RELIGIOUS INSTITUTIONALISM, IMPLIED CONSENT, AND THE VALUE OF VOLUNTARISM

MICHAEL A. HELFAND*

I. INTRODUCTION

Increasingly, clashes between the demands of law and aspirations of religion center on the legal status and treatment of religious institutions. Much of the rising tensions revolving around religious institutions stem from conflicts between the religious objectives of those institutions and their impact on third parties who do not necessarily share those same objectives. Indeed, these persisting tensions have pressed two fundamental questions to the forefront of legal debate: what institutions count as religious institutions and to what extent should these institutions be excused from complying with otherwise valid laws?

These questions were front and center in two of the U.S. Supreme Court's most recent forays into the debate over religious institutions. In its 2012 decision *Hosanna-Tabor Evangelical Lutheran Church & School 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."[1] In affirming the ministerial exception, a unanimous court held that the First Amendment grants "special solicitude to the rights of religious organizations."[2] Thus, the defendant—a church-operated primary school—

* Associate Professor of Law, Pepperdine University School of Law; Associate Director, Diane and Guilford Glazer Institute for Jewish Studies. The author would like to thank Derek Muller and Robert Pushaw as well as participants in the "Religious Accommodation in the Age of Civil Rights" conference for their insightful comments on this project.

1. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 705–07 (2012).

2. *Id.* at 706.

could not be held liable under the American with Disabilities Act ("ADA") for terminating the plaintiff—a fourth grade teacher—because she was a "called teacher."[3] The decision however, did not provide much detail when it came to defining the terms "religious organization" or "minister," simply concluding, based upon the facts on the record, that the parties satisfied those definitions.[4]

These questions once again emerged in litigation over the Affordable Care Act's contraception mandate, which requires employers who provide health insurance to also cover contraceptives approved by the Food and Drug Administration or face significant financial penalties.[5] While religious nonprofit organizations were exempted from the mandate,[6] religious for-profit institutions were not.[7] In turn, a wide range of institutions brought suit, arguing that complying with the mandate would violate their religious consciences.[8] The government responded with a two-fold rejoinder: for-profit organizations should not be considered "religious institutions"—the term should be reserved for only nonprofit institutions—and even if such institutions were deemed religious, the mandate was necessary to achieve a compelling government interest: protecting women's health.[9] In *Burwell v. Hobby Lobby Stores*, a majority of Justices found in favor of the plaintiffs, holding that the Religious Freedom Restoration Act ("RFRA") also protected for-profit corporations[10] and that the mandate was not the least restrictive means for achieving a compelling government interest.[11] In dissent, Justice Ginsburg voiced deep concerns over both of the majority's holdings, worrying about the potential

3. *Id.* at 699–700, 708–09 (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").

4. *Id.* at 705, 707.

5. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2762 (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-iiitheres-no-employer.html (arguing that employers are not mandated to provide coverage for contraceptives, but have an alternative—paying a tax in lieu of providing an employee health-care plan).

6. *Hobby Lobby*, 134 S. Ct. at 2763.

7. *Id.*

8. For a list of cases brought against the contraception mandate, see *HHS Mandate Information Central*, BECKETT FUND FOR RELIGIOUS LIBERTY, http://www.becketfund.org/hhsinformationcentral/ (last updated Feb. 11, 2015).

9. *E.g.*, Brief for the Petitioners at 13–23, 37–58, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356), *available at* http://www.becketfund.org/wp-content/uploads/2014/03/SG-Merits-Brief-Hobby-Lobby.pdf.

10. *Hobby Lobby*, 134 S. Ct. at 2775.

11. *Id.* at 2780–83.

implications of the decision for future cases.[12]

Both *Hosanna-Tabor* and *Hobby Lobby* represented clashes between religious institutions and governmental attempts to protect the interests of third parties. In *Hosanna-Tabor*, the First Amendment shielded the church-operated school from liability under the ADA, which would otherwise have protected the interests of one of the school's employees.[13] And in *Hobby Lobby*, RFRA shielded a for-profit corporation from one of the requirements of the Affordable Care Act, which would otherwise have protected the interests of the company's female employees.[14] Importantly, these are not the only cases which have raised this dynamic. In New Mexico, a religious photographer was held liable under the state's public accommodations laws for refusing to provide her professional photography services at a same-sex commitment ceremony;[15] in Washington, a religious florist was similarly found liable for refusing to provide flower arrangements at a same-sex wedding;[16] and in Colorado, a baker was also found liable under the state's public accommodations law for refusing to bake a cake for a same-sex wedding.[17] In each case, legislation protecting the interests of employees, customers, and other citizens clashed with the religious commitments of churches, companies, and other religiously-motivated institutions. And in each of these cases, the same two questions emerge: which institutions should be exempted from complying with such laws and what should be the scope of those exemptions?

This Article provides an answer to these two questions, arguing that the legal protections afforded to religious institutions should be based on the principle of *voluntarism*. On such an account, 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. This process of consent—what the Supreme Court has referred to in *Watson v. Jones* as

12. *Id.* at 2787–88 (Ginsburg, J., dissenting).

13. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 702, 710 (2012).

14. *Hobby Lobby*, 134 S. Ct. at 2785.

15. Elane Photography, LLC v. Willock, 309 P.3d 53, 77 (N.M. 2013).

16. State v. Arlene's Flowers, Inc., No. 13-2-00871-5, at 26–37 (Wash. Sup. Ct. Feb. 18, 2015) (granting summary judgment as to liability in favor of plaintiffs).

17. Craig v. Masterpiece Cakeshop, Inc., No. CR 2013-0008 at 1, 13 (Colo. Office of Admin. Courts Dec. 6, 2013) (initial decision), *available at* https://www.aclu.org/sites/default/files/assets/initial_decision_case_no._cr_2013-0008.pdf.

"implied consent"[18]—empowers religious institutions to promulgate rules to promote shared religious values. In this way, the creation of religious institutions will represent 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.

Approaching the legal treatment of religious institutions through the prism of implied consent provides a framework for answering some of the more vexing questions left unanswered by recent Supreme Court decisions. First, in trying to determine which institutions ought to qualify as *religious* institutions, a focus on implied consent entails a context-sensitive inquiry into whether the institution was sufficiently open and obvious about its religious objectives; only where an institution is sufficiently open and obvious about its religious objectives can we infer implicit consent to its authority over religious matters from joining the institution's membership. From such a vantage point, the inquiry into whether an institution is a religious institution has nothing to do with it being a for-profit or nonprofit institution; there simply is no such thing as a *per se* religious institution. Instead, it is a focused inquiry into whether individuals understood when they joined the institution that it had uniquely religious objectives.

Second, in determining the scope of protection afforded religious institutions, an implied consent framework conceives of institutional rights as paradigmatic free exercise claims. Establishing the rights of religious institutions in the voluntary choices of their membership grounds the claims of religious institutions in the choices of individuals to pursue the free exercise of religion collectively. In this way, protecting religious institutions is about protecting the ability of citizens to exercise religion freely and voluntarily; it is not, as some have suggested, about the limited authority of government to trespass on the internal workings of religious institutions. This distinction—a shift from establishment to free exercise—has important consequences. Once properly located under the rubric of the Free Exercise Clause, the claims of religious institutions must follow a familiar structure; unlike claims sounding in the Establishment Clause, Free Exercise Clause claims can be overridden where the attempted regulation of religious institutions satisfy strict scrutiny.

This Article proceeds in three parts. Part II analyzes some of the doctrinal confusion surrounding religious institutions, including (1) the confusion over the doctrinal origins of the "church autonomy doctrine",

18. Watson v. Jones, 80 U.S. (13 Wall.) 679, 728–29 (1871).

(2) the debate over the definition of religious institutions, and (3) the uncertain link between the religion clauses of the First Amendment and RFRA. Part III then provides a framework for analyzing the legal treatment—both for the purposes of the First Amendment and RFRA—of religious institutions. It then applies this framework—one that focuses on the value of *voluntarism* as distilled through implied consent—to resolve some of the core doctrinal confusion currently plaguing the legal treatment of religious institutions. Part IV concludes.

II. DOCTRINAL CONFUSION

As an uncontroversial starting point, the First Amendment has always provided *some* degree of protection to *some* religious institutions. Relying on decisions from as early as the nineteenth century, the Supreme Court has repeatedly applied the religion clauses of the First Amendment to churches. This series of decisions gave rise to what is often referred to as the "church autonomy doctrine,"[19] which generally grants religious institutions the authority to govern their own internal affairs free from excessive governmental interference.[20] This doctrine was first announced as a common law doctrine in the Supreme Court's 1872 decision *Watson v. Jones*, in which the Court held that the decisions of "church judicatories" regarding "questions of discipline, or of faith, or ecclesiastical rule, custom, or law" must be considered "final" by courts.[21] Subsequently, the Supreme Court rebranded the church autonomy doctrine as a constitutional rule, describing the *Watson* decision as "radiat[ing] . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation," which thereby granted religious institutions "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[22]

But stating that the religion clauses of the First Amendment provide some protection for religious institutions tells us little about what these protections look like. In fact, once we move beyond the most general of statements, it quickly becomes clear that the doctrine is in a fundamental state of confusion. Among the most salient features of this confused

19. The phrase "church autonomy doctrine" was made famous by Douglas Laycock in his seminal article, Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981).

20. For more on the lineage of this doctrine, see Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493, 519–41 (2013).

21. *Watson*, 80 U.S. (13 Wall.) at 727.

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

doctrinal landscape are (1) confusion about the constitutional basis for protecting religious institutions; (2) confusion over which institutions are granted these protections; and (3) confusion over the extent to which RFRA, passed by Congress in 1993,[23] alters the contours of the constitutional protections afforded to religious institutions. The nature of these confusions are outlined below.

A. DOCTRINAL ORIGINS: FREE EXERCISE VERSUS ESTABLISHMENT

To appreciate the confusion over the origins of the church autonomy doctrine, consider one of its most notable applications—the "ministerial exception,"[24] which exempts religious institutions from complying with various employment statutes in the hiring and firing of "ministers."[25] The ministerial exception was first announced by the U.S. Court of Appeals for the Fifth Circuit in *McClure v. Salvation Army*,[26] 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.[27]

In reaching this conclusion, the Fifth Circuit relied upon *Watson* and subsequent Supreme Court decisions outlining the constitutionally protected "freedom for religious organizations," which the court held would be impermissibly infringed upon if Title VII were applied to the relationship between a church and its minister.[28] Prior to 1990, other jurisdictions typically followed the Fifth Circuit's lead in *McClure*, tracing

23. Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb–2000bb-4 (2012)).

24. *See, e.g.*, 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, 44–45, 49–50 (2008) (explaining the development of the ministerial exception and its constitutional foundation).

25. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 705–06 (2012) ("[T]he Courts of Appeals have uniformly recognized the existence of a 'ministerial exception,' grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers. We agree that there is such a ministerial exception.").

26. 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.").

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

28. *Id.* at 558–60.

the ministerial exception to the demands of the Free Exercise Clause.[29]

The Supreme Court, however, unsettled this doctrinal picture with its decision in *Employment Division, Department of Human Resources v. Smith*.[30] In *Smith*, the Court famously held that the First Amendment does not shield religiously motivated conduct from regulation by an otherwise valid, facially neutral, and generally applicable law.[31] Instead, the primary scope of the Free Exercise Clause is only to prohibit laws that target religiously motivated conduct.[32]

The Court's holding in *Smith* raised significant questions regarding the viability of the ministerial exception going forward. Surely antidiscrimination statutes—such as Title VII and the ADA—do not target religion. If so, why should a church autonomy doctrine grounded in the Free Exercise Clause provide any protection against such claims?[33]

Notwithstanding this core tension, lower courts uniformly upheld various applications of the church autonomy doctrine even after *Smith*.[34] This trend may have been, in part, a consequence of one sentence in *Smith* that somewhat obliquely seemed to reaffirm the church autonomy line of cases—although the *Smith* decision failed to provide a rationale as to why these cases should remain good law.[35] In response to this tension, courts

29. Kalscheur, *supra* note 24, at 49. *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 therefore unnecessary to discuss the potential applicability of the Establishment Clause); Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1168–69 (4th Cir. 1985) (characterizing the ministerial exception as primarily a free exercise doctrine). *See also McClure*, 460 F.2d at 560 (linking the ministerial exception to the Free Exercise Clause).

30. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

31. *Id.* at 879 ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring))).

