

# WHAT IS A “RELIGIOUS INSTITUTION”?

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**Abstract:** Change in the First Amendment landscape tends toward the incremental, but the U.S. Supreme Court’s opinion two terms ago in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*—holding that religious institutions enjoy a range of First Amendment protections that do not extend to other individuals or organizations—is better understood as a jurisprudential earthquake. And yet, it could be that the biggest aftershock has yet to be felt, with the Court leaving open the most important functional question that exists in scenarios where there will be constitutional winners and losers: what, or who, is a “religious institution” for First Amendment purposes? Although lower federal courts have begun to grapple with the question, no satisfactory approach exists. This Article proposes a framework for distinguishing between those institutions that fall within the scope of the religious institutions category and those that do not. The framework proposed proceeds from a purposive analysis that turns on which institutions will most often and most effectively use the newly identified and exclusive protections to benefit society as a whole. To this end, the framework favors institutions that have as their purpose: (1) protection of individual conscience; (2) protection of group rights; and (3) provision of desirable societal structures.

## INTRODUCTION

What religious institutions have constitutional rights? This question has become increasingly important. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, decided in 2012, the Supreme Court held that religious institutions have an absolute constitutional right to fire ministers

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without regard for employment discrimination laws.<sup>1</sup> Undergirding the holding was, Chief Justice John Roberts stated, the general principle that the text of the Constitution gives “special solicitude” to the rights of religious organizations.<sup>2</sup> With this statement, the Court in *Hosanna-Tabor* fundamentally changed the framework of the First Amendment Religion Clauses. Prior to *Hosanna-Tabor*, all litigants could pursue one or both of two claims under the Religion Clauses: that the government had burdened their religious liberty in violation of the Free Exercise Clause; and/or that the government had violated the Establishment Clause.<sup>3</sup> What *Hosanna-Tabor* has added is an additional doctrinal path for litigants to follow. Unlike the generally applicable Religion Clauses, however, this new cause of action is exclusive and applicable only to “religious institutions.”<sup>4</sup>

Commentators have waged war over the legitimacy of the Court’s new religious institutionalism.<sup>5</sup> The idea that religious institutions are unique for First

<sup>1</sup> 132 S. Ct. 694, 705–06 (2012) (adopting a ministerial exception, precluding the application of employment discrimination laws to “ministers” in religious institutions).

<sup>2</sup> *Id.* at 706.

<sup>3</sup> See U.S. CONST. amend. I. The Establishment and Free Exercise Clauses are contained within the First Amendment, which reads in pertinent part: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” *Id.* Part I, Section B details the Court’s doctrinal approach to the First Amendment Religion Clauses. See *infra* notes 156–171 and accompanying text.

<sup>4</sup> See *Hosanna-Tabor*, 132 S. Ct. at 706. Post-*Hosanna-Tabor*, if a litigant can show that it is a “religious institution,” it is entitled to a First Amendment right to absolute constitutional protection for any activity covered by the institutional right. See *id.*; Howard Wasserman, *Prescriptive Jurisdiction, Adjudicative Jurisdiction, and the Ministerial Exception*, 160 U. PA. L. REV. PENNUMBRA 289, 291–95 (2012), <http://www.pennlawreview.com/online/160-U-Pa-L-Rev-PENnumbra-289.pdf>, archived at <http://perma.cc/8F8-U7FX>. On the broad ramifications of *Hosanna-Tabor*, see, for example, Paul Horwitz, *Act III of the Ministerial Exception*, 106 NW. U. L. REV. 973, 975–76 (2011); Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 63 (2011); Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 HARV. J.L. & PUB. POL’Y 821, 837 (2012) (concluding that it “may be the broader doctrinal implications of *Hosanna-Tabor* that have the most lasting significance”); Wasserman, *supra*, at 291; John Inazu, *The Four Freedoms and the Future of Religious Liberty* 42 (Wash. Univ. in St. Louis Legal Studies Research Paper, Working Paper No. 12-10-08, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2158861](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2158861), archived at <http://perma.cc/TKY6-8FYX>.

<sup>5</sup> On the normative question of religious institutions as constitutional rights holders, see PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* 174–93 (2013); Richard W. Garnett, *The Freedom of the Church*, 4 J. CATH. SOC. THOUGHT 59, 64 (2007) [hereinafter Garnett, *The Freedom of the Church*]; Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 ST. JOHN’S J. LEGAL COMMENT. 515, 531–32 (2007) [hereinafter Garnett, *Religion and Group Rights*]; Douglas Laycock, *Church Autonomy Revisited*, 7 GEO. J.L. & PUB. POL’Y 253, 267–68 (2009) [hereinafter Laycock, *Church Autonomy*]. See also Carl H. Esbeck, *A Religious Organization’s Autonomy in Matters of Self-Governance: Hosanna-Tabor and the First Amendment*, 13 ENGAGE 168, 172 (2012) (noting how *Hosanna-Tabor* could lead to abuse and may leave religion “unregulated and out of control”); 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, 1373 (1981) [hereinafter Laycock, *Towards a General Theory*] (asserting that “churches have a constitutionally protected interest in managing their own institutions free of government interference”); Victor M. Muñiz-Fraticelli, *The Distinctiveness of Religious Liberty* 1–3 (McGill Univ., Working Paper, 2011), availa-

Amendment purposes, claims one prominent scholar, is antithetical to the ideals of neutrality and equality that the Religion Clauses were intended to enshrine.<sup>6</sup> However, while scholars focus on the normative validity of the Court's new institutional right, the doctrinal contours remain largely unaddressed.<sup>7</sup> And of all of the potential doctrinal issues raised by the Court's new religious institutionalism, one stands out as critically important: the threshold question of *who, or what, is a "religious institution."*<sup>8</sup> Answering this question is crucial because it determines what institutions have the unique and rare *absolute* constitutional protection over a whole host of activities.<sup>9</sup>

Myriad institutions have wasted no time in vying for the "religious institution" designation.<sup>10</sup> Religiously-owned businesses, religious lobby groups,

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*ble* at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1921646](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1921646), archived at <http://perma.cc/FQ6W-AFRH> (arguing that the tradition of religious liberty is distinctive and includes church autonomy); Steven D. Smith, *Freedom of Religion or Freedom of the Church?* 1 (Univ. of San Diego Sch. of Law Legal Studies Research Paper Series, Paper No. 11-061, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1911412](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1911412), archived at <http://perma.cc/7952-LRVS> (citing the fallacy of past Religion Clause scholarship as being under the false belief that "the First Amendment's religion clauses are about religion," and arguing instead that "[t]hey are about *the church*"). Compare Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 919–21 (2013) (arguing that religious institutions do not give rise to a special set of rights, autonomy, or sovereignty separate from individual rights of conscience), with Paul Horwitz, *Defending (Religious) Institutionalism*, 99 VA. L. REV. 1049, 1061–63 (2013) (offering a critique of Schragger and Schwartzman's article refuting the special rights of religious institutions).

<sup>6</sup> Schragger & Schwartzman, *supra* note 5, at 920 (arguing that, historically, "the institutional church . . . has often been the enemy of toleration and of religious liberty"); see ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* 95–96 (2013).

<sup>7</sup> *But see* Douglas Laycock, *Hosanna-Tabor and the Ministerial Exception*, 35 HARV. J.L. & PUB. POL'Y 839, 861–62 (2012) (outlining the potential implications of *Hosanna-Tabor* for tort and contract cases involving churches and ministers); Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor*, 108 NW. U. L. REV. (forthcoming 2014) (manuscript at 47), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2294766](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2294766), archived at <http://perma.cc/7YTC-8BEJ> (explaining how fully protecting the specific institutional right in the employment discrimination context raises questions regarding the applicability of contracts, torts, and labor law principles to religious institutions).

<sup>8</sup> See *infra* notes 68–128 and accompanying text (providing an overview of scholars' limited attempts to define a "religious institution").

<sup>9</sup> See *infra* notes 138–141 and accompanying text (elaborating on this assertion). On the Court's general unwillingness to recognize a constitutional right as absolute, see, for example, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 3, 21 (1989) (refusing to extend absolute constitutional protections to matters of opinion); *Sherbert v. Verner*, 374 U.S. 398, 402–03 (1963) (distinguishing the absolute constitutional protections provided against government regulation of religious beliefs from the limited constitutional protections for religiously motivated conduct); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (denying "fighting words" absolute constitutional protection).

<sup>10</sup> See generally *Franciscan Univ. of Steubenville v. Sebelius*, No. 2:12-CV-440, 2013 WL 1189854 (S.D. Ohio Mar. 22, 2013); *Roman Catholic Diocese v. Sebelius*, 927 F. Supp. 2d 406 (N.D. Tex. 2013); *Conlon v. Sebelius*, 923 F. Supp. 2d 1126 (N.D. Ill. 2013); *Archdiocese of St. Louis v. Sebelius*, 920 F. Supp. 2d 1018 (E.D. Mo. 2013); *Roman Catholic Archbishop v. Sebelius*, 920 F. Supp. 2d 8 (D.D.C. 2013); *Persico v. Sebelius*, 919 F. Supp. 2d 622 (W.D. Pa. 2013); *Univ. of Notre Dame v. Sebelius*, No. 3:12CV253RLM, 2012 WL 6756332 (N.D. Ind. Dec. 31, 2012); *Catholic Diocese of Biloxi, Inc. v. Sebelius*, No. 1:12CV158-HSO-RHW, 2012 WL 6831407 (S.D. Miss. Dec. 20,

religious universities, and religious schools have all filed claims with the lower federal courts claiming to be First Amendment religious institutions.<sup>11</sup> These institutions are claiming that they are constitutionally protected from adhering to, for example, Title VII discrimination laws,<sup>12</sup> the Obama Administration's health insurance mandate requiring employers to provide contraception,<sup>13</sup> workers compensation laws,<sup>14</sup> and basic common law rules like negligence and contract.<sup>15</sup>

The lower courts are struggling to figure out how to determine which of these institutions are "religious institutions" for the purposes of the new First Amendment right.<sup>16</sup> Lacking any guidance or coherent theory as to how to sin-

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2012); *Roman Catholic Archdiocese v. Sebelius*, 907 F. Supp. 2d 310 (E.D.N.Y. 2012); *Zubik v. Sebelius*, 911 F. Supp. 2d 314 (W.D. Pa. 2012); *Roman Catholic Diocese v. Sebelius*, No. 4:12-CV-00314 (N.D. Tex. May 21, 2012) (West, Dockets); *Diocese of Fort Wayne-South Bend v. Sebelius*, No. 1:12-CV-00159 (N.D. Ind. May 21, 2012) (West, Dockets). For a discussion of the erosion of religious freedom in the United States, see generally AD HOC COMM. FOR RELIGIOUS LIBERTY, U.S. CONFERENCE OF CATHOLIC BISHOPS, *OUR FIRST, MOST CHERISHED LIBERTY: A STATEMENT OF RELIGIOUS LIBERTY* (2012), available at <http://www.usccb.org/issues-and-action/religious-liberty/upload/Our-First-Most-Cherished-Liberty-Apr12-6-12-12.pdf>, archived at <http://perma.cc/9ET6-DSWD>.

<sup>11</sup> See *supra* note 10 (collecting cases).

<sup>12</sup> See, e.g., *Cannata v. Catholic Diocese*, 700 F.3d 169, 170 (5th Cir. 2012); *Askew v. Trustees of Gen. Assembly of Church of the Lord Jesus Christ of the Apostolic Faith Inc.*, 684 F.3d 413, 415 (3d Cir. 2012); *Herzog v. St. Peter Lutheran Church*, 884 F. Supp. 2d 668, 671–72 (N.D. Ill. 2012).

<sup>13</sup> See generally *Franciscan Univ. of Steubenville*, 2013 WL 1189854; *Roman Catholic Diocese*, 927 F. Supp. 2d 406; *Conlon*, 923 F. Supp. 2d 1126; *Archdiocese of St. Louis*, 920 F. Supp. 2d 1018; *Roman Catholic Archbishop*, 920 F. Supp. 2d 8; *Univ. of Notre Dame*, 2012 WL 6756332; *Roman Catholic Archdiocese*, 907 F. Supp. 2d 310; *Roman Catholic Diocese*, No. 4:12-CV-00314; *Diocese of Fort Wayne-South Bend*, No. 1:12-CV-00159. For information about the health insurance mandate, see Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010). On the contraception mandate specifically, see 42 U.S.C. § 300gg-13(a)(4) (Supp. V 2011) (requiring that any group health plan provide coverage to women for "preventative care and screenings" without any cost sharing, as provided for in the Health Resources and Services Administration ("HRSA") guidelines); Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Affordable Care Act, 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (to be codified at 29 C.F.R. pt. 54). The HRSA guidelines define women's preventative healthcare to include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." *Women's Preventative Services Guidelines: Affordable Care Act Expands Prevention Coverage for Women's Health and Well-Being*, U.S. DEP'T HEALTH & HUMAN SERVICES, <http://www.hrsa.gov/womensguidelines/>, archived at <http://perma.cc/U2RX-JV7B> (last visited Jan. 14, 2014).

<sup>14</sup> See *Big Sky Colony v. Mont. Dep't of Labor and Indus.*, 291 P.3d 1231, 1235 (Mont. 2012) (arguing that the State of Montana has violated their institutional rights by forcing the community to provide workers compensation insurance to its members that work outside the community).

<sup>15</sup> See, e.g., *Lund*, *supra* note 7, at 21–46 (outlining a series of lower court decisions where religious institutions claim constitutional protection from the application of contract and torts rules).

<sup>16</sup> Compare *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1135 (10th Cir.), cert. granted, 82 U.S.L.W. 3139 (U.S. Nov. 26, 2013) (No. 13-354) (holding that the protections of the First Amendment extend to for-profit corporations), with *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 381 (3d Cir.), cert. granted, 82 U.S.L.W. 3139

gle out this newly specialized constitutional group among a sea of organizations that increasingly claim to be religious, courts are vacillating between identifying First Amendment religious institutions based on who they are, what they are doing, how they go about it, or why they want to—without any clear theoretical justification for their choices.<sup>17</sup>

Given the importance of this threshold question, it is surprising that there has yet to be any serious attempt to define a “religious institution” for First Amendment purposes. This Article fills this gap by presenting the first scholarly attempt to offer a set of guidelines for courts to identify a First Amendment religious institution. It proceeds from the perspective of First Amendment exceptionalism—that only a certain subset of groups claiming to be religious in nature will qualify as a constitutional religious institution. The Article argues that the most pragmatic and definable way to sort first-order religious institutions—i.e., those groups that should be classified as rights holders—from second-order religious institutions—i.e., those groups that possess no broader rights than individual citizens—is to examine the Court’s justification for the existence of a First Amendment religious institution category and to subsequently identify the underlying values that support that justification.<sup>18</sup> This purposive perspective uncovers three values that should undergird any framework for categorizing religious institutions: (1) recognition of religious group rights and sovereignty; (2) promotion of individual freedom; and (3) provision of desirable democratic structures.<sup>19</sup> From these values we can develop a set of pragmatic guidelines that courts can utilize to identify institutions that fulfill a unique and important role in our constitutional democracy.<sup>20</sup>

This Article is organized as follows. Part I focuses on the question of identifying the holder of any given constitutional right.<sup>21</sup> It examines the Court’s general approach to determining who (or what) holds a constitutional right in order to extract guidance on calibrating the guidelines for determining what is a constitutional religious institution. This Part also takes a more narrow focus and examines judicial, statutory, and scholarly attempts to define a “religious institution,” albeit typically in a limited statutory context. Part II provides a comprehensive overview of the Court’s new religious institutionalism jurisprudence, clarifying both the substance and structure of the Court’s new religious institutionalism, thereby laying the groundwork for identifying both the justifications for, and underlying values of, constitutional religious institu-

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(U.S. Nov. 26, 2013) (No. 13-356) (holding that “a for-profit, secular corporation cannot assert a claim under the Free Exercise Clause”).

<sup>17</sup> See, e.g., *Hobby Lobby*, 723 F.3d at 1135; *Conestoga Wood*, 724 F.3d at 384–85.

<sup>18</sup> See *infra* notes 142–265 and accompanying text.

<sup>19</sup> See *infra* notes 94–265 and accompanying text.

<sup>20</sup> See *infra* notes 265–305 and accompanying text.

<sup>21</sup> See *infra* notes 22–67 and accompanying text.

tionalism.<sup>22</sup> Part III is the core of the Article.<sup>23</sup> Part III argues that the most theoretically sound way to identify first-order religious institutions is to tease out the values that the Court seeks to protect by recognizing a discrete constitutional right for religious institutions. By building a definition from the fundamental values encapsulated in the Court's religious institutionalism decisions, we are more likely to focus on protecting those religious institutions that fulfill a special constitutional role in our democracy. Relying on the three identified constitutional values of religious group rights, individual liberty, and democratic support, Part III concludes by offering a set of preliminary guidelines for lower courts to identify a first-order religious institution. These guidelines offer courts a constitutionally coherent and theoretically consistent means by which to identify first-order religious institutions and sort institutional claimants going forward.

### I. THE FORGOTTEN ANTECEDENT QUESTION: IDENTIFYING THE CONSTITUTIONAL RIGHTS-HOLDER

The exceptional status that the Supreme Court has given to religious institutions presumes some kind of identity-based distinction among religious groups, at least as far as whether they are or are not a first-order religious institution. The problem, however, is figuring out how to make these constitutional distinctions between first- and second-order religious institutions. The definition is so challenging that it is even difficult to settle on the appropriate framing of the question: do we identify first-order religious institutions based on who they are, what they are doing, how they go about it, or why they want to?

Fortunately, we do not start with a completely blank slate. In beginning to answer this definitional question, Section A of this Part examines how the Court has identified constitutional rights-holders in other constitutional contexts.<sup>24</sup> Section B then looks at attempts by the lower federal courts to identify a "religious institution" in the statutory context.<sup>25</sup> The purpose of this Part is to ascertain what each of these inquires contributes to the quest of identifying religious institutions for First Amendment purposes—that is, first-order religious institutions.

#### A. *Identifying Constitutional Rights Holders*

Americans have long debated who the Constitution applies to. Examples include slaves and ex-slaves, Native Americans, residents of U.S. territories, residents of U.S.-conquered island possessions, and immigrants or would-be

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<sup>22</sup> See *infra* notes 68–141 and accompanying text.

<sup>23</sup> See *infra* notes 142–305 and accompanying text.

<sup>24</sup> See *infra* notes 26–46 and accompanying text.

