in *McClure v. Salvation Army*,⁴³ in which the court found:

[T]hat the application of the provisions of Title VII to the employment relationship existing between The Salvation Army and Mrs. McClure, a church and its minister would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment.⁴⁴

In this way, the ministerial exception represented a central piece of a broader principle that government interference in the internal workings of religious institutions represented, at least in some circumstances, a violation of the Free Exercise Clause of the First Amendment. The Supreme Court has previously framed this principle as follows: “Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.”⁴⁵ Accordingly, prior to 1990, other jurisdictions typically followed the Fifth Circuit’s lead of *McClure*,⁴⁶ tracing the ministerial exception to the demands of the Free Exercise Clause, which required courts to afford some degree to autonomy to religious institutions.⁴⁷

But what to make of the ministerial exception—and, more broadly, claims of religious institutional autonomy—in the wake of *Smith*? If the Free Exercise Clause only affords exceptions from laws that target religion, then what justification could there be for religious institutional autonomy claims based upon the Free Exercise Clause? Surely the types of claims at stake in many ministerial exception cases—such as Title VII and the American with Disabilities Act—do not target religion. If so, why should a religious institutional-autonomy doctrine grounded in the Free Exercise Clause

⁴² See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012) (defining and applying the ministerial exception).

⁴³ Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 BYU L. REV. 1633, 1651 (“Beginning with the Fifth Circuit’s decision in *McClure v. Salvation Army*, lower federal courts have uniformly carved out what has become known as the ‘ministerial exception’ to employment discrimination statutes.” (footnote omitted)).

⁴⁴ *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972).

⁴⁵ *Kedroff*, 344 U.S. at 116.

⁴⁶ See *Hosanna-Tabor*, 565 U.S. at 188 (“[T]he Courts of Appeals have uniformly recognized the existence of a ‘ministerial exception’ . . .”).

⁴⁷ See, e.g., *Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354, 1356 (D.C. Cir. 1990) (examining the ministerial exception in the context of the Free Exercise Clause and noting that it was unnecessary to discuss the potential applicability of the Establishment Clause); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985) (characterizing the ministerial exception as primarily a free exercise doctrine); *McClure*, 460 F.2d at 560 (linking the ministerial exception to the Free Exercise Clause).

provide any protection against such claims beyond the protections afforded by *Smith*?⁴⁸

Some critics of religious institutional autonomy took this argument to its logical conclusion, contending that, in the wake of *Smith*, religious institutions—like religious individuals—ought to only receive the Free Exercise Clause’s protections when a law targets some sort of religious practice.⁴⁹ Absent such a finding, religious institutions should receive the same, and only the same, protections that are afforded other institutions under the rubric of the First Amendment’s freedom of association.

Indeed, this precise argument was presented to the Supreme Court in the 2012 case, *Hosanna-Tabor v. EEOC*, in which Cheryl Perich, a fourth-grade teacher at a church-operated school, claimed that her employer violated her rights under the Americans with Disabilities Act.⁵⁰ The employer, however, claimed that it was shielded from liability by the ministerial exception because Perich was a “called teacher.”⁵¹ Perich and the EEOC, in pressing the case, argued that whatever protections were afforded religious institutions by the First Amendment stemmed from the implicit freedom of association and not the religion clauses.⁵² Thus, as characterized by the Court, “[t]he EEOC and Perich . . . see no need—and no basis—for a special rule for ministers grounded in the Religion Clauses themselves.”⁵³

The Court, in a unanimous opinion, rejected Perich’s claims and specifically attacked this argument:

We find this position untenable. . . . It follows under the EEOC’s and Perich’s view that the First Amendment analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club That result is hard to square with the text of the First Amendment

⁴⁸ See, e.g., Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 *FORDHAM L. REV.* 1965, 2004–05 (2007) (describing the weakness of a doctrine based in the Free Exercise Clause when compared to one based in the Establishment Clause); Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 *BYU L. REV.* 1099, 1194–95 (“In those jurisdictions that recognize the ministerial exception, it is unlikely to be reversed in the near future, but it is in tension with the Court’s most recent cases clarifying the Free Exercise Clause.”).

⁴⁹ Hamilton, *supra* note 46, at 1195.

⁵⁰ *Hosanna-Tabor*, 565 U.S. at 189.

⁵¹ See *id.* at 177 (differentiating “‘called’ teachers”—teachers “called to their vocation by God through a congregation”—from “‘contract’ teachers”—teachers “appointed by the school board without a vote of the congregation”).

⁵² See Oral Argument at 37:22, *Hosanna-Tabor*, 565 U.S. 171 (No. 10-553), <https://www.oyez.org/cases/2011/10-553> [<https://perma.cc/S73K-T7W7>] (“We don’t see that line of church autonomy principles in the Religion Clause jurisprudence as such. We see it as a question of freedom of association.”).

⁵³ *Hosanna-Tabor*, 565 U.S. at 189.

itself, which gives special solicitude to the rights of religious organizations.⁵⁴

But this reference to the “special solicitude to the rights of religious organizations” presented a bit of a puzzle.⁵⁵ *Smith* appeared to discard any notion that the Free Exercise Clause provided any special protections for religiously motivated conduct; it only provided protection against the targeting of religious conduct.⁵⁶ How could you square *Hosanna-Tabor* with *Smith*?

The Court tried its hand at answering the question, arguing as follows:

It is true that the ADA’s prohibition on retaliation, like Oregon’s prohibition on peyote use, is a valid and neutral law of general applicability. But a church’s selection of its ministers is unlike an individual’s ingestion of peyote. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself. The contention that *Smith* forecloses recognition of a ministerial exception rooted in the Religion Clauses has no merit.⁵⁷

Not surprisingly, commentators puzzled over the Court’s distinction between “outward physical acts” in *Smith* and the “internal” acts supposedly at stake in *Hosanna-Tabor*. Was termination of an employee not also an outward physical act?⁵⁸ The Court’s distinction seemed to be deeply unsatisfying, leaving the central question unanswered: Why should religious institutions be afforded special constitutional protections under the religion clauses?

One response was to distinguish between free exercise claims brought by individuals and free exercise claims brought by religious institutions.⁵⁹ For example, the D.C. Circuit Court of Appeals avoided the challenges of

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 888–90 (1990).

⁵⁷ *Hosanna-Tabor*, 565 U.S. at 190 (citation omitted).

⁵⁸ See, e.g., Michael Dorf, *Ministers and Peyote*, DORF ON LAW (Jan. 12, 2012, 12:30 AM), <http://www.dorfonlaw.org/2012/01/ministers-and-peyote.html> [<https://perma.cc/5YBB-775Q>] (responding to the Supreme Court’s attempt in *Hosanna-Tabor* to distinguish *Smith* by querying, “With due respect: huh???”); Jeffrey Pasek, *Ministerial Exemption is Shrouded in Uncertainty*, JURIST (Jan. 21, 2012, 12:00 PM), <http://jurist.org/sidebar/2012/01/jeffrey-pasek-ministerial-ada.php> [<https://perma.cc/L8GU-BGPZ>] (“The internal-external distinction is new and hardly self-explanatory. However, the *Hosanna-Tabor* opinion said little to illuminate or defend it.”).

⁵⁹ See *Petruska v. Gannon Univ.*, 462 F.3d 294, 306 (3d Cir. 2006) (“The Free Exercise Clause protects not only the individual’s ‘right to believe and profess whatever religious doctrine one desires,’ but also a religious institution’s right to decide matters of faith, doctrine, and church governance.” (citations omitted)).

Smith when it came to the ministerial exception by holding that “the burden on free exercise that is addressed by the ministerial exception is of a fundamentally different character from that at issue in *Smith*” because “[t]he ministerial exception is not invoked to protect the freedom of an individual to observe a particular command or practice of his church. Rather, it is designed to protect the freedom of the church to select those who will carry out its religious mission.”⁶⁰ Similarly, the Third Circuit Court of Appeals noted that, notwithstanding *Smith*, the Free Exercise Clause still protected “a religious *institution’s* right to decide matters of faith, doctrine, and church governance.”⁶¹

This notion that the Free Exercise protections afforded religious institutions (like in *Hosanna-Tabor*) were fundamentally different than the Free Exercise protections afforded individuals (like in *Smith*) linked to the growing body of scholarship supporting the “church autonomy doctrine,” which provided religious institutions with sovereignty over their own internal affairs free from government interference.⁶² On such an account, the religion clauses instructed courts not to encroach on the jurisdiction of religious institutions. Proponents of this sovereignty approach⁶³ emphasized the important values promoted by a jurisdictional approach to the authority

⁶⁰ *EEOC v. Cath. Univ. of Am.*, 83 F.3d 455, 462 (D.C. Cir. 1996).

⁶¹ *Petruska*, 462 F.3d at 306 (emphasis added) (citation omitted).

⁶² See, e.g., Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 NW. U. L. REV. COLLOQUY 175, 175 (2011) (“The ‘ministerial exception,’ at issue in *Hosanna-Tabor*, is a clear and crucial implication of religious liberty, church autonomy, and the separation of church and state—principles embodied in both the Free Exercise and Establishment Clauses of the First Amendment.”); Thomas C. Berg, *Religious Organizational Freedom and Conditions on Government Benefits*, 7 GEO. J.L. & PUB. POL’Y 165, 167 (2009) (arguing that protection for internal decisions could be supported by both the Free Exercise and the Establishment Clauses); Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 288 (2008) (explaining that churches’ ability to control their internal procedures is not based on a special status, but instead is based on constitutional values); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L.L. REV. 79, 81 (2009) [hereinafter Horwitz, *First Amendment Institutions*] (describing the “church autonomy” doctrine as an “increasingly important site of contestation in the law of the Religion Clauses”); Paul Horwitz, *Act III of the Ministerial Exception*, 106 NW. U. L. REV. COLLOQUY 156, 161 (2011) (analogizing the church and state to two separate sovereigns) [hereinafter Horwitz, *Act III*]; Kalscheur, *supra* note 39, at 48–49 (2008) (discussing how the ministerial exception has been “invoked to protect religious institutions from the requirements of antidiscrimination law in the ministerial employment context”); see also Mark DeWolfe Howe, *The Supreme Court, 1952 Term—Foreword: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91, 94 (1954) (examining the “preference” for churches and how “the Court may have been persuaded that a church must enjoy prerogatives of sovereignty which are not to be conceded to other social groups”).

⁶³ See, e.g., Horwitz, *Act III*, *supra* note 60, at 161–62 (2011) (“[C]ourts, and the state itself, are simply not authorized to intervene in life at the heart of churches. At a deep level, these questions lie beyond the reach of the state altogether. The two kingdoms of temporal and spiritual authority, of church and state, constitute two separate sovereigns.”).

and autonomy of religious institutions: the limited authority of the state⁶⁴ and the free development of religious life.⁶⁵ By granting religious institutions with sole authority over matters of religious doctrine, discipline, and governance, the state recognizes the independent autonomy of religious institutions and provides those institutions with the space to control those core religious matters. And in this way—and for these reasons—religious institutions ought to draw broader protections from the religion clauses than do religiously motivated individuals.

A sovereigntist approach to religious institutions was only one theory for explaining the legal and constitutional status of religious institutions. Other courts and scholars have embraced a hands-off approach that does not assign any unique legal status to religious institutions.⁶⁶ Instead, the reason religious institutions are granted a sphere of autonomy free from government interference is simply to ensure that government does not become impermissibly entangled in religious matters.⁶⁷ Maybe the most representative and explicit judicial statement of this view comes from the Seventh Circuit's opinion in *Schleicher v. Salvation Army*:

The purpose of the doctrine is not to benefit marginal religions that, lacking the political muscle to obtain legislative protections of their rituals and observances, turn to the courts instead; it is to avoid judicial involvement in religious matters, such as claims of discrimination that if vindicated would limit a church's ability to determine who shall be its ministers.⁶⁸

Such approaches keep courts out of the internal business of religious institutions, not because such institutions are deserving of some sort of constitutionally mandated autonomy; it is simply to ensure that courts do not become embroiled in resolving religious questions in violation of the Establishment Clause. Indeed, picking up on this approach, many courts have, subsequent to *Smith*, increasingly emphasized that church autonomy

⁶⁴ See, e.g., Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 67 (1998) (“[R]eligions that point to a transcendent authority help check the power of the modern nation-state. This is because such religions refuse to recognize the state's sovereignty as absolute.”); Kalscheur, *supra* note 39, at 43 (describing how conceptualizing the ministerial exception as jurisdictional reaffirms the “penultimacy of the state”).

⁶⁵ See, e.g., Esbeck, *supra* note 64, at 63 (“Rather, the aim of the Clause is for government to avoid activities that harm the integrity of religion (*religare*) or religious organizations (the *ekklesia*).”); Horwitz, *supra* note 62, at 114 (concluding that “[u]nder a sphere sovereignty approach to religious entities,” religious institutions “would coexist alongside the state . . . serving a vital role in furthering self-fulfillment, the development of a religious community, and the development of public discourse”).

⁶⁶ For an explanation of the “hands-off” doctrine, see Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1844 (1998) (explaining that the hands-off approach requires the government to “keep out of internal problems of religious bodies when those problems concern religious understandings”).

⁶⁷ See *infra* notes 70–78 and accompanying text.