32. *Id.*

33. *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) ("Because the free exercise clause after *Smith* cannot justify the ministerial exemption, several commentators have turned to 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.").

34. *E.g.*, Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 656 (10th Cir. 2002) ("Several circuits have examined whether the ministerial exception survives in light of *Smith*, and each has concluded that it does.").

35. *Smith*, 494 U.S. at 877 ("The government may not . . . lend its power to one or the other side in controversies over religious authority or dogma" (citations omitted)). *See also, e.g.*, Serbian E. Orthodox Diocese for the U.S. and Can. v. Milivojevich, 426 U.S. 696, 724–25 (1976) (holding that the

generally responded in one of two ways.

One response was to distinguish between free exercise claims brought by individuals and free exercise claims brought by religious institutions.[36] The D.C. Circuit held 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."[37] Similarly, the Third Circuit noted that notwithstanding *Smith*, the Free Exercise Clause still protected "a religious *institution's* right to decide matters of faith, doctrine, and church governance."[38]

Other courts adopted a different approach in the wake of *Smith*, arguing that the church autonomy doctrine—and its various applications—was really a function of the Establishment Clause and not the Free Exercise Clause.[39] For example, the Seventh Circuit explained away the tension between *Smith* and the ministerial exception by concluding that "the ministers exception is a rule of interpretation, not a constitutional rule; and though it is derived from policies that animate the First Amendment, the relevant policies come from the establishment clause rather than from the free-exercise clause."[40]

First Amendment allows hierarchical religious institutions to create their own laws for internal governance and that civil courts are bound by the decisions of those institutions' religious tribunals); Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 451–52 (1969) (holding that the First Amendment prohibits civil courts from reviewing church law or interpreting church doctrine); Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94, 120–21 (1952) (declaring that civil courts must regard decisions made by the church over issues of religious discipline or ecclesiastical law as final).

36. 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." (citation and internal quotation marks omitted)); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 462 (D.C. Cir. 1996) ("[T]he burden on free exercise that is addressed by the ministerial exception is of a fundamentally different character from that at issue in *Smith* and in the cases cited by the Court in support of its holding. The 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."). *See also* Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343, 348–49 (5th Cir. 1999) (citing approvingly the D.C. Circuit's analysis in *Catholic University of America*).

37. *Catholic Univ. of Am.*, 83 F.3d at 462.

38. *Petruska*, 462 F.3d at 306 (emphasis added).

39. Another alternative adopted by one court is that the ministerial exception falls within the "hybrid situation" referred to in *Smith*. *See Catholic Univ. of Am.*, 83 F.3d at 467.

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

On such an account, the reason religious institutions are granted a sphere of autonomy free from government interference is not to promote the free exercise of religion; instead, it is to ensure that government does not become impermissibly entangled in religious matters.[41]

While other courts have not been as explicit as the Seventh Circuit in shifting the church autonomy doctrine from the Free Exercise Clause to the Establishment Clause, they have, post-*Smith*, placed more emphasis on the Establishment Clause.[42] As Douglas Laycock has noted, even as he lacks "confidence in the Establishment Clause as a way to do an end run around *Smith*," the fact that *Smith* "shrinks the Free Exercise Clause to a substantial but still undetermined extent, certainly encourages lawyers to look for Establishment Clause explanations [for the ministerial exception cases]."[43] This sentiment has been echoed by Ira Lupu and Robert Tuttle, who have argued that *Smith* demonstrated "the 'ministerial exception' could no longer rest on a doctrine of free exercise exemptions,"[44] making the Establishment Clause a far more hospitable doctrinal home for applications of the church autonomy doctrine.[45]

Where adopted, this shift fundamentally altered the scope and impact of the church autonomy doctrine. 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 government "establishing" a religion. Accordingly, church autonomy, on such an

41. *Id.* ("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.").

42. *See, e.g.*, Rweyemamu v. Cote, 520 F.3d 198, 208–10 (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 [ministerial] exception is based on the establishment and free-exercise clauses of the First Amendment."); 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 Hosps., 929 F.2d 360, 363 (8th Cir. 1991) (using an analysis based on the Establishment Clause to refuse to review a dispute involving a religious matter).

43. Douglas Laycock, *Church Autonomy Revisited*, 7 GEO. J.L. & PUB. POL'Y 253, 262–64 (2009).

44. 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, 130–31 (2009).

45. *See id*. ("The decision in *Smith* did not lead, however, to the demise of the ministerial exception. Instead, courts fell back on the line of decisions . . . concerning non-intervention in the internal affairs of religious entities.").

account, is not about protecting the autonomy of religious institutions; church autonomy is simply a by-product of the fact that courts lack the jurisdictional authority to intervene in the internal affairs of religious institutions.[46] Thus, in articulating an Establishment Clause vision of church autonomy, some scholars have emphasized that church autonomy is emblematic of the limited authority of the state.[47] Other scholars have focused more specifically on how the church autonomy doctrine is simply 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.[48] Either way, under the shift from the Free Exercise Clause to the Establishment Clause, the church autonomy doctrine morphed into a jurisdictional principle that conceptualized church and state as two separate "sovereigns," each without authority to intervene in the affairs of the other.[49]

46. *See, e.g.*, Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 45–51 (1998) (referring to the church autonomy doctrine as a "jurisdictional bar" for the courts); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 118–22 (2009) ("[The ministerial exemption] is a recognition by the courts that they lack the jurisdiction to examine these claims."); Kalscheur, *supra* note 24, at 70 ("[T]he First Amendment denies courts the authority to adjudicate a particular type of legal controversy—claims that seek to impose secular standards on a religious institution's employment of its ministers. Thus, civil courts lack subject-matter jurisdiction over such claims." (footnote omitted)).

47. *E.g.*, Esbeck, *supra* note 46, at 67 ("[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 24, at 91–96 (describing how conceptualizing the ministerial exception as a jurisdictional reaffirms the "penultimacy of the state").

48. Lupu & Tuttle, *supra* note 44, at 122. *See also* Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789, 1815 [hereinafter Lupu & Tuttle, *Ecclesiastical Immunity*] ("[E]cclesiastical 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.").

49. *See, e.g.*, Steven D. Smith, *Freedom of Religion or Freedom of the Church?*, *in* LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE UNITED STATES: ACCOMMODATION AND ITS LIMITS 249, 272–73, 278–79 (Austin Sarat ed., 2012) (arguing that courts and scholars have erroneously discarded the core jurisdictional and institutional impulse behind the religion clauses); Esbeck, *supra* note 46, at 55–56 ("If the law is to order two entities ('separation of church and state'), the law must first recognize the existence of both entities. The juridical consequence is that the status of religious entities is acknowledged by the Establishment Clause, and a sphere is reserved in which religious entities may operate unhindered by government in accordance with their own understanding of divine origin and mission."); Paul Horwitz, *Act III of the Ministerial Exception*, 106 NW. U. L. REV. 973, 980 (2012) [hereinafter Horwitz, *Act III*] ("[C]ourts, and the state itself, are simply not authorized to intervene in life at the heart of the church. 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."); Horwitz, *supra* note 46, at 114 (concluding that under "a sphere sovereignty

With these doctrinal debates lurking in the background, the Supreme Court recently attempted to address the tension between *Smith* and the church autonomy doctrine head-on. In its 2012 *Hosanna-Tabor* decision, the Supreme Court reaffirmed the ministerial exception by holding that a religious school could not be held liable for terminating one of its ministers under the ADA.[50] In so doing, the Court held that the ministerial exception derived from both the Free Exercise and Establishment Clauses;[51] according to the Court, "the text of the First Amendment . . . gives special solicitude to the rights of religious organizations."[52] The Court then went on to state:

> 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.[53]

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?[54]

The Court's somewhat bungled attempt in *Hosanna-Tabor* to explain

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"); Mark DeWolfe Howe, *The Supreme Court 1952 Term—Foreword: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91, 94 (1953) (interpreting the Supreme Court's church property cases and concluding that "the Court may have been persuaded that a church must enjoy prerogatives of sovereignty which are not to be conceded to other social groups").

50. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 710 (2012).

51. *Id.* at 702 ("Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.").

52. *Id.* at 706.

53. *Id.* at 707 (citation omitted).

54. *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 (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 ("The internal-external distinction is new and hardly self-explanatory. However, the *Hosanna-Tabor* opinion said little to illuminate or defend it."). *See also* Carl H. Esbeck, *A Religious Organization's Autonomy in Matters of Self-Governance:* Hosanna-Tabor *and the First Amendment*, 13 ENGAGE 168, 168–70 (2012) (analyzing the Court's distinction between the ministerial exception and *Smith*).

the continued vitality of the church autonomy doctrine post-*Smith* has left unresolved a whole set of doctrinal questions. Most notably, the church autonomy doctrine's uncertain constitutional lineage raises an important doctrinal question: Can the autonomy of religious institutions be overcome by a compelling government interest? In cases like *Sherbert v. Verner*[55] and *Wisconsin v. Yoder*,[56] the Court subjected Free Exercise rights to a compelling state interest test. And the Fifth Circuit in *McClure* had indicated the ministerial exception—like other Free Exercise claims—would also be subject to the compelling state interest test.[57] Accordingly, the fact that a law substantially burdened religiously motivated conduct did not end the inquiry; such a law could still pass constitutional muster if it was narrowly tailored to advance a compelling government interest. This test also remained post-*Smith* for cases that either fell into one of *Smith*'s exceptions or that were not facially neutral and generally applicable.[58]

But given increasing judicial reliance on the Establishment Clause as justification for the church autonomy doctrine, could laws impinging on the constitutionally protected autonomy of religious institutions still be upheld when they were narrowly tailored to advance a compelling government interest? The logic of a church autonomy doctrine grounded in the Establishment Clause would seem to require discarding any inquiry into whether the law in question could satisfy strict scrutiny.[59] This is because

55. Sherbert v. Verner, 374 U.S. 398, 406 (1963) ("We must . . . consider whether some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right.").

56. Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) ("[A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment . . . .").

57. McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972) ("Only in rare instances where a compelling state interest in the regulation of a subject within the State's constitutional power to regulate is shown can a court uphold state action which imposes even an incidental burden on the free exercise of religion. In this highly sensitive constitutional area only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." (internal quotation marks omitted)).

58. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993) ("Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.").

59. Lupu & Tuttle *Ecclesiastical Immunity*, *supra* note 48, 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."); Molly A. Gerratt, Note, *Closing a Loophole:* Headley v. Church of Scientology International *as an Argument for Placing Limits on the Ministerial Exception from*

an Establishment Clause interpretation of church autonomy focuses not on the religious freedom of religious institutions, but on constitutional limitations on the authority of the state to intervene in the affairs of religious institutions. Thus, courts—to the extent they adopt an Establishment Clause gloss on the church autonomy doctrine—lack the jurisdiction to intervene in such disputes, obviating any opportunity to subject claims of church autonomy to strict scrutiny.[60]

Not surprisingly given this fundamental doctrinal uncertainty, courts have been all over the map when it comes to whether to apply strict scrutiny to church autonomy claims. In the ministerial exception context, a number of courts have—consistent with a Free Exercise approach to church autonomy—continued to subject ministerial exception claims to strict scrutiny, thereby leaving open the possibility that in some circumstances the claims of a religious institution will be overridden by compelling government interests.[61] But other courts have applied the ministerial exception without raising the issue at all.[62] And this confusion persists

Clergy Disputes, 85 S. CAL. L. REV. 141, 165–66 (2011) ("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.").

60. As an example of this analysis, see 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* [*v. Kurtzman*, 403 U.S. 602 (1971),] even if they might otherwise have been justifiable under the strict scrutiny of the Free Exercise Clause.").

61. Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698, 703 (7th Cir. 2003) (applying strict scrutiny to the ministerial exception and holding that the "balance weighs in favor of free exercise of religion" (quoting Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1168 (4th Cir. 1985))); Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 948 (9th Cir. 1999) (employing a balancing test under the Free Exercise Clause to determine whether to apply the ministerial exception and concluding that, "[w]here the church provides no doctrinal nor protected-choice based rationale for its alleged actions, and indeed expressly disapproves of the alleged actions, a balancing of interests strongly favors application of the statute"); Young v. N. Ill. Conference of United Methodist Church, 21 F.3d 184, 185 (7th Cir. 1994) ("[I]n a direct clash of 'highest order' interests, the interest in protecting the free exercise of religion embodied in the First Amendment to the Constitution prevails over the interest in ending discrimination embodied in Title VII.").

62. Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 656–57 (10th Cir. 2002) (citing *Smith*, which "found that laws burdening individuals' religious practices need not be justified by a compelling governmental interest if they are neutral and generally applicable" and concluding that "the church autonomy doctrine remains viable after *Smith*"); EEOC v. Roman Catholic Diocese of Raleigh, N.C., 213 F.3d 795, 801 (4th Cir. 2000) ("[T]he existence of the ministerial exception does not derogate the profound state interest in assuring equal employment opportunities for all, regardless of race, sex, or national origin. Rather, the exception simply recognizes that the introduction of government standards to the selection of spiritual leaders would significantly, and perniciously, rearrange the relationship between church and state. Application of the exception thus manifests no more than the reality that a constitutional command cannot yield to even the noblest and most exigent of statutory mandates." (citations and internal quotation marks omitted)); Gellington v. Christian

when it comes to other church autonomy claims,[63] including claims related to ministers who have engaged in alleged sexual misconduct[64] and claims against churches for defamation as a result of shunning their members.[65]

Methodist Episcopal Church, Inc., 203 F.3d 1299, 1304 (11th Cir. 2000) ("[T]he [ministerial] exception only continues a long-standing tradition that churches are to be free from government interference in matters of church governance and administration."); Scharon v. St. Luke's Episcopal Presbyterian Hosps., Corp., 929 F.2d 360, 363 (8th Cir. 1991) ("Personnel decisions by church-affiliated institutions affecting clergy are *per se* religious matters and cannot be reviewed by civil courts, for to review such decisions would require the courts to determine the meaning of religious doctrine and canonical law and to impose a secular court's view of whether in the context of the particular case religious doctrine and canonical law support the decision the church authorities have made.").

63. *See, e.g.*, *Church of Scientology Flag Serv.*, 2 F.3d at 1543–47 (noting that if the court were to interpret church autonomy as an Establishment Clause doctrine there would be no need to consider whether the law in question could satisfy strict scrutiny, but ultimately concluding that the law did not satisfy strict scrutiny).

64. *Compare* 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."), *and* Doe v. Evans, III, 718 So. 2d 286, 291 (Fla. Dist. Ct. App. 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."), *with* Doe v. Dorsey, 683 So. 2d 614, 617 (Fla. Dist. Ct. App. 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."). *See also* Roman Catholic Archbishop of L.A. v. Superior Court of L.A. Cnty., 32 Cal. Rptr. 3d 209, 219–24 (Ct. App. 2005) ("[W]e conclude that even pursuant to the *former* strict scrutiny test . . . disclosure of the subpoenaed documents would not violate petitioners' rights. Therefore, we need not decide whether *Smith* applies to California's free exercise clause." (emphasis added)); Malicki v. Doe, 814 So. 2d 347, 358 (Fla. 2002) (holding that lawsuit for alleged sexual misconduct could proceed, but only because "religious autonomy" principle—which was interpreted to be based on the Establishment Clause—could be avoided by resolving the case under neutral principles of law).

65. *Compare* Anderson v. Watchtower Bible & Tract Soc'y of N.Y., Inc., No. M2004-01066-COA-R9-CV, 2007 Tenn. App. LEXIS 29, 82 (Ct. App. Jan. 19, 2007) ("In the context of the motion to dismiss for lack of subject matter jurisdiction based on the First Amendment's protection of ecclesiastical decisions, the most pertinent analysis is one that focuses on the nature of the claim in light of the prohibition on court entanglement in or interference with disputes that are fundamentally religious. Where religious belief or practice is implicated, some claims that could be adjudicated if they arose in a secular context are not subject to court intervention because they do not present the kind of compelling state interest to overcome freedom of religion concerns."), *and* Heard v. Johnson, 810 A.2d 871, 883 (D.C. 2002) ("Under most circumstances, defamation is one of those common law claims that is not compelling enough to overcome First Amendment protection surrounding a church's choice of pastoral leader. When a defamation claim arises entirely out of a church's relationship with its pastor, the claim is almost always deemed to be beyond the reach of civil courts because resolution of the claim

The fact that the current state of the doctrine provides limited guidance as to whether claims of church autonomy are subjected to strict scrutiny is startling. Debating what strict scrutiny demands is one thing; not knowing whether it applies is a confusion of a fundamentally different order.

B. QUESTION OF SCOPE: FOR-PROFIT VERSUS NONPROFIT

While startling, the fact that we have limited doctrinal guidance as to whether the claims of religious institutions can be subjected to strict scrutiny is just the beginning. The current state of the doctrine also provides limited guidance as to what institutions even qualify for protections under the religion clauses of the First Amendment.[66] While courts have articulated some scope of autonomy for churches and other analogous institutions, should similar protections be afforded to for-profit companies that claim to also be religiously motivated?

In the Court's decisions, First Amendment protections were never expressly extended—nor expressly refused—to for-profit institutions. Thus, in its 1961 decision *Gallagher v. Crown Kosher Super Market*, the Supreme Court considered, among other claims, whether the Massachusetts Sunday Closing Laws violated the free exercise rights of a for-profit kosher supermarket, indicating that a for-profit corporation could have free exercise rights.[67] However, the Court ultimately held that because its precedent had previously rejected claims that Sunday Closing Laws infringed on free exercise rights it had no need to further determine whether the kosher supermarket had standing to raise the claim.[68]

Notwithstanding *Gallagher*, the Court's next foray into the for-profit debate was far more skeptical of whether for-profit entities could retain First Amendment rights. In *United States v. Lee*, the Court considered the

would require an impermissible inquiry into the church's bases for its action."), *with* Klagsbrun v. Va'ad Harabonim of Greater Monsey, 53 F. Supp. 2d 732, 736, 739–42 (D.N.J. 1999) (dismissing defamation claims pursuant to the Establishment Clause without applying strict scrutiny because the "resolution of the factual disputes would require this court to inquire into religious doctrine and practice").

66. *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, 1515–16 (1979) (noting the uncertainty in the definition of "religious belief" that defines a religious institution); Michael A. Helfand, *What is a "Church"?: Implied Consent and the Contraception Mandate*, 21 J. CONTEMP. LEGAL ISSUES 401, 418–24 (2013) (discussing the various factors courts take into consideration when determining "religious institution"); Zoë Robinson, *What is a "Religious Institution"?*, 55 B.C. L. Rev. 181, 184–85 (2014) (noting that lower courts are "[l]acking any guidance or coherent theory as to how to single out" the category of religious institutions).

67. Gallagher v. Crown Kosher Super Mkt. of Mass., Inc., 366 U.S. 617, 618 (1961).

68. *Id.* at 630–31.

claim of an Amish farmer who refused on religious grounds to withhold social security taxes for his Amish workers.[69] The Court held that the Free Exercise Clause did not exempt the farmer, concluding that "[b]ecause the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax."[70] However, the Court then went on to state that, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."[71] To be sure, *Lee* addressed the claims of a religiously motivated individual, not an institution. But indications from *Lee* pointed in the direction of a potential doctrinal distinction between for-profit and nonprofit institutions.

This same question—whether the religion clause covers for-profit corporations—was also implicated in the Court's 1987 decision *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, albeit in a somewhat roundabout fashion. In *Amos*, the Court addressed the constitutionality of the "religious organization" exception to Title VII, determining whether the exception constituted an impermissible establishment of religion.[72] The Court ultimately held that applying the exception to "secular nonprofit activities of religious organizations" did not violate the Establishment Clause; therefore, the petitioner—which ran a nonprofit gymnasium under the auspices of the Mormon Church—could raise the exception as a shield against Title VII liability for having fired one of its employees who failed to qualify for a certificate of membership in the church.[73]

However, as noted by two of the concurrences, the majority's decision did not address whether the outcome would have been different had the case addressed the application of the "religious organization" exception to a for-profit entity. Justice Brennan grounded the exception in the church autonomy doctrine—"religious organizations," he explained, "have an interest in autonomy in ordering their internal affairs"—and therefore government has a legitimate interest in providing an exception to Title VII.[74] But such a *per se* exception for religious organizations, argued

69. United States v. Lee, 455 U.S. 252, 252 (1982).

70. *Id.* at 260.

71. *Id.* at 261.

72. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 329–30 (1987).

73. *Id.*

74. *Id.* at 341 (Brennan, J., concurring).

Brennan, made sense when dealing with nonprofit entities where we could reasonably presume that the organization was truly organized around religious principles.[75] While not explicit, Brennan's analysis—which focuses on the constitutional need to protect religious activities—would seem to require a more searching inquiry when it comes to for-profit entities to determine whether they are sufficiently religious to provide a constitutionally sufficient justification for Title VII's religious organization exception.[76] And raising this distinction between for-profit and nonprofit entities pointed to the likely possibility that for-profit entities were insufficiently religious to receive First Amendment protections.

If Brennan's concurrence gestured in this direction, Justice O'Connor's concurrence made it more explicit. Employing her endorsement framework for interpreting the Establishment Clause,[77] O'Connor argued that a reasonable observer would not see the religious organization exception as endorsing religion where it was applied to nonprofit activity; this is because of the sufficiently high likelihood that "a nonprofit activity of a religious organization will itself be involved in the organization's religious mission."[78] And where an accommodation of religion is seen as lifting a burden on the exercise of religion—as opposed to providing an "unjustifiable awards of assistance to religious organizations"[79]—Establishment Clause concerns are avoided. By contrast, explained O'Connor, "[i]t is not clear . . . that activities conducted by religious organizations solely as profit-making enterprises will be as likely to be directly involved in the religious mission of the organization."[80] Therefore, providing an exception for for-profit activities might be seen as an unjustifiable award of assistance and therefore constitutionally prohibited.

Given all this, O'Connor concluded that while she "express[ed] no

75. *Id.* at 344 ("The fact that an operation is not organized as a profit-making commercial enterprise makes colorable a claim that it is not purely secular in orientation. In contrast to a for-profit corporation, a non-profit organization must utilize its earnings to finance the continued provision of the goods or services it furnishes, and may not distribute any surplus to the owners.").

76. *See id.* at 343 ("This rationale suggests that, ideally, religious organizations should be able to discriminate on the basis of religion *only* with respect to religious activities, so that a determination should be made in each case whether an activity is religious or secular.").

77. *Id.* at 348 (O'Connor, J., concurring).

78. *Id.* at 349 ("Because there is a probability that a nonprofit activity of a religious organization will itself be involved in the organization's religious mission, in my view the objective observer should perceive the Government action as an accommodation of the exercise of religion rather than as a Government endorsement of religion.").

79. *Id.* at 348.

80. *Id.* at 349.

opinion on the issue," she concluded that "under the holding of the Court" as well as her "view of the appropriate Establishment Clause analysis, the question of the constitutionality of the § 702 exemption as applied to for-profit activities of religious organizations remains open."[81] Put differently, O'Connor was uncertain whether there was a sufficiently clear free exercise interest when accommodating for-profit religious organizations so as to avoid the perception that such an exception constituted an endorsement of religion. Thus, in the wake of *Amos*, it remained unclear whether for-profit institutions could claim constitutional protections under the First Amendment.

C. THE RELIGIOUS FREEDOM RESTORATION ACT: PURELY STATUTORY OR CONSTITUTIONALLY GROUNDED?

Confusion over the protections afforded to religious institutions have extended beyond the realm of religion clause jurisprudence. In response to the Supreme Court's decision in *Smith*, Congress passed RFRA. 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 interest[82]—the constitutional standard that was explicitly rejected by the Court in *Smith*.[83]

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*. Thus, in outlining its overall purpose, the House Report characterized RFRA as "turn[ing] the clock back to the day before *Smith* was decided."[84] 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*

81. *Id.*

82. 42 U.S.C. § 2000bb-1(a), (b)(1)–(2) (2012).

83. 42 U.S.C. § 2000bb. 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. City of Boerne v. Flores, 521 U.S. 507, 532–36 (1997). Many states responded to *City of Boerne* by passing their own RFRAs—so-called mini-RFRAs. *See* Christopher C. Lund, *Religious Liberty After* Gonzalez*: A Look at State RFRAs*, 55 S.D. L. REV. 466, 466–67 (2010) (describing mini-RFRAs as "state-law analogues of the federal Religious Freedom Restoration Act, usually passed by state legislatures."); Craig W. Mandell, *Tough Pill to Swallow: Whether Catholic Institutions are Obligated Under Title VII to Cover Their Employees' Prescription Contraceptives*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 199, 227 (2008) ("[S]ince *City of Boerne*, many states have been passing 'mini-RFRAs,' which like the federal RFRA, demand that their state laws be substantively neutral towards religion.").