<sup>25</sup> See *infra* notes 47–67 and accompanying text.

immigrants.<sup>26</sup> On its terms, the Constitution refers to a number of different categories of applicable persons, including a "natural born Citizen,"<sup>27</sup> "Citizen" or "Citizens,"<sup>28</sup> "the people" or "the People,"<sup>29</sup> a "Person" or "Persons,"<sup>30</sup> and specific persons, including "the accused" or "the Owner."<sup>31</sup> Although the Constitution reserves a small selection of rights exclusively for citizens, by and large the Bill of Rights and the subsequent amendments make no mention of citizens, instead focusing on "persons" and "the people" in general terms. For the most part, then, the Supreme Court is not faced with the antecedent question of who holds any given constitutional right, because "people" or "citizens" more generally hold the right.

Of course, there are exceptions to this. One need only reflect on the Court's infamous 1856 Supreme Court decision in *Dred Scott v. Sandford*.<sup>32</sup> In *Dred Scott*, the Court told us that African Americans were neither citizens nor persons, they were slaves and thus outside the protective auspices of the Constitution.<sup>33</sup> A more recent example is the Court's 2010 decision in *Citizens United v. Federal Election Commission*,<sup>34</sup> where the Court held that at least for the purposes of the First Amendment Free Speech Clause, corporations are rights holders in the same way that individuals are rights holders.<sup>35</sup> In *Citizens United*, a five justice majority specified that a key provision of the McCain-Feingold Bipartisan Campaign Finance Act—which had placed limits on the amount of money that corporations and unions could spend on political campaigns—was unconstitutional.<sup>36</sup> The Court specified that corporations and unions are simply associations of individuals, and as such, had the same First Amendment rights as individuals themselves.<sup>37</sup> In the context of the legislation

<sup>26</sup> See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 17 (2002) (noting historically rooted questions regarding geographical limitations to, and the popular scope of, the Constitution's application). See generally GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996) (exploring the boundaries of the Constitution and the limits as to whom the Constitution applies).

<sup>27</sup> U.S. CONST. art. II, § 1, cl. 5.

<sup>28</sup> See, e.g., *id.* art. I, § 2, cl. 2; *id.* art. IV, § 2, cl. 1; *id.* art. II, § 1, cl. 5; *id.* amend. XI; *id.* amend. XIV, § 1; *id.* amend. XIX; *id.* amend. XXIV, § 1; *id.* amend. XXVI, § 1.

<sup>29</sup> *Id.* pmb. ("[w]e the People"); *id.* art. I, § 2, cl. 1 ("the People"); *id.* amend. I ("right of the people"); *id.* amend. II (same); *id.* amend. IV (same); *id.* amend. IX ("the people"); *id.* amend. X (same); *id.* amend. XVII (same).

<sup>30</sup> See, e.g., *id.* art. I, § 3, cl. 3; *id.* art. II, § 1, cl. 5.

<sup>31</sup> See *id.* amend. III ("the owner"); *id.* amend. VI ("the accused").

<sup>32</sup> See 60 U.S. (19 How.) 393, 404 (1856).

<sup>33</sup> *Id.* ("We think [slaves and former slaves] . . . are not included, and were not intended to be included, under the word 'citizens' in the Constitution.")

<sup>34</sup> See 558 U.S. 310, 343 (2010).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 365.

<sup>37</sup> See *id.* at 343.

in *Citizens United*, the ban on corporations and unions from providing campaign finance was a limitation on the First Amendment speech rights of those associations.<sup>38</sup>

Still, *Citizens United* presents a slightly different question than the one the Court is now facing post-*Hosanna-Tabor*. The Court in *Citizens United* was asked to determine whether a corporate entity is a “person” for constitutional purposes.<sup>39</sup> In so determining, the Court was assessing whether corporations could join a constitutionally inclusive category—i.e., the broad “insider” group comprised variously of “people,” “persons” and “citizens.” A similar assessment is being undertaken in the lower federal courts on the question of religious liberty rights for for-profit corporations. For example, in *Conestoga Wood Specialties Corp. v. HHS*, the U.S. Court of Appeals for the Third Circuit directly confronted the question of whether for-profit corporations could bring a claim pursuant to the Free Exercise and Establishment Clauses.<sup>40</sup> In *Conestoga Wood*, the corporation did not seek to be classified as a first-order religious institution pursuant to *Hosanna-Tabor*. Instead, the corporation claimed rights under the generally applicable Religion Clauses and sought access to a right that is considered inclusive and broadly applicable.<sup>41</sup> The Third Circuit held that even though *Citizens United* extended First Amendment protections to corporations, the “‘nature, history, and purpose’ of the Free Exercise Clause” does not support a corporate claim in the Religion Clause context.<sup>42</sup> Regardless of the correctness of the Third Circuit’s assessment in *Conestoga Wood*, the decision highlights the distinction between claimants seeking identification as a rights-holder for the purposes of an *inclusive* constitutional right,

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* (“The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons.’”). This question is distinguishable from *Hosanna-Tabor*, as it deals with the question of who, or what, is a rights holder in the context of an inclusive constitutional right, as opposed to an exclusive constitutional right. Compare *Hosanna-Tabor*, 132 S. Ct. at 705–06 (describing a First Amendment religious institution category with unique rights that are limited to religious institutions), with *Citizens United*, 558 U.S. *passim* (discussing whether corporations could join the broad, inclusive group of “people” or “persons”). Inclusive rights consist of those that are generally applicable to all constitutional citizens. Cf. LESLIE C. GRIFFIN, LAW AND RELIGION 17 (2d ed. 2010) (indicating that under both the Free Exercise and Establishment Clauses, so long as litigants can show that their religion is burdened, the litigants hold the rights contained in the Religion Clauses). In contrast, exclusive rights, such as the right at issue in *Hosanna-Tabor*, are limited to certain entities. See 132 S. Ct. at 705–06.

<sup>40</sup> 724 F.3d at 381. The Supreme Court will review the case during the October 2013 term. *Conestoga Wood Specialties Corp. v. Sebelius*, 134 S. Ct. 678 (2013).

<sup>41</sup> *Id.* at 382–83.

<sup>42</sup> *Id.* at 385; cf. *Hobby Lobby*, 723 F.3d at 1135 (holding that the “First Amendment logic of *Citizens United* . . . where the Supreme Court has recognized a First Amendment right of for-profit corporations to express themselves for political purposes, applies” in the Religion Clauses context (citations omitted)).



and those claimants seeking identification as a rights-holder for an *exclusive* constitutional right. In the context of the new religious institutionalism, it is the latter that is at issue, and the Court must determine membership into a constitutionally exclusive category.

There are very few exclusive rights in the Constitution. The most relevant example is the Press Clause in the First Amendment, which declares that "Congress shall make no law . . . abridging the freedom . . . of the Press."<sup>43</sup> Unfortunately, the Press Clause yields limited guidance on how the Court determines who holds a right for the purposes of an exclusive constitutional category. The Court has consistently avoided making determinations as to who is "the press" for First Amendment purposes, commenting on the difficulty of the definitional task.<sup>44</sup> For the Court, the identification of an exclusive category that warrants special constitutional protection "reeks of government favoritism toward a privileged few and discrimination against other, less favored speakers."<sup>45</sup> The Court has expressed its concern with constitutional rights limited to specific groups. Chief Justice Warren E. Burger, for example, commented that categorizing some speakers as "the press" would create a pecking order "reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country."<sup>46</sup>

It seems, then, that the Press Clause provides no guidance either. While we might be concerned that it is the exclusive nature of the Press Clause that has caused the Court to avoid addressing who or what is "the press" for First Amendment purposes, given the Court's willingness to imply a categorical protection from the Religion Clauses, it appears that the Court is more willing to give meaning to the religious institutionalism category. Furthermore, whereas the Press Clause has remained dormant, lower federal courts have been actively employing the religious institution category, making it unlikely that the Court will abruptly reverse gears and disengage from defining the rights holder because of the exclusive nature of the right.

Identifying a "religious institution" therefore becomes of critical importance. As daunting as this task might seem, we do not start from a blank

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<sup>43</sup> U.S. CONST. amend. I.

<sup>44</sup> Sonja R. West, *Awakening the Press Clause*, 58 UCLAL. REV. 1025, 1028–30 (2011).

<sup>45</sup> *Id.* at 1029; see also Anthony Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRAL. REV. 595, 627 (1979) (arguing that the Press Clause should not be interpreted as providing an exclusive right because the First Amendment was designed for the public and the press, "and freedom is indivisible"). *But cf.* David Lange, *The Speech Clause and Press Clauses*, 23 UCLAL. REV. 77, 78–79 (1975) (indicating that freedom of speech and freedom of press are separate rights, as argued by Justice Potter Stewart, and therefore the freedom of the press must be an exclusive right).

<sup>46</sup> *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 801 (1978) (Burger, C.J., concurring); see *Branzburg v. Hayes*, 408 U.S. 665, 705 n.40 (1972) (discussing the potential dangers of including "sham" newspapers within special institutional rights given to the press).

slate, and although limited, there are scholarly and statutory definitions of a “religious institution” that can guide the search for a constitutional definition.

### B. *Other Attempts to Define a “Religious Institution”*

Despite the lack of precedential guidance in determining membership in an exclusive constitutional category, ascertaining how to identify a first-order religious institution is not impossible. Identifying “religious institutions” is something that is done all the time by legislatures and courts in non-constitutional contexts.<sup>47</sup> In addition, a small handful of scholars have attempted to define a “religious institution” for limited statutory purposes.<sup>48</sup> These efforts not only demonstrate that definition is possible, but they also provide useful guidance on how to define religious institutions in the constitutional context. This Section looks at what these extra-constitutional attempts can contribute to a constitutional definition of first-order religious institutions.

Legislative and scholarly attempts to define a religious institution are overwhelmingly functional, focusing on whether the organization is engaging in a religious activity.<sup>49</sup> The appeal of this approach is obvious because it plays

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<sup>47</sup> See, e.g., 29 U.S.C. § 1002(33)(C)(iv) (2006) (defining organizations for the purposes of the Employee Retirement Income Security Act as “associated with a church or a convention or association of churches” where the organization “shares common religious bonds and convictions with that church or convention or association of churches”); 42 U.S.C. § 2000e-1(a) (2006) (stating that Title VII of the Civil Rights Act of 1964 does not apply “to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities”); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225–26 (6th Cir. 2007) (indicating that Methodist Healthcare is a religious institution in part because religious institutions are not limited to traditional organizations, but rather include other entities such as religious schools, corporations, and hospitals); *Shaliesabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 310 (4th Cir. 2004) (concluding “that a religiously affiliated entity is a ‘religious institution’ for purposes of the ministerial exception whenever that entity’s mission is marked by clear or obvious religious characteristics”); *Scharon v. St. Luke’s Episcopal Presbyterian Hosp.*, 929 F.2d 360, 362 (8th Cir. 1991) (concluding that the defendant is a religious institution for the purposes of Title VII and the Age Discrimination in Employment Act).

<sup>48</sup> Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1539–40 (1979); Michael A. Helfand, *What Is a “Church”? Implied Consent and the Contraception Mandate*, 21 J. CONTEMP. LEGAL ISSUES 401, 402–11 (2013) (discussing religious employer exceptions to the Affordable Care Act); see also Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1 *passim* (2013) (asking specifically whether for-profit corporations are within the scope of the Religious Freedom Restoration Act).

<sup>49</sup> See, e.g., *Shaliesabou*, 363 F.3d at 310 (examining whether the “entity’s mission is marked by clear or obvious religious characteristics” for the purposes of the ministerial exception in Title VII); *Altman v. Sterling Caterers, Inc.*, 879 F. Supp. 2d 1375, 1385 (S.D. Fla. 2012) (finding that the defendant was not a religious institution in the context of the Fair Labor Standards Act because the defendant acted like a for-profit restaurant in providing both kosher and non-kosher food); Report and Recommendations, *Shukla v. Sharma*, No. 07-CV-2972 (CBA) (E.D.N.Y. Aug. 21, 2012), 2009 U.S. Dist. LEXIS 90044, at \*18–19 (holding that whether an organization is for-profit should not impact

on the sense that to be a "religious institution," the organization is acting in some way that furthers religion as religion.

Approaches to discerning whether an institution is a "religious institution" tend to be either objective or subjective, with the dominant approach being objective.<sup>50</sup> An example of the narrowest objective functional approach is one scholar's early attempt to establish a meaning of the term religious institution in the context of employment discrimination.<sup>51</sup> The question "what is a religious institution," according to this method, could be answered by identifying the core religious attributes of institutions that claimed institutional status akin to that of a church.<sup>52</sup> Under this approach, churches qua churches are considered the epicenter of any institutional category.<sup>53</sup> Outside the epicenter, any actions moving an organization closer to the secular world meant the institution was subjecting "itself to secular regulation proportionate to the degree of secularity of its activities and relationships."<sup>54</sup> Thus, the more objective and identifiable the indicia of religiosity are, the more readily that institution could be analogized to a church.

Many lower courts have followed a similar framework when interpreting the scope of "religious institutions" in a variety of statutory contexts.<sup>55</sup> Of fundamental importance for nearly all courts has been the corporate structure of the institution,<sup>56</sup> and courts have placed strong emphasis on whether the gov-

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whether it is considered religious in the context of the Fair Labor Standards Act); *see also* Shukla v. Sharma, No. 07-CV-2972 (CBA), 2009 U.S. Dist. LEXIS 91051 (E.D.N.Y., Sept. 29, 2009) (adopting the recommendations submitted by the Magistrate).

<sup>50</sup> Helfand, *supra* note 48, at 408–10. Helfand describes the objective approach that most courts and scholars at least used to take as an attempt to "identify core religious attributes of institutions that claimed the status akin to that of a church." *Id.* at 409. The reasoning behind this was that "the more objective and identifiable indications of religiosity were manifested by the institution, the more easily it could be analogized to a church for the purposes of the relevant legal inquiry." *Id.*

<sup>51</sup> *See* Bagni *supra* note 48, at 1539–40.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1539. The epicenter is described as representing:

the purely spiritual life of a church. The relationship between a church and its clergy and modes of worship and ritual surely fall within the spiritual epicenter, as do membership policies of a church. Religious education programs such as catechism, bible study, and Sunday school also fall within the epicenter. Similarly, church-operated or affiliated schools that teach secular subjects with a decidedly religious orientation might also fall within the epicenter.

*Id.*

<sup>54</sup> *Id.* at 1540.

<sup>55</sup> Bagni, *supra* note 48, at 1533–39 (discussing a series of cases related to defining religious institutions with regard to federal employment discrimination laws).

<sup>56</sup> *See, e.g., Hobby Lobby*, 723 F.3d at 1137 (noting that although the parties were for-profit corporations, the corporations were closely held family businesses, were not publicly traded, and had missions that explicitly included Christian ideals); *Conestoga Wood*, 724 F.3d at 384–85 (taking into consideration the fact that the institution was a nonprofit corporation); *Roman Catholic Archdiocese*, 907 F. Supp. 2d at 316 (noting that the Archdiocese was a nonprofit organization that encompassed a

erning documents of the institution reference a religious mission, whether board members are required to be affiliated with any religion, and whether any house of worship retains any jurisdiction over the entity.<sup>57</sup> Some courts have emphasized that an institution must be not-for-profit, specifying that for-profit entities are at odds with the pursuit of religious objectives.<sup>58</sup>

Other courts have taken a more subjective approach to determining whether an institution functions as a “religious institution.”<sup>59</sup> These courts emphasize the importance of religion in the day-to-day life of the institution. For example, the Fourth Circuit has stated that at the core of the definitional inquiry is whether the “entity’s mission is marked by clear or obvious religious characteristics.”<sup>60</sup> For the Fourth Circuit, manifestations of religion in daily institutional life is an important element in determining whether an institution is a “religious institution.”<sup>61</sup>

One notable recent attempt to define a religious institution moved away from a functional definition toward a definition that takes into consideration constitutional values.<sup>62</sup> In the employment context, this new perspective sees functional approaches as beginning from the wrong starting point.<sup>63</sup> Instead, this approach recommends determining an institution’s status from the perspective of the employee, and suggests that courts “ask whether the facts and circumstances surrounding the employment relationship were sufficient for the employee to recognize his or her employer as a religious employer.”<sup>64</sup>

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large number of parishes within New York); *Altman*, 879 F. Supp. 2d at 1385 (considering the restaurant’s for-profit incorporation).

<sup>57</sup> Helfand, *supra* note 48, at 410; *see, e.g., Hobby Lobby*, 723 F.3d at 1137 (describing the corporations’ missions as explicitly Christian); *Hollins*, 474 F.3d at 225–26; *Scharon*, 929 F.2d at 362 (noting that “[t]he hospital’s Board of Directors consists of four church representatives” and that its “Articles of Association may be amended only with the approval of the Episcopal Diocese of Missouri of the Protestant Episcopal Church in the United States of America and the local Presbytery of the Presbyterian Church (U.S.A.)”).

<sup>58</sup> *Altman*, 879 F. Supp. 2d at 1385; Report and Recommendations, *supra* note 49, at \*18 (considering the plaintiff’s claim that the ministerial exception was unavailing because defendant was a for-profit corporation); Helfand, *supra* note 48, at 410 (observing that in debates regarding “the contraction mandate, the government has consistently taken the position that institutions cease to function as religious employers . . . if the institution in question seeks to turn a profit”).

<sup>59</sup> *Hollins*, 474 F.3d at 225–26 (considering the role that individuals play with regard to the organization in determining whether the ministerial exception applies); *Shaliesabou*, 363 F.3d at 310 (noting that “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”).

<sup>60</sup> *Shaliesabou*, 363 F.3d at 310; *accord Hollins*, 474 F.3d at 225–26 (illustrating that the Sixth Circuit has adopted a similar position).

<sup>61</sup> *Shaliesabou*, 363 F.3d at 310.

<sup>62</sup> *See* Helfand, *supra* note 48, at 409, 424–25.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 409.

This employee-focused perspective is based on the Court's implicit acceptance of implied consent in its decisions involving church property.<sup>65</sup> The claim is that the Court recognized that people join religious institutions in order to achieve uniquely religious objectives, such as faith and salvation. Consequently, in joining such an organization the members impliedly consent to any rules and regulations of that organization.<sup>66</sup> Thus, an institution will only be designated a "religious institution" if the employees can be presumed to have impliedly consented to the authority of the institution in order to promote those objectives particularly unique to the religion.<sup>67</sup> This approach, then, is more firmly rooted in the Constitution than any of the other approaches outlined in this Section.