⁶⁸ *Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008).

doctrines, such as the ministerial exception, are grounded not in the Free Exercise Clause, but in the Establishment Clause and its subsidiary requirement that government not become entangled in religious matters.⁶⁹

The two most prominent scholarly exponents of this view—Ira Lupu and Robert Tuttle—have pressed the consequences of this perspective, forcefully arguing over the course of a number of years against the view that “religious institutions are presumptively autonomous.”⁷⁰ On their account, courts are constitutionally prohibited from adjudicating religious claims, but not because of some constitutional desire to “systematically protect the interests of certain classes of parties, defined by religious mission.”⁷¹ Instead, the Establishment Clause imposes a bar on judicial resolution of religious claims because such “claims would require courts to answer questions that the state is not competent to address.”⁷² Thus, as one scholar has summarized this approach,

[i]n contrast to ordinary questions of fact, religious questions are understood to lie beyond judicial competence because they do not depend on the logic of law. Instead, religious questions may be answered on the basis of faith, mystical experiences, miracles, or other nonrational sources.⁷³

Accordingly, courts cannot interfere in such matters on a theory of “adjudicative disability”—the state simply has “limited jurisprudential competence” to decide such religious matters.⁷⁴ From this standpoint, to intervene in a religious institution’s internal affairs—and lend the authority of the state to one side or the other of a dispute—would be tantamount to

⁶⁹ See, e.g., *Rweyemamu v. Cote*, 520 F.3d 198, 208–09 (2d Cir. 2008) (using the Establishment Clause to hold the application of Title VII to a decision made by a religious institution unconstitutional); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006) (“The exception is based on the establishment and free-exercise clauses of the First Amendment . . .” (citations omitted)); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1304 (11th Cir. 2000) (“[W]e find that the Free Exercise and Establishment Clauses of the First Amendment prohibit a church from being sued under Title VII by its clergy.”); *Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940, 948 (9th Cir. 1999) (“The Establishment Clause serves as a separate constitutional basis for the ministerial exception to Title VII.”); *Scharon v. St. Luke’s Episcopal Presbyterian Hosp.*, 929 F.2d 360, 363 (8th Cir. 1991) (using an analysis based on the Establishment Clause as a basis for refusal to review a dispute involving a religious matter).

⁷⁰ Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 78–79 (2002).

⁷¹ Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders*, 7 GEO. J.L. & PUB. POL’Y 119, 122 (2007).

⁷² *Id.* at 138; see also Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789, 1815 (2004) (elaborating on the implications of the Establishment Clause in this context).

⁷³ Jared A. Goldstein, *Is There a “Religious Question” Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 536 (2005). On the nonrational character of religious claims, see Brian Leiter, *Why Tolerate Religion?*, 25 CONST. COMMENT. 1, 18 (2008).

⁷⁴ Lupu & Tuttle, *supra* note 71, at 122–23.

government “establishing” a religion.⁷⁵ As a result, the protections afforded to religious institutions are not grounded in some notion of inherent autonomy; these legal protections are simply a byproduct of the fact that courts lack the jurisdictional authority to intervene in the internal affairs of religious institutions.⁷⁶ The church autonomy doctrine is thus best viewed as shorthand for the “adjudicative disability” of courts—that is, the fact that courts cannot resolve disputes within religious institutions because they lack the competence to resolve disputes that implicate religious doctrine or practice.⁷⁷ Applied to the ministerial exception, Lupu and Tuttle have explained the ramifications of their theory as follows:

[R]ecognizing the ministerial exception serves the prophylactic function of fully recognizing the adjudicative disability of courts with respect to fitness for ministry, and thereby protecting religious communities from both inappropriate intrusion and the risk of erroneous determinations.⁷⁸

Both the sovereignty and the adjudicative-disability approaches to the unique legal standing of religious institutions, however, are problematic in that they fail to provide adequate limitations on the authority of religious institutions. Criticism of the sovereignty approach for lacking meaningful limits to the authority of religious institutions has been a recurring theme in recent academic literature. Maybe the most forceful critique of religious institutionalism, a 2013 article by Richard Schragger and Micah Schwartzman titled *Against Religious Institutionalism*, presented the problem of limits as follows:

The strong form of sphere sovereignty claims that churches have a special, unique, and exclusive mission to preach the Word, to convert the unconverted, and to glorify God. This is the nature of the jurisdictional claim at its heart, and stated in its baldest form, it seems to countenance very few limits on church immunity. The stakes are too high.⁷⁹

⁷⁵ *Cf. id.* at 137 (“Marking out regulatory zones from which government is excluded constitutes a central element in a strategy of ensuring the anti-totalitarian quality of governance.”).

⁷⁶ *See, e.g.*, Esbeck, *supra* note 64, at 45–46 (discussing the underpinnings of the courts’ lack of jurisdiction over the internal matters of churches); Horwitz, *First Amendment Institutions*, *supra* note 62, at 120–22 (advocating for broad institutional immunity for churches in employment decisions); Kalscheur, *supra* note 41, at 48–49 (addressing the ministerial exemption and its widespread adoption among courts).

⁷⁷ Lupu & Tuttle, *supra* note 71, at 122; *see also* Lupu & Tuttle, *supra* note 72, at 1815 (explaining that ministerial immunities arise from jurisdictional limitations).

⁷⁸ Lupu & Tuttle, *supra* note 6, at 1283.

⁷⁹ Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 946 (2013).

More recently, Lupu and Tuttle have launched a similar criticism:

[T]he notion that any private entities should be afforded sweeping authority, free of state supervision, over persons and their property is thoroughly inconsistent with liberal democratic order Our constitutional arrangements do not permit the delegation of coercive and unreviewable authority to families or other private associations, whether these associations are religious or not.⁸⁰

To the extent the sovereignty approach to religious institutions derives the authority of such institutions from an inherent sovereignty that stands beyond the authority of the state, it is difficult to see what legal principles could be marshaled to articulate limits on religious institutional authority. And given that there are some claims where we might surely expect some legal limits on the authority of religious institutions,⁸¹ a sovereignty approach seems to prove too much to serve as a viable framework.

Ironically, the claims of adjudicative disability suffer from a somewhat similar problem.⁸² As noted above, theories of adjudicative disability seek to limit religious institutional claims by rejecting the notion that such institutions have any inherent autonomy. Instead, courts can regulate religious institutions, so long as such regulation relates to resolving claims that do not require interrogating of religious doctrine or religious standards.⁸³ To do otherwise—to resolve claims that implicate religious questions—would ostensibly violate the Establishment Clause by leading courts to become impermissibly entangled with religion.⁸⁴

The challenge, however, is that refusing to interrogate claims that implicate religious standards creates a legal space where government cannot adequately protect the interests of citizens from serious harms. Consider again the foremost proponents of this view: Lupu and Tuttle. In maybe the most thorough consideration of institutional autonomy and sexual misconduct, Lupu and Tuttle explore how their theory of adjudicative

⁸⁰ Lupu & Tuttle, *supra* note 6, at 1298.

⁸¹ See Michael A. Helfand, *How to Limit Accommodations: Wrong Answers and Rights Answers*, 4 J.L. RELIGION & STATE 1, 4 (2016) (discussing, and criticizing, the attempted use of RFRA as a defense to physical violence by a group of rabbis seeking to force husbands to grant their wives religious divorces); *infra* note 97 (discussing claims related to sexual misconduct by religious leaders).

⁸² I say “ironically” because this is the precise criticism Lupu and Tuttle level against those promoting a sovereignty approach to religious institutions as well as those adopting an implied consent framework. See Lupu & Tuttle, *supra* note 6, at 1302 (claiming that proponents of sovereignty or implied consent theories “persistent[ly] fail[] to analyze situations that seem difficult, or to identify any cases in which religious entities should lose”).

⁸³ See *supra* notes 64–75 (providing numerous assertions of this position).

⁸⁴ I have elsewhere contested this interpretation of the Establishment Clause. *E.g.*, Helfand, *Litigating Religion*, *supra* note 5, at 497 (arguing that courts should not interpret the Establishment Clause to categorically prevent them from litigating on religious issues).

disability might map on to claims of clergy sexual misconduct.⁸⁵ In explaining how, in their view, institutional autonomy is not a right granted religious institutions, but a function of the limitation on judicial intervention in religious disputes, they note:

Ecclesiastical immunities . . . are not the offspring of rights in the conventional sense. They are not the legal entitlements of religious entities in the way that, for example, authors and political advocates possess rights to communicate. Instead, ecclesiastical immunities are the entailments of the jurisdictional limitations that the Establishment Clause imposes upon the state's role. Because the state is forbidden from being the author or coauthor of religious faith, it may not adjudicate or regulate the ways in which communities of faith are organized. Nor may the state select the voices which lead these communities, nor the lessons they communicate.⁸⁶

Lupu and Tuttle go on to carefully parse various different scenarios in which individuals and institutions might seek refuge from liability for conduct related to sexual misconduct—and to what extent the Establishment Clause provides that refuge.⁸⁷

The problem is that, in linking liability to avoidance of Establishment Clause prohibitions, Lupu and Tuttle's theory does not allow courts to take into account the interests at stake in any given case that counterbalance the religious institutional claims. Thus, for example, Lupu and Tuttle argue that many claims that allege a religious institution breached its fiduciary duty to one of its members—for example, where a house of worship failed to take the necessary steps or precautions in order to prevent a religious leader from engaging in sexual misconduct—are constitutionally off limits.⁸⁸ The reason: “[T]he Establishment Clause forbids a state from using the civil law to impose a normative vision of the structure of religious organizations.”⁸⁹ Therefore, many civil suits against religious institutions for failing to properly respond to the sexual misconduct of employees cannot be adjudicated by courts because those suits either assume certain organizational relationships or impose certain supervisory responsibilities; and for a court to assuming such relationships or impose such responsibilities would amount to the state taking a position regarding the

⁸⁵ Lupu & Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, *supra* note 72, at 1797–98, 1801.

⁸⁶ *Id.* at 1815.

⁸⁷ *See id.* at 1891–92 (examining the relationship between priest-penitent privilege and Establishment Clause analyses).

⁸⁸ *See id.* at 1836, 1838 (arguing that judicial expansion of a religious institution's fiduciary duty “is in serious tension with . . . First Amendment considerations”).

⁸⁹ *Id.* at 1844.

appropriate internal functioning of a religious institution, which Lupu and Tuttle see as constitutionally prohibited. Or, in their own words:

Because such duties of loyalty to all adherents of the faith effectively dictate the mechanisms of control over clergy, and effectively compel a particular organizational response to victims of clergy misbehavior, imposing these duties tends to unconstitutionally establish a legally preferred structure of denominational life.⁹⁰

Importantly, this assessment remains true regardless of how damaging the sexual misconduct at stake: according to a theory of adjudicative disability, the Establishment Clause prohibits certain kinds of religious inquiries into the theology and traditions that animate employment relationships within a religious organization. For this reason, using the Establishment Clause to define the protections afforded religious institutions is heavy medicine. Consider the following: claims asserted pursuant to the Free Exercise Clause are subjected to strict scrutiny; as a result, Free Exercise claims can be trumped where doing so is the least-restrictive means for advancing a compelling government interest.⁹¹ In this way, courts have a safeguard to protect compelling government interests when addressing religious liberty claims grounded in the Free Exercise Clause.⁹²

By contrast, grounding the claims of religious institutions in the Establishment Clause prevent courts from taking any relevant compelling government interests into account.⁹³ This is because the Establishment Clause is a structural constraint on government power, imposing jurisdictional limitations on the authority of the state to intervene.⁹⁴ Thus, courts—to the extent they adopt an adjudicative disability theory and adopt an Establishment Clause gloss on the protections afforded religious institutions—lack the jurisdiction to intervene in such disputes, missing any

⁹⁰ *Id.* at 1845.

⁹¹ *See, e.g.,* *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (“We must next consider whether some compelling state interest . . . justifies the substantial infringement of appellant’s [free exercise rights].”).

⁹² *See, e.g.,* *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (explaining that a school cannot compel attendance beyond a certain grade if it “interferes with the practice of a legitimate religious belief” and there is not “a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause”).

⁹³ *See* Lupu & Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, *supra* note 72, at 1815–16 (“Because the state is forbidden from being the author or coauthor of religious faith, it may not adjudicate or regulate the ways in which communities of faith are organized Religious entities cannot waive this jurisdictional limitation, which we believe resides most comfortably in the Establishment Clause Moreover, no state assertion of countervailing state interests, compelling or otherwise, may operate to set aside this limitation.”).

⁹⁴ *See generally* Esbeck, *supra* note 64, at 33 (1998) (discussing standing, class-wide remedies, church autonomy, and the nondelegation rule as verification of the structuralist view).

opportunity to subject claims of religious institutions to strict scrutiny.⁹⁵ In this way, theories like those of Lupu and Tuttle must concede—as they in fact do⁹⁶—that certain failures to police sexual misconduct within religious institutions will go unpunished because there can be no constitutional inquiry into the religious structures and religious standards of, for example, houses of worship. And that constraint remains true regardless of the severity of the sexual misconduct implicated in the case.⁹⁷ A theory of adjudicative disability, because it is grounded in the Establishment Clause, simply has no way to take those kinds of considerations into account.⁹⁸

In this way, a theory of adjudicative disability, with its basis in the Establishment Clause, may fall short in providing a mechanism to prevent some of the worst offenses within religious institutions. And in turn, like

⁹⁵ See, e.g., *Church of Scientology Flag Serv. Org. v. City of Clearwater*, 2 F.3d 1514, 1543 (11th Cir. 1993) (“Thus, we have concluded, the Establishment Clause may condemn certain entanglements that take the form of civil intervention in church political organization under *Lemon* even if they might otherwise have been justifiable under the strict scrutiny of the Free Exercise Clause.”).

⁹⁶ See *supra* notes 85–86 and accompanying text (summarizing Lupu and Tuttle’s arguments that “many claims alleging that a religious institution breached its fiduciary duty to one of its members . . . are constitutionally off limits.”). For more of my prior work discussing sexual misconduct cases and implied consent, see Helfand, *Religious Institutionalism*, *supra* note 5, at 551–53.