84. *See* H.R. REP. No. 103-88, at 15 (1993) (internal quotation marks omitted).

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 . . . ."[85]

However, linking the terms of RFRA to pre-*Smith* free exercise jurisprudence only drew RFRA into the deep confusion over the scope of free exercise protection available before *Smith*. In some pre-*Smith* decisions, the Supreme Court appeared to provide wide-ranging protections under the Free Exercise Clause. The two most notable examples were *Sherbet v. Verner*[86] and *Wisconsin v. Yoder*[87]—where laws burdening religiously motivated conduct were subjected to strict scrutiny.[88] In *Sherbert*, the Court held that denying the plaintiff her unemployment compensation because she refused to work on Saturday, on account of her religious commitments, violated her free exercise rights.[89] In so doing, the Court emphasized that when it comes to the Free Exercise Clause, "[o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation."[90] The Court employed similar logic in *Yoder*, holding that Wisconsin's compulsory education law infringed on the free exercise rights of Amish parents who, in accordance with their religious beliefs, refused to send their children to public school beyond eighth grade.[91] In reaching this conclusion, the Court—echoing its decision in *Sherbert*—stressed that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[92] In this way, both the *Sherbet* and *Yoder* courts afforded broad protection to religiously motivated conduct against the substantial burdens imposed by otherwise valid laws—insisting that such religiously

85. 42 U.S.C. § 2000bb(a)(4).

86. Sherbert v. Verner, 374 U.S. 398, 406–09 (1963).

87. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

88. Other Supreme Court decisions also articulated this standard under the Free Exercise Clause. *See, e.g.*, Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 835 (1989) ("And, as we have said in the past, there may exist state interests sufficiently compelling to override a legitimate claim to the free exercise of religion. No such interest has been presented here."); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141 (1987) (holding that "infringements [on religiously motivated conduct] must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest"); Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is [t]he least restrictive means of achieving some compelling state interest. However, it is still true that the essence of all that has been said and written on the subject is that only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion." (alteration in original) (internal quotation marks omitted)).

89. *Sherbert*, 374 U.S. at 407–09.

90. *Id.* at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

91. *Yoder*, 406 U.S. at 205.

92. *Id.* at 215.

motivated conduct was guaranteed free exercise protections save in the most extreme of circumstances.

But not all pre-*Smith* free exercise decisions provided the same degree of protection. In the years leading up to *Smith*, the Supreme Court had limited the reach of the Free Exercise Clause in a series of cases considering various religious accommodations. For example, in *United States v. Lee*, the Court refused to exempt an Amish farmer from his required social security taxes.[93] While *Lee* did adopt some form of the strict scrutiny analysis,[94] the Court also emphasized the need to strike a "balance . . . between the values of the comprehensive social security system, which rests on a complex of actuarial factors, and the consequences of allowing religiously based exemptions."[95] Such balancing language seemed to lower the bar for constitutionality, requiring not that the particular accommodation in question undermine a compelling government interest, but simply that the aggregate effect of such accommodations undermine the government's ability to achieve important objectives.

Only a few years later, Chief Justice Burger emphasized in Part III of his majority opinion in *Bowen v. Roy*—the portion of his decision that was only joined by two other Justices[96]—that "[a]bsent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest."[97] This focus on intent to discriminate, while not securing a majority of votes on the Court in 1986—and subjected to significant criticism by other Justices[98]—foreshadowed the framework adopted by the Court in *Smith*.[99] The Court's 1988 decision in *Lyng v. Northwest Indian Cemetery Protective Association* further held that it cannot be the case "that incidental effects of government programs, which may make it more

93. United States v. Lee, 455 U.S. 252, 252 (1982).

94. *Id.* at 257 ("The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.").

95. *Id.* at 259.

96. In Part III of the opinion, Chief Justice Burger was joined by Justices Powell and Rehnquist. Bowen v. Roy, 476 U.S. 693, 695, 701–12 (1986).

97. *Id.* at 707–08.

98. *Bowen*, 476 U.S. at 727 (O'Connor, J., concurring in part and dissenting in part) (arguing that the test proposed by Chief Justice Burger "has no basis in precedent and relegates a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause already provides"); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141 (1987) (refusing to embrace the standard articulated by Chief Justice Burger in *Bowen*).

99. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 883–89 (1990).

difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions."[100] Together *Lee*, *Bowen*, and *Lyng* set the stage for the Court's decision in *Smith* even as these holdings put the Court's free exercise jurisprudence in tension with its earlier precedents in *Sherbert* and *Yoder*.[101]

This all raises the following question for RFRA: When RFRA sought to undo *Smith*,[102] which cases did it intend to form the interpretive backdrop for the new statute? RFRA may have "turn[ed] the clock back to the day before *Smith* was decided,"[103] but it is hard to pinpoint what the law was the day before *Smith* was decided.

In providing guidance on this question, RFRA seems to present conflicting indications. On the one hand, RFRA states that "the purposes of [RFRA are] to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*, and to guarantee its application in all cases where free exercise of religion is substantially burdened . . . ."[104] On the other hand, RFRA also states that "the compelling interest test as set forth in *prior Federal court rulings* is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."[105] These conflicting references to pre-*Smith* decisions inject serious uncertainty into precisely what degree of protection RFRA provides. In highlighting *Sherbert* and *Yoder*, RFRA singles out the two cases that represent the high water mark for pre-*Smith* Free Exercise protections; and yet at the same time, RFRA references the wider set of

100. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450–51 (1988).

101. It is also worth noting that the Supreme Court embraced a lower standard of review when Free Exercise challenges arose in certain unique contexts. *See, e.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342, 350 (1987) ("Though the availability of accommodations is relevant to the reasonableness inquiry, we have rejected the notion that prison officials . . . have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint. By placing the burden on prison officials to disprove the availability of alternatives, the approach articulated by the Court of Appeals fails to reflect the respect and deference that the United States Constitution allows for the judgment of prison administrators." (citation and internal quotation marks omitted)); Goldman v. Weinberger, 475 U.S. 503, 507 (1986) ("[W]hen evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.").

102. 42 U.S.C. § 2000bb(a)(4) (2013).

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

104. 42 U.S.C. § 2000bb(b)(1) (citations omitted).

105. 42 U.S.C. § 2000bb(a)(5) (emphasis added). For a discussion of this tension and a different view on how to reconcile the provisions, see Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 283–91 (1995).

"prior Federal court rulings" when it comes to applying the "compelling government interest test," which would seem to include both the *Sherbert* and *Yoder* line of cases as well as the *Lee*, *Bowen*, and *Lyng* line of cases. Indeed, by embracing the wider set of cases, RFRA simply incorporates the same tensions that plagued free exercise doctrine prior to *Smith*. But notwithstanding that complication, there is good reason to think that is exactly what Congress intended. Indeed, the House Committee's report on RFRA stated that "[i]t is the Committee's expectation that the courts will look to free exercise of religion cases decided prior to *Smith* for guidance in determining whether or not religious exercise has been burdened and the least restrictive means have been employed in furthering a compelling governmental interest."[106]

By linking the application of RFRA to "prior Federal court rulings,"[107] Congress also imported another ambiguity of free exercise doctrine into the new statutory context: should RFRA also apply to for-profit institutions? RFRA by its terms applied to "person[s]";[108] and pursuant to the Dictionary Act, the term "person" by default "include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals"[109]—that is, unless the "context indicates otherwise."[110] But this raises an interesting question: does RFRA's context indicate otherwise? On the one hand, we might conclude that for-profit corporations cannot exercise religion in any obvious way and therefore the term "person" should not be read in the context of RFRA to include corporations.[111] On the other hand, some corporations—most notably churches—have long received religious liberty protections precisely because they do exercise religion,[112] raising significant questions as to whether we should read the context of RFRA as providing a basis for deviating from the default definition of "person."[113] The problem, in many

106. H.R. REP. NO. 103-88, at 6–7. *See also* S. REP. NO. 103-111, at 9 (1993) ("This bill is not a codification of the result reached in any prior free exercise decision but rather the restoration of the legal standard that was applied in those decisions.").

107. 42 U.S.C. § 2000bb(a)(5).

108. 42 U.S.C. § 2000bb-1(a).

109. 1 U.S.C. § 1 (2013).

110. *Id.*

111. *See* Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 411 (E.D. Pa. 2013) ("[W]e have determined that a for-profit, secular corporation cannot exercise religion . . . .") *aff'd sub nom.* Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377 (3d Cir. 2013), *cert granted*, 134 S. Ct. 678 (2013) and *rev'd and remanded sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

112. *See supra* notes 19–23 and accompanying text.

113. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1129 (10th Cir. 2013) (en banc), *cert. granted*, 134 S. Ct. 678 (2013) and *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct.

ways, lies in the equivocation within free exercise doctrine as to which institutions have been granted constitutional protections and, therefore, can be fairly said to be capable of exercising religion.[114]

Both of these issues emerged as pivotal in the Supreme Court's recent decision in *Burwell v. Hobby Lobby Stores*. In *Hobby Lobby*, the Supreme Court addressed whether RFRA prohibited enforcing the Affordable Care Act's "contraception mandate"—the requirement that employers provide employees with health insurance that covers contraception—against for-profit corporations.[115] The contraception mandate had been challenged by a wide range of companies around the country;[116] the specific case before the Court considered the claims of three closely held for-profit corporations: Hobby Lobby, an arts-and-crafts chain; Mardel, a chain of bookstores selling Christian books and products; and Conestoga Wood, a custom cabinet manufacturer. All three of these corporations objected to providing insurance coverage for four of twenty contraceptives mandated under the Affordable Care Act.[117]

Finding in favor of the three corporations, the Court answered both of the doctrinal puzzles that stemmed from ambiguities in the relationship between RFRA and free exercise jurisprudence. When it came to identifying which prior Supreme Court cases informed RFRA's strict scrutiny analysis, the majority surprisingly opted for none.[118] The question most directly arose in the Court's attempt to distinguish the language in *Lee*, which seemed to state that commercial activities were not eligible for free exercise protection.[119] In explaining why the Court's prior statements in *Lee* did not control its decision in *Hobby Lobby*, the Court wrote:

> *Lee* was a free exercise, not a RFRA, case, and the statement to which [the United States Department of Health and Human Services] points, if taken at face value, is squarely inconsistent with the plain meaning of RFRA. Under RFRA, when followers of a particular religion choose to enter into commercial activity, the Government does not have a free

2751 (2014).

114. *See infra* Part III.A.

115. *See supra* note 5 and accompanying text.

116. *See supra* note 8 and accompanying text.

117. *Hobby Lobby*, 134 S. Ct. at 2764–66.

118. *See* Micah Schwartzman et al., *The New Law of Religion: Hobby Lobby Rewrites Religious-Freedom Law in Ways That Ignore Everything That Came Before*, SLATE (July 3, 2014, 11:54 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/07/after_hobby_lobby_there_is_only_rfra_and_that_s_all_you_need.html (criticizing the Supreme Court's argument justifying this conclusion).

119. United States v. Lee, 455 U.S. 252, 260–61 (1982).

> hand in imposing obligations that substantially burden their exercise of religion.[120]

While buried in a footnote, the Court's contention amounted to a radical break between free exercise doctrine and RFRA. The benefit, of course, was that the Court did not need to address the tensions that existed within free exercise doctrine prior to *Smith*. [121] Unfortunately, this came at the cost of further bifurcating the structure of religious liberty claims, opening the door for widely different standards depending on whether a claim was constitutional or statutory. And to the extent religious liberty claims—both statutory and constitutional—emanated from a general set of principles, it would become increasingly harder to justify them.[122] Indeed, this doctrinal move raises questions as to the theory driving the strict scrutiny analysis under RFRA—what legal sources should provide the basis for applying RFRA's strict scrutiny standard?