In considering what the Court is valuing in the church property cases, the implied consent approach moves the focus away from the functional criteria that has dominated the lower courts' approach to religious institutionalism, and toward an approach that better accounts for constitutional values. Standing alone, however, this approach falls short of the goal of identifying those institutions that fulfill the constitutional function of religious institutions. That is, the lens is too narrowly focused and risks underinclusion. If we are to calibrate guidelines for the courts to use to ascertain which institutions are first order religious institutions, we need to broaden our approach. To this end, the next Part reviews the entirety of the Court's religious institutionalism jurisprudence to provide the necessary grounding for elucidating the Court's rationale for its unique valuing of religious institutions under the Constitution.

## II. RELIGIOUS INSTITUTIONALISM IN THE SUPREME COURT

This Part has three core goals. First, as noted above, this Part charts the trajectory of the Court's First Amendment treatment of religious institutions. The Court's treatment of First Amendment disputes involving religious institutions has mostly followed a linear path. Both in church-property and church-clergy disputes, the Court has consistently taken a hands-off approach, deferring to the decisions made by the religious institution in question. In one sense, *Hosanna-Tabor* is more of the same; the Court refused to intervene in an employment decision made by a religious institution. But, as this Part outlines, the Court exceeded its typical hands-off approach in *Hosanna-Tabor*, suggesting that not only should courts treat the internal workings of constitutional reli-

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<sup>65</sup> *Id.*; see *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 115 (1952) (citing *Watson v. Jones* as "radiating a spirit of freedom for religious organizations"); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1871) (indicating that those who choose to unite with a religious organization impliedly consent to the organization's governance); *infra* notes 68–93 and accompanying text

<sup>66</sup> Helfand, *supra* note 48, at 409.

<sup>67</sup> *Id.*

gious institutions (i.e., first-order religious institutions) with deference, but also that first-order religious institutions possess special First Amendment rights not enjoyed by individual citizens or non-religious institutions (i.e., second-order religious institutions).

Second, foreshadowing the purposive approach this Article takes to defining first-order religious institutions in Part III, this Part has the goal of beginning to tease out the principles that undergird these decisions, paying special attention to the continuity of these principles through the decision in *Hosanna-Tabor*. This jurisprudential overview, then, provides the essential background for developing a workable framework for identifying first-order religious institutions in Part III. Finally, this Part concludes by providing the first clear overview of the new Religion Clauses by outlining the pre- and post-*Hosanna-Tabor* litigation possibilities available to wronged religious claimants.

### A. *The Rise of Religious Institutionalism in the Supreme Court*

This Section examines *Hosanna-Tabor* and the cases that predate it in order to provide a picture of the basis on which the Court has recognized religious institutions as constitutionally distinct. This case analysis will form the basis for examining the underlying values of the special constitutional protection for religious institutions and the related preliminary framework for sorting institutions discussed in Part III. Because the case law has developed in a subject-matter context, I will examine the cases in these groupings. The first two Subsections illustrate the early deferential approach of the Court. The third Subsection details the more expansive approach that the Court followed in *Hosanna-Tabor*.

#### 1. Religious Institutionalism and Church-Property Disputes

The decision that is frequently referred to as the seminal religious institutionalism case is the 1871 Supreme Court decision in *Watson v. Jones*.<sup>68</sup> *Watson* involved a dispute over control of church property, following a schism between two church factions over the issue of slavery. The anti-slavery faction had the support of the majority of the congregation and the national church, whereas the minority pro-slavery faction was comprised of the elders that governed the church, as well as a majority of the trustees who held the title to the property. Both factions filed claims in court claiming to be the true church and therefore entitled to use and control of the building.<sup>69</sup>

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<sup>68</sup> 80 U.S. (13 Wall.) 679. For an excellent overview and greater illumination of this decision and its importance, see Kurt T. Lash, *Beyond Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 447, 456–59 (2009); Lund, *supra* note 4, at 12–15.

<sup>69</sup> *Watson*, 80 U.S. (13 Wall.) at 685–700; see Lash, *supra* note 68, at 456–59; Lund, *supra* note 4, at 12–15.

In holding for the anti-slavery faction, the Supreme Court specified that it was required to respect the autonomy of the church.<sup>70</sup> The Court said that courts were required to stay out of church disputes because churches had the right to govern themselves and resolve their own disputes.<sup>71</sup> For the Court, this idea of church autonomy was traceable to the concept of "implied consent."<sup>72</sup> The Court noted that religious associations are voluntary organizations, and when individuals join a church they impliedly consent to that church and to any overarching hierarchy that makes decisions with respect to matters of faith and governance.<sup>73</sup> For the Court, it was unquestioned that voluntary religious associations had the right to form and facilitate the dissemination and expression of religious doctrine.<sup>74</sup> Congregants can then either choose to stay in the church as they joined it, or they can choose to leave. In no way, the Court said, could the government be employed to force the church to change its governance, practices, or religious views.<sup>75</sup> The implied consent of the congregants meant that the courts had an obligation to defer to the preexisting rules of conduct established by the church itself.<sup>76</sup>

The Court explained that maximization of church autonomy meant that courts would be required to adopt a different approach to church schism cases depending on whether the church was hierarchical or congregational.<sup>77</sup> Where the denomination in question has a hierarchical structure—i.e., the congregation accepted the authority of a larger church body—and the congregation was originally part of that hierarchy, the Court said that courts should defer to the decision of the hierarchical authorities as to who is entitled to the local church

<sup>70</sup> *Watson*, 80 U.S. (13 Wall.) at 729.

<sup>71</sup> *Id.* ("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.")

<sup>72</sup> *Id.* ("All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it.")

<sup>73</sup> *Id.* at 728–29. According to the Court:

The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned.

*Id.*

<sup>74</sup> *Id.* at 729.

<sup>75</sup> *Id.*

<sup>76</sup> *See* *Jones v. Wolf*, 443 U.S. 595, 614 (1979) (Powell, J., dissenting) (describing the *Watson* rule as requiring courts to "give effect in all cases to the decisions of the church government agreed upon by the members before the dispute arose"). In *Watson* itself, this meant that the federal courts could not quarrel with the General Assembly's conclusion that the anti-slavery side represented the true church and therefore was the true owner of the church property. 80 U.S. (13 Wall.) at 734–35.

<sup>77</sup> *See* *Watson*, 80 U.S. (13 Wall.) at 724–27.

property.<sup>78</sup> Where the feuding denomination was congregational in nature—i.e., there was no church authority higher than the individual congregation—the Court would defer to the decision of the majority of the congregation members.<sup>79</sup> On the facts in *Watson*, this meant that the Court deferred to the decision of the General Assembly of the Presbyterian Church, and the anti-slavery faction supported by the hierarchy had the right to the property.<sup>80</sup>

Although not a constitutional decision, the *Watson* Court recognized that the principles contained therein were premised on entrenched views of the appropriate relationship between church and state.<sup>81</sup> The framework in *Watson*, as well as the underlying rationale of implied consent to autonomous institutional behavior, was subsequently applied in numerous church-property disputes,<sup>82</sup> and was eventually constitutionalized by the Court in the 1952 case *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*.<sup>83</sup> In *Kedroff*, the Court held that a New York state statute that permitted a local congregation of the Russian Orthodox Church to split from the hierarchy and keep the church property violated the First Amendment.<sup>84</sup> The Court based its decision on *Watson*, stating that the principles underlying *Watson* “must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.”<sup>85</sup> The Court said that the *Watson* principle “[r]adiates . . . a spirit of freedom for religious organizations” that is “part of the free exercise of religion.”<sup>86</sup> Furthermore, the Court noted that religious institutions had a constitutional right “to decide for themselves, free from state interference, matters of church government as well as those of

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<sup>78</sup> *Id.* 726–27.

<sup>79</sup> *Id.* at 724–25.

<sup>80</sup> *Id.* at 733–34.

<sup>81</sup> *See id.* at 727 (stating that the decision was “founded in a broad and sound view of the relations of church and state”); *see also* *Kedroff*, 344 U.S. at 116 (holding that “[t]he [*Watson*] opinion radiates . . . a spirit of freedom for religious organizations” which ultimately must be considered “part of the free exercise of religion”).

<sup>82</sup> *See, e.g.*, *Shepard v. Barkley*, 247 U.S. 1, 2 (1918) (applying *Watson*’s principles regarding hierarchical churches to give disputed church property to the national Presbyterian church over the claims of a local Presbyterian congregation); *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 140 (1872) (applying *Watson*’s principles regarding congregational churches to give disputed church property to a faction representing the majority of the congregation).

<sup>83</sup> *See* 344 U.S. at 120–21.

<sup>84</sup> *Id.* at 116. *Kedroff*’s holding was extended in a follow-up case involving the same parties still fighting over the same property. *See Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190, 191 (1960). Where *Kedroff* had held that New York could not transfer power from the international Russian Orthodox Church to local churches by state statute, *Kreshik* held that New York could also not transfer that power through courts utilizing common law principles. *See id.* (holding that *Kedroff* applies to state power exercised over a religious institution whether that power is legislative or judicial in nature).

<sup>85</sup> *Kedroff*, 344 U.S. at 116.

<sup>86</sup> *Id.*



faith and doctrine."<sup>87</sup> For the Court, even where a property dispute results from church decisions based on church custom on ecclesiastical issues, the Court will give deference to the church's decision in order to protect the Church's right to freely exercise its religion.<sup>88</sup>

In a series of decisions following *Kedroff*, the Court has applied this deferential approach consistently. In the 1969 decision *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, for example, the Court held that courts have no role in adjudicating intra-church disputes.<sup>89</sup> The Court reversed a lower court decision based on judicial interpretation of church doctrine.<sup>90</sup> The Court stated that civil court decisions based on ecclesiastical doctrine violated constitutional norms of church-state separation and would ultimately undermine religious institutions.<sup>91</sup> Justice William J. Brennan, Jr. specified that any attempt to make determinations of allocation of church property based on inquiries into and analysis of church doctrine would undermine the intended freedom for religious organizations enshrined in the First Amendment.<sup>92</sup>

Collectively, *Watson*, *Kedroff*, and their progeny have been described as the Court's "hands-off" approach to religious institutions, requiring the government to defer to the will of the institution rather than to apply often conflicting legislative or judicial principles to determine the outcome of property disputes.<sup>93</sup>

<sup>87</sup> *Id.*; Lund, *supra* note 4, at 15.

<sup>88</sup> *Kedroff*, 344 U.S. at 120–21.

<sup>89</sup> 393 U.S. 440, 447, 449 (1969) ("[T]he civil courts [have] no role in determining ecclesiastical questions in the process of resolving property disputes . . . [or] underlying controversies over religious doctrine."); Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837, 845 (2009) (stating that *Presbyterian Church* confirms the courts' hands-off approach to ecclesiastical disputes); see 1 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS* 265 (2006).

<sup>90</sup> *Presbyterian Church*, 393 U.S. at 444.

<sup>91</sup> *Id.* at 445–47 (observing that it is "wholly inconsistent with the American concept of the relationship between church and state to permit civil courts to determine ecclesiastical questions," and that to permit the civil courts to assess and base decisions on the interpretation of church doctrine, would "lead to the total subversion of . . . religious bodies").

<sup>92</sup> *Id.* at 448 (quoting *Kedroff*, 455 U.S. at 116).

<sup>93</sup> Lund, *supra* note 4, at 16; see Garnett, *supra* note 89, at 845 (describing the "cluster of [church autonomy] cases that seem to illustrate and confirm the hands-off rule"); Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1847 (1998) (describing *Watson* as "the origin of a 'hands-off' approach"); see also Joanne C. Brant, "Our Shield Belongs to the Lord": *Religious Employers and a Constitutional Right to Discrimination*, 21 HASTING CONST. L.Q. 275, 299–300 (1994) ("[T]he Court's early church property decisions indicate that courts should not attempt to resolve 'internal' church disputes."); William Johnson Everett, *Ecclesial Freedom and Federal Order: Reflections on the Pacific Homes Case*, 12 J.L. & RELIGION 371, 382 (1996) ("A long series of legal precedents ha[s] confirmed that civil courts cannot interfere in internal church disputes . . ."). Note, however, that in some instances, the hands-off doctrine might require the courts to intervene. See, e.g., *Jones*, 443 U.S. at 602 (applying a "neutral principles of law" approach to a church property dispute where it was necessary for the Court to interfere and where permitted by the

## 2. Religious Institutionalism and Clergy Disputes

Although most of the Court's decisions involving inter-institutional disputes have involved church property, there have been a handful of cases involving disputes over the appointment, retention, and removal of clergy.<sup>94</sup> These cases center on an individual's claim regarding their right to act as a religious leader for a specific congregation.<sup>95</sup> In these cases, as in the context of church property disputes, the Court has stated that it will defer to the will of the church, as it predated the dispute.<sup>96</sup>

The earliest case involving a clergy dispute to reach the Court was *Gonzalez v. Roman Catholic Archbishop*, decided in 1929.<sup>97</sup> *Gonzalez* involved a claim to an endowed chaplaincy, created in a will in the early 1800s. The endowment specified that the chaplaincy was to be filled by descendants of the founder where possible.<sup>98</sup> Raul Gonzalez, a fourteen-year-old boy and descendant of the founder, claimed a right to the chaplaincy upon the death of his father. The Archbishop of Manila objected and refused to appoint Gonzalez to the position, specifying that the Catholic Church required all chaplains to be priests and have undergone seminary training.<sup>99</sup> Gonzales objected to these grounds for refusing his appointment, claiming that when the chaplaincy was endowed these requirements for employment did not exist.<sup>100</sup> The Court rejected Gonzales's claim, holding that determinations regarding both the qualifications of chaplains and whether a candidate meets those qualifications are ecclesiastical decisions to be made by church authorities.<sup>101</sup>

The Court was more direct in its determination and reasons in the 1976 decision of *Serbian Eastern Orthodox Diocese v. Milivojevich*.<sup>102</sup> Milivojevich was serving as the presiding bishop for the American-Canadian diocese of the Serbian Eastern Orthodox Church in America when the governing hierarchy, based in Yugoslavia, deposed him and chose to appoint someone else.<sup>103</sup> Milivojevich objected to his removal, claiming that it was invalid under church

First Amendment); *Bouldin*, 82 U.S. (15 Wall.) at 137 (determining which parties legally owned church property through a trusteeship); Lund, *supra* note 4, at 16–17.

<sup>94</sup> See, e.g., *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 697–98 (1976); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 10 (1929).

<sup>95</sup> See *Serbian E. Orthodox Diocese*, 426 U.S. at 697–98; *Gonzalez*, 280 U.S. at 10.

<sup>96</sup> See *Serbian E. Orthodox Diocese*, 426 U.S. at 724–25; *Gonzalez*, 280 U.S. at 16.

<sup>97</sup> See 280 U.S. at 10.

<sup>98</sup> *Id.* at 12.

<sup>99</sup> *Id.* at 12–14.

<sup>100</sup> *Id.* at 14.

<sup>101</sup> *Gonzalez*, 280 U.S. at 16 (holding that it is the “function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them,” and that “the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the civil courts as conclusive”).

<sup>102</sup> 426 U.S. at 724–25.

<sup>103</sup> *Id.* at 699, 702–06.

doctrine and filed suit to stop the removal.<sup>104</sup> The case not only involved a dispute over the right of a hierarchical church to appoint and remove clergy at their will; any determination of who was the rightful bishop of the church would resolve the question of who held the lucrative legal title for all of the church property in the United States.<sup>105</sup>

The Court held that the secular courts were required to accept the decisions of the governing body of a hierarchical church; which in this case meant that the decision of the hierarchical authority in Yugoslavia was final.<sup>106</sup> According to the Court, the principle outlined in the church property case of *Watson* applied with "equal force to church disputes over church polity and church administration."<sup>107</sup> The Court explained that religious institutions are the only institutions that could decide issues regarding church discipline and employment within the religious hierarchy because these issues "are at the core of ecclesiastical concern."<sup>108</sup>

### 3. Employment Decisions Beyond Clergy: The Ministerial Exception and *Hosanna-Tabor*

Perhaps the most contentious of the subject-matter categories involving the recognition of institutional rights involves the right of a religious institution to employ, retain, and retrench employees based on principles of faith—even where those principles contradict generally applicable laws. Although the issue dominated the lower federal courts following the 1964 enactment of the Civil Rights Act, the Supreme Court studiously avoided the issue until 2012.<sup>109</sup> The

<sup>104</sup> *Id.* at 706–07.

<sup>105</sup> Lund, *supra* note 4, at 18.

<sup>106</sup> *Serbian E. Orthodox Diocese*, 426 U.S. at 724–25 (holding that the First Amendment permits "religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters," and requires that civil courts accept religious tribunals' decisions).

<sup>107</sup> *Id.* at 710.

<sup>108</sup> *Id.* at 717.