⁹⁷ As examples of cases where the Establishment Clause foreclosed liability notwithstanding the severe consequences of the underlying sexual misconduct, see *Doe v. Evans*, 718 So. 2d 286, 291 (Fla. Dist. Ct. App. 4th Dist. 1998) (“In a church defendant’s determination to hire or retain a minister, or in its capacity as supervisor of that minister, a church defendant’s conduct is guided by religious doctrine and/or practice. Thus, a court’s determination regarding whether the church defendant’s conduct was ‘reasonable’ would necessarily entangle the court in issues of the church’s religious law, practices, and policies A court faced with the task of determining a claim of negligent hiring, retention, and supervision would measure the church defendants’ conduct against that of a reasonable employer; a proscribed comparison.”), *quashed by* 814 So. 2d 370 (Fla. 2002); *Schmidt v. Bishop*, 779 F. Supp. 321, 332 (S.D.N.Y. 1991) (“It would therefore also be inappropriate and unconstitutional for this Court to determine after the fact that the ecclesiastical authorities negligently supervised or retained the defendant Bishop. Any award of damages would have a chilling effect leading indirectly to state control over the future conduct of affairs of a religious denomination, a result violative of the text and history of the establishment clause.” (citation omitted)). By contrast, an inquiry that incorporates strict scrutiny has the built-in safeguard to override the constitutional status of a religious institution. See, e.g., *Doe v. Dorsey*, 683 So. 2d 614, 617 (Fla. Dist. Ct. App. 5th Dist. 1996) (“[W]e are persuaded that just as the State may prevent a church from offering human sacrifices, it may protect its children against injuries caused by pedophiles by authorizing civil damages against a church that knowingly (including should know) creates a situation in which such injuries are likely to occur. We recognize that the State’s interest must be compelling indeed in order to interfere in the church’s selection, training and assignment of its clerics. We would draw the line at criminal conduct.”), *abrogated by* *Malicki v. Doe*, 814 So. 2d 347 (Fla. 2002).

⁹⁸ See, e.g., Molly A. Gerratt, *Closing a Loophole: Headley v. Church of Scientology International as an Argument for Placing Limits on the Ministerial Exception from Clergy Disputes*, 85 S. CAL. L. REV. 141, 165–66 (“Unlike in free exercise jurisprudence, there is no risk that a compelling government interest test will allow cases to proceed if the ministerial exception is derived from the Establishment Clause.”). It is worth noting here that *Hosanna-Tabor* links the ministerial exception to both the Free Exercise Clause and the Establishment Clause. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188–89 (2012). Lupu and Tuttle have argued that, as a result, an implied consent approach misreads *Hosanna-Tabor*. Lupu & Tuttle, *supra* note 6, at 1300. To be clear, it is not a misreading, just a disagreement with the Court’s analysis.

sovereignty theories, it may leave us searching for another overarching framework for the protections afforded religious institutions—one that recognizes their unique constitutional status, but simultaneously allows courts to directly take other important government interests into account when determining the limits of religious institutional autonomy.

II. IMPLIED CONSENT: A PRIMER

Current doctrine continues to search for an underlying theoretical framework for the legal status of religious institutions. In the wake of *Employment Division v. Smith*, constitutional doctrine has struggled to reconcile the historical autonomy granted to religious institutions and the narrowing application of the Free Exercise Clause only to laws that are not neutral and generally applicable.

Importantly, the constitutional dimensions of this challenge have spilled over into statutory debates. In response to the Supreme Court’s decision in *Employment Division v. Smith*, Congress enacted the Religious Freedom Restoration Act (RFRA).⁹⁹ By its terms, RFRA prohibits government from “substantially burden[ing] a person’s exercise of religion” unless that burden “is in furtherance of a compelling government interest” and “is the least restrictive means of furthering” that interest¹⁰⁰—the very constitutional standard that was explicitly rejected by the Court in *Employment Division v. Smith*.¹⁰¹

Although RFRA stands as its own statutory provision, its primary purpose was linked to the Free Exercise jurisprudence prior to the Court’s decision in *Smith*. In outlining its overall purpose, the House Report characterized RFRA as “turn[ing] the clock back to the day before *Smith* was decided.”¹⁰² Indeed, the Congressional findings incorporated into the text of RFRA further emphasize that the core object of RFRA was to undo the impact of *Smith*, expressing dismay over the fact that “in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion”¹⁰³

⁹⁹ 42 U.S.C. § 2000bb (2013).

¹⁰⁰ *Id.* § 2000bb-1(a), (b)(1)–(2).

¹⁰¹ See *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 890 (1990) (holding that Oregon’s denial of unemployment benefits was consistent with the Free Exercise Clause because the plaintiff violated a state law that was facially neutral and generally applicable). The Supreme Court’s decision in *City of Boerne v. Flores* limited Congress’s RFRA to federal laws, holding that Congress lacked constitutional authority to enforce RFRA against states. 521 U.S. 507, 534 (1997). Many states responded to *Boerne* by passing their own RFRA’s—so-called mini-RFRA’s. See Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRA’s*, 55 S.D. L. REV. 466 (2010).

¹⁰² See H.R. REP. NO. 103-88, at 15 (1993) (internal quotation marks omitted).

¹⁰³ 42 U.S.C. § 2000bb(a)(4).

By turning back the clock on *Smith*, RFRA provided an additional avenue for religious institutions to secure exemptions from neutral and generally applicable laws. But RFRA expressed precious little about the framework for assessing the claims of religious institutions. Thus, while RFRA may have provided broader protections for religious institutions, it did not explain where and to what extent religious institutions ought to be granted a unique status within the legal order. To the contrary, the RFRA claims asserted by religious institutions—like parallel First Amendment claims—are in pressing need of a broader framework to explain their origin and scope.¹⁰⁴ Many of the clashes between religious institutions and other important government interests—such as contraception and same-sex marriage—have come to a head in the RFRA context.¹⁰⁵ And like the First Amendment challenges sketched above, the boundaries of RFRA remain highly uncertain and deeply contested. At the core of these challenges lies a single question: What framework should inform the doctrine affording protection to religious institutions?

Instead of institutional theories grounded in the inherent sovereignty of religious institutions or the adjudicative disability of courts, I have argued that the authority and autonomy of religious institutions ought to be seen as deriving from the *implied consent* of their membership.¹⁰⁶ To understand how this theory works requires explaining the two fundamental principles underlying an implied consent approach to religious institutions.

The first principle of implied consent institutionalism is *voluntarism*. Voluntarism is “the freedom to make religious choices for oneself, free from governmental compulsion or improper influence.”¹⁰⁷ And, in turn, a voluntarism-based approach to religious institutions sees those institutions as valuable because they are borne out of the voluntary choices of their members.¹⁰⁸ Grounding the value of religious institutions in voluntarism firmly entrenches the constitutional protections afforded religious institutions under the umbrella of the Free Exercise Clause. Religious institutions are created through the voluntary decisions of individuals to join together and pursue shared religious values.

As I have discussed previously, the value of voluntarism has long been foundational to the philosophical and constitutional principle of religious

¹⁰⁴ *Id.* § 2000bb-1(a).

¹⁰⁵ See *supra* notes 14–28 and accompanying text.

¹⁰⁶ *Supra* note 5.

¹⁰⁷ DANIEL O. CONKLE, *CONSTITUTIONAL LAW: THE RELIGION CLAUSES* 39 (2d ed. 2009); see also John Witte Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 390 (1996) (describing voluntarism as expressing our constitutional commitment to “the unencumbered ability to choose and change one’s religious beliefs and adherences”).

¹⁰⁸ See generally Schragger & Schwartzman, *supra* note 79, at 961–62 (arguing that churches have autonomy because the institution itself is a “product of free association,” deriving its power from the voluntary consent of its members).

liberty.¹⁰⁹ It can be traced from John Locke, through Thomas Jefferson and James Madison, all the way through early Supreme Court conceptions of religious institutional autonomy.¹¹⁰ The principle of voluntarism flows from a fundamental commitment to freedom of conscience—that is, the freedom to make choices about religious belief and practice in the absence of improper government influence.

The second foundational principle of implied consent institutionalism is that religion is predominantly experienced as a social or collective phenomenon. Accordingly, “[r]eligion, as understood both by the framers and contemporary observers, is primarily a group phenomenon”¹¹¹ Or, put in the negative, “[r]eligion is rarely an individual endeavor. Instead, people come together, bound in collective belief, worship, and related action.”¹¹² Robert Cover famously captured this impulse toward collective religious experience in constitutional terms: “The religion clauses of the Constitution seem to me unique in the clarity with which they presuppose a collective, norm-generating community whose status as a community and whose relationship with the individuals subject to its norms are entitled to constitutional recognition and protection.”¹¹³ Religious institutions, in turn, serve as focal points for the collective exercise of religion, providing the institutional infrastructure that makes religious exercise possible.¹¹⁴

All told, an implied consent theory of religious institutionalism relies on these twin principles: it values religious decisions to the extent they represent voluntary choices of conscience and it presumes that religious aspirations are typically pursued and experienced by groups or collectivities. And not surprisingly, these two principles played central roles in the development of Supreme Court doctrine on the constitutional treatment of religious institutions.¹¹⁵

For example, in its 1871 decision *Watson v. Jones*, the Supreme Court grounded the authority of religious institutions in the voluntary choices of their members, arguing “[t]hat in so far as the law can regard them, the powers of the church judicatories are derived solely from the consent of the

¹⁰⁹ See, e.g., Helfand, *Religious Institutionalism*, *supra* note 5, at 567–72 (noting that Locke, Jefferson, and Madison discussed the voluntary choice to freely practice religion as a cornerstone of life in civil society, which continues to “serve[] as the North Star” in free exercise cases).

¹¹⁰ *Id.*

¹¹¹ Stephen Pepper, *Conflicting Paradigms of Religious Freedom: Liberty Versus Equality*, 1993 BYU L. REV. 7, 24 (1993).

¹¹² Zoë Robinson, *What Is a Religious Institution?*, 55 B.C. L. REV. 181, 206 (2014).

¹¹³ Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 32 n.94 (1982).

¹¹⁴ See Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 294–95 (2008) (arguing for the importance of religious institutions because they “contribute to . . . the reality of religious freedom under the law” by serving as part of the infrastructure upon which “the freedom of religion depends”).

¹¹⁵ See Schragger & Schwartzman, *supra* note 79, at 975–76, 982–83 (discussing voluntary religious choice and religious group identity in Supreme Court precedent).

members of the church”¹¹⁶ Similarly, in its 1929 decision *Gonzalez v. Roman Catholic Archbishop of Manila*, the Supreme Court explicitly grounded church autonomy in the consent of the religious institution’s members, holding that “the decisions of the proper church tribunals on matters purely ecclesiastical . . . are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise.”¹¹⁷

In formulating the special treatment of religious institutions in terms of voluntary choice, the Court provided a unique gloss on how such voluntariness would be legally inferred: “All who unite themselves to such a body do so with an *implied consent* to this government, and are bound to submit to it.”¹¹⁸ In this way, joining a church or other religious institution entails an implicit consent authorizing the institution to self-govern and resolve internal disputes.

What justifies inferring implicit consent to the authority of a religious institution from joining that institution? According to the Court in *Watson*, the justification is tied directly to the desire of individuals to pursue religious experience as collectivities: “It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.”¹¹⁹ Thus the reason why we can legally infer implied consent from the mere act of joining a religious institution is because it tracks the general impulse of individuals to pursue religious experiences and objectives as a collective—and pursuing those religious experiences and objectives are only possible if institutions develop internal religious rules and doctrine to organize individuals into a religious collectivity.

Watson captured this intuition in the converse formulation: “[I]t would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.”¹²⁰ If institutions could not promulgate rules and render decisions regarding the collective pursuit of religious aspirations, then individuals would not be able to join together into functioning collectivities geared towards achieving shared religious objectives and experiences. Accordingly, if religious decisions are valued to the extent they are voluntary, and if individuals are presumed to desire collective pursuit of religious aspirations, then the law can infer, from the

¹¹⁶ *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 710 (1871).

¹¹⁷ *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929). The Court continued by noting that “[u]nder like circumstances, effect is given in the courts to the determinations of the judicatory bodies established by clubs and civil associations.” *Id.* at 16–17.

¹¹⁸ *Watson*, 80 U.S. (13 Wall.) at 729 (emphasis added).

¹¹⁹ *Id.*

¹²⁰ *Id.*

mere act of joining a religious institution, that individuals implicitly grant the relevant institution the authority and autonomy necessary for the institution to enable the collective to reach its shared religious goals.

In leveraging this voluntarist impulse and the collective nature of religious pursuit, an implied consent theory most closely tracks John Locke's theory of tolerance. According to Locke, individuals voluntarily join churches to achieve "the Salvation of their Souls" and this "hope of Salvation" serves as the motivation for "Members voluntarily uniting" into a church.¹²¹ However, Locke notes, in order to successfully accomplish such objectives, the church must "be regulated by some Laws, and the Members all consent to observe some Order."¹²²

Importantly, the rules and order brought to bear on a religious institution, according to Locke, could not come from civil society. Civil society is not organized to pursue particular religious conceptions of the good; it seeks to "procur[e], preserv[e], and advanc[e] . . . Civil Interests," such as "Life, Liberty, Health and Indolence of Body; and the Possession of outward things, such as Money, Land, Houses, Furniture, and the like."¹²³ This is all by design; by focusing its efforts and energies on "outward things," a civil society avoids taking sides on how its citizens should lead the good life, leaving room for the deep value-pluralism that typifies the liberal nation-state.