With respect to the second question—whether for-profit corporations are covered by RFRA—the Court held in favor of Hobby Lobby and the other petitioning corporations, emphasizing three primary arguments. First, the Court emphasized that "persons" included corporations under the Dictionary Act;[123] second, the Court noted that the corporate form had not been an obstacle to enabling nonprofit companies from being covered under RFRA;[124] and third, the Court noted that cases like *Gallagher*, as noted above,[125] provided some indication that the Free Exercise Clause covered for-profit corporations while contrary indications from the Court's precedent were relatively weak.[126]

That being said, the Court was not willing to extend RFRA protections to all corporations. Responding to the government's worries over broadening the scope of RFRA protections, the Court limited its holding to "closely held corporations" as opposed to "publicly traded corporations."[127] In such cases, and as opposed to cases of publicly traded corporations, the limited number of shareholders in a closely held corporation could more easily coalesce around a single set of religious beliefs.[128] And in cases of conflict between corporate shareholders, state corporations law could

120. *Hobby Lobby*, 134 S. Ct. at 2784 n.43.
121. *See supra* notes 86–101 and accompanying text.
122. *See infra* Part III.B.
123. *Hobby Lobby*, 134 S. Ct. at 2768–69.
124. *Id.* at 2769–70.
125. *See supra* notes 67–68 and accompanying text.
126. *Hobby Lobby*, 134 S. Ct. at 2772–73.
127. *Id.* at 2774.
128. *Id.*

provide the method for resolving disputes.[129]

This limitation, however, provides its own challenge. The category of "closely held corporations" does not have a clear legal definition.[130] Therefore applying the Court's holding in *Hobby Lobby* would require a degree of line-drawing that creates significant uncertainty. Put simply, how closely held must a corporation be to receive RFRA protections?

All in all, *Hobby Lobby* addressed some of the key questions raised by the complex relationship between the Free Exercise Clause and RFRA. However, the Court's answers raise new questions. If free exercise doctrine does not inform RFRA's strict scrutiny standard, then what legal sources should courts look to? And while RFRA only applies to closely-held corporations, how closely held is enough to qualify? Together, the uncertainties created by the Court's *Hobby Lobby* ruling raise the following question: what theory, principle, or set of principles can we use to explain the religious liberty protections we provide religious institutions?

III. RELIGIOUS INSTITUTIONS THROUGH THE PRISM OF IMPLIED CONSENT

As described in the prior part, the legal doctrine applicable to religious institutions is in serious disrepair. Confusion over which of the religion clauses provides the basis for the constitutional protections afforded to religious institutions has created deep uncertainty over basic doctrinal questions—for example, whether the constitutional claims of religious institutions are subjected to strict scrutiny. Confusion over the rationale underlying the constitutional protections afforded to religious institutions have given rise to questions over whether such protections are granted only to nonprofit institutions or to for-profit institutions as well. And the confusions within religious clause jurisprudence have been replicated in RFRA, which has entrenched these doctrinal uncertainties into its statutory scheme. At the core of these confusions lies a single question: what framework should inform the doctrine affording protection to religious institutions?[131]

129. *Id.* at 2775.

130. *See generally* Baruch Gitlin, *When is Corporation Close, or Closely-Held, Corporation Under Common or Statutory Law*, 111 A.L.R. 207 (2003) (discussing the various definitions and understandings of closely held corporations).

131. Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 223 (1991) ("[I]f we cannot articulate a convincing justification for the commitment to religious freedom then we cannot know its purpose, and we are accordingly paralyzed in our efforts to interpret the commitment."). *See also* William P. Marshall, *Truth and the Religion Clauses*, 43 DEPAUL L. REV. 243, 243 (1994) (quoting Smith, and arguing that "[a] jurisprudence that is not based

As I have expressed elsewhere, I believe the core value of *voluntarism* has long animated the legal treatment of religious institutions.[132] Voluntarism is "the freedom to make religious choices for oneself, free from governmental compulsion of improper influence."[133] And, in turn, a voluntarism-based approach to religious institutions sees them as valuable because they are borne out of the voluntary choices of their members.[134] Thus, 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. In this way, religious institutions serve as focal points for the collective exercise of religion, providing the institutional infrastructure that makes religious exercise possible.[135] Put differently, when we grant religious institutions some scope of autonomy from governmental regulation, we do so because it promotes the voluntary free exercise of religion—not because we fear such governmental intervention would constitute the establishment of religion.

This link between religious institutions and voluntarism is most commonly associated with John Locke, who in his *Letter Concerning Toleration* defined the very essence of a church as "a voluntary society of men, joining themselves together of their own accord . . . ."[136] Thomas Jefferson incorporated Locke's characterization into his own *Notes on Religion*, emphasizing that one of the necessary conditions for valuing religious institutions is that they emerge from the voluntary choices of their

upon an understanding of the values involved is likely to be perceived as shallow, inconsistent, and nonpersuasive").

132. *See* Michael A. Helfand, *Religion's Footnote Four: Church Autonomy as Arbitration*, 97 MINN. L. REV. 1891, 1926 (2013) [hereinafter Helfand, *Religion's Footnote Four*]; Helfand, *supra* note 66, at 415.

133. DANIEL O. CONKLE, CONSTITUTIONAL LAW: THE RELIGION CLAUSES 38 (2003). *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 to change one's religious beliefs and adherences").

134. For more on this link, see Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 957–62 (2013) (explaining the qualities of churches as voluntary organizations).

135. 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 that makes religious freedom possible).

136. JOHN LOCKE, A LETTER CONCERNING TOLERATION (1689), *reprinted in* JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION 121, 129 (J. W. Gough ed., 1948).

members.[137] This embrace of voluntarism led both Locke and Jefferson to further emphasize that individuals were not, "*by nature* bound to any church,"[138] but instead "every one joins himself voluntarily to that society in which he believes he has found that profession and worship which is truly acceptable to God."[139]

This centrality of voluntarism—that is, the freedom to make choices about religious belief and practice in the absence of improper government influence—flowed from a fundamental commitment to religious conscience. Thus, James Madison articulated a right for every individual to "be left to [his] conviction and conscience" when it came to matters of faith.[140] And this wholesale embrace of liberty of conscience also traced itself to the work of John Locke,[141] serving as a frequent refrain during the founding period.[142] Indeed, the constitutional commitment to voluntarism was predicated on the view that religion has value to the extent that it emanates from each person's individual conscience. In turn, government must be restricted from exerting its influence on the process of religious decisionmaking, allowing citizens to make those decisions based on the "dictates" of their "consciences."[143] Thus, even outside the context of

137. *See* THOMAS JEFFERSON, NOTES ON RELIGION (1776), *reprinted in* 2 THE WRITINGS OF THOMAS JEFFERSON 1776–1781, at 92, 101 (Paul Leicester Ford ed., 1893) ("[A church] is *voluntary* bec. no man is *by nature* bound to any church.").

138. *Id.*; LOCKE, *supra* note 136 at 129.

139. LOCKE, *supra* note 136 at 129.

140. James Madison, *Memorial Remonstrance Against Religious Assessments*, 8 PAPERS 298 (1785), *reprinted in* 5 THE FOUNDER'S CONSTITUTION 82, ¶ 1 at 82 (Philip B. Kurland & Ralph Lerner eds., 1987).

141. JOHN LOCKE, A LETTER CONCERNING TOLERATION (1689), *reprinted in* JOHN LOCKE, A LETTER CONCERNING TOLERATION IN FOCUS 12, 32 (John Horton & Susan Mendus eds., 1991) ("No way whatsoever that I shall walk in against the dictates of my conscience, will ever bring me to the mansions of the blessed. . . . I cannot be saved by a religion that I distrust, and by a worship that I abhor. . . . Faith only, and inward sincerity, are the things that procure acceptance with God. . . . [A]nd therefore, when all is done, [men] must be left to their own consciences.").

142. For more on the focus on conscience and voluntarism during the founding period, see Witte, Jr., *supra* note 133, at 389–94; Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1420–27; Esbeck, *supra* note 46, at 63–67; Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 354–72 (2002) (highlighting the role of freedom of conscience and voluntarism in the early conceptions of religious freedom and the religion clauses); David C. Williams & Susan H. Williams, *Volitionalism and Religious Liberty*, 76 CORNELL L. REV. 769, 853–58 (1991).

143. Some have criticized voluntarism because it fails to recognize that individuals do not always "choose" their religious beliefs; instead, their religious affiliations are constitutive of their identities in ways that preclude—and predate—true choice. *See* Michael J. Sandel, *Religious Liberty—Freedom of Conscience or Freedom of Choice?*, 1989 UTAH L. REV. 597, 598; Williams & Williams, *supra* note 142, at 896. However, voluntarism need not be understood as arguing that religious choices have value only to the extent they are "truly" chosen. Voluntarism simply contends that individuals ought to be left free from government interference and intervention when it comes to internal religious decisions. Even

religious institutions, the Supreme Court has repeatedly highlighted the fundamental importance of voluntarism to the constitution's religion clause jurisprudence.[144]

Given the philosophical, historical, and doctrinal emphasis, it is far from surprising that voluntarism has played a central role in the development of Supreme Court doctrine on the constitutional treatment of religious institutions.[145] In its 1871 decision *Watson v. Jones*, the Supreme Court noted "[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 members of the church."[146] 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."[147]

However, 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."[148] In this way, joining a church or other religious institution entails an implicit consent authorizing the institution to self-govern and resolve internal disputes.[149]

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if individuals feel compelled to embrace particular religious beliefs, those beliefs still have value on a voluntaristic account so long as the decision to embrace those beliefs is internally motivated. *See* Williams & Williams, *supra* note 142, at 896 ("Voluntarism ensures that choices are 'free' only in the sense that they are free from government coercion, rather than entirely uncoerced or undetermined.").

144. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 53 (1985) ("[T]he individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful . . . ."). *See also* Zorach v. Clauson, 343 U.S. 306, 313 (1952) (stating that religious views must emanate from personal and voluntary choices and thereby "flourish according to the zeal of its adherents and the appeal of its dogma"); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (holding that the First Amendment guarantees the freedom "to adhere to such religious organization or form of worship as the individual may choose" and "safeguards the free exercise of the chosen form of religion").

145. *See supra* notes 132–134 and accompanying text.

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

147. Gonzalez v. Roman Catholic Archbishop of Manilla, 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.

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

149. *Id*.

The rationale for this implied consent is directly tied to the substantive objectives of religious institutions: "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."[150] Thus the reason why we can legally infer implied consent from the mere act of joining a religious institution—as opposed to a secular association—is predicated on the unique objectives of religious institutions and the need of such religious institutions to develop internal religious rules and doctrine to achieve those objectives.[151]

This reformulation of voluntarism through the prism of implied consent—and linking that implied consent to unique religious objectives—once again finds its origin in Locke, who explicitly connected the voluntary nature of religious institutions to the need for the membership's consent to institutional rule-making authority.[152] 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.[153] And again this formulation was echoed by Jefferson who emphasized that individuals join a church "in order to the public worshipping of god in such a manner as they judge acceptable to him & effectual to the salvation of their souls."[154] Thus, Jefferson concluded, "[t]he hope of salvation is the cause of his entering into [the church]."[155]

On this account, religious institutions are formed in order to pursue a

150. *Id.*

151. To be sure, singling out religious institutions for special treatment relies on the assumption that there is a unique feature of religious institutions—and their religious objectives—that distinguishes them from secular institutions. Some have questioned this claim. *See generally* Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012) (examining the question, "[m]ust *religion* be special," focusing on the "conflict between the legal and normative status of religion"). Of course, if this assumption turns out to be false, then the special treatment afforded religious institutions might be extended to secular institutions as well. There is some reason to believe that, at least at one point, the Supreme Court considered this a worthwhile approach. *See Gonzalez*, 280 U.S. at 16–17 ("[T]he decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise. Under like circumstances, effect is given in the courts to the determinations of the judicatory bodies established by clubs and civil associations." (footnote omitted)).

152. *See* LOCKE, *supra* note 141, at 20 ("A church then I take to be a voluntary society of men, joining themselves together of their own accord . . . in such a manner as they adjudge acceptable to him . . . .").

153. *Id.*

154. JEFFERSON, *supra* note 137, at 101 (internal quotation marks omitted).

155. *Id.*

particular conception of the good life, tied up in specific notions of faith and salvation. Individuals voluntarily join religious institutions to collectively pursue uniquely religious objectives. In order to accomplish these shared religious objectives, members grant authority over religious matters to the religious institution; in turn, religious institutions develop doctrine and resolve disputes in order to promote these collectively held religious objectives. Indeed, it might be seen as contradictory to join a religious community, but to maintain that promulgation, interpretation, and application of the relevant religious doctrine to be within the purview of the secular nation-state. A civil society dedicated to the principles of liberalism does not pursue any single conception of the good life—religious or otherwise—and therefore is particularly ill-suited to oversee the pursuit of religious objectives.[156]

It is precisely for this reason that the *Watson* Court presented a conception of religious institutionalism that inferred the very act of joining a religious institution as granting that institution the authority to make rules, develop doctrine, and resolve disputes. And the flipside of granting religious institutions this authority was the inferred desire of each individual member to withdraw that authority from civil courts. In the words of the *Watson* Court, "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."[157] Or, in the words of Locke, if members failed to grant institutions authority of internal governance, the "church . . . will presently dissolve and break in pieces."[158]

On this point, an implied consent model differs from another prevailing vision of religious institutionalism. To some scholars, religious institutions have an inherent authority as their own independent jurisdictions outside the authority of the state.[159] Such "dual jurisdiction"

156. *See* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 80–84 (1995) (describing the features of liberalism and how they affect religious freedom).