<sup>109</sup> See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 705–06 (2012) (holding that there is a ministerial exception under the First Amendment and acknowledging that, until 2012, the Supreme Court had not considered the ministerial exception); *McClure v. Salvation Army*, 460 F.2d 553, 555 (5th Cir. 1972) (first recognizing the ministerial exception); Lund, *supra* note 4, at 21 (indicating that every federal circuit and many states have adopted a form of the ministerial exception). For examples of circuit court cases affirming the ministerial exception, see, for example, *Rweyemamu v. Cote*, 520 F.3d 198, 209 (2d Cir. 2008); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 227 (6th Cir. 2007); *Petruska v. Gannon Univ.*, 462 F.3d 294, 307–08 (3d Cir. 2006); *Tomic v. Catholic Diocese*, 442 F.3d 1036, 1039 (7th Cir. 2006); *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 955 (9th Cir. 2004); *Bryce v. Episcopal Church*, 289 F.3d 648, 656–57 (10th Cir. 2002); *EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 800 (4th Cir. 2000); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1303–04 (11th Cir. 2000); *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 349 (5th Cir. 1999); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 465 (D.C. Cir. 1996); *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*,

Court came close to facing a similar issue in the 1979 case, *NLRB v. Catholic Bishop*.<sup>110</sup> There, the National Labor Relations Board (“NLRB”) claimed jurisdiction over parochial Catholic schools in Chicago, Illinois, and South Bend, Indiana.<sup>111</sup> The NLRB claimed that there had been unfair labor practices occurring in the schools, ordered union elections, and subsequently declared a labor violation when the Catholic Church refused to bargain with the newly elected union representatives.<sup>112</sup> The Catholic Church claimed that it had a constitutional right to be exempt from NLRB jurisdiction, and that the National Labor Relation Act’s (“NLRA”) attempt to exercise authority over the Church schools undermined Church control over both the school and its teachers.<sup>113</sup>

The Supreme Court specified that whether the NLRA was applicable to the Catholic Church and its subsidiary schools and employees raised “difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.”<sup>114</sup> Both the Act and the NLRB’s exercise of authority, the Court recognized, imposed on the “freedom of church authorities to shape and direct teaching in accord with the requirement of their religion.”<sup>115</sup> The Court, however, avoided this constitutional question, holding that there was no evidence that the NLRA was intended to apply to religious schools.<sup>116</sup>

The issue of faith-based hiring practices culminated with the 2012 Supreme Court decision of *Hosanna-Tabor*.<sup>117</sup> The facts of *Hosanna-Tabor* are well-known by now, but warrant a brief rendition here. The case involved an elementary school teacher, Cheryl Perich, who was employed as a “called teacher” —someone voted as such by the congregation after satisfying congregationally specified, doctrinally-based academic requirements—at the Hosan-

929 F.2d 360, 363 (8th Cir. 1991); *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1578 (1st Cir. 1989). For state court decisions applying the ministerial exception, see, for example, *Gunn v. Mariners Church, Inc.*, 84 Cal. Rptr. 3d 1, 6–8 (Ct. App. 2008); *Rweyamamu v. Comm’n on Human Rights & Opportunities*, 911 A.2d 319, 331 (Conn. App. Ct. 2006); *Pardue v. Ctr. City Consortium Sch. of the Archdiocese of Wash., Inc.*, 875 A.2d 669, 675 (D.C. 2005); *Coulee Catholic Sch. v. Labor & Indus. Review Comm’n*, 768 N.W.2d 868, 892 (Wis. 2009).

<sup>110</sup> See 440 U.S. 490, 491 (1979).

<sup>111</sup> *Id.* at 493.

<sup>112</sup> See *Catholic Bishop v. NLRB*, 559 F.2d 1112, 1113–14 (7th Cir. 1977).

<sup>113</sup> *NLRB*, 440 U.S. at 493; see National Labor Relations Act, 29 U.S.C. §§ 151–169 (2006).

<sup>114</sup> See *NLRB*, 440 U.S. at 507 (“[I]n the absence of a clear expression of Congress’ intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could [involve] . . . difficult and sensitive questions arising out of . . . the First Amendment Religion Clauses.”). Justices Brennan, Byron White, Thurgood Marshall, and Harry Blackmun indicated in their dissent that they would have resolved the constitutional question. *Id.* at 508–18 (Brennan, J., dissenting).

<sup>115</sup> See *id.* at 496, 501 (majority opinion).

<sup>116</sup> *Id.* at 507. Note, however, that since *Catholic Bishop*, many courts have considered whether state labor laws can apply with equal force to parochial schools and have concluded that they do. See Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 BYU L. REV. 1633, 1658 & nn.156–57 (providing examples); Lund, *supra* note 4, at 20.

<sup>117</sup> See 132 S. Ct. at 705–06.

na-Tabor Evangelical Lutheran Church and School, a K–8 school in Redford, Michigan.<sup>118</sup> Perich performed her duties as a called teacher for five years before becoming ill prior to the commencement of the 2004–2005 school year, which forced her to take disability leave.<sup>119</sup> Part way through the school year, Perich received a doctor’s note that stated she was medically cleared to return to work and asked the school to return to the classroom. The school stated that a substitute had been hired through the end of the school year and that they doubted Perich’s ability to return to the classroom given the nature of her illness.<sup>120</sup> After a meeting of the congregation, Perich was offered a “peaceful release” from her call, which Perich refused and threatened to file a claim with the Equal Employment Opportunity Commission (EEOC).<sup>121</sup> Perich was fired and filed a disability discrimination claim with the EEOC, and Hosanna-Tabor responded by claiming that the suit was barred by the First Amendment Religion Clauses’ “ministerial exception.”<sup>122</sup> This exception—previously recognized by the lower courts—prohibits any state interference with the employment relationship between a first-order religious group and one of its ministers.

The Court agreed with Hosanna-Tabor and declared that the First Amendment Religion Clauses, working together, “bar the government from interfering with the decision of a religious group to fire one of its ministers.”<sup>123</sup> The Court specified that were the Americans with Disabilities Act or any other employment laws to apply to a first-order religious institution, the state would be unconstitutionally interfering with internal church workings—a violation of that groups’ religious liberty.<sup>124</sup> For the Court, at the core of the liberty protected by both of the First Amendment Religion Clauses is the ability of a first-order religious group to “shape its own faith and mission.”<sup>125</sup> Internal church decisions that “affect the faith and mission of the church itself” are so fundamental to the concept of religious liberty enshrined in the First Amendment that the Court held that the ministerial exception was not limited to internal decisions based on religious grounds.<sup>126</sup> Scholarly expositions of the *Hosanna-Tabor* decision are still developing. Nevertheless, law and religion scholars seem to agree that this decision “recognizes the constitutional liberty of reli-

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<sup>118</sup> *Id.* 699–700.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 701–02.

<sup>123</sup> *Id.* at 702.

<sup>124</sup> *Id.* at 706–07.

<sup>125</sup> *See id.* at 706.

<sup>126</sup> *See id.* Indeed, the Court has suggested that attempting to draw a line between what is religious and non-religious would itself violate the First Amendment Religion Clauses. *See United States v. Ballard*, 322 U.S. 78, 88 (1944) (holding that the lower court was correct in withholding questions regarding the truth of respondents’ religious beliefs).

gious organizations to manage their institutions and limit the reach of secular or civil authority into their internal workings.”<sup>127</sup>

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Taken together, the hands-off approach enshrined in the Court’s church-property, clergy, and institutional-employment decisions constitutionalize a principle of institutional separation, whereby the institutions of church and state are to be separate and distinct.<sup>128</sup> *Hosanna-Tabor*, however, also foreshadowed a new understanding of religious institutions as special rights holders. Still, the decision did not delve into which organizations would be deemed first-order religious institutions. The importance of this question is evident once we consider the shift that the new religious institutionalism has caused in Religion Clause doctrine.

### B. *The New Religion Clauses*

It is clear that *Hosanna-Tabor* ushered in a new doctrinal structure under the Religion Clauses. Prior to *Hosanna-Tabor*, litigants could claim that the government had violated either or both the Free Exercise Clause or the Establishment Clause. Pursuant to the Free Exercise Clause, litigants can claim that the government has burdened their religious liberty in one of two ways. First, a litigant can claim that the government has burdened their religious belief.<sup>129</sup> If the government burdens religious belief, then the litigant receives absolute constitutional protection and no judicial balancing occurs.<sup>130</sup> Second, a litigant can claim that the government burdened their religious action.<sup>131</sup> The Court’s decisions on religious action indicate that religious action can be burdened either by a discriminatory law or a non-discriminatory law.<sup>132</sup> The distinction matters for liti-

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<sup>127</sup> Wasserman, *supra* note 4, at 291 (summarizing that the ministerial exemption “is a specific application of the broader freedom of the church doctrine . . . which recognizes the constitutional liberty of religious organizations to manage their institutions and limits the reach of secular or civil authority into their internal workings”). Compare Esbeck, *supra* note 5, at 168 (discussing the role “internal church governance” played in the Court’s analysis and indicating that *Hosanna-Tabor* represents a limit on government regulation of religious institutions), with Schragger & Schwartzman, *supra* note 5, at 918 (stating that some scholars have interpreted *Hosanna-Tabor* to support an “institutional theory” of the Religion Clauses even though the Court did not expressly discuss the idea of “church autonomy” in its decision).

<sup>128</sup> Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1497.

<sup>129</sup> See, e.g., *Davis v. Beason*, 133 U.S. 333, 346–48 (1890); *Reynolds v. United States*, 98 U.S. 145, 162 (1879).

<sup>130</sup> See *Torcaso v. Watkins*, 367 U.S. 488, 495–96 (1962).

<sup>131</sup> See, e.g., *McDaniel v. Paty*, 435 U.S. 618, 629 (1978); *Torcaso*, 367 U.S. at 495. The vast majority of Free Exercise Clause litigation involves a claim that a person’s ability to act in accordance with their beliefs has been burdened. See MICHAEL W. MCCONNELL ET AL., *RELIGION AND THE CONSTITUTION* 87–91 (2d ed. 2006).

<sup>132</sup> See, e.g., *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993); *Sherbert v. Verner*, 374 U.S. 398, 406–07 (1963); *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961).

gants because if the burden on the litigant's religious action is via a discriminatory law, then the protection afforded that covered action is high—strict scrutiny.<sup>133</sup> Conversely, if the burden on the litigant's religious action results from a non-discriminatory law (i.e., a generally applicable law), then there is no protection afforded that religious action absent a showing of a hybrid claim, or an individualized administrative determination (e.g., employment discrimination).<sup>134</sup>

Litigants can also bring a claim pursuant to the Establishment Clause, claiming either that the government is favoring one religious sect over another,<sup>135</sup> or that the government is benefiting one religion by, for example, requiring or permitting prayer in public schools or permitting religious symbols in the public square.<sup>136</sup> Under both the Free Exercise and Establishment Clauses, so long as litigants can show that their religion is burdened, the rights contained in the Religion Clauses are applicable to them.<sup>137</sup> The Religion Clauses, then, can be considered generally applicable—inclusive and applicable to all constitutional citizens.

What *Hosanna-Tabor* has added to the Religion Clauses is an additional doctrinal path for litigants to follow. However, unlike the generally applicable Religion Clauses, *Hosanna-Tabor*'s institutional category is exclusive, and applicable only to "religious institutions."<sup>138</sup> This means that if the litigant can claim to be a "religious institution" for First Amendment purposes—that is, a first-order religious institution—then to the extent of the coverage of the institutional right the institution is afforded absolute constitutional protection. Importantly, what this does *not* mean is that the religious liberty of first-order religious institutions is protected *only* to the extent of the coverage of the institu-

<sup>133</sup> See *Church of Lukumi Babalu Aye*, 508 U.S. at 531; *Sherbert*, 374 U.S. at 406 (invalidating a state law burdening the free exercise of religion); see also Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 861–62 (2006) ("Strict scrutiny is always fatal to laws intentionally discriminating against religion."). Under strict scrutiny, the discriminatory law would have to be "justified by a compelling government interest" and "narrowly tailored to advance that interest." *Church of Lukumi Babalu Aye*, 508 U.S. at 531.

<sup>134</sup> See *Emp't Div. v. Smith*, 492 U.S. 872, 884 (1990) (holding that special accommodations for religious practices are not constitutionally mandated, except for claims combining a free exercise claim and a claim arising from another constitutional provision—i.e., "hybrid" claims—or for claims in contexts that "invite consideration of . . . particular circumstances"). For commentary on the *Smith* doctrine, see 1 GREENAWALT, *supra* note 89, at 80–81 (noting that *Smith* "marks a crucial divide in free exercise law"); Adam Samaha, *Litigant Sensitivity in First Amendment Law*, 98 NW. U. L. REV. 1291, 1335 (2004).

<sup>135</sup> See, e.g., *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

<sup>136</sup> See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 60–61 (1985) (striking down a statute encouraging prayer in school); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 116, 127 (1982) (holding unconstitutional a statute that vests in churches the authority to veto liquor licenses within 500 feet of the church).

<sup>137</sup> GRIFFIN, *supra* note 39, at 17.

<sup>138</sup> See 132 S. Ct. at 705–06.

tional right. Instead, to the extent that the institutional litigant claims protection from government intrusion on religious action that falls outside the scope of the institutional category, the action may well be protected by the generally applicable Religion Clauses. Similarly, a second-order religious institution—that is, an institution not meeting the criteria for classification as a first-order religious institution—is not without constitutional protection. Instead, the second-order religious institution can avail itself of the various Free Exercise and Establishment Clause protections that are available to all litigants who can demonstrate that their religion has been burdened.<sup>139</sup>

The institutional category enshrined by *Hosanna-Tabor* is, then, a powerful extension of the previously settled Religion Clause doctrine.<sup>140</sup> It adds a tiered structure to the Religion Clauses that was absent before the Court's pronouncement. The post-*Hosanna-Tabor* Religion Clauses can best be understood as a two-tiered regime, whereby institutional litigants are best advised to claim that they are first-order religious institutions and thus entitled to the protective auspices of the exclusive category. If this claim fails—either because the subject-matter does not fall within the coverage of the right or because the litigant does not meet the criteria to be classified as a first-order religious institution—then that litigant can fall back to the inclusive, generally applicable Religion Clause doctrine.<sup>141</sup> The fundamental importance of being classified as a first-order religious institution, then, cannot be overstated. For an institutional claimant, being identified as a first-order religious institution means absolute constitutional protection for any activity covered by the institutional right. As this Article stated at the outset, it is imperative to develop a workable framework for identifying first-order religious institutions. The following Part establishes a framework to answer the question of how courts can determine whether an institutional claimant is a “religious institution” for First Amendment purposes.

### III. TOWARD A WORKABLE FRAMEWORK FOR IDENTIFYING “RELIGIOUS INSTITUTIONS”

Although most of us would readily identify a local house of worship as a “religious institution,” the question becomes more complicated as we pan out from the core. For example, many local houses of worship belong to hierarchical organizations that mandate conduct and direct belief.<sup>142</sup> It may be un-

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<sup>139</sup> See *infra* notes 288–305 and accompanying text (discussing inclusive religious rights that institutions may fall back on where religion has been burdened).

<sup>140</sup> See McConnell, *supra* note 4, at 821 (concluding that it “may be the broader doctrinal implications of *Hosanna-Tabor* that have the most lasting significance”).

<sup>141</sup> See *infra* notes 296–305 and accompanying text (discussing “fallback protections”).

<sup>142</sup> See *supra* notes 97–108, 123–127 and accompanying text (illustrating how the Court has examined hierarchical as opposed to congregational religious institutions).



controversial that these organizations are also religious institutions, but what about the independent organizations funded and managed by the hierarchical organization, such as Catholic hospitals or for-profit businesses established by the hierarchy to supplement church income? There are also various educational institutions, both K–12 and university-level, that identify as religious. These organizations also vary in structure, with some institutions being established, maintained, and managed by churches or church hierarchies, whereas others are independent of any management structure and instead govern themselves. Then there are a slew of for-profit businesses that claim to be religious organizations.<sup>143</sup> Which of these institutions is a first-order religious institution? Are they all first-order religious institutions, able to organize at least some of their affairs independent of state regulation? Are only some of them?

As noted earlier, this Article advances the principle of exceptionalism—that there exist certain religious institutions that fulfill a unique and important role in our democracy.<sup>144</sup> First-order religious institutions comprise a limited group of institutions that share common attributes and ultimately fulfill unique constitutional functions of religion qua religion. The most theoretically sound approach to identifying first-order religious institutions is to examine the Supreme Court's decisions in its limited religious institutionalism jurisprudence. By examining these decisions, we can tease out the values the Court seeks to protect by recognizing discrete constitutional rights for an isolated category of actor. Indeed, by building a definition from the fundamental values encapsulated in the Court's religious institutionalism decisions, we are more likely to focus in on identifying the unique functions of the religious institution as opposed to the religious individual or other associational forms. That is, the search for a definition via values puts the emphasis on what the Constitution is protecting when it protects religious institution qua religious institution.

This is not a novel approach. Sonja West has proposed a similar value-based definition in a recent discussion of the search for a definition of "the press" for the purposes of the First Amendment Press Clause.<sup>145</sup> Similarly, in the context of universities under the First Amendment, Paul Horwitz has ar-

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<sup>143</sup> See *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1135 (7th Cir.), cert. granted, 82 U.S.L.W. 3139 (U.S. Nov. 26, 2013) (No. 13-354); *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 381 (3d Cir.), cert. granted, 82 U.S.L.W. 3139 (U.S. Nov. 26, 2013) (No. 13-356). This is an especially critical issue in the various challenges to the Contraception Mandate. See *Conestoga Wood*, 724 F.3d at 381. On whether for-profit corporations have First Amendment rights, see James D. Nelson, *Conscience, Incorporated*, 2014 MICH. ST. L. REV. (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2247051](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2247051), archived at <http://perma.cc/824T-49KD>.

<sup>144</sup> For a similar argument in the context of the Press Clause, see Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. (forthcoming 2014) (arguing for press exceptionalism and presenting a framework for identifying the press in the age of new communication technology).

<sup>145</sup> See West, *supra* note 44, *passim*.

gued for a definition based on constitutional values.<sup>146</sup> Most relevantly, in the context of generalized religious rights under the Religion Clauses, a host of scholars and judges have presented frameworks for determining the scope of protection based on the underlying values of the clauses.<sup>147</sup> Following this approach, Section A of this Part will identify those values that underlie private ordering rights of religious institutions, and thus the Court's new religious institutionalism.

### A. *The Unique Constitutional Functions of Religious Institutions*

The institutions that we ultimately seek to categorize as first-order religious institutions are those institutions that fulfill the unique constitutional functions of religion qua religion. As a general matter, it is undisputed that the Religion Clauses broadly protect religious belief, expression, and action.<sup>148</sup> The value of religious *institutions*, then, focuses us in on the medium of institutional religion.<sup>149</sup>

Religion is rarely an individual endeavor. Instead, people come together, bound in collective belief, worship, and related action. Valuing this group formation and collective action in religious affairs, the text, history, and Supreme Court's interpretation of the Religion Clauses all recognize the necessity of cleaving religious institutions from religious individuals.<sup>150</sup> In valuing *religious* institutions, moreover, the Court recognizes that faith and spiritual rela-

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<sup>146</sup> Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLAL. REV. 1497, 1500–01 (2007).

<sup>147</sup> See, e.g., Laycock, *Towards a General Theory*, *supra* note 5, at 1373; Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146, 147–48 (1987) (arguing that using a neutrality principle is not always sufficient in defining what is constitutionally protected under the Religion Clauses); Nelson Tebbe, *Free Exercise and the Problem of Symmetry*, 56 HASTINGS L.J. 699, 699–700, 704–05 (2005) (critiquing how scholars and judges use principles of formal and substantive neutrality as a means of defining protected religious rights, and ultimately proposing a liberty principle).

