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**Article**

**Religion’s Footnote Four: Church  
Autonomy as Arbitration**

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INTRODUCTION

While often overlooked, footnotes occasionally foreshadow

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groundbreaking legal revolutions.<sup>1</sup> No better example exists than the celebrated footnote four of *United States v. Carolene Products Co.*<sup>2</sup> Emerging from “below the line,” footnote four re-oriented the Supreme Court’s approach to Equal Protection Clause jurisprudence, isolating “discrete and insular minorities” as the building block for what would later become the Court’s suspect classification doctrine.<sup>3</sup>

Identifying such path-breaking footnotes all too frequently requires making sense of the doctrinal tea leaves, especially given the uncertain importance granted propositions of law buried beneath the text. But in the Supreme Court’s recent decision *Hosanna-Tabor v. EEOC*, a new footnote four makes a bold assertion—holding that the “ministerial exception” serves as an affirmative defense as opposed to a jurisdictional bar<sup>4</sup>—that rests on a radically new conception of the relationship between church and state, gesturing towards an increasingly symbiotic relationship between religious institutions and civil courts.<sup>5</sup>

By contrast and for some years, a wide range of scholars on both sides of the political spectrum had conceptualized the relationship between religious institutions and civil courts as “jurisdictional.”<sup>6</sup> That is, scholars converged on the view that the

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1. See J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275, 293–94 (1989). For more critical assessments of the proliferation of footnotes generally, see Arthur D. Austin, *Footnotes as Product Differentiation*, 40 VAND. L. REV. 1131 (1987); Abner J. Mikva, *Goodbye to Footnotes*, 56 U. COLO. L. REV. 647 (1985).

2. 304 U.S. 144, 152 n.4 (1938).

3. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 75–77 (1980); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1289–91 (1982); see also Dan T. Coenen, *The Future of Footnote Four*, 41 GA. L. REV. 797, 798 (2007) (“The Supreme Court’s decision in *United States v. Carolene Products Co.* generated the most famous footnote—and perhaps the most famous passage—in all of the American Judiciary’s treatment of constitutional law.”); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 758 (2011) (noting that footnote four of *Carolene Products* is “[v]iewed by many as the fountainhead of the heightened scrutiny framework for minority groups”).

4. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 709 n.4 (2012) (“We conclude that the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar.”).

5. See *infra* Part II.

6. See *infra* notes 65–67. I do not here reference the debates over whether and to what extent the Establishment Clause was aimed at the relative authority of state and federal government over religion. For examples of scholars addressing this issue, see AKHIL REED AMAR, *THE BILL OF RIGHTS* 32–42 (1998); PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 101–07 (2002); Kent Greenawalt, *Common Sense About Original and Subsequent Un-*

religion clauses deprived courts of subject-matter jurisdiction over religious claims such as religious defamation,<sup>7</sup> religious employment,<sup>8</sup> communal shunning,<sup>9</sup> clergy malpractice,<sup>10</sup> and religious contracts.<sup>11</sup> Placing increasing emphasis on the Establishment Clause, a growing number of scholars argued that claims implicating “questions of discipline, or of faith, or ecclesiastical rule, custom, or law”<sup>12</sup> were properly within the sole province of religious institutions.

The jurisdictional approach to the religion clauses found champions among scholars advocating for a robust “church autonomy doctrine,” which provided religious institutions with a right to direct their own internal affairs free from government

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*derstandings of the Religion Clauses*, 8 U. PA. J. CONST. L. 479 (2006); Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155 (2004); Steven D. Smith, *The Jurisdictional Establishment Clause: A Reappraisal*, 81 NOTRE DAME L. REV. 1843 (2006).

7. See, e.g., *Klagsbrun v. Va'ad Harabonim*, 53 F. Supp. 2d 732, 734 (D.N.J. 1999); *Farley v. Wis. Evangelical Lutheran Synod*, 821 F. Supp. 1286, 1288 (D. Minn. 1993); *Goodman v. Temple Shir Ami Inc.*, 712 So. 2d 775, 776–77 (Fla. Dist. Ct. App. 1998); *Downs v. Roman Catholic Archbishop of Balt.*, 683 A.2d 808, 813 (Md. Ct. Spec. App. 1996); *Abdelhak v. Jewish Press Inc.*, 985 A.2d 197, 200 (N.J. Super. Ct. App. Div. 2009).

8. See, e.g., *Hosanna-Tabor*, 132 S. Ct. at 705 (noting uniform acceptance of the ministerial exception by federal courts of appeals); *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1290 (9th Cir. 2010); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655 (10th Cir. 2002).

9. *Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 819 F.2d 875, 881 (9th Cir. 1987); *Burgess v. Rock Creek Baptist Church*, 734 F. Supp. 30, 34 (D.D.C. 1990); *Sands v. Living Word Fellowship*, 34 P.3d 955, 959 (Alaska 2001); *Anderson v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, No. M2004-01066-COA-R9-CV, 2007 WL 161035, at \*1 (Tenn. Ct. App. Jan. 19, 2007); see also Justin K. Miller, Comment, *Damned if You Do, Damned if You Don't: Religious Shunning and the Free Exercise Clause*, 137 U. PA. L. REV. 271, 272 (1988).