The members of a religious institution, if they hope to successfully and collectively pursue religious objectives, must therefore consent to authorizing their shared institution to serve that role—that is, to "regulate . . . some laws" and "observe some order."¹²⁴ Religious associations are formed in order to pursue a particular conception of the good life, tied up with specific notions of faith and salvation. As phrased by Locke, "everyone joins himself voluntarily to that Society in which he believes he has found that Profession and Worship which is truly acceptable to God."¹²⁵ But without the ability to promulgate religious rules, religious institutions would not be able to pursue those shared religious aspirations. In the words of Locke, without granting religious institutions rule-making and dispute-resolution authority, the "Church . . . will presently dissolve and break in pieces."¹²⁶

In sum, from the vantage point of a religious institution's membership, the pursuit of shared religious objectives can only be done within the

¹²¹ John Locke, *A Letter Concerning Toleration*, in *A LETTER CONCERNING TOLERATION AND OTHER WRITINGS* 15–16 (Mark Goldie ed. 2010).

¹²² *Id.* at 16. Example of such necessary rules include "place and time of meeting . . . Rules for admitting and excluding Members . . . Distinction of Officers, and putting things into a regular Course . . ." *Id.*

¹²³ *Id.* at 12 (emphasis omitted).

¹²⁴ *Id.* at 16.

¹²⁵ *Id.* at 15.

¹²⁶ *Id.* at 16.

framework of the religious collective; it would be a non sequitur for the state to guide the religious collective in the pursuit of those religious objectives. The religious rules and regulations necessary to achieve shared religious objectives must come internally from the very institution formed by the membership to pursue those aspirations. And this underlying theory animated the *Watson* Court's formulation of religious institutional autonomy. As the Court explained, "it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed."¹²⁷

The logic underlying an implied consent theory of religious institutionalism highlights its differences from other prevailing theories for why the law ought to treat religious institutions differently. Contrary to sovereignty theories, an implied consent approach does not grant any inherent autonomy to religious institutions. Religious institutions derive their authority from the voluntary choices of their members—members who cede some degree of autonomy and authority to religious institutions in order to facilitate the shared religious objectives of the membership.

An implied consent theory also stands in opposition to theories that translate the autonomy of religious institutions as simply a byproduct of the prohibition against courts becoming impermissibly entangled with religious questions, doctrines, or practices. The starkest distinction is that implied consent theory—because of its emphasis on the affirmative decision to join a religious institution—flows from the Free Exercise Clause, valuing the voluntary decisions of individuals to collectively pursue religious objectives. It is not simply the result of an adjudicative vacuum created by the Establishment Clause prohibiting courts from intervening in internal religious matters and thereby becoming entangled with religious doctrine.

III. THE NATURE AND LIMITS OF IMPLIED CONSENT: A DEFENSE

An implied consent theory of religious institutionalism relies on the voluntary choice of members as the legitimating force driving the authority and autonomy granted religious institutions. Members of religious institutions implicitly grant those institutions authority and autonomy to make rules and resolve disputes to the extent necessary in order to successfully pursue shared collective religious goals and aspirations.

By conditioning the authority and autonomy of religious institutions on this implied consent, the theory remains true to its core voluntarist impulse, which values the freedom to make religious choices free from coercion. The autonomy of religious institutions over internal religious decision-making retains this voluntarist character in that it flows from the authority granted voluntarily by the collective membership.

¹²⁷ *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1871).

The fulcrum of an implied consent theory is the argument that the law can infer implicit consent to the authority and autonomy of a religious institution from the mere fact that a member joined the institution. The rationale for this inference runs as follows. Individuals typically pursue religious goals—like faith, prayer, and salvation—in concert with others. In so doing, they join together to form institutions that allow them to fulfill this impulse to pursue shared religious principles and values as a collective.

To pursue these shared religious objectives, collectives must set up some institutional framework to establish religious rules and resolve religious disputes. The state cannot play this role because it lacks the institutional resources and constitutional authority to promulgate religious rules that could provide a framework for the collective pursuit of religious aspirations shared by a religious institution's membership. And without an institutional framework for religious rule-making and dispute resolution, the very objective of joining together into a religious collective would be thwarted. Accordingly, members—from the very act of joining an institution in pursuit of shared religious objectives—must be understood to grant a religious institution the necessary authority and autonomy to support those shared objectives. In the words of Locke, without institutional authority the “Church . . . will presently dissolve and break in pieces . . .”¹²⁸

To be sure, while an implied consent theory builds on the nature of rule-making and decision-making within religious institutions, it does not read notions of consent into the theological self-understanding of religious collectivities. Thus, to embrace an implied consent theory does not require viewing religious institutions—or their relationship with their membership—as necessarily consensual. To the contrary, as Jessie Hill has emphasized in her criticism of implied consent institutionalism, religious institutions often view their relationships with members as nonconsensual.¹²⁹ But the internal perceptions held by institutions need not dictate what the law considers relevant for evaluating whether members have legitimately ceded religious institutions authority or autonomy. Accordingly, religious institutions might view their membership relationships as inherent or a function of birth. But what makes those relationships relevant and valuable to the state from an implied consent perspective is the extent to which the membership has demonstrated, even if implicitly, that they also consent to that relationship and that the relationship persists because of that consent. It is in that way that implied consent leverages a voluntarist impulse. Religious institutions can view themselves

¹²⁸ Locke, *supra* note 121, at 16.

¹²⁹ See Hill, *supra* note 6, at 426 (arguing that implied consent is a descriptively inaccurate characterization of the self-understanding within many religious communities, noting that “numerous religious traditions embrace modes of becoming members that have nothing whatsoever to do with consent, such as infant baptism (in numerous Christian denominations, including Catholicism) or matrilineal descent (in Judaism)”).

however they so choose, but an implied consent theory contends that the law should value the relationship between religious institutions and their members—and accordingly grant some legally recognized degree of authority and autonomy—only to the extent that there exist sufficient indications to justify categorizing the relationship as voluntary.

A. *Implied Consent Through “Membership”*

As should be clear by now, an implied consent model relies heavily on the notion of volitional membership in a religious institution. And it is precisely here where many critics have aimed their fire. For example, Lupu and Tuttle have argued that “[i]mplied consent is a strong and unjustified inference to be drawn from membership, standing alone.”¹³⁰ Or, as emphasized by Hill, “[i]ndividuals do not always enter religious communities voluntarily, and they do not always stay because they want to.”¹³¹

To unpack the question of inferring implied consent from membership, let us begin with the prototypical model of membership in a religious institution: an individual choosing to join a house of worship. Indications that an individual is a member of that institution could include, for example, paying some sort of annual dues, attending services at that house of worship, or any other participation in the collective pursuit of religious objectives.

Again, as some critics have noted, the choice to join a house of worship—or any other religious institution—is not purely volitional. There are some pressures at play. An individual may have been born into a particular faith or may have begun attending a specific house of worship as a minor and merely continued that participation into adulthood after becoming somewhat attached—in terms of identity or socially—to the house of worship. Thus, even the prototypical membership in a religious institution might not be viewed as purely volitional.¹³²

This is, of course, true. And in that way, criticism of the volitional nature of entry into a religious institution captures the core intuition that nearly all forms of consent are not *purely* volitional. This is also true of nearly all contracts; my choice to purchase food is somewhat pressured by my need to eat. To the extent a theory justifies obligation based upon consent, it requires line drawing as to how much consent is necessary. Thus, courts adopting an implied consent model, even in the prototypical case, might agree on the basic principles, but disagree on where to draw the line. Cases like *Watson* indicate that the Supreme Court, at least at one point in time, thought background considerations like a preexisting religious affiliation were not

¹³⁰ Lupu & Tuttle, *supra* note 6, at 1300.

¹³¹ Hill, *supra* note 6, at 425.

¹³² See *supra* notes 130–131 and accompanying text.

enough to render consent to joining a religious institution nonconsensual.¹³³ And some might disagree with this assessment. This kind of disagreement can all happen within an implied consent framework.

A second, and related, objection to even the prototypical instances of implied consent is not simply that there is not enough consent, but that there is an insufficient basis to infer whether a particular member has, in fact, consented to the authority of the religious institution to make rules and resolve disputes related to the shared religious objectives of the membership.¹³⁴ In the prototypical case, the argument for inferring implied consent is at its strongest. A house of worship conveys a clear message to members that it is an institution with religious objectives. And, leveraging the Lockean argument, the house of worship can assume that its members are on notice of a core religious institution, which aims to promote the collective pursuit of religious objectives, must make necessary religious rules and regulations to achieve those objectives.¹³⁵ In this way, an implied consent framework contends that the religious institution can infer consent to its authority over matters necessary to the pursuit of collective religious objectives from the mere act of joining the institution.

This inference from volitional membership, however, is only justified so long as the individual member does not end his or her relationship with the house of worship. In instances, for example, where an individual withdraws from a church, a church certainly can no longer lay claim to authority over that individual based on implied consent—that consent has clearly lapsed with the individual’s exit from the institution.

This emphasis on exit is of central importance in cases of communal shunning. Some houses of worship have the practice of “shun[ning] members of their religious communities for failing to abide by shared religious rules of conduct.”¹³⁶ Such shunning typically “involves the complete withdrawal of social, spiritual, and economic contact from a member or former member of a religious group.”¹³⁷ At times, these practices have given rise to claims of defamation and intentional infliction of emotional distress. For the most part, such suits have been dismissed on church autonomy grounds.¹³⁸ As articulated by the Ninth Circuit,

¹³³ *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 734 (1871).

¹³⁴ *See Lupu & Tuttle*, *supra* note 6, at 1299–1300 (“For participants, involvement may derive from circumstances of birth or early childhood when awareness of institutional policies will be slim or none Implied consent is a strong and unjustified inference to be drawn from membership, standing alone.”)

¹³⁵ *Locke*, *supra* note 121, at 16.

¹³⁶ *Helfand*, *Church Autonomy*, *supra* note 5, at 1937 (citing Michael A. Helfand, *Fighting for the Debtor’s Soul: Regulating Religious Commercial Conduct*, 19 *GEO. MASON L. REV.* 157, 181 (2011)).

¹³⁷ *Id.* (citing Justin K. Miller, Comment, *Damned if You Do, Damned if You Don’t: Religious Shunning and the Free Exercise Clause*, 137 *U. PA. L. REV.* 271, 272 (1988)).

¹³⁸ *See id.* (citing Annotation, *Suspension or Expulsion from Church or Religious Society and the Remedies Therefor*, 20 *A.L.R.2d* 435–36 (1952)); *see also* Michael A. Helfand, *Fighting for the Debtor’s*

“[c]hurches are afforded great latitude when they impose discipline ‘[R]eligious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be.’”¹³⁹

This, of course, makes sense from an implied consent perspective so long as the individual remains a member of the institution. By joining a house of worship, an individual certainly consents to that institution enforcing religious standards to ensure that the collective can pursue religious aspirations. Indeed, such instances may represent the strongest claims of authority and autonomy of a religious institution. But what happens when a member leaves a church? Can the church still engage in defamatory conduct or intentionally inflict emotional distress?

Institutional claims based upon the inherent sovereignty of religious institutions or on the adjudicative disability of courts are unlikely to differentiate between members pre- and post-withdrawal. Sovereignty claims would presumably extend regardless of whether the individual is still a member,¹⁴⁰ and claims of adjudicative disability are likely to emphasize the judicial challenges of evaluating the truth of religiously defamatory statements, a central component of adjudicating such claims given that truth is a defense to defamation.¹⁴¹

But from an implied consent perspective, houses of worship are shielded from liability against conduct related to shunning only so long as the individual remains a member. Once an individual exits the membership, the inference of implied consent is no longer justified and therefore the rights of authority and autonomy with respect to that member must end. If we are to ground religious institutionalism in some form of consent, then the import of a member’s exit must be central to such a theory.¹⁴² And indeed, some

Soul: Regulating Religious Commercial Conduct, 19 GEO. MASON L. REV. 157, 191 (2011); Justin K. Miller, Comment, *Damned if You Do, Damned if You Don't: Religious Shunning and the Free Exercise Clause*, 137 U. PA. L. REV. 271, 290 (1988).

¹³⁹ Paul v. Watchtower Bible & Tract Soc’y, 819 F.2d 875, 883 (9th Cir. 1987) (citation omitted).

¹⁴⁰ Several courts have apparently adopted a sovereignty-like approach. *See id.* at 883 (“Churches are afforded great latitude when they impose discipline on members or former members.”); *Sands v. Living Word Fellowship*, 34 P.3d 955, 959 (Alaska 2001) (holding that shunning practices are protected by the First Amendment in the context of a suit against non-church members); *see also Anderson v. Watchtower Bible & Tract Soc’y of N.Y., Inc.*, 2007 Tenn. App. LEXIS 29, *62–66 (Tenn. Ct. App. Jan. 19, 2007) (holding that “[s]hunning is religiously based conduct, a religious practice based on interpretation of scripture, and is subject to the protection of the First Amendment” and not differentiating between conduct committed pre-disfellowship and post-disfellowship).

¹⁴¹ *See, e.g., Anderson*, 2007 Tenn. App. LEXIS 29, at *96–97 (“If, to resolve [a] particular claim brought, a court would need to resolve underlying controversies over religious doctrine, then the claim is precluded.”); *see also Klagsbrun v. Va’ad Harabonim*, 53 F. Supp. 2d 732, 742 (D.N.J. 1999) (holding that the defendant could not be found liable for religious defamation because “the Establishment Clause is implicated whenever courts must interpret, evaluate, or apply underlying religious doctrine to resolve disputes involving religious organizations”).