<sup>148</sup> *Lee v. Weisman*, 505 U.S. 577, 589 (1992) (stating that the “Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State). See generally Laycock, *Towards a General Theory*, *supra* note 5 (taking into account issues of religious belief, expression, and action when considering the best framework for analyzing what constitutes a protected religious right); McConnell, *supra* note 147 (same); Tebbe, *supra* note 147 (same).

<sup>149</sup> See Horwitz, *supra* note 146, at 1510–11 (describing the roles that institutions play in the First Amendment and building an institutional approach for organizations that serve roles and fulfill functions essential to the First Amendment).

<sup>150</sup> See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012); Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 1987 (2007). Note that this necessarily presupposes that religion is special, which is a deeply contested issue. See generally Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391 (1987) (critiquing theories supporting religious institutions' immunities); Micah Schwartzman, *What If Religion Isn't Special?* 79 U. CHI. L. REV. 1351 (2012) (rejecting the notion that religion deserves special protections).

tionships are more than simply aggregates of individuals.<sup>151</sup> Instead, the constitutional recognition of religious institutions is an acknowledgement that the First Amendment includes two clauses that give "special solicitude to the rights of religious organizations."<sup>152</sup>

In carving out and recognizing religious institutions as a distinct category under the First Amendment, the Court is acknowledging the distinct private sphere of operation of religious institutions. This institutional recognition is an anomaly in First Amendment jurisprudence. Typically, the Supreme Court has adopted categories that are almost always subject-based, and its doctrine has been referred to as "institutionally blind."<sup>153</sup> The Court's first inclination has generally been to view First Amendment claims through the lens of "juridical categories," in which all rights-claimants are collected together and then sorted into categories based on the subject-specific facts of the claim.<sup>154</sup> The institutional blindness of the Court's First Amendment jurisprudence is especially apparent in the Speech Clause under the doctrine of content neutrality.<sup>155</sup> Under the Speech Clause, the primary sorting principle is the content of the speech; the institutional identity of the speaker—be it the internet, telephone, books, magazines, or movies—is irrelevant.<sup>156</sup> In other words, it is the speech rather than the speaker that matters, thus rendering relevant institutional distinctions between the speakers meaningless for First Amendment analysis.<sup>157</sup> Similarly, the Court has remained unwilling to recognize "the press" as an identifiable and legitimate sorting category, despite a clear textual basis for doing so.<sup>158</sup>

<sup>151</sup> See Corbin, *supra* note 150, at 1987–88.

<sup>152</sup> Mark E. Chopko & Marissa Parker, *Still a Threshold Question: Refining the Ministerial Exemption Post-Hosanna-Tabor*, 10 FIRST AMEND. L. REV. 233, 272 (2012) (citing *Hosanna-Tabor*, 132 S. Ct. at 706).

<sup>153</sup> Frederick Schauer, *Institutions as Legal and Constitutional Categories*, 54 UCLA L. REV. 1747, 1754–56 (2007) (noting that the trend of Religion Clauses jurisprudence is one of institutional agnosticism).

<sup>154</sup> Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 119 (1998) (arguing that "American free speech doctrine has never been comfortable distinguishing among institutions") [hereinafter Schauer, *Principles, Institutions, and the First Amendment*]; see also Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 85 (2009) (discussing institutional blindness and institutional categories in First Amendment jurisprudence); Frederick Schauer, *Prediction and Particularity*, 78 B.U. L. REV. 773, 781–85 (1998) (discussing Oliver Wendell Holmes, Jr. and categorical approaches to Supreme Court jurisprudence).

<sup>155</sup> See Schauer, *supra* note 153, at 1754–55.

<sup>156</sup> *Id.* at 1755.

<sup>157</sup> *Id.*

<sup>158</sup> See Horwitz, *supra* note 154, at 85; West, *supra* note 44, at 1070 ("Despite an explicit textual directive, the Press Clause has been interpreted to mean nothing more than the freedom to publish or disseminate individual speech—a right that is of dubious value considering that the Speech Clause protects these same freedoms.").

Despite this trend, as Part I outlined the Court has consistently recognized that there is a difference between religious institutional claimants and other claimants in a small number of specific contexts.<sup>159</sup> The Court's religious institutionalism jurisprudence makes it clear that the Court perceives religious institutions as constitutionally distinct.<sup>160</sup> This Section refers to the Court's institutional jurisprudence and draws out those values undergirding the Court's recognition of special First Amendment protection for religious institutions, namely: (1) protection of religious sovereignty; (2) promotion of individual freedom; and (3) provision of desirable structures.

### 1. Protection of Religious Sovereignty

The Court's religious institutionalism decisions emphasize the importance of religious sovereignty.<sup>161</sup> In this context, religious sovereignty presupposes that religious institutions are primary sovereigns, at least with respect to matters of internal governance and faith.<sup>162</sup> To put it another way, the Court assumes religious institutions are independent private governments (at least for some purposes), with a related right of private ordering.<sup>163</sup> Generally speaking, the term "private government" refers to a private group that possesses a legal structure and an organizational decision-making process by which members, officers, and agents pursue common goals of the organization.<sup>164</sup> These private organizations are "governments" because they "govern" some part of society,

<sup>159</sup> See *supra* notes 24–67 and accompanying text; *infra* notes 160–265 and accompanying text.

<sup>160</sup> See *supra* notes 148–159 and accompanying text.

<sup>161</sup> See *infra* notes 162–196 and accompanying text.

<sup>162</sup> See *infra* notes 197–235 and accompanying text (discussing how promoting individual freedom is a constitutional value underlying the Religion Clauses).

<sup>163</sup> See *infra* notes 236–265 and accompanying text (discussing how providing desirable structures that facilitate social engagement and protect the state from religious involvement are constitutional values that underlie the Religion Clauses). "Private ordering" refers to a form of private law making in which private parties voluntarily regulate themselves through self-created rules and procedures. Annette Burkeen, *Private Ordering and Institutional Choice: Defining the Role of Multinational Corporations in Promoting Global Labor Standards*, 6 WASH. U. GLOBAL STUD. L. REV. 205, 207 (2007); Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 375, 376 (2005).

<sup>164</sup> See Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 148–50 (2003) (identifying and defining private governments); Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 202–03 (1937) (discussing the trend of private groups seeking and obtaining legal rights). For various perspectives on how private organizations exercise governmental power, see Harold I. Abramson, *The Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 HASTINGS CONST. L.Q. 165, 169–74 (1989) (analyzing categories of private exercise of government power according to the formality of the relationship between the government and private actors); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 551–56 (2000) (conceiving of governance as a set of negotiated relationships between private and public actors); David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 694–95 (1986) (outlining a proposal for a due process analysis of private delegations of public power).

and because they control resources, they have the power to influence through the grant or withholding of those resources.<sup>165</sup> Of course, the public/private distinction is not infallible, but the term is useful in denoting a category of organizations that exercise power in a specified dominion. In other words, the concept of private government recognizes that some institutions are uniquely autonomous and hold exclusive jurisdiction—i.e., sovereign rights of private ordering—over certain affairs within that institution.<sup>166</sup>

The term “private government” and the related right of private ordering is an apt descriptor of much of American law and society. For example, consider for-profit corporations, political advocacy groups, charitable trusts, trade unions, and households and families.<sup>167</sup> These organizations are “governments” in the sense that they govern some part of society, and within their private sphere, their “rule” is, at least to some degree, sovereign.<sup>168</sup> Moreover, they can recourse to the public government—local, state, or federal—to enforce their regulations, orders, and decisions.<sup>169</sup> Indeed, a significant amount of U.S. law has been fought about the scope of the right of private ordering of these private governments, and where the boundary of the private sphere ends and the sphere of the state begins.<sup>170</sup>

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<sup>165</sup> Hills, *supra* note 164, at 148–50.

<sup>166</sup> *See id.* at 149–52. Note that in his characterization of the rights of religious institutions, Paul Horwitz uses the term “sphere sovereignty.” Horwitz, *supra* note 154, at 83. Horwitz derives this term from a unique and very specific reference, the Calvinist theorist Abraham Kuyper. *Id.* Despite the narrow derivation, sphere sovereignty is terminology that could also be apt in this context, as it is used to describe an institution that has a specified sphere of authority to the exclusion of all other entities. *Id.* at 94.

<sup>167</sup> Roderick Hills notes that households and families are more controversial concepts in this context because, for example, what counts as a family is often contested. Hills, *supra* note 164, at 149; *see, e.g.*, Moore v. City of E. Cleveland, Oh., 431 U.S. 494, 504–06 (1977) (indicating that the idea of family is expansive and may include an array of different persons and relations that are “equally deserving of constitutional recognition”); Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1394–97 (1993) (describing the decision-making, efficiency, and resource allocation advantages of multimember households); Lee E. Teitelbaum, *Family History and Family Law*, 1985 WISC. L. REV. 1135, 1175 (noting that U.S. Supreme Court decisions protecting family autonomy and rights of private ordering “allocate[] . . . power to one family member or reserve[] it to the state,” rather than allocate power to the familial entity as such).

<sup>168</sup> Hills, *supra* note 164, at 149–50.

<sup>169</sup> *Id.* at 150.

<sup>170</sup> *See, e.g.*, Reno v. Condon, 528 U.S. 141, 151 (2000) (holding that a statute limiting the state’s ability to release drivers’ information without their consent is constitutional); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 530 (1985) (addressing whether the Commerce Clause empowers Congress to enforce fair labor practices in areas of traditional government functions). The law has similarly struggled with the issue of distinguishing between the proper spheres of federal and state governance. *See, e.g.*, Printz v. United States, 521 U.S. 898, 902 (1997) (addressing the constitutionality of the Brady Act, which required state and local law enforcement officers to enforce a federal instant background check system for firearms purchasers); New York v. United States, 505 U.S. 144, 149 (1992) (considering the constitutionality of a federal radioactive waste disposal policy imposed on state regulators).

The public/private distinction and the constitutional recognition of family sovereignty in certain spheres—for example the right to educate one’s child as one chooses<sup>171</sup>—is just one example of the battle over the beginning and end of the private government and force of private ordering, and the beginning of the public sphere of sovereignty. Although all of the institutional settings have limits within their sphere of activity—e.g., the federal government and state governments cannot intrude on individual liberties contained in the Bill of Rights, and parents must meet minimum standards for the care and education of their children—each institution is recognized as uniquely “jurisgenerative” within its own sphere, a distinct “paedic *nomoi*” that functions autonomously “within the broader imperial *nomos*.”<sup>172</sup> Undergirding all of these constitutional choices about dominion in specific institutional settings is the fundamental principle that the people, as sovereigns, made these delineating institutional choices, and choose to continue to value them.<sup>173</sup>

A similar choice was arguably made with respect to religious institutions. For the Court, the people, both past—through the text and history of the First Amendment—and present—through the perpetuation of this special constitutional solicitude—have chosen to encapsulate special authority over matters of faith, doctrine, and whatever else, within religious institutions.<sup>174</sup> Although it is possible to resist the marking of religious institutions as worthy of special constitutional value over and above other associational forms (e.g., the Boy Scouts) as a normative claim, as a descriptive matter it seems difficult to resist this recognition of religious institutions as unique private governments.<sup>175</sup>

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<sup>171</sup> See, e.g., *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–36 (1925).

<sup>172</sup> See *Reno v. Flores*, 507 U.S. 292, 304–05 (1993) (prescribing minimum standards for parents); *Duncan v. Louisiana*, 391 U.S. 145, 147–48 (1968) (circumscribing the power of the state); Robert Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 12–14 (1983). A “*nomos*” refers to the normative universe in which we live. *Id.* at 4. Within that universe, law is created through cultural mediums and various institutions contribute to law creation. See *id.* at 11. The phrase “paedic *nomoi*” refers to a paradigm in which law is created through “(1) a common body of precept and narrative, (2) a common and personal way of being educated into this corpus, and (3) a sense of direction or growth that is constituted as the individual and his community work out the implications of their law.” *Id.* at 12–13. An “imperial *nomos*,” on the other hand, is a model in which “norms are universal and enforced by institutions.” *Id.* at 13.

<sup>173</sup> See Mark DeWolfe Howe, *The Supreme Court, 1952 Term—Foreword: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91, 91 (1953) (“[G]overnment must recognize that it is not the sole possessor of sovereignty, and that private groups within the community are entitled to lead their own free lives and exercise within the area of their competence an authority so effective as to justify labeling it a sovereign authority.”).

<sup>174</sup> See Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1274 (2005) (stating that “a certain number of existing social institutions . . . serve functions that the First Amendment deems especially important”).

<sup>175</sup> See Garnett, *Religion and Group Rights*, *supra* note 5, at 531 (commenting on *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000)).

Segregating religious institutions into sovereign constitutional spheres has strong historic roots.<sup>176</sup> Prior to the disestablishment of religion in America, institutional religious belief and action was deemed essential to the proper functioning of the government by supporting the public morality and civic virtue thought essential to the survival of civil authority.<sup>177</sup> Likewise, it was thought that state support for, and involvement in religion was necessary for the flourishing of religion.<sup>178</sup>

Following the disestablishment of religion, the state and religious institutions underwent a "formal decoupling" whereby civil authorities had no further role in religious institutional governance and matters of faith, and religious institutions were to have no formal place in civil affairs.<sup>179</sup> The restraint on both government and religion in the involvement in the affairs of the other was expected to yield benefits to both the state and religious institutions.<sup>180</sup> Deregulating religious institutions promised domestic peace over matters of religious doctrine and governance.<sup>181</sup> Although disputes over theology would inevitably still arise, their resolution was no longer linked to taxes, voting rights, office-holding capacity, or other secular matters. In addition, the removal of state control over religious matters meant that religious institutions would be autonomous entities, with the liberty to rise and fall on their own merits, based on the appeal of the institutional faith and message.<sup>182</sup> This removal of secular control from religious institutions was a welcome departure from the standard tendency of the state to co-opt power rather than relinquish it.<sup>183</sup> There was a new awareness that government involvement with religious institutions could have a detrimental effect on both the religious character and mission of that institution.<sup>184</sup>

Undergirding the disestablishment of religion, then, is an acknowledgment of the vitality of religion to the human condition, and of the need for institutional autonomy for religious liberty—and consequently the secular state—to flourish. Whether this vision is true today is certainly open to de-

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<sup>176</sup> See generally Esbeck, *supra* note 128 (tracing the relationship between the church and the state throughout Western history).

<sup>177</sup> See *id.* at 1412 ("Puritanism's more personal and emotional Protestantism was intertwined with sympathy for greater popular governance and Parliamentary rule.").

<sup>178</sup> See *id.*

<sup>179</sup> *Id.* at 1393, 1396.

<sup>180</sup> *Id.* at 1396–98.

<sup>181</sup> JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 767–68 (1941); Esbeck, *supra* note 128, at 1397.

<sup>182</sup> Esbeck, *supra* note 128, at 1397–98 ("[C]hurches were free to fail, as well as succeed, in the marketplace for souls.").

<sup>183</sup> *Id.* at 1397.

<sup>184</sup> *Id.* at 1398; see Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 351 (1984).

bate.<sup>185</sup> What remains constant, however, is the Court's recognition that at least to some degree, in the words of James Madison, "Religion is wholly exempt from [the] cognizance" of the "institution[s] of Civil Society."<sup>186</sup>

Looking to Madison for guidance, the Court in *Hosanna-Tabor* emphasized Madison's veto of a bill that would have incorporated the Protestant Episcopal Church, where Madison espoused "the essential distinction between civil and religious functions."<sup>187</sup> For the Court, interference with decisions of a religious institution that "affect the faith and mission" of that institution is a violation of that institution's religious liberty.<sup>188</sup> Attempting to prescribe regulations that affected the internal workings of *Hosanna-Tabor* infringed on the sovereignty of that institution to make certain decisions without the oversight and possible infringement of the state.<sup>189</sup> This fundamental recognition of the right of religious institutions to absolute protection over their internal affairs, without any possibility of state infringement on that institutional sphere, not only limits the reach of secular authorities, but completely forecloses them. This is the epitome of private government and the right of private ordering, and concrete recognition of the constitutional enshrinement of the dualism of religious institutions and state.

Examining the other decisions that involve deference to religious institutional sovereignty, it is possible to see this theme of private government and the right of private ordering permeating the Court's jurisprudence.<sup>190</sup> In *Watson v. Jones*, for example, the Court noted the "unquestioned" right of religious institutions to decide "controverted questions of faith" as well as matters of "ecclesiastical government."<sup>191</sup> Speaking to the jurisdiction of the Court to decide on the question of the ownership of the church property at issue, the Court specified that it is a core right of religious institutions to have final decision-making authority on questions of faith and internal governance.<sup>192</sup> For the *Wat-*

<sup>185</sup> Schragger & Schwartzman, *supra* note 5, at 931; see ROBERT D. PUTNAM & DAVID E. CAMPBELL, *AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US* 443–92 (2010); PAUL J. WEITHMAN, *RELIGION AND THE OBLIGATIONS OF CITIZENSHIP* 36–66 (2002); John A. Coleman, *Public Religion and Religion in Public*, 36 *WAKE FOREST L. REV.* 279, 282–93 (2001).

<sup>186</sup> See *Everson v. Bd. of Educ.*, 330 U.S. 1, 64 app. (1947) (Rutledge, J., dissenting) (quoting JAMES MADISON, *MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS* para. 1 (1785)).

<sup>187</sup> 132 S. Ct. at 703–04 (quoting 22 *ANNALS OF CONG.* 982–83 (1811) (veto statement of President James Madison)); see Wasserman, *supra* note 4, at 297.

<sup>188</sup> *Hosanna-Tabor*, 132 S. Ct. at 707.

<sup>189</sup> See *id.* at 706.

<sup>190</sup> See *infra* notes 191–265 and accompanying text. Note that unlike *Hosanna-Tabor*, these other decisions do not contain a statement of an absolute constitutional right for religious associations within the context of the subject area considered. See *supra* notes 26–46 and accompanying text.

<sup>191</sup> 80 U.S. (13 Wall.) 679, 728–29 (1871).