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

158. LOCKE, *supra* note 136, at 129.

159. *See, e.g.*, Horwitz, *Act III*, *supra* note 49, at 980 ("[C]ourts, and the state itself, are simply not authorized to intervene in life at the heart of the church. 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."). *See also* Smith, *supra* note 49, at 272–73, 278–79 (arguing that courts and scholars have erroneously discarded the core jurisdictional and institutional impulse behind the religion clauses); Horwitz, *supra* note 46, 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"); Howe, *supra* note 49, at 94 (interpreting the Supreme Court's church property

approaches are often traced to some of Madison's own views on the primacy of religion over and above the authority of the state.[160] In turn, they typically focus less on the scope of autonomy constitutionally granted to religious institutions—instead focusing more on the constitutional limits placed on the state from intervening in the internal affairs of religious institutions.[161] In so doing, they view the rights of religious institutions primarily through the prism of the Establishment Clause, arguing that judicial trespass into the internal life of religious institutions amounts to the "establishment" of religion.[162] In this way, the rights of religious institutions are negatively constructed based upon what authority the state lacks instead of what affirmative or positive authority religious institutions have.

But an implied consent model, grounded in the value of voluntarism, takes the opposite approach. On such an account, religious institutions have constitutional value because they are borne out of the voluntary choices of their members. Members—through the mechanism of implied consent—join these institutions to pursue core religious objectives, such as faith and salvation. At the same time, the *Watson* Court established a default rule that allowed courts to presume individual members had consented to the self-governing and adjudicative authority of religious institutions in the absence of actual consent.[163] In this way, the *Watson* Court provided religious institutions with a sphere of authority, but grounded this authority on voluntaristic principles.[164]

cases and concluding that "the Court may have been persuaded that a church must enjoy prerogatives of sovereignty which are not to be conceded to other social groups").

160. James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* THE SEPARATION OF CHURCH AND STATE: WRITINGS ON A FUNDAMENTAL FREEDOM BY AMERICA'S FOUNDERS 56, 62 (Forrest Church ed., 2004) ("We maintain, therefore, that in matters of religion no man's right is abridged by the institution of civil society, and that religion is wholly exempt from its cognizance.").

161. Esbeck, *supra* note 46, at 55–56 ("If the law is to order two entities ('separation of church and state'), the law must first recognize the existence of both entities. The juridical consequence is that the status of religious entities is acknowledged by the Establishment Clause, and a sphere is reserved in which religious entities may operate unhindered by government in accordance with their own understanding of divine origin and mission."). *See also id.* at 57–58 ("Indeed, in some cases it is the religious rights claimant inviting the Court to make the inquiry into religious doctrine, and it is the Court refusing to do so. Thus, the rule could not be vindicating a free exercise right. Some would even expand the concept of jurisdictional dismissals and dual sovereigns as encapsuling the entire law of government-religion relations." (footnotes omitted)).

162. *See id.*; Kalscheur, *supra* note 24, at 63–69.

163. For more elaboration on this point, see Helfand, *Religion's Footnote Four*, *supra* note 132, at 1924–34.

164. I have discussed elsewhere how and why Locke employed a similar implied consent mechanism in other contexts. *See generally* Michael A. Helfand, *A Liberalism of Sincerity: The Role of*

One of the key consequences of adopting a positive voluntaristic reconstruction of religious institutionalism—one that relies on the affirmative, albeit implied, decisions of institutional members—is that it relocates the doctrine within the larger free exercise framework. It understands the rights of religious institutions to develop doctrine and resolve disputes—what the Court described as a "freedom for religious organizations"[165]—as flowing from a decision between group members to pursue religious objectives, such as faith and salvation, collectively; and, in turn, a decision to have those religious pursuits governed by the doctrine and values developed within the religious institution's administration. Viewed in this way, religious institutionalism amounts to a constitutionally protected contract of sorts[166]—one that grants institutions "an independence from secular control or manipulation" in adjudicating "matters of church government as well as those of faith and doctrine"[167]—based upon the voluntary choice of individuals to join the religious institution. It is about the positive decisions of the institution's members and not the negative authority of the state. Or, put in the terms of the religion clauses, it is more about pursuing the free exercise of religion and less about concerns related to the establishment of a church.

Adopting an implied consent framework for religious institutions—one that relocates religious institutionalism under the umbrella of the Free Exercise Clause—also highlights why the claims of religious institutions are treated differently than individual claims; or, to frame the puzzle in terms of recent Supreme Court cases, why *Hosanna-Tabor* comes out differently than *Smith*. As opposed to cases where individuals seek religious accommodations, claims of religious institutions are not simply attempts to be excused from the demands of a facially neutral and generally applicable law. They represent claims to protect an agreement between the institution's membership to have the relationships governed by religious law and doctrine. This implied agreement—which emanates from the voluntary decision of individuals to join into a religious collectivity—is granted constitutional protection in order to insulate the voluntary religious associational claims of the membership. And while the law generally does not allow individuals to waive certain statutorily protected rights,[168]

Religion in the Public Square, 1 J.L. RELIGION & ST. 217 (2012).

165. Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952).

166. I have elsewhere described this as a constitutionalized arbitration agreement. *See* Helfand, *Religion's Footnote Four*, *supra* note 132, at 1919–24.

167. *Kedroff*, 344 U.S. at 116.

168. *See, e.g.*, Jeffrey M. Hirsch, *The Law of Termination: Doing More With Less*, 68 MD. L.

members are granted the constitutional authority to do so when it comes to joining religious institutions in order to promote the value of religious voluntarism.[169] Thus, the voluntary—albeit implied—decisions of individuals to join religious institutions are afforded constitutional protection under the Free Exercise Clause so that they can collectively pursue unique religious objectives, such as faith and salvation. In this way, an implied consent framework promotes the voluntary free exercise of religion.

Identifying a central principle animating the constitutional treatment of religious institutions also provides guidance for understanding the relationship between the Free Exercise Clause and RFRA. As noted above, RFRA sought to undo the consequences of *Smith* by "'turn[ing] the clock back' to the day before *Smith* was decided."[170] The challenge in interpreting RFRA, however, has been that Free Exercise doctrine prior to *Smith* was far from monolithic, with two primary lines of Supreme Court decisions vying for supremacy in the years leading up to *Smith*.[171] This tension even appears to have filtered down into the text of RFRA itself. On the one hand, RFRA states that the purpose of RFRA is "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*"[172]—thereby highlighting the two cases that serve as the high water mark for free exercise protection. On the other hand, RFRA states that "the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests"[173]—capturing a wider swath of cases that have import when interpreting and applying RFRA.

But focusing on core constitutional values underlying the treatment of religious institutions allows us to move beyond these jurisprudential tensions. As applied to religious institutions, RFRA embodies a statutory framework that entrenches the constitutional value of voluntarism—captured through the prism of implied consent—to afford expanded

REV. 89, 130 (2008) ("Employees are generally not permitted to prospectively waive their substantive statutory rights, although there are exceptions. The ban on such waivers exists because most workplace rights, absent congressional permission to the contrary, are considered to be a minimum level of protection that parties cannot contract around." (footnote omitted)).

169. To be sure, a commitment to voluntarism would also be consistent with rejecting the Supreme Court's holding in *Smith*.

170. H.R. REP. No. 103-88, at 15 (1993).

171. *See supra* notes 86–106 and accompanying text.

172. 42 U.S.C. § 2000bb(b)(1) (2012) (citations omitted).

173. 42 U.S.C. § 2000bb(a)(5). For a discussion of this tension and a different view on how to reconcile the provisions, see Paulsen, *supra* note 105, at 283–91.

protections to further promote this core value. Thus, although free exercise jurisprudence prior to *Smith* might have suffered from some internal inconsistency, the central value at stake did not. When granting constitutional liberties to religious institutions, the objective was to protect the voluntary decisions of individuals to join together in pursuit of religious objectives. Thus, when it comes to interpreting and applying RFRA, the constitutionally entrenched value of voluntarism serves as the North Star, providing guidance when prior free exercise case law is uncertain. And in adopting this approach to RFRA, the statute can be brought into line with free exercise doctrine, providing a more consistent and uniform framework for the treatment of religious institutions—an outcome at odds with the Supreme Court's own approach in *Hobby Lobby*.[174]

Reframing religious institutionalism in this way—as promoting voluntarism through the prism of implied consent—provides a framework for resolving some of the confusions that plague current doctrine. To see how, I will apply this framework to two of the central questions raised by the recent *Hobby Lobby* litigation: (1) Which institutions should be considered religious institutions? And (2) what standard should we apply to religious institutional claims?

A. WHAT IS A RELIGIOUS INSTITUTION?

In the context of the contraception mandate litigation, all parties seemed to agree that there is a category of "religious institutions" that are afforded religious liberty. For example, both the Third Circuit—which held that RFRA did not protect for-profit corporations against the contraception mandate[175]—and the Tenth Circuit—which held that RFRA did protect for-profit corporations against the contraception mandate[176]—recognized that churches are paradigmatic religious institutions afforded unique constitutional protection. Thus, the Tenth Circuit noted, "[a]s should be obvious, the Free Exercise Clause at least extends to associations like churches—including those that incorporate."[177] The Third Circuit did not contest this conclusion, but, in seeking to distinguish for-profit corporations from churches, stated that "[w]e will not draw the conclusion that, just because courts have recognized the free exercise rights of churches and other religious entities, it necessarily follows that for-profit, secular

174. *See supra* notes 118–122 and accompanying text.

175. Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 381 (3d Cir. 2013).

176. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1137 (10th Cir. 2013).

177. *Id*. at 1134.

corporations can exercise religion," and specifically "[t]hat churches—as means by which individuals practice religion—have long enjoyed the protections of the Free Exercise Clause is not determinative of the question of whether for-profit, secular corporations should be granted these same protections."[178]

Of course, this all raises the question of how you tell what institutions qualify as religious institutions for the purposes of the Free Exercise Clause. Some have argued that the inquiry into whether an institution is a "religious institution" requires determining whether it is acting within its "epicenter"—that is, "the purely spiritual life of a church"—or whether it is "act[ing] outside this epicenter and mov[ing] closer to the purely secular world."[179] This type of objective evaluation requires differentiating between an institution's spiritual and secular conduct, and then balancing the extent to which any particular institution is pursuing one category of conduct over and above the other.[180] However, such line-drawing is littered with pitfalls, especially as some churches have expanded the scope of services they provide to their congregants to include, for example, fitness centers, cafés, and free automotive services.[181]

A voluntaristic approach grounded in a theory of implied consent, on the other hand, does not engage in such inquiries. Instead, it focuses on the relationship between the individual members of the institution and the institution itself. It therefore asks the following question: Can we presume that individual members implicitly consented to grant their institution authority to govern over matters of religious doctrine and practice?

For the answer to be yes, the institution must provide sufficient indications to potential members that it pursues religious objectives. We cannot assume that a member would be willing to grant an institution authority over religious objectives if that member was unaware the

178. *Conestoga Wood Specialties Corp*., 724 F.3d at 385–86.

179. Bagni, *supra* note 66, at 1539–40.

180. I am grateful to Zoë Robinson, who has used the terms "objective" and "subjective" to distinguish my views on the 'what is a religious institution' question from those of Bagni. *See* Robinson, *supra* note 66, at 191 & nn.50–51.