¹⁴² DeGirolami has criticized this possibility of withdrawing implied consent, noting both the practical challenges of identifying the point of withdrawal as well as his concern that in the context of

courts have taken this approach, limiting the house of worship's shield from liability to only pre-withdrawal conduct.¹⁴³ As the Oklahoma Supreme Court reasoned in one such case of religious shunning, “[b]y voluntarily uniting with the church, [the plaintiff] impliedly consented to submitting to its form of religious government.”¹⁴⁴ Therefore, “[w]hen she later removed herself from membership, [the plaintiff] withdrew her consent, depriving the Church of the power actively to monitor her spiritual life through overt disciplinary acts.”¹⁴⁵

To be sure, sometimes the problem runs deeper than attempts to defame or intentionally inflict emotional distress on a former member. Sometimes circumstances make actually exiting the community such an onerous burden that members who want to leave cannot overcome the pressures to remain within the fold. In the words of Hill, “although individuals have a legal right to leave a religious tradition, informal sanctions might attend that choice, such as loss of custody of a child or loss of employment. Though perhaps not coercive in a legal sense, such burdens are substantial”¹⁴⁶ But the implied consent model can meet this challenge head on and without apology. Where the burdens of exit become sufficiently significant, an implied consent model ceases to justify the authority or autonomy of a religious institution; if members cannot reasonably leave the institution, then their consent is a fiction.

Of course, the devil is in the details here. How significant must the hurdles to exiting the institutional community be before remaining a member ceases to have legal significance? This kind of question raises similar line-drawing problems to those courts face when applying the duress defense to contract formation. Should those hurdles have to be wrongful, improper,

the ministerial exception, “this resolution greatly compromises and weakens the reach of the ministerial exception.” DeGirolami, *supra* note 6, at 117. As DeGirolami argues, “consent to the contract is not generally revocable, at least not without the payment of damages for breach.” *Id.* This is, of course, true. On my account, however, withdrawing consent would only be effective prospectively, not retrospectively. In this way, it would not work to undo the authority and autonomy of a religious institution related to conduct prior to the withdrawal. Instead, withdrawing consent would simply mean that there is no longer an “agreement,” so to speak going forward such that the member is no longer pursuing religious objectives as part of the religious institution’s collective.

¹⁴³ See, e.g., *Smith v. Calvary Christian Church*, 592 N.W.2d 713, 719 (Mich. Ct. App. 1998), *rev’d*, 14 N.W.2d 590 (Mich. 2000) (holding that plaintiff’s conduct evidenced his implied consent to the church’s practices); *Hester v. Barnett*, 723 S.W.2d 544, 559 (Mo. Ct. App. 1987) (holding the First Amendment could shield a pastor from claims of defamation against members of his church, but not against non-members); *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766, 786 (Okla. 1989) (holding that prewithdrawal discipline was not actionable because plaintiff had consented to such conduct, post-withdrawal discipline was actionable).

¹⁴⁴ *Guinn*, 775 P.2d at 777.

¹⁴⁵ *Id.* at 779.

¹⁴⁶ Hill, *supra* note 6, at 426.

or maybe something even more significant?¹⁴⁷ This kind of question requires a context-sensitive inquiry—an inquiry that is vital if implied consent will do the work necessary in order to justify the authority and autonomy of religious institutions.¹⁴⁸

The bigger challenge for an implied consent theory, however, is that it hopes to illuminate not only the prototypical cases of membership, but also the more complicated “membership relationship” of employees at religious institutions. The most obvious employment cases for houses of worship are those involving their religious leaders. An implied consent approach to the employment relationship between religious leaders and houses of worship generally presumes that the leader has granted wide authority and autonomy to his or her employer. By agreeing to be a minister, imam, or rabbi, an employee implicitly recognizes that he or she is part of a collective—indeed, is leading a collective—in the pursuit of religious objectives. And to make that relationship functional, the religious institution must establish religious rules to channel this collective pursuit. From the vantage point of the religious leader, there is unlikely to be any question as to his or her implied consent to religious rules geared to the pursuit of religious objectives. An implied consent approach is therefore likely to conclude that a religious leader has both granted authority to the religious institution to resolve employment disputes internally and to have also relinquished any ability to pursue such claims in civil courts.¹⁴⁹ In this way, an implied consent approach overlaps with paradigmatic examples of the ministerial exception, granting the religious institution the same kind of autonomy granted by the Court in *Hosanna-Tabor*.¹⁵⁰

Cases become more complicated as we move away from the house of worship-minister relationship. One axis on which the nature of a case might change is the role of the employee in question. Cases of a minister prove relatively easy from an implied consent perspective; cases of a church’s

¹⁴⁷ See, e.g., *Totem Marine Tug & Barge v. Alyeska Pipeline Serv. Co.*, 584 P.2d 15, 22 (Alaska 1978) (“Courts have not attempted to define exactly what constitutes a wrongful or coercive act, as wrongfulness depends on the particular facts in each case.”).

¹⁴⁸ For more discussion on the challenges of religious duress in a related context, see Michael A. Helfand, *Arbitration’s Counter-Narrative: The Religious Arbitration Paradigm*, 124 YALE L.J. 2994, 3042–51 (2015) [hereinafter Helfand, *Arbitration*], which analyzes claims of communal duress in the context of religious arbitration.

¹⁴⁹ To be sure, there may be some instances where even religious leaders and religious institutions demonstrate, through neutral contract terms, that they will submit disputes to some specified form of dispute resolution. In those circumstances, contract terminology can serve as a mechanism to withdraw a matter from the authority and autonomy of the religious institution and thereby demonstrate that the presumption of implied consent no longer holds. For more on this point, see Helfand, *Church Autonomy*, *supra* note 5, at 1940–42.

¹⁵⁰ See *id.* at 1896–97 (noting that “in *Hosanna-Tabor*, the Court affirmed the ministerial exception, which exempts religious institutions from complying with various employment statutes in the hiring and firing of ‘ministers’”).

music director or communications director prove somewhat more challenging.¹⁵¹ In this context, courts often adopt a functional approach, analogizing between a minister and other employees of a house of worship. Thus, a court might ask how central a particular employee is to the religious purpose of the institution.¹⁵² An adjudicative disability approach might focus more directly on the particular claims at stake in a dispute; that is, can a court resolve a specific employment dispute between an employee and a house of worship without becoming entangled in religious questions or doctrine?¹⁵³

An implied consent approach asks a somewhat different question: Do the circumstances give rise to a sufficiently justified inference that the employee impliedly consented to the authority of the religious institution to promulgate rules and resolve disputes related to the employee's membership in the institution? Accordingly, an implied consent approach does not impose functional limits on the nature of the employee that might be subject to the authority of a religious institution. There is no objective category of sufficiently religious employment roles that fall under the umbrella of a religious institution's autonomy. The question is what we can infer from the context in which a person accepted employment with a religious institution.

One instance where these approaches might lead to different results is in the context of general studies teachers in religious schools. A functional approach might focus on the fact that the teacher does not have religious duties.¹⁵⁴ By contrast, an implied consent approach might focus more directly on whether a general studies teacher understood his or her employment responsibilities to be part and parcel with the religious aspirations of the religious institution. For example, were there specific

¹⁵¹ See, e.g., *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 802–03 (4th Cir. 2000) (church's music director); see also *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 704 (7th Cir. 2003) (church's press secretary).

¹⁵² *Roman Catholic Diocese*, 213 F.3d at 802 (applying the exception to a church's music director because "music is a vital means of expressing and celebrating those beliefs which a religious community holds most sacred. Music is an integral part of many different religious traditions."); see also *Alicea-Hernandez*, 320 F.3d at 704 (applying the exception to a church's press secretary because "[t]he role of the press secretary is critical in message dissemination, and a church's message, of course, is of singular importance").

¹⁵³ See *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 465–66 (D.C. Cir. 1996) (discussing the Establishment Clause prohibitions implicated by assessing the quality of an employee's Canon Law scholarship).

¹⁵⁴ See, e.g., *EEOC v. Tree of Life Christian Sch.*, 751 F. Supp. 700, 706 (S.D. Ohio 1990) ("Although it appears undisputed that the principles of the Christian faith pervade the schools' educational activities, this alone would not make a teacher or administrator a 'minister' for purposes of exempting that person from the FLSA's definition of 'employee.'"); see also *Gallo v. Salesian Soc'y, Inc.*, 676 A.2d 580, 590 (N.J. Super. Ct. App. Div. 1996) ("Defendants now rely on this stipulation [that 'religion permeates the school atmosphere'], plus 'The philosophy of Don Bosco Preparatory High School' and the guide to hiring teachers, 'Characteristics of Teachers in Catholic Schools,' to support their contention that all parochial school teachers, regardless of the subject taught, perform a ministerial function. However, none of these generalized contentions support the conclusion that propagation of the faith was an integral part of the curriculum in secular subjects taught by plaintiff.").

religious values that the general studies teacher is expected to integrate into the curriculum? Were there curricular limitations placed upon the teacher to ensure that the classroom material conformed to shared religious values within the relevant faith community? And were these expectations conveyed to the employee at the outset of the employment relationship or only after the fact? From an implied consent approach, answers to these questions would illuminate whether there was a sufficient basis to infer that the employee understood that he or she was joining a religious institution in pursuit of collective religious objectives. And where the concept of membership was aptly applied, the religious institution ought to be deemed as having authority and autonomy to resolve internal religious disputes.

Cases also vary along the employer axis. In some employment cases, the institution claiming a religious status is not a house of worship, but some other class of institution. These cases range from non-profit institutions, such as hospitals, universities, and social service organizations, to various for-profit businesses, such as bakers, florists, and photographers.¹⁵⁵ The question of “what is a religious institution” may be the most hotly contested issue in recent litigation. Most notably, it was central to the litigation between religiously motivated for-profit companies and the government over whether RFRA allowed these businesses to exclude contraception coverage from their employees’ insurance plans in contravention of the contraception mandate.¹⁵⁶ And it is likely to emerge as cases persist between religiously motivated business owners who have refused to provide their services at same-sex weddings in contravention of prevailing public-accommodations laws. In a number of cases, the question of what qualifies as a religious institution has been a key threshold question.¹⁵⁷

Some scholars, as well as the government—at least at times¹⁵⁸—have argued that organizations, by definition, cannot be “religious” and for-profit

¹⁵⁵ See *Eternal Word Television Network, Inc. v. Sec’y of U.S. Dep’t of Health & Human Servs.*, 818 F.3d 1122, 1136 (11th Cir. 2016) (media network); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 609 (7th Cir. 2015), *cert. granted, judgment vacated*, 136 S. Ct. 2007, 195 L. Ed. 2d 210 (2016) (university); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (baker); *Arlene’s Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018) (florist); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 60 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014) (photographer).

¹⁵⁶ See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768–72 (2014) (discussing the meanings of “person” and “exercise of religion” included in RFRA and whether they apply to the corporation).

¹⁵⁷ See, e.g., *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 291 (Colo. App. 2015), (concluding that Masterpiece was not exempt under the religious-purpose exemption), *overturned* *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018); *State v. Arlene’s Flowers, Inc.*, 389 P.3d 543, 560–61 (Wash. 2017) (noting the appellant’s argument that the Washington Law Against Discrimination is “unfair” because it does not extend the “religious organization” exemption to her business), *vacated and remanded sub. nom.*, *Arlene’s Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018).

¹⁵⁸ See, e.g., Defendants’ Memorandum in Opposition to Plaintiffs’ Motion for Preliminary Injunction at 12–13, *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012) (No.

because the profit motive and religious motivation are mutually exclusive.¹⁵⁹ Others have identified more nuanced dividing lines between those institutions that qualify as religious institutions and those that don't quite fit into that category based upon the quantum of religious conduct within the relevant organizations.¹⁶⁰

By contrast, and as with the employee question, an implied consent approach focuses not on the inherent or objective religious nature of the organization—or whether the institution is a for-profit or a non-profit institution—but on whether the context justifies an inference of implied consent to the authority and autonomy of the institution.¹⁶¹ To justify such an inference, the employer must clearly convey to its prospective employees that they are working at an institution geared towards the pursuit of collective religious objectives. Without clearly conveying the collective pursuit of religious objectives, there would be no reason for prospective employees, when choosing to accept employment, to grant autonomy and authority to the institution to make religious rules and establish methods of religious dispute resolution. Members only grant that authority and autonomy so that the institution can make the rules necessary to reach the collective religious objectives.¹⁶² But if there is no basis for employees to know of their employer's religious objectives, then there would be no reason for them to have impliedly consented to their employer's autonomy or authority.¹⁶³

CIV-12-1000-HE) (“Hobby Lobby is a for-profit, secular employer, and a secular entity by definition does not exercise religion.”); Defendants’ Opposition to Plaintiffs’ Motion for Preliminary Injunction at 15, *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106 (D.D.C. 2012) (Civil Action No. 12-1635 (RBW)) (“Tyndale is a for-profit employer that cannot ‘exercise religion’ under RFRA and the Free Exercise Clause.”).

¹⁵⁹ See Harry G. Hutchison, *Religious Liberty for Employers as Corporations, Natural Persons or Mythical Beings? A Reply to Gans*, 120 PENN ST. L. REV. 537, 546 (2015) (discussing another scholar’s belief “that for-profit corporations cannot exercise religion because they lack human attributes”).

¹⁶⁰ See, e.g., Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1539–40 (1979) (explaining the “emanation[s]” of the church’s activities and what should be outside of governmental regulation). For another recent and insightful approach to the question, see Robinson, *supra* note 110, at 181, which argues for a definition of religious institution that focuses on the institution’s protection of “individual conscience” and “group rights,” as well as its ability to provide “desirable societal structures.”

¹⁶¹ See Robinson, *supra* note 112, at 193 (“[A]n institution will only be designated a ‘religious institution’ if the employees can be presumed to have impliedly consented to the authority of the institution in order to promote those objectives particularly unique to the religion.”).

¹⁶² See Helfand, *What is a “Church”?*, *supra* note 5, at 402 (discussing how members of a religious organization allow the institution’s rules to achieve “religious objectives”).