<sup>192</sup> *Id.* at 729 ("[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



son Court, each religious institution has its own body of constitutional and ecclesiastical law that relate to matters of faith and governance over which secular authorities have no jurisdiction.<sup>193</sup>

The Court made similar statements in *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, again implicitly enshrining the idea of religious sovereignty.<sup>194</sup> As noted above, the *Kedroff* Court stated that religious institutions have a constitutional right to decide matters of church governance, faith, and doctrine without risk of state interference.<sup>195</sup> In fact, across the Court's decisions in all subject-matter categories involving churches is recognition that the Religion Clauses protect a sphere of institutional authority for religious institutions—a sphere within which the secular courts and political branches have no adjudicatory and/or prescriptive authority.<sup>196</sup>

A core value of the Court's religious institutionalism, then, is the protection of group rights as a value in and of itself. The Court seems to perceive something special about religious groups as groups, operating independently from the government. In many respects, the remaining values that animate the Court's religious institutionalism jurisprudence are interrelated with this foundational valuing of group rights. That is, the remaining values in many respects facilitate the valuing of groups qua groups.

## 2. Promotion of Individual Freedom

Related to the protection of religious group rights is the Court's acceptance that religious institutions promote or enhance the individual right of conscience and belief.<sup>197</sup> In other words, religious institutions facilitate religious individuals' exercise of their First Amendment liberties. In this way, religious institutions act as intermediaries and hold rights only for the purpose of promoting individual liberties and ensuring the protection of individual interests.<sup>198</sup>

The Court has long recognized that individual conscience and the right of individuals to choose between religions—or no religion—are values enshrined

all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.”).

<sup>193</sup> *Id.*

<sup>194</sup> See 344 U.S. 94, 116 (1952); *supra* notes 77–84 and accompanying text (discussing the Court's analyses regarding congregational churches and hierarchical churches).

<sup>195</sup> 344 U.S. at 116.

<sup>196</sup> See Wasserman, *supra* note 4, at 192 (“The church autonomy doctrine's limitations on state authority ensure a structural balance separating church and state as competing sovereigns within American society, each with irreducible authority in its own ‘sphere.’”); *supra* notes 68–128 and accompanying text (providing an overview of religious institutionalism cases in the Supreme Court).

<sup>197</sup> See, e.g., Bruce Bagni, *supra* note 48, at 1540; Laycock, *Towards a General Theory*, *supra* note 5, at 1373.

<sup>198</sup> Schragger & Schwartzman, *supra* note 5, at 925–26.

in the First Amendment.<sup>199</sup> This voluntarist approach to individual religious conscience has deep historic roots, drawing support from James Madison.<sup>200</sup> On this view, the government may not impose a preferred way of religious life on the citizenry. Instead, people are free to choose their own ends for themselves and select the religious faith that best accords with their individual view of the good life.<sup>201</sup>

This freedom of choice over individual belief appeared in its modern form in the 1940 Supreme Court case *Cantwell v. Connecticut*,<sup>202</sup> the case that incorporated the Free Exercise Clause of the First Amendment.<sup>203</sup> There the Court said that “[f]reedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law.”<sup>204</sup> Similar statements about choices of faith according to the dictates of conscience appear in the 1963 case *Abington School District v. Schempp*, where the Court recognized “the right of every person to freely choose his own course . . . free of any compulsion from the state.”<sup>205</sup> More recently, in the 1985 Supreme Court decision in *Wallace v. Jaffree*, Justice John Paul Stevens stated that a fundamental, and unquestioned, purpose of the Religion Clauses is the value of choice as to religious faith and conscience.<sup>206</sup> The principle of free religious choice is, of course, a fundamental principle of liberal theory, premised on both the Lockean notion of natural rights and the Kantian premise of autonomy.<sup>207</sup> Above all things, liberalism values human autonomy.<sup>208</sup>

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<sup>199</sup> *Wallace v. Jaffree*, 472 U.S. 38, 52–53 (1985); *Torcaso v. Watkins*, 367 U.S. 488, 495 n.10 (1961); *U.S. v. Ballard*, 322 U.S. 78, 86 (1944).

<sup>200</sup> See MADISON, *supra* note 186, at para. 1 (emphasizing the right to embrace and observe a religion of our own choosing, and an equal right not to follow or practice a religion).

<sup>201</sup> See Michael J. Sandel, *Religious Liberty—Freedom of Conscience or Freedom of Choice?* 1989 UTAH L. REV. 597, 598.

<sup>202</sup> 310 U.S. 296, 303–04 (1940).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 303.

<sup>205</sup> 374 U.S. 203, 222 (1963).

<sup>206</sup> 472 U.S. at 52–53. Justice Stevens said:

[T]he individual’s freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. . . . [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.

*Id.*

<sup>207</sup> See John Locke, *A Letter Concerning Toleration* (1689), reprinted in POLITICAL WRITINGS 390–435 (David Wootton ed., 1993) (explaining Locke’s views on religion and religious toleration in the liberal state); L. Scott Smith, “*Religion Neutral*” *Jurisprudence: An Examination of Its Meaning and End*, 13 WM. & MARY BILL RTS. J. 841, 852–56 (2005) (exploring Kant’s views on religion, religious tolerance, autonomy, and governance). See generally Andrew Seth, *Epistemology in Locke and*

Religious institutions fit into this vision of freedom of belief once we move from a thin conception of religious choice—individual choice and religious belief—to a thicker vision, that includes at its core recognition and understanding that exercise of conscience is typically a communal endeavor.<sup>209</sup> One of the most powerful acknowledgements of the communal aspect of religious conscience is in the brief filed for the Amish in *Wisconsin v. Yoder*.<sup>210</sup> The brief states:

There exists no Amish religion apart from the concept of the Amish community. A person cannot take up the Amish religion and practice it individually. The community subsists spiritually upon the bounds of a common, lived faith, sustained by common traditions and ideas which have been revered by the whole community from generation to generation.<sup>211</sup>

In other words, religious belief and the communal form in or through which religious expression occurs are inextricably linked and are ultimately inseparable.<sup>212</sup>

Law and religion scholars have recognized this intimate connection between individual religious liberty and religious institutions. One scholar notes that individuals exercise and express their religious beliefs within groups comprised of persons with similar views.<sup>213</sup> Another scholar acknowledges that religious institutions play a fundamental role in defining and shaping the individual conscience.<sup>214</sup> For yet another commentator, religious institutions are “ongoing and independent entities that influence in their own right how indi-

*Kant*, 2 PHIL. REV. 167 (1893) (discussing the concept of knowledge as explained by Locke and Kant) <http://www.jstor.org/stable/2175664>, archived at <http://perma.cc/HHH4-LKBQ>.

<sup>208</sup> See generally JOHN RAWLS, *A THEORY OF JUSTICE* (1971) (outlining Rawls’s “justice as fairness” theory, which elevates the value of human autonomy in a liberal society); DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION* (1986) (proposing a theory on the primacy of religious toleration as an outgrowth of the liberal theory of individual autonomy and choice); Gail Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 508 (1978) (arguing that individual choice in matters of religion is the fundamental value underlying the Religion Clauses).

<sup>209</sup> See Kathleen A. Brady, *Religious Group Autonomy: Further Reflections About What Is at Stake*, 22 J.L. & REL. 153, 155 (2006); Brady, *supra* note 116, at 1675 (stating that religious groups are connected to individual religious convictions because “Individuals express and exercise their beliefs in religious communities, and religious organizations also play an essential role in shaping the beliefs that individuals hold”).

<sup>210</sup> See Brief for Respondent at 21, *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (No. 70-110), 1971 WL 133706.

<sup>211</sup> *Id.*

<sup>212</sup> See EMILE DURKHEIM, *THE ELEMENTARY FORMS OF RELIGIOUS LIFE* 59 (1965) (“In all of history, we do not find a single religion without a church.”).

<sup>213</sup> Esbeck, *supra* note 184, at 369–70.

<sup>214</sup> John H. Garvey, *Churches and the Free Exercise of Religion*, 4 NOTRE DAME J.L. ETHICS & PUB. POL’Y 567, 580–81 (1990).

viduals think, express themselves, and act.”<sup>215</sup> For these reasons, although religious institutions can in some ways be characterized as the aggregate of the individual member-believers, religious institutions are much more than a pure individualized aggregation of religious individuals.<sup>216</sup> Instead, religious institutions are prior to and independent of the individual members, more than just vehicles for the expression of individual religious beliefs.<sup>217</sup> They “represent[] an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals.”<sup>218</sup>

It is the collective action of the individuals that create traditions that in turn become entrenched and ongoing.<sup>219</sup> Religious institutions become places where religious conscience is not only practiced, but formed and preserved.<sup>220</sup> It is the institutions, represented by member-officials, that engage with the individual members on matters of faith, doctrine, worship, and other issues.<sup>221</sup> The principle of individual choice as to matters of conscience and belief, then, also includes the right to form collective associations through which those beliefs can be supported, nourished, questioned, and practiced. In other words, religious institutions are valued as independent constitutional actors because of the fact that they are belief-enforcing.<sup>222</sup>

The question remains: How does the collection of individual beliefs into one institutional form generate an independent institutional right that is worthy of constitutional protection separate from the individual generative right? Even if we accept that religious institutions function as belief-enforcing mediums, how does that premise translate into institutional liberties independent from the original rights holder? The answer lies in the power of collective belief.

When individuals form into a group to exercise their conscience rights there is general agreement on the fundamentals of the collective form that are

<sup>215</sup> Frederick M. Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 107.

<sup>216</sup> See *supra* notes 209–215 and accompanying text. On the theory of aggregated rights in the context of religious institutions, see MEIR DANN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS 55–119 (1986); Lupu, *supra* note 150, at 424–26. On the theory of institutional aggregated rights more generally, see GRAHAM ALLISON & PHILIP ZELIKOW, ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS 72–76 (1971) (discussing aggregate rights in the context of corporations); JAMES Q. WILSON, POLITICAL ORGANIZATIONS *passim* (1973) (discussing aggregate rights in the context of political parties, labor unions, business associations, and civil rights groups).

<sup>217</sup> See *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring); Brady, *supra* note 116, at 1669; Gedicks, *supra* note 215, at 107.

<sup>218</sup> *Amos*, 483 U.S. at 342 (Brennan, J., concurring).

<sup>219</sup> Gedicks, *supra* note 215, at 107.

<sup>220</sup> Brady, *supra* note 116, at 1675.

<sup>221</sup> See Laura S. Underkuffler, *Thoughts on Smith and Religious-Group Autonomy*, 2004 BYUL REV. 1773, 1785 (“It is through living beliefs in a religious community that beliefs are exercised, refined, and reformed.”).

<sup>222</sup> See Brady, *supra* note 116, at 1671–72.

necessary to protect their individual conscience rights. The institution, then, becomes more than an aggregate of individual beliefs and instead morphs into an independent entity that protects more than the sum of its parts. The institution protects the values of the collective expression of faith. In this way, the institution is more than the representative of the individual, and instead it is a necessary element to the exercise of conscience.<sup>223</sup> Once we accept the essential nature of expression and action of belief through the institutional form, we can see that the Religion Clauses presupposes a constitutionally protected community that itself generates religious norms.<sup>224</sup>

Underlying *Watson* and its progeny is the Court's implicit acceptance that religious institutions are independently valuable and worthy of special First Amendment protection.<sup>225</sup> The independent belief-enforcing value of religious institutions is arguably one value undergirding the Court's decisions that recognize a right of institutional private ordering.<sup>226</sup> From *Watson* through *Hosanna-Tabor*, it is possible to see the Court's recognition of the value of religious institutions as unique groups that enable religious self-definition, belief, and choice. In *Watson*, for example, the Court held that "[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."<sup>227</sup> Consequently, in order to ensure individual fulfillment of religious belief, individuals had the right to form associations in which to practice their

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<sup>223</sup> Colombo, *supra* note 48, at 53–54; Paul C. Fricke, *The Associational Thesis: A New Logic for Free Exercise Jurisprudence*, 53 HOW. L.J. 133, 161 (2009) (discussing how Locke's Letter demonstrates his belief that "religion starts and ends with a community of believers; it is thoroughly associational"). Many religion scholars have sided with Locke's associational view of religion. *Id.*

<sup>224</sup> Cover, *supra* note 172, at 32 n.94 ("The religion clauses . . . [are] unique in the clarity with which they presuppose a collective, norm-generating community whose status as a community and whose relationship with the individuals subject to its norms are entitled to constitutional recognition and protection."). *But see* Lupu, *supra* note 150, at 422 ("[I]f free exercise exemption rights are thus rights of autonomy, organizations may not possess them."); Schragger & Schwartzman, *supra* note 5, at 920 ("[I]nstitutions do not, in themselves, give rise to any distinctive set of rights, autonomy, or sovereignty, and that what might be called institutional or church autonomy is ultimately derived from individual rights of conscience.").

<sup>225</sup> *See, e.g., Kedroff*, 344 U.S. at 116 (upholding institutional rights and stating that the *Watson* decision "radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine").

<sup>226</sup> *See supra* notes 197–225 and accompanying text; *infra* notes 227–235 and accompanying text. The idea of private choice in religious decisions permeates the Court's modern jurisprudence. For example, in assessing whether grants of tangible aid to religious groups violates the Establishment Clause, the Court has held that private choice is the governing principle. *See, e.g., Mitchell v. Helms*, 530 U.S. 793, 816, 835 (2000) (holding that in the context of tangible aid, private choice is the standard); *Agostini v. Felton*, 521 U.S. 203, 234–35 (1997) (same).

<sup>227</sup> 80 U.S. (13 Wall.) at 728.

religious beliefs.<sup>228</sup> These religious institutions were formed, the Court said, to facilitate the dissemination and expression of religious doctrine.<sup>229</sup>

The sovereignty of religious institutions, then, becomes a function of individual faith that institutions foster, nurture, and protect. Religious institutional autonomy, one scholar notes, is a corollary of voluntariness, where autonomy allows for religious groups to voluntarily organize themselves around a religious mission without government interference.<sup>230</sup> Once we accept that the institutions are independent protectors and facilitators of religious conscience and freedom of choice as to religious belief, then it is possible to better understand the Court's decisions denying secular authorities prescriptive and adjudicative power over religious institutions where matters that could impact individual belief are concerned.

For the Court, the individual choice to opt into a religious institution carries with it the acceptance that the institution acts in the interests of the whole. The Court in *Watson* stated that individuals who voluntarily opt into a religious institution also impliedly consent to the governance of that institution.<sup>231</sup> An institution, in other words, is entitled to expect institutional loyalty from voluntary members.<sup>232</sup> As part of the choice to express individual conscience through the medium of a group, the individual has accepted the collective expression of faith that the institution represents and is obliged to protect. Individuals can opt into an institution, they can engage with the institution on matters of faith, or they can opt out of the institution,<sup>233</sup> but an individual cannot rely on secular authorities to challenge the collective expression of conscience manifested by a religious institution.<sup>234</sup> Secular involvement would be a clear

<sup>228</sup> See *id.* at 728–29.

<sup>229</sup> *Id.* at 729.

<sup>230</sup> See Thomas C. Berg, *The Voluntary Principle and Church Autonomy, Then and Now*, 2004 BYU L. REV. 1593, 1606 (“[T]he autonomy of religious organizations is a corollary of the voluntary principle: autonomy allows religious communities to organize themselves and define their missions according to their own voluntary choices, without government interference.”).

<sup>231</sup> 80 U.S. (13 Wall.) at 729.

<sup>232</sup> Chopko & Parker, *supra* note 152, at 283.

<sup>233</sup> On whether an individual's right of exit from an institution is sufficient to legitimate private ordering, see, for example, JOHN RAWLS, *POLITICAL LIBERALISM* 221–22 (1995); Hills, *supra* note 164, at 148–53; Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 VA. L. REV. 1053, 1140–44 (1998) (attempting to derive a theory of private government from Rawls' political liberalism and theory of justice).

<sup>234</sup> *Barkley v. Hayes*, 208 F. 319, 323 (W.D. Mo. 1913), *aff'd sub nom. Shepard v. Barkley*, 247 U.S. 1 (1918); see also Laycock, *Towards a General Theory*, *supra* note 5, at 1403 (“If one is ill-treated by his church, he can leave it; if he feels bound by faith or conscience to stay in, the government can offer him no remedy.”). As the U.S. District Court for the Western District of Missouri noted in the 1913 case *Barkley v. Hayes*:

He need associate himself with no religious organization if he does not wish to do so, and he need remain identified with one no longer than he may desire; but when he does

violation of the fundamental premise of freedom of religious belief enshrined in the Religion Clauses. In this way, the sovereignty accorded religious institutions is both derivative of and independent of individual freedom of conscience.<sup>235</sup>

### 3. Provision of Desirable Structures

The third and final value animating the Court's religious institutionalism jurisprudence is an understanding that religious institutions provide societal structures that are democratically desirable. By disavowing state power over certain religious-based topics, the Court is suggesting that religious institutions are relatively more competent than secular bodies to perform two democratic functions: (1) facilitation of social engagement, and (2) protection of the state from religious involvement with secular offices.

Although the belief-enforcing value outlined above derived its legitimacy from an independent individual right, the concept of religious institutions as valuable democratic structures is an institutional right, separate and independent of any individual right.<sup>236</sup> That is, this institution-based right does not rely on any conception of religious institutions as conscience-enhancing or belief-enforcing for individuals. Instead, an institution-based conception of the private ordering rights of religious institutions holds that protection for religious institutions is based on the democratic value of preserving religious institutions.<sup>237</sup> This view gives sovereignty to religious institutions based on their "likelihood of making decisions appropriate to the social sphere in which they operate," thereby empowering them "to enforce a particular conception of the good against their members."<sup>238</sup> What remains is to explore the two assumptions that religious institutions both facilitate social engagement and protect the state from religious involvement.

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unite with a church, and becomes a member of that ecclesiastical body, he voluntarily surrenders his individual freedom to that extent. So long as he desires to avail himself of such a relationship, and to enjoy the privileges and benefits flowing from that association, he must conform to the laws by which it is governed.

208 F. at 323.

<sup>235</sup> See generally Smith, *supra* note 5 (tracing the history of the Religion Clauses as protecting institutional religion, through which individuals may secure freedom of conscience). But see Schragger & Schwartzman, *supra* note 5, at 920 (indicating that the First Amendment focuses on individual freedom of conscience, not institutions, because institutions themselves do not give rise to "any distinctive set of rights").

<sup>236</sup> See Hills, *supra* note 164, at 182–84 (arguing that institutions are important in that they provide the structure and space for individuals to exercise power, advancing individual autonomy).

<sup>237</sup> *Id.* at 184.

<sup>238</sup> *Id.* at 189.