181. *E.g.*, Jesse Bogan, *America's Biggest Megachurches*, FORBES (June 26, 2009, 7:15 PM), http://www.forbes.com/2009/06/26/americas-biggest-megachurches-business-megachurches.html (noting how the Second Baptist Church of Houston has "fitness centers, bookstores, information desks, a café, a K-12 school and free automotive repair service for single mothers"). *See also* Bobby Allyn, *Nashville Megachurch Appeals Tax Break Ruling over Bookstore, Café*, TENNESSEAN (Nov. 15, 2012), http://www.tennessean.com/article/20121115/NEWS06/311150008/Nashville-megachurch-appeals-tax-break-ruling-over-bookstore-café (noting that a "South Nashville megachurch" had a gym, bookstore, and café on its property to meet the "spiritual needs" of its congregation).

institution pursued religious objectives in the first place. In this way, it matters less how we categorize the institution and more how potential members perceive the institution. Indeed, some courts have employed this type of logic; for example, in the context of the ministerial exception, the Sixth Circuit sought to evaluate whether the institution in question—a hospital—had a "mission" that was "marked by clear or obvious religious characteristics."[182]

This type of inquiry thereby focuses on the extent to which an employee voluntarily joins an institution aware of its religious objectives; where joining was indeed voluntary, we infer that the individual authorized the institution to make rules and develop doctrine in pursuit of religious objectives. By granting this authority, the individual chooses to pursue his own free exercise of religion by joining with others under the umbrella of an institution that is advancing shared religious principles and values. By contrast, for an individual to join such an institution and not grant such authority over religious matters would, in the words of the *Watson* court, amount to "a vain consent and would lead to the total subversion of such religious bodies."[183]

As should be clear, such an approach does not distinguish between for-profit and nonprofit corporations. Of course, the overwhelming majority of for-profit corporations do not convey in an open and obvious way to their potential employees that it seeks, through its business, to achieve core religious objectives like faith and salvation. While it may be true that the owner of a for-profit corporation may maintain strong religious beliefs on a wide range of topics, simply maintaining such beliefs is not enough; under an implied consent approach, the question is whether potential employees would have known that the corporation was geared to achieve these objectives.[184] Thus, there may be good reason to believe—as hypothesized by the Tenth Circuit in its *Hobby Lobby* decision—that a kosher butcher shop might integrate religion sufficiently into its day-to-day operations through, for example, a permanent *mashgiach* (kosher

182. Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 225–26 (6th Cir. 2007). *Accord* Shaliehsabou v. Hebrew Home of Greater Wash., Inc. 363 F.3d 299, 310–11 (4th Cir. 2004) (applying this standard to a home for elder care).

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

184. Even for-profit corporations can be organized to pursue core religious objectives. *See* Alan J. Meese & Nathan B. Oman, Hobby Lobby, *Corporate Law, and the Theory of the Firm: Why For-Profit Corporations Are RFRA Persons*, 127 HARV. L. REV. F. 273, 280–81 (2014) ("Corporate law is not a set of immutable government commands issued on a take-it-or-leave-it basis to those who wish to incorporate. . . . [T]he law that facilitates the formation of large public corporations consists of default rules that parties can change in various ways.").

supervisor) as well as pervasive religious symbols to put a potential employee on notice that the corporation aimed to achieve core religious objectives.[185]

There are, to be sure, some concerns that arise when importing an implied consent model into the for-profit context. Implied consent derives its theoretical foundation from voluntarism; where individuals consent—implicitly or otherwise—to the authority of a religious institution, granting that institution authority over religious matters promotes the free exercise rights of its membership. But an individual's decisionmaking calculus in the for-profit context is more muddled. An employee may join an institution knowing full well of its religious objectives, but might choose to do so because it is the only employment available. To the extent that such conditions exists, it provides good reason to wonder whether a particular decision to accept employment represents a truly voluntary decision to join a religious institution in pursuit of shared religious objectives. An implied-consent framework would take such considerations into account, resisting the exercise of religious authority over an individual where there is good reason to believe that joining the institution was insufficiently consensual to advance the purposes of voluntarism.[186]

Played out in the context of the *Hobby Lobby* litigation, an implied consent approach provides a unique set of results. One of the plaintiffs in the litigation before the Supreme Court—Mardel—is an affiliated chain of thirty-five Christian bookstores which exclusively sells Christian books and materials.[187] Mardel's website describes itself as "a faith-based company dedicated to renewing minds and transforming lives through the products

185. *See, e.g.*, *Shaliehsabou*, 363 F.3d at 310–11 ("Pursuant to that mission, the 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.").

186. Zoë Robinson has argued that religious institutions, among other traits, play a role "as protectors of the state from religious involvement." Robinson, *supra* note 66, at 222. As a consequence of this role, Robinson concludes that "[i]f we value religious institutions as establishments that are peculiarly suited to protecting the state from religious involvement . . . religious institutions should seek separation and disentanglement from the formal mechanisms of the state." *Id.* at 229. However, this approach draws Robinson into the jurisdictional camp, which understands religious institutions as drawing some of their constitutional significance from the limited authority of the state. *See id.* at 223 ("[T]he value is one that sees religion as a matter outside both the jurisdiction and the competence of civil government"). *See also id.* at 208–13 (describing the jurisdictional theory of religious institutionalism). I have argued against such an approach both above, *see supra* notes 159–164 and accompanying text, as well as elsewhere, *see* Helfand, *supra* note 20, at 519–41. An implied consent approach to religious institutions sees no reason why religious institutions should seek disentanglement from the state.

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

we sell and the ministries we support."[188] Thus, it "provide[s] a large selection of Bibles, books, movies, gifts, music, kid products, apparel, church and educational supplies, and homeschool curriculum."[189] 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 with 13,000 employees—simply sells generic arts and crafts,[190] 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."[191] Indeed, like Mardel, Hobby Lobby is closed on Sundays.[192] Here, there are conflicting indications and further evidence and discovery might serve to crystallize whether Hobby Lobby ought to qualify as a religious institution. By contrast, Conestoga Wood Specialties—the third plaintiff in the *Hobby Lobby* litigation—appears to have engaged in limited, if any, public manifestations of religion that would have alerted employees to its religious objectives.[193]

188. *About Us*, MARDEL CHRISTIAN & EDUCATION, http://www.mardel.com/about (last visited Mar. 15, 2015).

189. *Id.*

190. *Hobby Lobby*, 723 F.3d at 1122.

191. *Id.*

192. *Id.*

193. During the course of the litigation, Conestoga Wood did reference two statements indicating the Christian orientation of the company. One of those statements—"The Hahn Family Statement on the Sanctity of Human Life"—details the Hahn's belief that "human life begins at conception" and that "only God has the right to terminate human life." Verified Complaint at ¶ 90, Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394 (E.D. Pa. 2013) (No. 12-6744). *See also* Brief for Petitioners at 5, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-356). While this statement was also adopted by Conestoga Wood's board of directors, *see* Verified Complaint, *supra*, ¶ 90, the board only adopted the statement on October 31, 2012, a mere month before Conestoga Wood signed its complaint. *See id.* at 26–29 (reflecting that the Complaint was verified on November 30, 2012 and signed by Conestoga Wood's attorneys on December 4, 2012). Thus, it seems unlikely that this statement could have put employees on notice of Conestoga Wood's religious aspirations.

The second statement—what Conestoga Wood described as its "mission statement"—provides that "[Conestoga Wood] operate[s] in a professional environment founded upon the highest ethical, moral, and Christian principles reflecting respect, support, and trust for our customers." *Id.* ¶ 31. *See also Conestoga Wood*, 917 F. Supp. 2d at 402–03. It is, however, unclear whether this statement was ever made publicly available prior to 2012 when the Complaint was signed and verified. Although the current Conestoga Wood website displays language similar to its mission statement, a review of various pre-2012 versions of the website did not turn up any versions that included the mission statement or any similar language. *Compare About Conestoga*, CONESTOGA, http://www.conestogawood.com/about-conestoga (last visited Mar. 28, 2015) ("Our ethics and values are founded on the Christian principles that influence the way we do business."), *with About Us*,

In this way, an implied consent approach would provide a more context-specific outcome in the *Hobby Lobby* litigation, instructing a court to engage in a more extensive inquiry into the extent to which each company publicly conveyed its religious aspirations. In so doing, a court could better evaluate what potential employees should have known when accepting employment, providing a sounder basis for inferring implied consent to the corporation's authority over religious matters. Indeed, even some of the critics of the Court's logic in *Hobby Lobby*—and the trend towards "religious institutionalism" more broadly—have contended that the reasonable expectations of employees should factor into the scope of protection afforded certain religious institutions. Thus, Nelson Tebbe, Micah Schwartzman, and Richard Schragger have argued—in the context of distinguishing the Supreme Court's decision in *Amos* from the factual circumstances surrounding the *Hobby Lobby* litigation—that "the reasonable expectation that employees who work for churches and religious-affiliated non-profits"[194] mitigates some of the First Amendment concerns associated with allowing religious accommodations to impose burdens on third parties. Thus, Tebbe, Schwartzman, and Schragger note that some institutions—in their view churches—receive increased protection because their members "understand that their employers are focused on advancing a religious mission."[195]

Importantly, the implied consent logic need not be restricted to the constitutional inquiry under the Free Exercise Clause. As noted above, RFRA applies to all "persons," which under the Dictionary Act includes for-profit corporations unless the "context indicates otherwise."[196] But to

CONESTOGA, https://web.archive.org/web/20020604184318/http://www.conestogawood.com/index.cfm?act=about (last visited Mar. 28, 2015) (accessed by searching for Conestoga Wood' website in the Internet Archive index), *and About Us*, CONESTOGA, https://web.archive.org/web/20111006040223/http://www.conestogawood.com/about (last visited Mar. 28, 2015) (same). Indeed, the version of the mission statement attached to Conestoga Wood's Motion for Preliminary Injunction does not appear to be from their website and does not provide any indication that the mission statement was ever made publicly available. *See* Exhibits to Motion for Preliminary Injunction at Exhibit #3, *Conestoga Wood*, 917 F. Supp. 2d 394 (No. 12-6744). Nor does Conestoga Wood ever claim that the mission statement was ever made publicly available, simply noting that the Hahns "have established a vision and mission statement for Conestoga." Brief in Support of Motion for Preliminary Injunction at 4, *Conestoga Wood*, 917 F. Supp. 2d 394 (No. 12-6744). Of course, it is possible that further discovery and investigation would yield indications that Conestoga Wood did engage in public manifestations of its religious aspirations sufficient to put its employees on notice. But a review of the current record available did not make those manifestations readily apparent.

194. Micah Schwartzman, Richard Schragger & Nelson Tebbe, Hobby Lobby *and the Establishment Clause, Part III: Reconciling* Amos *and* Cutter, BALKINIZATION (Dec. 9, 2013), http://balkin.blogspot.com/2013/12/hobby-lobby-and-establishment-clause_9.html.

195. *Id.*

196. *See supra* notes 108–110 and accompanying text.

the extent RFRA is meant to capture the thrust of free exercise doctrine pre-*Smith*,[197] it should leverage the core principles of voluntarism that animated the constitutional treatment of religious institutions. In turn, when trying to determine who is a "person" under RFRA such that they can exercise religion, the answer should promote those same free exercise principles of voluntarism. As a result, institutions should be seen as being covered by RFRA—and thereby capable of exercising religion—to the extent that they represent the voluntary choices of their membership. Only under such circumstances—where the institution represents the manifestation of voluntary choices to join in the collective pursuit of religious objectives—do institutions exercise religion. Where that is not the case, the context of RFRA should be understood to "indicate otherwise"[198] and courts can therefore, notwithstanding the default definition provided by the Dictionary Act, limit the scope of RFRA to exclude such cases.

B. WHAT STANDARD SHOULD COURTS APPLY TO RELIGIOUS INSTITUTIONAL CLAIMS?

A voluntarism-based approach—one implemented through the mechanism of implied consent—does more than just provide the theoretical leverage for identifying which institutions should be able to assert religious liberty claims under the Free Exercise Clause and RFRA. It also provides a framework to evaluate those claims and identify their limits.

As discussed above, the Supreme Court's decision in *Smith* raised some significant uncertainties regarding the "church autonomy" doctrine. If *Smith* held that the Free Exercise Clause does not provide protection from facially neutral and generally applicable laws that substantially burden religiously motivated conduct, then why should doctrines that flow from the church autonomy doctrine—such as the ministerial exception—continue to shield religious institutions from liability?[199] Surely the types of antidiscrimination laws at stake in cases of the ministerial exception—such as Title VII and the ADA—are facially neutral and generally applicable.

As also discussed above, one of the strategies to addressing this question was to re-imagine the church autonomy doctrine—and ancillary doctrines such as the ministerial exception—as drawing primarily from the Establishment Clause and not the Free Exercise Clause.[200] Thus, to the extent *Smith* limited the Free Exercise Clause, it had no impact on laws

197. *See supra* notes 84–106 and accompanying text.
198. 1 U.S.C. § 1 (2012).
199. *See supra* Part II.A.
200. *See supra* notes 55–65 and accompanying text.

housed under the Establishment Clause.