¹⁶³ The focus on the perspective of a *prospective* employee is important. For example, in a forthcoming article, Elizabeth Sepper notes the challenges of categorizing hospitals as “religious” when they are purchased by Catholic hospital systems. Elizabeth Sepper, *Zombie Religious Institutions*, 112 NW. U. L. REV. 929 (2018). From an implied consent perspective, it would be unlikely to view an employee who works for an institution that becomes religiously affiliated after the onset of the employment relationship as having impliedly consented to that institution’s religious authority and

To be sure, from an implied consent perspective, the standard for knowledge of the employer's religious objectives need not be actual.¹⁶⁴ But at the same time, to justify an inference of implied consent, it isn't enough simply to be able, as a technical or legal matter, to impute that knowledge.

Consider the following: In some cases, courts approach the question of whether an institution is a religious institution by looking at the institution's corporate structure or the extent to which religious standards are built into the institution's bylaws. For example, in *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, the Eighth Circuit considered whether the defendant, a hospital, should be considered a religious institution for the purposes of the ministerial exception.¹⁶⁵ In answering the question in the affirmative, the court highlighted, among other considerations, that "the hospital's Board of Directors consists of four church representatives and their unanimously agreed-upon nominees"¹⁶⁶ and in addition, the hospital's

Articles of Association may be amended only with the approval of the Episcopal Diocese of Missouri of the Protestant Episcopal Church in the United States of America and the local Presbytery of the Presbyterian Church (U.S.A.).¹⁶⁷

Identifying religious motivation in corporate bylaws may be relevant if the metric for qualifying as a religious institution is the inherent quantum of an institution's religious content. But bylaws provide little to justify an inference of implied consent; it seems highly implausible to assume—or expect—that employees read an employer's bylaws prior to accepting employment. Instead, under an implied consent framework, the relevant inquiry is whether the employer's conduct was sufficient to convey its religious aspirations to its employees and thereby justify an inference of implied consent. As another example, consider the Fourth Circuit's analysis in *Shaliesabou v. Hebrew Home of Greater Washington*.¹⁶⁸ While the court relied in part on bylaws in evaluating whether the defendant could be considered a religious organization, it also highlighted the overt religious

autonomy. Of course, remaining employed at the institution for an extended period of time after the institution adopted a new religious affiliation could constitute some form of ratification of this new relationship. But the existing costs of switching employment, combined with other potential exit challenges, make such an inference fraught.

¹⁶⁴ See Helfand, *supra* note 5, at 402 (with an "open and obvious" religious mission, courts can "presume that employees recognized the unique religious objectives").

¹⁶⁵ *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362 (8th Cir. 1991).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*; see also *Shaliesabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 310 (4th Cir. 2004) ("[Hebrew Home's] By-Laws define it as a religious and charitable non-profit corporation and declare that its mission is to provide elder care to 'aged of the Jewish faith in accordance with the precepts of Jewish law and customs.'").

¹⁶⁸ 363 F.3d at 306.

policies and conduct of the defendant that would have clearly conveyed its core religious institutional objectives: “[T]he Hebrew Home maintained a rabbi on its staff, employed mashgichim to ensure compliance with the Jewish dietary laws, and placed a mezuzah on every resident’s doorpost.”¹⁶⁹ Indeed, focusing on concrete manifestations of an institution’s religious objectives, a number of courts have described the touchstone of the “religious institution” inquiry as whether the “entity’s mission is marked by clear or obvious religious characteristics.”¹⁷⁰ Such analysis fits squarely within the types of inquiries embraced by an implied consent framework.¹⁷¹

To see how implied consent might address the “what is a religious institution” question in some of the more recent cases, consider the multiple plaintiffs contesting the contraception mandate in *Burwell v. Hobby Lobby*.¹⁷² One of the plaintiffs in the litigation before the Supreme Court, Mardel, was “an affiliated chain of thirty-five Christian bookstores,” which exclusively sold Christian books and materials.¹⁷³ Mardel’s website describes itself as “a faith-based company dedicated to renewing minds and transforming lives through the products we sell and the ministries we support.”¹⁷⁴ Thus, it “provide[s] a large selection of Bibles, books, movies, gifts, music, kid products, apparel, church and educational supplies, and homeschool curriculum.”¹⁷⁵ Given the exclusive nature of Mardel’s products—and the public description of its services online—there may be good reason to infer implied consent from the decision of an individual to accept employment with the company.

The more public plaintiff before the Supreme Court, Hobby Lobby, provides a more uncertain case. On the one hand, Hobby Lobby—which has 500 stores and over 13,000 employees—simply sells generic arts and

¹⁶⁹ *Id.* at 310–11.

¹⁷⁰ *Id.* at 310; see also *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225–26 (6th Cir. 2007), *abrogated by Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 202–03 (2012) (noting the Fourth Circuit’s approach to categorizing religious institutions in support of extending the ministerial exception beyond ordained ministers).

¹⁷¹ Berg has argued that my previous suggestions for what might qualify as conveying to an employee the institution’s core and collective religious objectives might be “too strict,” because “[a]n organization may be deeply religiously motivated but engage in service activities without an explicitly articulated religious message.” Berg, *supra* note 6, at 1371. As described above, the test is intended to capture that the employees understand that they are viewed by their employer as members of a religious institution, organized around the pursuit of collective religious objectives. The more an employer could be viewed, without conveying otherwise, as a for-profit business pursuing standard economic objectives, the more necessary it will be for the employer to dispel that reasonable default assumption with concrete manifestations of its religious objectives and aspirations.

¹⁷² See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2764–66 (2014) (describing the multiple plaintiffs).

¹⁷³ *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1122 (10th Cir. 2013).

¹⁷⁴ *Our Story*, MARDEL, <http://www.mardel.com/our-story> [<https://perma.cc/XZWW9-XHJT>] (last visited Feb. 16, 2018).

¹⁷⁵ *Id.*

crafts,¹⁷⁶ providing little reason to alert a potential employee to the religious aspirations of the corporation's owners. At the same time, Hobby Lobby buys hundreds of full-page newspaper advertisements inviting people to "know Jesus as Lord and Savior."¹⁷⁷ Indeed, like Mardel, Hobby Lobby is closed on Sundays.¹⁷⁸ Here there are conflicting indications, and further evidence and discovery might serve to crystallize whether Hobby Lobby ought to qualify as a religious institution.

The third plaintiff, Conestoga Wood Specialties, was a custom cabinet manufacturer.¹⁷⁹ Reviewing the record, it appears to have engaged in limited, if any, public manifestations of religion that would have alerted employees to its religious objectives.¹⁸⁰ And to the extent Conestoga Wood referenced religion as relevant to its business in some way, it did so either in internal corporate documents or subsequent to the onset of litigation.¹⁸¹ As a result, it would be hard to see—given that record—how employees might have been construed to have impliedly consented to its authority and autonomy over religious matters given that it never made clear that it even aspired to pursue religious objectives.

Questions of implied consent in the employment context, as cases move further and further away from the prototypical case or a case of a minister employed by a house of worship, become increasingly fraught given the potential range of motivations for accepting employment with a particular employer. Indeed, maybe the strongest pushback against adopting an implied consent framework for employment cases is that many employees are not, in reality, joining the religiously motivated institution in order to pursue religious objectives. For many, they simply are looking for a job to pay the bills.¹⁸² As for many of the inquiries embraced by an implied consent framework, this inquiry is deeply contextual. For example, in cases where an employer is vague about its religious objectives, and the employment

¹⁷⁶ *Burwell*, 134 S. Ct. at 2765.

¹⁷⁷ *Hobby Lobby*, 723 F.3d at 1122.

¹⁷⁸ *Id.*

¹⁷⁹ *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 402 (E.D. Pa. 2013), *aff'd sub nom.*, *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013), *rev'd and remanded sub nom.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

¹⁸⁰ For a somewhat detailed discussion of the record on this point, see Helfand, *Religious Institutionalism*, *supra* note 5, at 576 n.193.

¹⁸¹ *Id.*; see also *Conestoga Wood Specialties*, 917 F. Supp. 2d at 402–03 (discussing a reference to Christian principles in Conestoga's mission statement).

¹⁸² As we move away from employment and towards different contexts where the stakes are even higher, the likelihood of categorizing someone as a member becomes increasingly more problematic. Sepper, for example, has considered how an implied consent framework might apply to patients at a Catholic hospital. Sepper, *supra* note 163, at 46–47. The answer, at least in the general run of cases, would lean heavily against viewing patients as having joined a religious institution in pursuit of collective religious objectives. Indeed, in this way, the implied consent framework provides a useful framework for distinguishing between different contexts of purported "membership."

conditions in a particular geographic area are particularly challenging, there might be good reasons to wonder whether an employee could be viewed as truly, albeit implicitly, joining a religious institution in order to pursue collective religious objectives. At the same time, the mere fact that a prospective employee knows that he or she is simply accepting a job because of the pay should not be dispositive where an employer has clearly conveyed the religious objectives and aspirations of the business and the role each employee is meant to play in the pursuit of those objectives and aspirations. Drawing lines between these kinds of cases is precisely the type of inquiry in which an implied consent framework encourages courts to engage.¹⁸³

In addition to varying along the employer and employee axes, cases also vary as to the stage of relationship between the employer and employee—or, more broadly, the member and institution. Leveraging implied consent works well once an employee has joined an employer or when a member has joined an institution; it is in those cases where we can most directly test whether the nature of the parties' relationship gives rise to an inference of implied consent. By contrast, religious institutions seek, at times, not simply autonomy over internal decisions regarding its existing membership, but also over the very process of accepting members. Thus, for example, where candidates apply to serve as the rabbi of an Orthodox synagogue or priest of a Catholic church, the house of worship or faith community may desire to exclude applicants who are women. Such a decision, which in principle runs afoul of antidiscrimination law, is largely thought to be protected from liability. How should an implied consent framework account for such cases given that these cases do not involve employees or members, but rather involve applicants who have not as of yet consented to the authority of the institution? Is an implied consent framework committed to the view that religious institutions should not be shielded from liability under relevant antidiscrimination statutes where those institutions discriminate in hiring decisions?

In short, not necessarily. It seems fair to presume that where applicants apply for employment opportunities that stand at the center of an institution's religious mission, they implicitly consent to join an inherently religious process governed by religious rules. Accordingly, where someone applies for the job of rabbi or priest, it seems reasonable to conclude that they have implicitly consented to working with the institution through a religious process to select and identify a religious leader for the house of worship. Thus, in some contexts, the mere process of application could reasonably be interpreted as providing the necessary, and once again implicit, consent to grant the institution the requisite authority and autonomy

¹⁸³ See Helfand, *Religious Institutionalism*, *supra* note 5, at 541–42 (defining “implied consent” as “represent[ing] the voluntary free exercise of religion on the part of many individuals, each granting a religious institution authority over internal religious life among the membership in order to promote the shared religious objectives”).

over the collective pursuit of shared religious aspirations such as faith and salvation. And as part of that collective pursuit, the applicant would grant the institution the authority and autonomy to reject the applicant based upon rules necessary to achieve those religious objectives.

By contrast, there are other contexts where the fact that an individual stands outside the institution makes it far more unlikely that they have impliedly consented to the authority of that institution. As an example, consider recent cases of religiously motivated businesses, including cases involving a florist, a photographer, and a baker, unwilling to provide their services at same-sex wedding ceremonies notwithstanding state laws prohibiting businesses open to the public from discriminating on the basis of sexual orientation.¹⁸⁴

In this context, requesting commercial services from a religiously motivated business would, without more, seem insufficient to justify an inference of implied consent to the religious authority and autonomy of the business. Thus, the mere decision of a customer to request to enter a commercial transaction would not appear to be a form of joining with the business in pursuit of collective religious objectives; in contrast to applying to be the leader of a house of worship, the attempt to purchase a commercial product does not provide adequate justification to infer that the *potential* customer is granting the business the implied consent to make religious rules and resolve religious disputes.¹⁸⁵

Again, in making this assessment, it is important to keep in mind that in such cases the prospective purchaser and shop owner do not consummate an agreement over the purchase of services; the point of these cases is that the business refuses to sell its services to the same-sex couple. Thus, even in circumstances where the business viewed its mission, day in and day out, as pursuing religious objectives with its customers, and it shared those objectives and aspirations with prospective customers, an implied consent model would find it difficult to see the prospective customers as having joined with the business in the pursuit of those religious objectives. Put differently, the implied consent model, which grounds the rights of religious institutions in notions of collectivity and membership, would be hard pressed to identify those kinds of analogies in cases where businesses reject prospective customers on account of a religious commitment that necessitates avoiding participation in a same-sex wedding.¹⁸⁶

¹⁸⁴ See cases cited, *supra* note 18.

¹⁸⁵ While an implied consent framework generally seeks to avoid assessing whether an institution or relationship is sufficiently religious—and instead looks at identifying whether there are sufficient grounds to justify the existence of implied consent—the distinction between prospective employees and prospective consumers does require distinguishing between contexts on the basis of religious content. I make this distinction with some reluctance.

¹⁸⁶ Berg, who highlighted the notion of notice as a potential mechanism to limit some religious accommodations, has suggested that some of my previous arguments of implied consent might be

Of course, the fact that a business violating public-accommodations laws would not qualify for religious institutional autonomy and authority under an implied consent approach need not be the end of the story. Such a business might then be eligible for the standard religious liberty protections afforded any other individual.¹⁸⁷ Thus a sole proprietorship might not, in these circumstances, be the kind of institution that can garner the implied consent of prospective customers; but that does not mean that the owner ceases to stand on the same footing as any other individual who can assert a free exercise claim or a claim under RFRA. In that way, there may be circumstances where even without the implied consent architecture, store owners might simply revert to the status of all other individuals with respect to religious liberty claims.