### a. *Facilitation of Social Engagement*

Early views of the appropriate relationship between church and state assumed that unity between the two spheres was essential to the survival of both.<sup>239</sup> Religion was thought to have a salutary effect on civic virtue and public morality that would facilitate democratic engagement.<sup>240</sup> The early colonies subscribed to the European model of a unified church-state, although in more mild and abridged forms than their European counterparts.<sup>241</sup> Over time, although the formal relationship between church and state was one of disestablishment, the new nation continued to see religion as essential to the success of the polity. For example, George Washington famously stated that “Religion and Morality are the essential pillars of Civil society,”<sup>242</sup> and John Adams noted that “We have no government armed with power capable of contending with human passions unbridled by morality and religion.”<sup>243</sup>

The crucial difference between the modern, post-First Amendment understanding of the importance of religion for good citizenry and the European model is that under the latter it was assumed that material and symbolic government support was essential to perpetuate religiosity. The modern view rejects this approach, instead embracing a principle of voluntarism. Under the early conception of voluntarism, it became the task of religious institutions to ensure a virtuous citizenry, without the support or involvement of the state. The understanding was that a free market approach to religion would compel churches to higher levels of virtuosity in the quest to persuade citizens—through the appeal of their doctrine and message—that their denomination should be preferred.<sup>244</sup> In turn, it was thought that these voluntary and invigorated institutions would “better perform their role . . . in seeing to the teaching of morals and civic virtue.”<sup>245</sup>

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<sup>239</sup> Esbeck, *supra* note 128, at 1395; see HAROLD J. GRIMM, *THE REFORMATION ERA: 1500–1650*, at 29–30 (2d ed. 1973).

<sup>240</sup> Esbeck, *supra* note 128, at 1395.

<sup>241</sup> *Id.*

<sup>242</sup> John Witte, Jr., *The Essential Rights and Liberties of Religion*, 71 NOTRE DAME L. REV. 371, 386 (1996).

<sup>243</sup> *Id.*

<sup>244</sup> See Zoë Robinson, *Rationalizing Religious Exemptions: A Legislative Process Theory of Statutory Exemptions for Religion*, 20 WM. & MARY BILL RTS. J. 133, 134–37 (2011). There is a growing literature on the notion of a “religious market.” See generally JOHN ANDERSON, *RELIGIOUS LIBERTY IN TRANSITIONAL SOCIETIES: THE POLITICS OF RELIGION* (2003); ROGER FINKE & RODNEY STARK, *THE CHURCHING OF AMERICA: WINNERS AND LOSERS IN OUR RELIGIOUS ECONOMY* (2005); ANTHONY GILL, *THE POLITICAL ORIGINS OF RELIGIOUS LIBERTY* (2008); CHARLES HANSON, *NECESSARY VIRTUE: THE PRAGMATIC ORIGINS OF RELIGIOUS LIBERTY IN NEW ENGLAND* (1998); RATIONAL CHOICE THEORY AND RELIGION (Lawrence A. Young ed., 1997); Roger Finke, *Religious Deregulation: Origins and Consequences*, 32 J. CHURCH & STATE 609 (1990); Roger Finke & Laurence R. Iannaccone, *Supply-Side Explanations for Religious Change*, 527 ANNALS AM. ACAD. POL. & SOC. SCI. 27 (1993).

<sup>245</sup> Esbeck, *supra* note 128, at 1397.



This early understanding of the role of religious institutions in our constitutional democracy signals an understanding of these institutions as protective of the collective interest of a certain political culture with a specific moral character.<sup>246</sup> Put another way, around the time of the framing of the First Amendment, religious institutions were understood to promote collective goods, for instance civic virtue and morality.<sup>247</sup> Poised between the state and the individual, religious institutions were perceived to have a form of social utility that acted to generate norms and behaviors that facilitated and perpetuated the continuation of the democratic polity.<sup>248</sup>

It is true that other associational forms equally act as socializing institutions that mediate between the state and the individual. The Boy Scouts, for example, is an expressive association with the goal of creating good citizens and leaders for our polity.<sup>249</sup> But religious institutions are distinctive for two reasons. First, religion is especially accounted for in the First Amendment. Whereas freedom of association is implied from a number of First Amendment sources, the place of religious institutions rests securely in the text of the Religion Clauses.<sup>250</sup> Second, as a matter of history, religious institutions were the primary locus for socializing activities at the time of the framing of the Constitution.<sup>251</sup> So long as originalist interpretation guides the Supreme Court's understanding of the Religion Clauses, religious institutions will continue to be seen as critically different from other associational forms.<sup>252</sup>

The valuing of religious institutions as socially desirable is another driver of the Court's new religious institutionalism and another value undergirding the private ordering rights of religious institutions. At least as a matter of historic intent, it was understood that enabling religious institutions to facilitate social engagement required intra-institutional space to create, cultivate, and

<sup>246</sup> See *id.*; Hills, *supra* note 164, at 176.

<sup>247</sup> JOSEPH RAZ, RIGHTS AND INDIVIDUAL WELL-BEING IN ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 54 (1994); Esbeck, *supra* note 184, at 369–70. On collective rights, see Hills, *supra* note 164, at 175–96 (describing a theory of institutional rights); Richards H. Piles, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 LEGAL STUD. 725, 760–63 (1998).

<sup>248</sup> Cf. PETER L. BERGER & RICHARD J. NEUHAUS, TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY 1–8 (1977) (discussing intermediary institutions as societal agents that are both value-generating and value-enhancing); ROBERT PUTNAM, BOWLING ALONE 66 (2001) (stating how religious institutions act as “incubator[s] for civil skills, civic norms, community interests, and civil recruitment”).

<sup>249</sup> See Garnett, *Religion and Group Rights*, *supra* note 5, at 531.

<sup>250</sup> Esbeck, *supra* note 184, at 371.

<sup>251</sup> See PUTNAM, *supra* note 248, at 66; Esbeck, *supra* note 184, at 367.

<sup>252</sup> See Robert P. George, *Protecting Religious Liberty in the Next Millennium: Should We Amend the Religion Clauses of the Constitution?*, 32 LOY. L.A. L. REV. 27, 29 (1998). There is a rich debate as to the normative assumption about the value of religious associations over other associational forms. This Article does not address this debate. *But see* Schragger & Schwartzman, *supra* note 5, at 930, 933 (addressing the debate).

propagate their religious views, as well as govern their members in a way that was consistent with that faith. Religious institutions alone are capable of defining what the conception of the good life is in the eyes of their own denominational teachings. If the goal of religious private governments was at least in part to entrust the inculcation of civic morality to religious institutions, then it seems inimical that the state cannot dictate the work of those institutions in that respect.

Historically, this important societal function involved at least the teachings and dissemination of the religious institution about their denominational understanding of ultimate truth, as well as related principles of worship.<sup>253</sup> These activities are the central feature of religious institutions, and sovereign control over them ensures that the institutions could perform the task of guiding morality in the image of the doctrine that they professed. If the secular authorities have the capacity to become involved with religious functions in an attempt to skew the morals and virtues of the citizenry, religious institutions become compromised in their mission to act in accordance with the directives of their higher authority. In other words, if religious institutions are to be the locus of the inculcation of societal and civic virtue, any influence of the state in that sphere would tend to corrupt the very purpose for the independent and sovereign sphere. At the extreme, as the religious institution is corrupted, so too is the citizenry, and the fabric of the civil state unravels. Political coloring of religion tends to move the state to the very sectarian strife that the Religion Clauses were designed to prevent.

#### b. *Protection of State from Religious Involvement*

Religious institutions also further the intimately related democratic value of protecting the state from capture by one or more dominant religious groups.<sup>254</sup> Symbiotic with the role of religious institutions as independent procurers of public virtue was the role of religious institutions as protectors of the state from religious involvement. Not only did the religious voluntarism ensure that religious institutions worked hard to attract the citizenry to their group, but it also ensured that religion was segregated from secular offices.<sup>255</sup> By carving out autonomous religious space, the understanding was that civil authorities

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<sup>253</sup> Esbeck, *supra* note 156, at 376; see BERGER & NEUHAUS, *supra* note 248, at 174–75.

<sup>254</sup> See *Hosanna-Tabor*, 132 S. Ct. at 703 (emphasizing the Religion Clauses' purpose as prohibiting a federal religion); *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); BERGER & NEUHAUS, *supra* note 248, at 29 (describing "no establishment of religion" as meaning that the state does not favor any religious institution over others); Robinson, *supra* note 244, at 144.

<sup>255</sup> See Esbeck, *supra* note 128, at 1397; Ira C. Lupu & Robert W. Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 53 (2002); Robinson, *supra* note 244, at 144.

would also be protected from the disruptive influence of religion in government office.<sup>256</sup>

The idea that religion operates outside the realm of politics can be traced back to James Madison's 1776 Virginia Declaration of Rights and his 1785 Memorial and Remonstrance Against Religious Assessments.<sup>257</sup> In the Memorial, Madison stated that a just government "will be best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and property."<sup>258</sup> This is not to say that religion was to have no role in the public square. On the contrary, as noted above, religion was thought to be crucial to a virtuous and moral civil society.<sup>259</sup> Instead, the value is one that sees religion as a matter outside both the jurisdiction and the competence of civil government.<sup>260</sup> The goal was to free the state and politics from religion, so as to free the state from the potential for abuse of its offices by religious groups seeking to gain an edge in the religious marketplace.<sup>261</sup>

For these reasons, the recognition of sovereign rights of religious institutions over inherently religious issues was seen to be democratic-enforcing. Perhaps because of the temptation of legislators to appeal to religion as a means of garnering votes to retain office, it was perceived that religious institutions themselves were structurally better suited to the role of protecting the state from both religion and itself.<sup>262</sup>

As democratic-enhancing entities, religious institutions were understood to have control over matters of faith.<sup>263</sup> This understanding partially explains

<sup>256</sup> See Esbeck, *supra* note 128, at 1396–97.

<sup>257</sup> See *Va. Declaration of Rights* para. 16 (June 12, 1776), available at [http://www.archives.gov/exhibits/charters/virginia\\_declaration\\_of\\_rights.html](http://www.archives.gov/exhibits/charters/virginia_declaration_of_rights.html), archived at <http://perma.cc/M4YV-R9WU>; MADISON, *supra* note 186, at para. 8.

<sup>258</sup> MADISON, *supra* note 186, at para. 8.

<sup>259</sup> See *supra* notes 246–253 and accompanying text. On the normative value of religious participation in the public square, see generally Denise Meyerson, *Why Religion Belongs in the Private Sphere, Not the Public Square*, in *LAW AND RELIGION IN THEORETICAL AND HISTORICAL CONTEXT* 44 (Peter Cane et al. eds., 2009).

<sup>260</sup> Lupu & Tuttle, *supra* note 255, at 53.

<sup>261</sup> See Robinson, *supra* note 210, at 144.

<sup>262</sup> Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 67 (1998) (specifying that religious institutions have "had a pivotal role in guarding against political absolutism." (internal quotation marks omitted)).

<sup>263</sup> See *Hosanna-Tabor*, 132 S. Ct. at 706 (holding that "[b]y imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments."); *Kedroff*, 344 U.S. at 116 (indicating that the Court has expressed that religious organizations should be free from state interference with regard to issues that concern faith and doctrine or church governance); *Watson*, 80 U.S. (13 Wall.) at 727 (finding that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final").

the Court's hands-off approach in *Watson* and its progeny.<sup>264</sup> It seems clear that if any office of the state were to attempt to control, direct, or resolve disputes that rested on theology, the state would be subjecting itself to the influence of that religion. Valuing religious institutions as private sovereigns ensures that the state is a "penultimate" institution, with a limited horizon that forswears any "comprehensive claim to undivided loyalty."<sup>265</sup>

Decisions like *Hosanna-Tabor* can in part be explained by this democratic-protective notion. Although *Hosanna-Tabor* and similar cases go beyond a prohibition on government making theologically based decisions on matters of faith and doctrine, they have as their base the same value. In order to protect the government from religion, arguably the government must also be insulated from the organizational functions of the religious institution. Meaningfully protecting government from the temptation of religious institutional support requires spherical insulation of religious organizational decisions as well. In other words, a robust conception of religious identity and therefore sovereignty is essential to protecting the secular sphere from being captured by a dominant religious group, voluntarily or otherwise.

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Together, the two institutional functions of facilitation of social engagement and protecting the state from religious capture can partially explain the Court's recognition of a distinct First Amendment category for religious institutions. More than simply rights-protective, the conception of the values underlying the recognition of private government rights for religious institutions assumes that religious institutions are institutions that are independently democratically desirable. Religious institutions, on this view, are uniquely competent to provide societal structures that are democracy-enhancing.

What remains is preliminarily drawing out some tangible principles from these values—religious sovereignty, individual conscience, and democratically valuable structures—in order to articulate workable guidelines for identifying first-order religious institutions.

### B. *From Values to Principles: Toward Workable Guidelines for Identifying Religious Institutions*

Drawing on the values outlined above, we can begin to compile a set of guidelines that courts can use to determine whether any given religious institution is a first- or second-order religious institution. Importantly, this Article does not attempt to definitively determine which institutions are and are not

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<sup>264</sup> See *supra* notes 68–128 and accompanying text (providing an overview of religious institutionalism cases in the Supreme Court).

<sup>265</sup> Lupu & Tuttle, *supra* note 255, at 83–84; see Thomas Berg, *Religious Organizational Freedom and Conditions on Government Benefits*, 7 GEO. J.L. & PUB. POL'Y 165, 173, 177 (2009).

first-order religious institutions. Instead, the list of factors that organically originate from the underlying constitutional values should be seen as the first attempt in an ongoing discussion to identify first-order religious institutions. The ultimate goal of this Section is to identify reliable proxies and considerations that will lead courts to identify those institutions that are best fulfilling the unique constitutional functions of the religious institution.

The three core values outlined in the preceding Section suggest that the following four factors are the most significant in identifying a first-order religious institution: (1) recognition as a religious institution; (2) functions as a religious institution; (3) voluntariness; and (4) privacy-seeking. These four factors provide workable guidelines, based on a secure theoretical foundation, to aid courts in determining what institutions attract the constitutional mantle of first-order religious institution.

### 1. Recognition as a Religious Institution

Relying on third-party recognition of what a first-order religious institution looks like allows us to capture those institutions that have as their goal uniquely religious objectives. Thinking back to the values undergirding constitutional recognition of religious institutionalism, the Court placed strong emphasis on the rights of groups that serve norm creating and reinforcing purposes and that provide social structures within which societal subgroups can function without state oversight.<sup>266</sup> The thought was that if these groups were to maintain their character as private associations, they needed space for religion to prosper and flourish. It makes sense, then, that a first-order religious institution is one that third parties recognize as providing a space for individuals to achieve uniquely religious objectives, such as faith and salvation.

This argument has been made in the limited context of employment discrimination, where the claim is that for an institution to be a religious institution, employees must be able to recognize it as such.<sup>267</sup> On this view, a third-party recognition rule ensures that employees can be validly held to have impliedly consented to a religious institution's authority.<sup>268</sup>

Extrapolating to a broader context, this principle has to be right. If the value of first-order religious institutions is to provide groups with space to develop and disseminate religious views, and individuals with the opportunity to develop their conscience in a manner of their choosing, the institution must be recognizable as religious so as to facilitate these constitutional goals. Related-

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<sup>266</sup> See *supra* notes 161–265 and accompanying text.

<sup>267</sup> Helfand, *supra* note 48, at 421.

<sup>268</sup> *Id.*; see *Watson*, 80 U.S. (13 Wall.) at 729 (establishing the principle that “[a]ll who unite themselves to . . . a [religious] body do so with an implied consent to this government, and are bound to submit to it”).

ly, third-party recognition of institutions as first-order religious institutions supports the independence of first-order religious institutions to facilitate social engagement in a manner synchronous with faith-principles. Citizen recognition of an institution as a locus of civil virtue buttresses any claim for recognition as a first-order religious institution.

This approach is similar to the *Hosanna-Tabor* Court's approach in determining whether a person is a minister for purposes of the ministerial exception.<sup>269</sup> The Court emphasized that Cheryl Perich was considered a minister by the school and church, and that her role was distinct from that of other members.<sup>270</sup> The Court noted that Perich's title was a "called" teacher, as opposed to a lay teacher, and that she was referred to as a commissioned minister.<sup>271</sup> For the Court, then, Perich was a minister because the Church labeled her as one, and she was recognized as one by members of the church and school community.

Practically speaking, measuring whether an institution is religious via third-party recognition necessarily involves some consideration of the functional aspects of the institution in question. Indeed, the Court admitted as much in its consideration of Perich's ministerial classification when it analyzed her job functions.<sup>272</sup> Whether a third party will recognize that the institution they are engaging with is religious will involve an assessment of sub-factors including whether the institution publicized a religious mission, whether the institutional functions were religiously oriented or at least religiously based, and whether involvement with the institution requires a religious commitment on the part of the individual. In other words, courts will need to look to the extent to which religious characteristics are incorporated into the life of the institution, such that institutional entrants would recognize the organization as distinctly religious.<sup>273</sup>

In this respect, we can draw on the approach other courts have taken to defining religious institutions in the statutory context, in particular the Fourth

<sup>269</sup> See 132 S. Ct. at 699–700, 707–08; see also West, *supra* note 144 (utilizing *Hosanna-Tabor* in uncovering a meaningful approach to defining "the Press" for First Amendment purposes).

<sup>270</sup> *Hosanna-Tabor*, 132 S. Ct. at 707; West, *supra* note 144.

<sup>271</sup> *Hosanna-Tabor*, 132 S. Ct. at 707.

<sup>272</sup> See *id.*

<sup>273</sup> See, e.g., *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225–26 (6th Cir. 2007); *Shalihsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 310 (4th Cir. 2004) (noting that "the Hebrew Home maintained a rabbi on its staff, employed mashgichim to ensure compliance with the Jewish dietary laws, and placed a mezuzah on resident's doorpost"); *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360, 362 (8th Cir. 1991) (observing that "[t]he hospital's Board of Directors consist[ed] of four church representatives and their unanimously agreed-upon nominees" and that the defendant's "Articles of Association may be amended only with the approval of the Episcopal Diocese of Missouri of the Protestant Episcopal Church in the United States of America and the local Presbytery of the Presbyterian Church (U.S.A.)"); *Altman v. Sterling Caterers, Inc.*, 879 F. Supp. 2d 1375, 1385 (S.D. Fla. 2012).