The logic of this constitutional migration also morphed the theory underlying the church autonomy doctrine. As seen through the prism of the Establishment Clause, the church autonomy doctrine represented constitutional limits on the authority of government to intervene in religious matters; it was not focused directly on promoting the ability of institutions to freely exercise religion. Put differently, envisioning the church autonomy doctrine as an Establishment Clause doctrine focuses on the limits of government authority as opposed to the rights of religious institutions.[201]

And this transformation on the theoretical level also entailed a fundamental shift in the application of the doctrine. Establishment Clause constraints on governmental authority are not subject to strict scrutiny.[202] Thus, to the extent that the claims of religious institutions were 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.

However, a voluntarism-based approach to church autonomy relocates the claims of religious institutions under the Free Exercise Clause. Religious institutions, under such an approach, can assert religious liberty protections because they are granted authority over internal religious matters by their members.[203] And the members grant such authority so that they can invest their religious institutions with the ability to make rules and develop doctrine that promotes the collective pursuit of shared religious values and principles. In this way, religious institutions provide the infrastructure to enable individuals to pursue the free exercise of religion. In turn, the authority granted to religious institutions becomes a function of the free and voluntary decisions of individuals to exercise religion; they are not a function of the limitations placed on government by the Establishment Clause.

Once recast as a function of the Free Exercise Clause, the claims of religious institutions are properly understood as subject to strict scrutiny; thus, religious institutions can assert religious liberty claims under the Free Exercise Clause, but such claims can be overridden where the regulation in

201. *See supra* notes 39–45, 59–60 and accompanying text.
202. *See supra* notes 59–65 and accompanying text.
203. *See supra* Part III.A.

question is narrowly tailored to achieve a compelling government interest.[204]

This raises another important question: what should qualify as a compelling government interest under the Free Exercise Clause? The very phrasing of "compelling government interest" seems to place the category all but out of reach. Indeed, this strong view of compelling government interest is popular in the context of equal protection doctrine,[205] where strict scrutiny has been described as "strict in theory, but fatal in fact."[206] A doctrinal cross-over from equal protection doctrine could bolster the view that only the loftiest of interests should qualify under the Free Exercise Clause as compelling.

But analogizing between equal protection doctrine and free exercise doctrine would be a mistake. 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."[207] 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.[208] 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.[209]

204. *See supra* note 61 and accompanying text.

205. *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 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 . . . ." (footnote omitted)). *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, 833–66 (2006) (providing empirical evidence from judicial decisions that strict scrutiny "is far from the inevitably deadly test").

206. 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) (internal quotation marks omitted). *See also* Fullilove v. Klutznick, 448 U.S. 448, 507 (1980) (Powell, J., concurring).

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

208. *Fullilove*, 448 U.S. at 496 (Powell, J., concurring).

209. *See, e.g.*, *Croson*, 488 U.S. at 493 ("The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."). 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, 436–37, 441 (1997). *See also* Michael A. Helfand, *How the Diversity Rationale Lays the*

By contrast, the compelling government interest test under the Free Exercise Clause has always been conceived of as a balancing test. In *Yoder*, the high water mark for religious liberty, the Supreme Court explained the test as follows: "only those interests of the highest order and those not otherwise served can *overbalance* legitimate claims to the free exercise of religion."[210] Similarly, in *McDaniel v. Paty*, the Court referred to the "delicate balancing required" when applying the compelling government interest test under free exercise analysis[211]—a characterization that has continued in subsequent Supreme Court decisions.[212]

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 the free exercise of religion. In this way, 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. A voluntarist conception of religious institutions embraces a doctrine that balances competing interests, recognizing that the free exercise claims of religious institutions must be considered against the potential interests harmed when accommodations are granted.[213]

Groundwork for New Discrimination: Examining the Trajectory of Equal Protection Doctrine, 17 WM. & MARY BILL RTS. J. 607, 615–18 (2009) (discussing the Court's use of strict scrutiny to identify illegitimate uses of race). According to some, however, the use of strict scrutiny under such circumstances is a mistake. 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 as opposed to an indicator role—is clearly secondary in the equal protection context. *Id.*

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

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

212. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 565–69 (1993) (Scalia, J., concurring in part and concurring in the judgment); Bowen v. Roy, 476 U.S. 693, 728–29 (1986) (O'Connor, J., concurring in part and dissenting in part).

213. In this way, an implied consent framework accounts for third-party harms as part of the application of strict scrutiny. Others have argued that consideration of third-party harms should be considered separately under the Establishment Clause. *See, e.g.*, 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, 356–59, 363, 372–83 (2014) ("[T]here is broad consensus that the Establishment Clause prohibits permissive accommodations that shift the costs of the accommodated religious practices onto third parties . . . ."); Brief for Amici Curiae Church-State Scholars Frederick Mark Gedicks, et al., in Support of the Government at 7–8, Sebelius v. Hobby Lobby Stores, Inc., Nos. 13-354, 13-356 (S. Ct. 2014) ("Under the Establishment Clause, no significant burden associated with a permissive religious accommodation like RFRA may be displaced onto a discrete and identifiable group of third parties that does not benefit from the accommodation.").

Accordingly, the emphasis on balancing in the free exercise context—as opposed to "smoking out" invidious discriminatory intent in the equal protection context—should inform how we identify which interests are compelling. To balance interests is to recognize the potential existence of multiple competing objectives when it comes to considering religious liberty claims—such as the religious liberty claims of religious institutions. And, maybe most importantly, it entails recognizing that not all of the competing interests will be achieved; where these interests stand in tension, the outcome will inevitably not be optimal. But a commitment to true balancing means that interests on the opposite end of the scale of religious liberty must sometimes win the day. As expressed by Kent Greenawalt, "[b]ecause 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.[214] Put differently, a true commitment to balancing eschews the notion that strict scrutiny will be "strict in theory, but fatal in fact."[215] Such an approach may have more resonance where the purposes of the strict scrutiny test is to ferret out invidious racial discrimination; but it runs counter to the fundamental premise animating strict scrutiny under the Free Exercise Clause—the balancing of religious liberty against other legitimate and compelling government interests.

Indeed, given this fundamental balancing approach, it is far from surprising that in the years leading up to *Smith*, the Supreme Court's decisions began widening the scope of interests that were sufficient to override religious liberty claims.[216] For example, in *United States v. Lee*, the Court emphasized the need to strike a "balance . . . between the values of the comprehensive social security system, which rests on a complex of actuarial factors, and the consequences of allowing religiously based exemptions."[217] And in *Bob Jones University v. United States*, the Court held that "the Government ha[d] a fundamental, overriding interest in eradicating racial discrimination in education," which "substantially outweigh[ed] whatever burden denial of" the petitioner's religious liberty

214. Kent Greenawalt, *Should the Religion Clauses of the Constitution Be Amended?*, 32 LOY. L.A. L. REV. 9, 15 n.25 (1998).

215. *See supra* note 206 and accompanying text.

216. *See, e.g.*, Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781, 783 (1998) ("The compelling interest test used in free exercise cases before *Employment Division v. Smith* was less demanding against the government than the compelling interest test of equal protection and free speech cases; courts applying the statute have also used a somewhat more 'relaxed' compelling interest test." (footnote omitted)).

217. United States v. Lee, 455 U.S. 252, 259 (1982).

claims might have caused.[218] This trajectory toward widening the scope of interests that could be considered compelling captured the core intuition that religious liberty claims must be, in fact, balanced against other important and compelling government interests.[219] When faced with clashing compelling government interests, courts must not privilege any one such interest over the other; instead, they must take stock of the interests and make the best judgment possible in balancing the two.

And this approach is not simply limited to the constitutional context. The core principle of balancing also stands at the center of the Court's RFRA analysis. As the text of RFRA notes, "the compelling interest test . . . is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."[220]

Of course, the text of RFRA also highlights two cases—*Sherbert* and *Yoder*—which both articulated an extremely high standard for what constitutes a "compelling government interest."[221] But RFRA only specifies *Sherbert* and *Yoder* when it comes to identifying what *test* should govern inquiries covered by the statute: "The purposes of this chapter are . . . to *restore the compelling interest test* as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* . . . ."[222] When it comes to specifying which cases should provide the standard for what constitutes a compelling government interest, RFRA casts a far wider net: "the compelling interest test *as set forth in prior Federal court rulings* is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."[223] Together, the two provisions of RFRA appear to embrace the compelling government interest *test*—as expressed in *Sherbert* and *Yoder*—and then identify the general category of "Federal court rulings" when it comes to fleshing out precisely how that test should

218. Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983).

219. *But see* Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1276–82 (2004) (criticizing the use of balancing tests under the rubric of the compelling government interest inquiry).

220. 42 U.S.C. § 2000bb(a)(5) (2012). *See also* Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 436 (2006) (noting that Congress's determination of the workability of the compelling interest test was supported by prior Supreme Court case law).

221. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (describing the relevant governmental interests as "only those interests of the highest order"); Sherbert v. Verner, 374 U.S. 398, 406 (1963) ("[N]o showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, [o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation." (second alteration in original) (citation and internal quotation marks omitted)).

222. 42 U.S.C. § 2000bb(b) (emphasis added) (citations omitted).

223. 42 U.S.C. § 2000bb(a)(5) (emphasis added).

apply.

Thus, RFRA opens the door for evolving standards when it comes to determining what constitutes a compelling government interest. Notwithstanding the Supreme Court's recent hard distinction between RFRA and free exercise cases,[224] the text of RFRA provides good reason to allow courts to take the wide expanse of precedent—*Yoder* and *Sherbert* on the one hand as well as *Lee*, *Bowen*, and *Lyng* on the other—when trying to determine how to strike the balance between religious liberty claims and other potentially compelling government interests.[225] And in so doing, RFRA provides a framework for evaluating the claims of religious institutions that tracks the value of voluntarism that is embedded at the center of the Free Exercise Clause.

IV. CONCLUSION

Religious institutions play a pivotal role in religious life. They serve as focal points for the collective pursuit of core religious objectives, such as faith and salvation, thereby providing the infrastructure that makes religious freedom possible.[226] And yet, the religious aspirations of religious institutions can, at times, put them in conflict with the law, raising important questions about how to resolve tensions between church and state.

This Article provides a framework for addressing these conflicts, grounding the constitutional protections afforded religious institutions in the value of voluntarism. In so doing, it conceptualizes the constitutional protections granted religious institutions as emanating from the Free Exercise Clause, focusing on the manner in which these institutions enable individuals to freely and voluntarily pursue the exercise of religion. In turn, it also interprets RFRA as tracking the core voluntarist commitments of the Free Exercise Clause, providing a single theoretical framework for understanding both the constitutional and statutory protections granted religious institutions.

The link between religious institutions and voluntarism is captured in, what the Supreme Court described in *Watson v. Jones* as "implied consent." On this account, we can infer implied consent to the authority of religious institutions over religious matters from each member's voluntary decision to join the institution's membership. Such consent is consistent

224. *See supra* notes 118–122 and accompanying text.
225. *See supra* notes 86–101 and accompanying text.
226. *See* Garnett, *supra* note 135, at 294–95.

with the primary objectives in joining religious institutions. Individuals join religious institutions in order to pursue shared religious objectives, such as faith and salvation—and they can therefore be assumed to grant religious institutions authority to make rules and develop doctrine in pursuit of those shared religious objectives.

Focusing on voluntarism through the prism of implied consent provides a framework for addressing a variety of important doctrinal questions. First, it provides a theory for identifying which institutions qualify as "religious institutions." As opposed to focusing on secondary questions—such as whether an institution is nonprofit or for-profit—an implied consent approach asks whether the institution in question is sufficiently open and obvious about its religious objectives. Where institutions make such objectives clear to potential members—such as employees—then we can safely infer implied consent to the authority of the institution over religious matters from the act of joining the institution.

Second, a theory of implied consent helps provide the standard for analyzing the claims of religious institutions. While there is currently some prevailing confusion among lower courts on this question, an implied consent theory—which understands the rights of religious institutions as primarily grounded in the Free Exercise Clause—requires subjecting the claims of religious institutions to strict scrutiny. And by subjecting the claims of religious institutions to strict scrutiny, we can give voice to other compelling government interests while still embracing a framework that continues to provide fundamental religious liberty protections.