B. *The Content of Implied Consent*

While the primary question of membership has attracted the most attention of implied consent critics, some have worried about a second and related problem: How can individuals consent to the rule-making authority and autonomy of a religious institution without knowing what rules he or she is signing up for? In the words of Hill, “consent is fairly meaningless if the consenter is not on notice of the actual terms of the agreement.”¹⁸⁸

It is certainly true that entering your standard agreement requires certainty over the terms.¹⁸⁹ But that does not mean that the very notion of consent, whether express or implied, is rendered a nullity where an individual grants authority and autonomy over rule-making and dispute resolution to some other entity. Indeed, the most natural comparison to the implied consent model of religious institutionalism is to arbitration

extended, by analogy, “to clients’ notice that the organization may have religious norms limiting the conduct it is willing to facilitate.” Berg, *supra* note 6, at 1371. While I would not foreclose this possibility, the logic driving my proposed implied consent framework makes that possibility extremely unlikely for the reasons described herein.

¹⁸⁷ See *Washington v. Arlene’s Flowers, Inc.*, 389 P.3d 543, 564–65 n.20 (Wash. 2017) (“The attorney general correctly notes that this court has never held that a corporate defendant such as Arlene’s Flowers has a ‘conscience’ or ‘sentiment’ subject to article I, section 11 protections But Stutzman argues only that she may assert her *own* free exercise rights on behalf of her corporation Thus, we address only Stutzman’s individual claim that *her* article I, section 11 rights have been violated. We do not address whether Arlene’s Flowers (the corporation) has any such rights.”), *vacated and remanded sub. nom.*, *Arlene’s Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018).

¹⁸⁸ Jessie Hill, *Ties That Bind? The Questionable Consent Justification for Hosanna-Tabor*, 109 *Nw. U. L. Rev.* 563, 570 (2015).

¹⁸⁹ See RESTATEMENT (SECOND) OF CONTRACTS § 33(1) (AM. LAW INST. 1981) (“Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.”).

agreements¹⁹⁰—a comparison that courts have picked up on from time to time.¹⁹¹

When it comes to arbitration, parties frequently do not know the content or specifics of the rules that will be applied to their case.¹⁹² And, moreover, the decisions of arbitrators are enforced even when arbitrators make legal errors and thereby fail to apply the relevant substantive law in rendering an award. Put bluntly, the law does not police the substantive law that arbitrators apply in resolving a particular case.¹⁹³ As a result, parties to an arbitration agreement certainly do not *know* the law that will be applied to resolve a dispute.¹⁹⁴

Instead, when it comes to arbitration, what parties are guaranteed is not substantive safeguards as to the content of the law, but procedural safeguards

¹⁹⁰ I have explored this analogy in depth previously. See Helfand, *Arbitration*, *supra* note 148, at 1944.

¹⁹¹ See *Elmora Hebrew Ctr., Inc. v. Fishman*, 593 A.2d 725, 731 (N.J. 1991) (“When entering its judgment based on the Beth Din’s decision, the Chancery Division drew an analogy between the EHC’s submission to the Beth Din’s jurisdiction and common-law arbitration. That analogy is apt, and it is reflected in one of the approaches that the United States Supreme Court has suggested for dealing with church-property cases presenting religious issues.”); *Trs. of E. Norway Lake Norwegian Evangelical Lutheran Church v. Halvorson*, 44 N.W. 663, 665 (Minn. 1890) (holding that the decisions of religious institutions are “conclusive” “not because the law recognizes any authority in such bodies to make any decision touching civil rights, but because the parties, by their contract, have made the right of property to depend on adherence to, or teaching of, the particular doctrines as they may be defined by such judicatory. *In other words, they have made it the arbiter upon any questions that may arise as to what the doctrines are, and as to what is according to them.*” (emphasis added)).

¹⁹² To be sure, they can contract to have a particular body of law apply to their case. But even there, the typical signatory to such an agreement, like the typical member of a religious institution, does not know the particulars of the law.

¹⁹³ See Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 861 (1961) (“[When surveyed, e]ighty per cent of the experimental arbitrators thought that they ought to reach their decisions within the context of the principles of substantive rules of law, but almost 90 per cent believed that they were free to ignore these rules whenever they thought that more just decisions would be reached by so doing.”); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 720–21 (1999) (“In short, the widespread belief among arbitrators that they are under no duty to apply the law is consistent with the standard view that many parties choose arbitration because it provides a less legalistic process than litigation In sum, an arbitration award that does not apply the law will probably be confirmed by courts.”).

¹⁹⁴ For examples of recent federal decisions emphasizing this point, see *Rainier DSC 1, L.L.C. v. Rainier Capital Mgmt., L.P.*, 828 F.3d 362, 364 (5th Cir. 2016) (“To constitute misconduct requiring vacation of an award, an error in the arbitrator’s determination must be one that is not simply an error of law, but which so affects the rights of a party that it may be said that he was deprived of a fair hearing.” (quoting *Laws v. Morgan Stanley Dean Witter*, 452 F.3d 398, 399 (5th Cir. 2006)); *Whitehead v. Pullman Grp., LLC*, 811 F.3d 116, 120 (3d Cir. 2016) (“[W]e have long held that for an error to justify vacating an arbitration award, it must be ‘not simply an error of law, but [one] which so affects the rights of a party that it may be said that he was deprived of a fair hearing.’ We have also spoken of procedural irregularities so prejudicial that they result in ‘fundamental unfairness.’”).

To be sure, some courts still apply the manifest-disregard-of-the-law standard although that is a high standard to meet, is rarely invoked and is, in some jurisdictions, in doctrinal retreat. For some discussion, see Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN. ST. L. REV. 1103, 1144–49 (2009) (discussing whether the manifest-disregard standard survived the *Hall Street* decision, noting that there is widespread disagreement).

ensuring the fairness of the dispute resolution proceedings.¹⁹⁵ This commitment is captured in the statutory grounds for vacating an arbitration award, which focus on procedural unfairness such as partiality, fraud, and misconduct.¹⁹⁶ As a result, when signing up for arbitration, parties agree not necessarily to a particular set of substantive rules, but to a process that must be inherently fair if it is to be deemed conclusive and enforceable by civil authorities.¹⁹⁷

This same framework animates the implied consent model of religious institutionalism. Members impliedly consenting to the authority and autonomy of a religious institution do so without necessarily knowing what rules that institution will make and what methods of dispute resolution it will adopt. What those members, however, are guaranteed is that the institution will make rules and resolve disputes in ways that will advance the collective religious objectives of the membership. And, when the institution adopts those religious rules, it will uphold procedural safeguards and enforce those rules fairly, without fraud, self-dealing, or misconduct.

Importantly, these procedural safeguards are part and parcel of the implied consent framework. Members cede authority and autonomy to an institution to the extent that institution develops rules and resolves disputes as necessary to pursue collective religious objectives. When religious institutions make rules and resolve disputes for institutional gain—or engage in fraud or misconduct for the personal windfall of religious leaders—those decisions are not granted any degree of legal protection; members have not

¹⁹⁵ See *Teamsters Local 312 v. Matlack, Inc.*, 118 F.3d 985, 996 (3d Cir. 1997) (affirming a district court decision to vacate a substantive portion of an arbitration award due to procedural errors which impeded the defendant's right to notice and opportunity to be heard).

¹⁹⁶ E.g., 9 U.S.C. § 10 (2012).

¹⁹⁷ This is not to say that arbitration itself is immune from criticism; to the contrary, scholars have long argued that arbitration doctrine has failed to provide sufficient procedural safeguards to ensure the ultimate fairness of the arbitration proceedings. See, e.g., Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 117 (1992) (“At present, arbitration operates in a culture where, as a matter of doctrine, no definite legal norms safeguard constitutional rights.”); Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1956 (1996) (“Federal law no longer protects the right to engage voluntarily in arbitration, but rather safeguards the right of some parties to force other parties into the process.”); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 63–64 (1997) (“Even in the absence of conclusive empirical studies of arbitration results compared to litigation results, one cannot simply disregard the clear perceptions of employers and their attorneys, on the one hand, and plaintiff-employees’ attorneys on the other, that arbitration systematically favors employers.”); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 705 (1996) (“If Congress is going to allow parties to waive their constitutional rights to a jury trial and a fair process in favor of the more informal arbitration process Congress should also ensure that parties receive the functional equivalent of those constitutional rights—specifically, notice and a fair hearing.”). While here is not the place to debate whether arbitration doctrine has successfully created a method of fair and just private dispute resolution, suffice it to say that the implied consent framework adopts arbitration doctrine’s principle of providing a fair and just method of dispute regardless of whether arbitration doctrine has been successful in practice.

impliedly consented for such deeply distorted rule-making or dispute resolution.

This is precisely the standard the Supreme Court used in some of its earlier decisions regarding religious institutional autonomy. In these early cases, the Supreme Court linked the doctrinal principle of implied consent to the need for “marginal civil court review”¹⁹⁸ of the internal rule-making and dispute resolution within religious institutions. This review, according to the Court, would ensure that the decisions of a religious institution were not the result of procedural misconduct—or to use the Court’s phrase, the decisions of a religious institution would be reviewed for “fraud, collusion or arbitrariness.”¹⁹⁹ The link between implied consent and marginal civil court review made perfect sense; members implicitly consent to a religious institution’s internal religious rules and decisions because they are necessary to enable the collective pursue shared religious objectives. However, if those rules are simply a function of self-dealing and fraud—if they fail to facilitate good faith adjudication—then the consent of the membership no longer provides a justification for the institution’s rule-making authority.²⁰⁰ In this way, the implied consent framework provided a strong and important procedural constraint on the authority and autonomy of religious institutions.

The Supreme Court has, for all intents and purposes, abandoned this marginal civil court review of religious institutional decision-making. The reason largely draws from a fundamental shift in the Court’s jurisprudence, moving from an implied consent framework to an adjudicative disability framework. Accordingly, and in keeping with much of Lupu and Tuttle’s preferred framework, the Supreme Court embraced an approach that deemed courts incompetent when it came to resolving disputes that implicated religious doctrine.²⁰¹ And as a result, it discarded the marginal civil court

¹⁹⁸ *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 447 (1969).

¹⁹⁹ *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929).

²⁰⁰ See Dennis E. Curtis, Note: *Judicial Intervention in Church Property Disputes—Some Constitutional Considerations*, 74 *YALE L.J.* 1113, 1120 (1965) (“[T]he consent of the members to be governed by the church authorities did not envision fraudulent, arbitrary, or collusive action by these authorities.”); Ira Mark Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 *CAL. L. REV.* 1378, 1391 (1981) (“Justice Brandeis’ other qualification in *Gonzalez*—‘in the absence of fraud, collusion, or arbitrariness’—also seems to follow from the use of contract principles. A court should always be available to determine whether an organizational decision has been made in the manner contemplated by the agreement, for otherwise the member could not be said to be bound by it. Few agreements would contemplate decisions made fraudulently or arbitrarily.”).

²⁰¹ See *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976) (“[T]his is exactly the inquiry that the First Amendment prohibits; recognition of such an exception would undermine the general rule that religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them.”).

review for fraud, collusion, or arbitrariness as constitutionally prohibited under the Establishment Clause.²⁰²

From an implied consent perspective, marginal civil court review—such as a fraud, collusion, and arbitrariness standard—is necessary to adopt a framework geared towards allowing religious institutions the authority and autonomy to make religious rules and resolve disputes. Without it, there can be no assurance that the processes of rule-making and dispute resolution truly comport with the religious aspirations of the membership. Indeed, in the years before the Supreme Court turned away from the implied consent framework, courts invoked this kind of marginal review of religious institutional decision-making, assessing whether decisions failed to abide by their own institutional rules.²⁰³ An implied consent approach embraces this kind of check on the authority and autonomy of religious institutions as it ensures that religious authority and autonomy are not used as a mere subterfuge to circumvent the legitimate rights of members who have joined together to pursue collective and authentic religious objectives.²⁰⁴

Accordingly, religious institutions have the right to promulgate rules—and even changes rules—to track theological commitments and theological evolution over time. This rule-making authority represents the core function of religious institutions under an implied consent framework; members join such institutions so that they can adopt, and even revise, rules that will promote the shared pursuit of religious objectives. However, the promulgation and evolution of internal rules cannot stem from mere attempts to manipulate the process of dispute resolution in a particular case. Thus, implementing the now-discarded marginal civil court review would require judicial assessment of whether an institution has modified rules as an attempt to reflect a new theological reality or, instead, to engage in fraud or self-dealing. This sort of inquiry surely presents significant adjudicatory challenges, but an implied consent approach must simultaneously allow for

²⁰² See *id.* (“For civil courts to analyze whether the ecclesiastical actions of a church judicatory are in that sense ‘arbitrary’ must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else in to the substantive criteria by which they are supposedly to decide the ecclesiastical question.”). While the Court did not explicitly overrule *Gonzalez* as it pertained to fraud and collusion, it cast significant doubt on their continued constitutional viability. See *id.* (“[W]hether or not there is room for ‘marginal civil court review’ under the narrow rubrics of ‘fraud’ or ‘collusion’ when church tribunals act in bad faith for secular purposes, no ‘arbitrariness’ exception . . . is consistent with [the religion clauses].”); see also *Young v. N. Ill. Conference of United Methodist Church*, 21 F.3d 184, 187 (7th Cir. 1994) (acknowledging that the Supreme Court left open the possibility of review for fraud or collusion, but noting the “unlikely significance this ‘open issue’ might have in some hypothetical case”).

²⁰³ See Helfand, *Church Autonomy*, *supra* note 5, at 1943–44 n.247 (2013) (collecting cases from the late 19th and early 20th centuries where courts assessed whether the decisions of religious institutions deviated from their own internal religious rules).