Circuit's approach to defining a religious institution in the context of Title VII. As mentioned above, the Fourth Circuit has specified that in any determination of whether an institution falls within the scope of Title VII's protections, it is critical that religion is part of the day-to-day life of the institution, and that the "entity's mission is marked by clear or obvious religious characteristics."<sup>274</sup> Sub-factors including whether the governing documents of the institution reference a religious mission, whether board members are required to be affiliated with any religion, and whether any house of worship retains any jurisdiction over the entity are central in making this determination.<sup>275</sup>

## 2. Functions as a Religious Institution

Intimately related with the first factor—third-party recognition—is the notion that an institution should have as a core value at least the capacity to promote individual conscience on matters of faith. If a feature of first-order religious institutions is at least partially to generate norms among a collective group of citizens in order to facilitate individual belief, as well as provide democratic structures to facilitate social engagement, it seems rational to conclude that the community whom the religious institution supports is somehow jurisgenerative.<sup>276</sup> This suggests that the community must be organized around some religious mission, with an associated guiding doctrine, as well as internal governance structures that have as their goal the protection of the institution for the purposes of collective belief-enforcement and the facilitation of individual belief.<sup>277</sup> What distinguishes this factor from the first is that not only does the institution need to be perceived as a religious institution, but it needs to also fulfill its role as a religious institution.

This inquiry is again similar to that which the Court undertook in *Hosanna-Tabor* when it determined whether Perich was a "minister" for purposes of the ministerial exception.<sup>278</sup> In *Hosanna-Tabor*, the Court specified that Perich would be considered a "minister" if she actually functioned as a minister.<sup>279</sup> The Court noted that, in her capacity as a called teacher, Perich led devotional exercises, worship services, daily prayers, and also taught scriptures.<sup>280</sup> By

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<sup>274</sup> *Shaliehsabou*, 363 F.3d at 310; see *supra* notes 59–61 and accompanying text.

<sup>275</sup> See *Hollins*, 474 F.3d at 225–26; *Scharon*, 929 F.2d at 362; *Altman*, 879 F. Supp. 2d at 1385.

<sup>276</sup> Cover, *supra* note 172, at 15.

<sup>277</sup> See *supra* notes 236–258 and accompanying text.

<sup>278</sup> See 132 S. Ct. at 708 (giving weight to the fact that "Perich's job duties reflected a role in conveying the Church's message and carrying out its mission," and observing that "Perich performed an important role in transmitting the Lutheran faith to the next generation"); West, *supra* note 144 (analyzing *Hosanna-Tabor* for the purposes of establishing a framework for identifying the "Press" for First Amendment purposes).

<sup>279</sup> See 132 S. Ct. at 708.

<sup>280</sup> *Id.*

engaging in these duties, the Court held, Perich epitomized what it meant to be a minister.<sup>281</sup>

As with the search for a “minister,” ascertaining which institutions are first-order religious institutions involves identifying which institutions are fulfilling a particular constitutional function. Distinguishing a first-order religious institution from a second-order religious institution, therefore, requires asking whether the institution is carrying on the unique role of a religious institution. And while the focus in the first factor is whether a third party perceives the institution as performing special constitutional functions, the focus in this second factor is whether those functions are truly being fulfilled. If we are searching for institutions that are constitutionally unique, we need to focus on those intra-institutional functions that identify the institutions that are worthy of special constitutional protection and find those institutions that are actually satisfying the role.

Finally, it is important to note that in *Hosanna-Tabor*, the Court held that the fact that Perich spent relatively minimal time on ministerial duties was not of central importance for identification as a minister.<sup>282</sup> The Court noted that time spent on these duties was relevant; however, time was not to “be considered in isolation, without regard to the nature of the religious functions performed and . . . other considerations.”<sup>283</sup> This indicates that institutions beyond churches and other houses of worship *can* be classified as a first-order religious institution, but keeps the focus on the fact that any group claiming special constitutional protection still must act to fulfill the constitutional values undergirding the recognition of constitutional religious institutionalism.

### 3. Voluntariness

The third factor focuses on the value of individual liberty promotion and emphasizes that to be considered a first-order religious institution membership in the institution in question must be voluntary. In this context, voluntariness must at least mean that individuals know that they are entering into a religious institution and that they can exit at will.<sup>284</sup> In other words, an individual must have the opportunity to determine that a religious institution best serves their conscience and consciously opt-in to that institution. Equally, if an individual determines that the institutional arrangements, both substantive and structural, do not best serve their individual conscience needs, the individual must have the opportunity and option to exit that institution.

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<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 708; see West, *supra* note 144.

<sup>283</sup> *Hosanna-Tabor*, 132 S. Ct. at 709.

<sup>284</sup> See *Torcaso*, 367 U.S. at 495 n.10 (noting the right to choose to practice religion, or no religion); *Ballard*, 322 U.S. at 86; RAWLS, *supra* note 233, at 221–22; Esbeck, *supra* note 128, at 1395–97; Hills, *supra* note 164, at 148–53; Laycock, *Towards a General Theory*, *supra* note 5, at 1403.



Voluntariness, determined by entry and exit capacity, is essential to support the value of individual freedom. The freedom to believe and to act upon those beliefs is only possible if there is truly individual freedom to accept any institution's positions and reject them. An institution that does not provide an individual with the freedom to choose to enter or exit *because of* the dogma promoted by the institution necessarily violates individual freedom and conscience. This is especially so given the value of group rights. So long as the Constitution values and promotes the choice of the group in its decisions about belief, dogma, and action in pursuance of those beliefs, then the individual will be subject to the constraints of the institution.<sup>285</sup> When the Constitution values group autonomy and sanctions religious sovereignty, leaving governance of group members to the group, individuals must have the independent choice of whether to submit to that sovereignty, both as an initial matter and in an ongoing sense.<sup>286</sup>

#### 4. Privacy-Seeking

Finally, the institution should seek disengagement from the formal arms of the state, rather than engagement with the secular authorities.<sup>287</sup> If we value religious institutions as establishments that are peculiarly suited to protecting the state from religious involvement, first-order religious institutions should seek separation and disentanglement from the formal mechanisms of the state.

The above Section notes that undergirding the Court's religious institutionalism jurisprudence is the valuing of first-order religious institutions as providing desirable societal structures. First-order religious institutions, then, both facilitate social engagement and protect the state from religion. In order to fulfill this role, at its core a first-order institution should seek privacy from, rather than involvement with, the formal arms of the civil government.

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There is no doubt that searching for a workable framework to identify first-order religious institutions is fraught with difficulty. Even at first glance it is clear that this framework will capture a very limited group of institutions beyond formal houses of worship. That is, the framework is narrow, and per-

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<sup>285</sup> See *Watson*, 80 U.S. (13 Wall.) at 729; *Jones v. Wolf*, 443 U.S. 595, 614 (1979) (Powell, J., dissenting) (describing the *Watson* rule as requiring that courts "give effect in all cases to the decisions of the church government agreed upon by the members before the dispute arose").

<sup>286</sup> See RAWLS, *supra* note 208, at 211–13. See generally Leslie Green, *Right of Exit*, 4 LEGAL THEORY 165 (1998) (discussing the role of a "right of exit" where religious institutions or groups place internal restrictions on their members' liberty). John Rawls articulated this sentiment, suggesting that "associations may be freely organized as their members wish, and they may have their own internal life and discipline subjects to the restriction that their members have a real choice of whether to continue their affiliation." RAWLS, *supra* note 208, at 211–13.

<sup>287</sup> See *supra* notes 254–265 and accompanying text.

mits only a limited type of religious institution to be characterized as a first-order religious institution. Although many will see this as a flaw in the framework, this narrowness is ultimately beneficial because unless some distinguishable criteria are agreed upon, and some institutions are excluded from the categorical protections, religious institutionalism will eventually melt into the general Religion Clauses, leaving the new religious institutional category void of any content. Thus, a narrower definition of a first-order religious institution can be both constitutionally acceptable and functionally superior.

### C. *Embracing a Narrower Definition of “Religious Institution”*

A narrow definition of constitutional religious institutions is ultimately beneficial. Although the impulse to include a broader type of religious institution in the First Amendment category comes from a place of valuing equality and neutrality, this overprotective impulse is a poor fit with constitutional religious institutionalism. The consequences of institutional overinclusiveness has the potential to seriously weaken the institutional protection for core religious institutions. This Section discusses the problems with an over-inclusive definition, as well as the reasons why we might be comfortable accepting a narrower institutional definition for the purposes of constitutional religious institutionalism.

#### 1. Less Is More

Over-inclusion of institutions in the constitutional category will result in the disappearance of protections for first-order religious institutions. It does so by creating a “feedback loop” that erases distinctions between protections accorded to first-order religious institutions and the protections contained in the generally applicable Religion Clauses. Ironically, the more broadly we define first-order religious institutions, the less substantive protection those first-order religious institutions will likely receive.

Philip Hamburger notes this phenomenon in his study on the definition of religion under the Free Exercise Clause.<sup>288</sup> There, Hamburger specifies that “an enlarged definition of any right may invite limitations on the circumstances in which it is available . . . and its effects are apt to be felt with particular

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<sup>288</sup> Philip Hamburger, *More Is Less*, 90 VA. L. REV. 835, 838 (2004) [hereinafter Hamburger, *More Is Less*]; see also West, *supra* note 44, at 1048–61 (applying this phenomenon to her inquiry of what constitutes the Press). For Hamburger’s consideration of the “more is less” phenomenon in other contexts, see generally Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823 (2009) (applying more is less to the extension of constitutional rights to non-resident aliens); Philip Hamburger, *Getting Permission*, 101 NW. U. L. REV. 405 (2007) (applying more is less to speech and press rights); Philip Hamburger, *The New Censorship: Institutional Review Boards*, 2004 SUP. CT. REV. 271 (same).

regret."<sup>289</sup> Hamburger notes the dangers inherent in an overinclusive right, claiming that "at some point, as the definition of a right is enlarged, there are likely to be reasons for qualifying access [to that right]."<sup>290</sup> Hamburger observes that in the context of the Free Exercise Clause, as the concept of "free exercise" is enlarged, access to that right concurrently diminished.<sup>291</sup> Vincent Blasi notes in the context of the Speech Clause, that when rights are interpreted broadly, they inevitably become politically vulnerable.<sup>292</sup> Sonja West claims that any broad definition of "the Press" will result in Press Clause redundancy.<sup>293</sup>

Any over inclusion in the religious institutions category will inevitably have a similar effect. The outcome will be that those institutions that clearly fall within the constitutional definition of a religious institution (e.g., churches) will suffer from constitutional underprotection. In other words, fueled by the desire to create a definition of religious institutions that protects institutions at the periphery as well as the core, those borderline institutions that seek inclusion in the institutional category will ultimately harm the interests of the core religious institutions. The reason for this is that once every faith-affiliated or faith-based institution is declared a first-order religious institution, the initial purpose for carving out religious institutions as something unique under the Religion Clauses becomes lost. Once this occurs, the purposes for the special recognition of religious institutions under the First Amendment become blurred and the institutional protections verge towards constitutional redundancy.

In addition, a broad definition raises distinct pragmatic problems. It is untenable that a wide range of institutions could claim absolute sovereignty from the prescriptive and adjudicative auspices of the state.<sup>294</sup> Rationally, we cannot let virtually everyone out of the sovereign jurisdiction of the state. If judges are forced to choose between letting everyone in a broad institutional category have sovereign rights or no one, they will inevitably choose no one.<sup>295</sup>

## 2. The Availability of "Fallback Protections"

Limiting the institutions that can access the special protections for first-order religious institutions is not as constitutionally problematic as limiting the type of religious claims that can access the generally applicable Religion

<sup>289</sup> Hamburger, *More is Less*, *supra* note 288, at 838.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> See Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 452–59 (1985); see also William P. Marshall, *Diluting Constitutional Rights: Rethinking "Rethinking State Action,"* 80 NW. U. L. REV. 558, 567–68 (1985) (applying this concept to the Speech Clause).

<sup>293</sup> West, *supra* note 44, at 1048–61.

<sup>294</sup> See *id.* at 1057–58.

<sup>295</sup> See *id.* at 1058.

Clauses.<sup>296</sup> Whereas limiting the potential plaintiffs under the Religion Clauses by limiting the definition of “religion” results in *no* constitutional protection, limiting the institutions that can claim to be first-order religious institutions does not have the same outcome.<sup>297</sup> Instead, if an institution based on religious premises is not considered a first-order religious institution, that institution still has extensive rights under the Religion Clauses.<sup>298</sup>

Undergirding the Religion Clauses is an overinclusiveness as to what claims are in fact religious. This overinclusiveness stems from both the desire to include the maximum number of commitments claimed to be based on individual conscience, as well as the judicial desire to not engage with the question of defining religion for constitutional purposes. Indeed, the Supreme Court has never adopted a constitutional definition of religion; nevertheless, its cases that touch on the issue suggest a broad conception that includes a vast array of beliefs.<sup>299</sup> For example, in the 1989 Supreme Court case *Frazee v. Illinois Department of Employment*, the plaintiff was denied unemployment insurance for refusing to work on Sunday because of his non-institutional Christian belief that Sunday is the “Lord’s Day.”<sup>300</sup> Although limiting the application of the Religion Clauses to “religious” beliefs (and excluding “purely secular” based beliefs), the Court held that Frazee fell within the scope of the Clauses, suggesting that for a claim to be religious, it was sufficient that a belief in some higher power be personally held.<sup>301</sup>

The Court has gone even further in the statutory context. In the often cited Supreme Court cases of *Welsh v. United States* and *United States v. Seeger*, decided in 1970 and 1965, respectively, the Court went so far as to state that whether a belief was in fact religious was a question best answered by asking whether the claimant’s belief was “in his own scheme of things, religious.”<sup>302</sup> The Court specified that the notion of a god or gods was not determinative, instead, sincere and meaningful belief, unrestricted by traditional or parochial concepts of religion, was what was determinative of the religious character of a

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<sup>296</sup> See *supra* notes 129–141 and accompanying text (discussing the structure of the Religion Clauses post-*Hosanna-Tabor*).

<sup>297</sup> Cf. West, *supra* note 44, at 1058–60 (discussing the same concept with regard to the Press Clause, where broad speech protections serve as a fallback for all those who do not fall under the narrow, institutional press protections).

<sup>298</sup> See *supra* notes 129–141 and accompanying text (discussing current analyses under the Religion Clauses).

<sup>299</sup> See *Yoder*, 406 U.S. at 214 (discussing the Amish faith); *Davis v. Beason*, 133 U.S. 333, 348 (1890) (discussing whether the Church of the Latter Day Saints, and the related practice of polygamy, was protected by the Free Exercise Clause of the First Amendment).

<sup>300</sup> 489 U.S. 829, 830, 834–35 (1989).

<sup>301</sup> See *id.* at 834.

<sup>302</sup> *Welsh v. United States*, 398 U.S. 333, 339 (1970); *United States v. Seeger*, 380 U.S. 163, 185 (1965).

claimed belief.<sup>303</sup> Similarly broad definitions of religion prevail in the lower federal courts. For example, in the 2000 U.S. Court of Appeals for the D.C. Circuit case *Kalka v. Hawk*,<sup>304</sup> the court held that humanism, “a philosophy that advocates happiness in this life rather than hope for a heaven in an after-life,” was religious for First Amendment purposes.<sup>305</sup>

This broad definition means that no claim that has religious faith as its base will be left without constitutional recourse. No concern exists, then, that a limited definition of first-order religious institutions will exclude some groups from the auspices of the Religion Clauses. These religious-based claims, valued as they are by their special recognition in the First Amendment, will still receive the fallback protection of the neutrally applicable doctrine under the Free Exercise Clause or the Establishment Clause—the very same protections that religious individuals are entitled to under the Clauses.

This makes the religious institutions category unique. We strive for an overinclusive definition of religion so that a belief that a person holds as religious is not inadvertently excluded because religious beliefs are considered uniquely valuable in our constitutional scheme. The negative effects of excluding a belief claimed to be religious is the devaluing of a person’s faith, as well as potential cultural favoritism toward traditional and familiar belief structures. These costs are large, and overinclusion seems necessary. Nevertheless, the potential costs of excluding a religious institution from the institutional category of the Religion Clauses are not so high, and rather than being denied the protection for and from religion guaranteed by the Religion Clauses entirely, an excluded institution will still be free to claim protection under the generally and neutrally applicable doctrine. These fallback protections, then, lessen any impact on religious institutions that do not fall within the limited definition proposed in the above Section, and provides protection against potential errors in line-drawing.

## CONCLUSION

The Supreme Court’s recognition of a special category of protection for a distinct constitutional actor—religious institutions—results in a constitutional regime that raises significant interpretive issues. The religious institutions category recognizes an absolute right of private ordering for those institutions that validly claim to fall within the auspices of its protection. In the face of this new First Amendment protection, the most urgent interpretive question facing

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<sup>303</sup> *Welsh*, 398 U.S. at 339 (quoting *Seeger*, 380 U.S. at 176).

<sup>304</sup> 215 F.3d 90, 92 (D.C. Cir. 2000).

<sup>305</sup> See Leslie C. Griffin, *Fighting the New Wars of Religion: The Need for a Tolerant First Amendment*, 62 ME. L. REV. 23, 53–56 (2010) (providing a comprehensive discussion of lower court treatment of the definition of religion).

the courts is what religious institutions are first-order religious institutions. The recognition of the distinct constitutional right for religious institutions necessarily raises this question of who will (and conversely who will not) be able to rely upon them.

This is a very real and pressing interpretive question and this Article has sought to elucidate a preliminary framework for identifying first-order religious institutions. Drawn from the values animating the Court's religious institutionalism jurisprudence, the framework embraces the principle of exceptionalism. The Court has made it clear that religious institutions play a specific and important role in our constitutional democracy—a role that not every institution claiming to be religious fulfills. Designating all institutions with some religious component as first-order religious institutions does not further the constitutional goals of religious institutionalism.

The values and related framework proposed in this Article result in a narrow category of protected institutions under the Religion Clauses. It is arguably necessary to reject overprotection in the context of religious institutions in order to justify the special recognition of religious institutions over and above the general Religion Clauses protections and to secure the rights of those protected groups. The fallback protections of the generally applicable Religion Clause doctrine, meanwhile, ensure that all religious claims are afforded constitutional protection, even if the activity is exogenous to the institutional setting.

The Court has interpreted the Religion Clauses to give religious institutions explicit protection. It has done so because it considers that the Constitution has assigned an important and exceptional role to religious institutions. In light of this, it is important that we embrace religious institutional exceptionalism and provide guidance on the unique and important interpretive issues faced in implementing this religious institutions category.