²⁰⁴ For more on this point, see generally *id.* at 1942–51, 1957–60 (discussing deference, by courts, to religious institutions based on the implied consent of the institution’s members).

religious institutions to change their rules to reflect theological evolution, while still ensuring that rules are not modified in an attempt to manipulate the internal process of dispute resolution.²⁰⁵

To be sure, the analogy to arbitration's process-based focus is not perfect. Maybe the most notable difference is that arbitration, while lacking in any statutory definition, has been characterized as a method of dispute resolution where parties submit a dispute for binding resolution to a "neutral third party."²⁰⁶ By contrast, granting autonomy to a religious institution over internal matters may amount to placing authority in the hands of the very institution whose interests may be implicated when resolving internal disputes. Thus, the institution may lack the neutrality that serves, at least in theory, as the lynchpin of the arbitration regime.²⁰⁷ But the fact that ceding rule-making and dispute resolution authority to religious institutions raises the specter of partiality and self-dealing is precisely why marginal civil court

²⁰⁵ On this point, the distinction between process and substance may have some purchase, but is not ultimately dispositive. Procedural changes may be more likely to represent attempts to manipulate the resolution of disputes and substantive changes may be more likely to represent evolution of theological commitment. At the same time, there is no doubt that the reverse is also quite possible; therefore, courts, embracing a marginal civil court review, would ultimately need to review any allegations of changes to rules when assessing the internal decisions of religious institutions. For more on the difficulties inherent in reviewing the decision-making process of religious institutions, see Michael A. Helfand, *The Future of Religious Arbitration in the United States: Looking Through a Pluralist Lens*, in OXFORD LEGAL HANDBOOK ON GLOBAL LEGAL PLURALISM (Paul Schiff Berman ed. forthcoming 2018), <https://ssrn.com/abstract=3086833> [<https://perma.cc/5BP9-TLJU>]; Michael A. Helfand, *Between Law and Religion: Procedural Challenges to Religious Arbitration Awards*, 90 CHI.-KENT L. REV. 141, 141 (2015).

²⁰⁶ See, e.g., *Cheng-Canindin v. Renaissance Hotel Assoc.*, 57 Cal. Rptr. 2d 867, 872 (Ct. App. 1996) (quoting *Arbitration*, BLACK'S LAW DICTIONARY (6th ed. 1990)).

²⁰⁷ It is worth noting, however, that the purported neutrality of arbitration is itself somewhat complicated. For one, many scholars have argued that arbitration suffers from a repeat-player bias, demonstrating that the system is itself not neutral. See Helfand, *Arbitration*, *supra* note 148, at 3005–06 nn.40–41. To be sure, these conclusions regarding repeat-player bias have themselves been questioned. See *id.* at 3007 nn.46–47.

By contrast, some scholars have even promoted the use, in some circumstances, of "embedded neutrals" as arbitrators—even as those arbitrators may have relationships with the parties—because they present benefits in their understanding of the social and cultural context of the parties; in so doing, these scholars embrace the risk of less neutrality given the potential benefits. See *id.* at 3033–34 nn.173–75 and accompanying text.

Finally, as a doctrinal matter, the judicial approach to policing certain forms of neutrality has not been particularly aggressive. Courts typically do not assess the neutrality of an arbitrator prior to the proceedings. *But see* *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999) (holding that a particular arbitration regime included "so many biased rules" that the arbitration agreement could not be enforced). Instead, they wait until after an award has been rendered to review the arbitration for "evident partiality"—and even then require evidence of direct bias as opposed to evidence that the proceedings were structurally biased against one party as opposed to assessing the presumed neutral standing of an arbitrator prior to the proceedings. See, e.g., *Harter v. Iowa Grain Co.*, 220 F.3d 544, 553, 555 (7th Cir. 1999) (collecting cases on structural bias). This combination of the judicial reluctance to deem an arbitration sufficiently biased on the front-end of the proceedings and the relatively high standard for review once an award has been rendered does raise questions as to whether arbitration doctrine has the tools to satisfactorily police the neutrality of proceedings.

review is vital to implementing an implied consent framework. Indeed, extrapolating from arbitration, an implied consent framework may therefore require that marginal civil court review—in its inquiry for fraud, collusion, or arbitrariness—be even more searching than the standards employed by courts when assessing whether to vacate an arbitration award, precisely because religious institutions lack some of the neutrality present when parties submit a dispute for arbitration to a third-party neutral.

The connection between implied consent and procedural safeguards is sometimes missed by critics of implied consent. Hill, for example, has noted that “litigated disputes in which religious organizations assert claims of religious autonomy often involve situations in which the religious organization has refused to follow its own rules,”²⁰⁸ concluding that “religious institutionalists generally assume that church autonomy should be afforded in these circumstances as well.”²⁰⁹ It is true that theories that view religious institutionalism through the prism of sovereignty or adjudicative disability are both reluctant to review the decisions of religious institutions for deviations from internal church policies: the former because courts inherently lack the jurisdiction to police such matters and the latter because it would require resolution of religious questions. But such cases are where one of the unique features of implied consent institutionalism comes into full focus. Individuals surely do not consent—impliedly or otherwise—to the manipulation of religious rules and courts; and under an implied consent approach, courts ought to be fully authorized to police those boundaries of institutional autonomy and authority.²¹⁰ Members may cede significant power to religious institutions to make the substantive rules necessary for pursuit of shared religious objectives. But conversely, under an implied consent approach, courts also serve as an important check on religious institutions, ensuring that fraud, misconduct and self-dealing do not spill into the rule-making or dispute resolution process. That kind of conduct is precisely the kind of institutional malfeasance that an implied consent approach seeks to ferret out by and expose to the scrutiny of civil courts.

C. *Existence of Other Compelling Government Interests*

As emphasized above,²¹¹ an implied consent approach to religious institutionalism relocates the doctrinal origins of the authority and autonomy of religious institutions under the Free Exercise Clause as opposed to the Establishment Clause. Under an implied consent framework, this authority

²⁰⁸ Hill, *supra* note 6, at 432.

²⁰⁹ *Id.* at 433.

²¹⁰ To be sure, such a position does require a significant loosening of the religious question doctrine—that is, the view that courts are constitutionally prohibited from resolving disputes that require providing answers to inherently religious questions. *See generally* Helfand, *Litigating Religion*, *supra* note 5, at 494 (attempting to justify that view on doctrinal and policy grounds).

²¹¹ *See supra* notes 91–92 and accompanying text.

and autonomy is a set of affirmative rights ceded to religious institutions by the membership so that they can collectively pursue religious objectives and aspirations.

The central implication of this distinction is that religious institutional authority and autonomy under an implied consent framework must, like any other religious liberty right under the Free Exercise Clause, be subjected to strict scrutiny. Accordingly, if the assertion of religious institutional authority and autonomy threatens a compelling government interest—and withholding that institutional autonomy and authority is the least restrictive means for advancing the compelling government interest—then the rights of a religious institution must capitulate to the compelling government interest.

This is in stark contrast to the adjudicative disability framework of *Lupu* and *Tuttle*, which highlights the Establishment Clause and sees the authority of religious institutions as simply a byproduct of the adjudicative disability of civil courts to resolve religious disputes that implicate religious doctrine.²¹² Establishment Clause constraints on governmental authority are not subject to strict scrutiny; they are structural constraints on government authority.²¹³ Thus, to the extent the claims of religious institutions are analyzed under the Establishment Clause, they could not be overcome in cases where the attempted government regulation was narrowly tailored to advance a compelling government interest. And given the wide-range of cases where religious institutions might assert their religious liberty, the lack of strict scrutiny review might provide a reason to worry.

Of course, this raises another central question for assessing religious institutional claims: What should qualify as a compelling government interest under the Free Exercise Clause? Qualifying for the category has often been perceived as requiring a government interest to clear a relatively high threshold. Indeed, in the context of the Equal Protection Clause, the list of compelling government interests is typically viewed as quite short,²¹⁴ and accordingly strict scrutiny has been described as “strict in theory, but fatal in fact.”²¹⁵ But the fact that few interests are viewed as compelling in the

²¹² See *id.* (discussing *Lupu* and *Tuttle*’s theories on the Establishment Clause).

²¹³ *Id.*

²¹⁴ See, e.g., *Fisher v. Univ. of Tex.*, 631 F.3d 213, 248 (5th Cir. 2011) (Garza, J., specially concurring) (“[S]ince the Court began applying strict scrutiny to review governmental uses of race in discriminating between citizens, the number of cases in which the Court has permitted such uses can be counted on one hand. The Court has rejected numerous intuitively appealing justifications offered for racial discrimination . . .”). But see Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795 (2006) (providing empirical evidence from judicial decisions that strict scrutiny “is far from the inevitably deadly test”).

²¹⁵ Gerald Gunther, *The Supreme Court, 1971 Term: Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); see also *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell, J., concurring) (“[T]he failure of legislative action to survive strict scrutiny has led some to wonder whether our review of racial classifications has been strict in theory, but fatal in fact.”).

equal protection context does not necessarily demand a similar reluctance in the free exercise context. Under the Equal Protection Clause, one of the primary purposes of subjecting racial classifications to strict scrutiny is to “to ‘smoke out’ illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.”²¹⁶ Thus, when a racial classification is employed in a statute or regulation, we inquire whether that statute or regulation is seeking to advance a compelling government interest. If it isn’t, then we worry that the supposed justification for the racial classification is pretextual; using a racial classification where no compelling government interest is at stake indicates that there may be some sort of invidious discriminatory intent driving the statute or regulation under discussion.²¹⁷

By contrast, the compelling government interest test under the Free Exercise Clause has long been conceived of as a balancing of competing legitimate claims and values. In *Wisconsin v. Yoder*, the high-water mark for religious liberty doctrine, the Supreme Court explained the test as follows: “[O]nly those interests of the highest order and those not otherwise served can *overbalance* legitimate claims to the free exercise of religion.”²¹⁸ Similarly, in *McDaniel v. Paty*, the Court referred to the “delicate balancing required” when applying the compelling government interest test under free exercise analysis²¹⁹—a characterization that has continued in subsequent Supreme Court decisions.²²⁰

This express focus on interest-balancing fits within a voluntarist approach to the claims of religious institutions. Under this approach, religious institutions are afforded constitutional protections because they embody the voluntary decision of their members to join together to pursue collective religious objectives. Their claims represent core and fundamental constitutional values that must be jealously safeguarded. But that does not mean there aren’t other vital government objectives that also must be given significant weight. An implied consent framework embraces a doctrine that

²¹⁶ *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989).

²¹⁷ It is worth noting that in many cases, courts employ strict scrutiny where there is no invidious discriminatory intent to “smoke out,” but instead using the test in order to “justify” the use of a racial classification. Jed Rubenfeld, *Affirmative Action*, 107 *YALE L.J.* 427, 436, 441 (1997); Michael A. Helfand, *How the Diversity Rationale Lays the Groundwork for New Discrimination*, 17 *WM. & MARY BILL RTS. J.* 607, 611–12 (2009) [hereinafter Helfand, *New Discrimination*]. According to some, the use of strict scrutiny under such circumstances is a mistake. *E.g.*, Rubenfeld, *supra*, at 441 (“Offsetting state benefits cannot ‘justify’ a law violating an individual’s equal protection rights.”). I have previously argued that it is not a mistake, but represents an alternative conception of rights as applied in the equal protection context. *See* Helfand, *supra*, at 629 n.138. Regardless, this form of applying strict scrutiny—in a justificatory more as opposed to an indicator more—is clearly secondary in the equal protection context. *Id.*

²¹⁸ *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (emphasis added).

²¹⁹ *McDaniel v. Paty*, 435 U.S. 618, 628 n.8 (1978).

²²⁰ *Bowen v. Roy*, 476 U.S. 693, 729 (1986).

balances competing interests, recognizing that the free exercise claims of religious institutions must be considered against the potential interests harmed when accommodations are granted.²²¹

In this way, an implied consent framework leverages its free exercise origins, providing an important check on the authority and autonomy of religious institutions. And that check draws directly on the other values conflicting with the rights of religious institutions, ensuring that courts can assess and evaluate these competing claims so as to balance the institutional needs of faith communities against other claims central to civil society generally.

CONCLUSION

Grounding religious institutionalism in implied consent provides a workable framework for resolving some of the thorniest conflicts between the aspirations of religion and the demands of the law. Implied consent draws from a line of Supreme Court cases dating back to the 19th century, and leverages the value of voluntarism alongside the human inclination for collective religious experience. Together, they provide the doctrinal backbone for the core insight of the theory: to presume that individuals who join religious institutions do so in order to join a collective in pursuit of religious objectives. And, as a corollary, it highlights the need for institutions pursuing religious objectives to make internal religious rules and resolve internal religious disputes to ensure that the collective can successfully pursue those religious objectives.

Using this framework provides not only a theory for why religious institutions receive special treatment under the law, but it also provides principles to limit the authority and autonomy of religious institutions. Using principles of volitional membership and safeguards of strict scrutiny, implied consent hopes to provide a way to resolve, however imperfectly, some of the persistent tensions between law and religion.

²²¹ Kent Greenawalt, *Should the Religion Clauses of the Constitution Be Amended?*, 32 LOY. L.A. L. REV. 9, 15, n.25 (1998) (“Because a claimant’s victory in the free exercise exemption cases means carving out an exception to laws that are themselves appropriate, the courts have justifiably lowered the government’s burden [in satisfying the compelling government interest test].”).

In this way, an implied consent framework accounts for third-party harms as part of the application of strict scrutiny. *But see* Brief for Amici Curiae Church-State Scholars Frederick Mark Gedicks et al., *Sebelius v. Hobby Lobby Stores, Inc.*, Nos.13-354, 13-356, 2014 WL 333891 (U.S. Jan. 27, 2014) (arguing that third-party harms should be considered separately under the Establishment Clause); Fredrick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 348–50 (2014) (arguing the same).