10. See, e.g., *Schmidt v. Bishop*, 779 F. Supp. 321, 327 (S.D.N.Y. 1991); *Nally v. Grace Comm. Church*, 253 Cal. Rptr. 97, 103 (1988); *Wisniewski v. Diocese of Belleville*, 943 N.E.2d 43, 75 (Ill. App. Ct. 2011); *H.R.B. v. J.L.G.*, 913 S.W.2d 92, 98 (Mo. Ct. App. 1995); *F.G. v. MacDonell*, 696 A.2d 697, 703 (N.J. 1997); *Jones v. Trane*, 591 N.Y.S.2d 927, 930 (N.Y. Sup. Ct. 1992); *White v. Blackburn*, 787 P.2d 1315, 1318–19 (Utah Ct. App. 1990).

11. See, e.g., *Sieger v. Sieger*, 747 N.Y.S.2d 102, 104–05 (N.Y. App. Div. 2002); *Zummo v. Zummo*, 574 A.2d 1130, 1146 (Pa. Super. Ct. 1990).

12. *Ogle v. Hocker*, 279 F. App'x 391, 395 (6th Cir. 2008) (quoting *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1871)); *Bryce*, 289 F.3d at 655 (“This church autonomy doctrine prohibits civil court review of internal church disputes involving matters of faith, doctrine, church governance, and polity.”); see also *Rweyemamu v. Cote*, 520 F.3d 198, 205 (2d Cir. 2008); *Minker v. Balt. Annual Conference of the United Methodist Church*, 894 F.2d 1354, 1357 (D.C. Cir. 1990).

interference.<sup>13</sup> On such an account, the Establishment Clause instructed courts to stay out of religious disputes for fear of encroaching on the jurisdiction of religious institutions. Proponents of this vision of “dual jurisdictions” emphasize the important values promoted by a jurisdictional approach to the relationship between church and state: the limited authority of the state<sup>14</sup> and the free development of religious life.<sup>15</sup> Thus, by granting religious institutions sole authority over matters of religious doctrine, discipline and governance, the state recognizes the independent autonomy of religious institutions and provides those institutions with the space to control core religious matters.

Ironically, the jurisdictional approach to the relationship between church and state also resonated with scholars who explicitly rejected the claim that “religious institutions are presumptively autonomous.”<sup>16</sup> Thus, Ira Lupu and Robert Tuttle argued that courts are constitutionally prohibited from adju-

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13. See, e.g., Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 NW. U. L. REV. COLLOQUY 175, 175 (2011); Thomas C. Berg, *Religious Organizational Freedom and Conditions on Government Benefits*, 7 GEO. J.L. & PUB. POL'Y 165, 177 (2009); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 3–4 (1998); Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 288 (2008); Paul Horwitz, *Act III of the Ministerial Exception*, 106 NW. U. L. REV. COLLOQUY 156, 161–62 (2011) [hereinafter Horwitz, *Act III*]; Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 87 (2009) [hereinafter Horwitz, *Churches as First Amendment Institutions*]; Gregory A. Kalscheur, *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject-Matter Jurisdiction, and the Freedom of the Church*, 17 WM. & MARY BILL RTS. J. 43, 48–49 (2008); Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111, 1167 (2011).

14. See, e.g., Esbeck, *supra* note 13, at 67 (“[R]eligions that point to a transcendent authority help check the power of the modern nation-state. This is because such religions refuse to recognize the state’s sovereignty as absolute.”); Kalscheur, *supra* note 13, at 91–96 (describing how conceptualizing the ministerial exception as jurisdictional reaffirms the “penultimacy of the state”).

15. See, e.g., Esbeck, *supra* note 13, at 63 (“Rather, the aim of the Clause is for government to avoid activities that harm the integrity of religion (*religare*) or religious organizations (the *ekklesia*).”); Horwitz, *Churches as First Amendment Institutions*, *supra* note 13, at 114 (concluding that under “a sphere sovereignty approach to religious entities,” religious institutions “would coexist alongside the state . . . serving a vital role in furthering self-fulfillment, the development of a religious community, and the development of public discourse”).

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

cating religious claims not because of some constitutional desire to “systematically protect the interests of certain classes of parties, defined by religious mission.”<sup>17</sup> Instead, the Establishment Clause imposes a jurisdictional bar on judicial resolution of religious claims because such “claims would require courts to answer questions that the state is not competent to address.”<sup>18</sup> Accordingly, courts cannot interfere in such matters on a theory of “adjudicative disability”—the state simply has “limited jurisprudential competence” to decide such religious matters.<sup>19</sup>

Notwithstanding the conflicting theoretical underpinnings—one focused on the freedom of religious institutions and the other on the adjudicative disability of courts—both groups agreed that courts lacked the necessary subject-matter jurisdiction to resolve claims implicating religious matters. Such an approach has important and practical implications. Most notably, if courts are jurisdictionally barred from adjudicating religious claims, then courts can and must raise such constitutional worries *sua sponte*, irrespective of whether the parties raise them.<sup>20</sup> For example, if a minister brings suit against a religious institution for violating employment discrimination statutes, the court must raise the “ministerial exception” defense regardless of whether the religious institution does so.<sup>21</sup>

This would be true even if both parties want a court to resolve a dispute—maybe on account that the dispute is simply too intractable to resolve within the institution’s own adjudicative framework. Put differently, religious institutions cannot prevent courts from dismissing religious claims on constitutional grounds—that is, they cannot waive such claims—because the constitutional restrictions on judicial resolution of religious claims are not rights to be asserted by the religious institution;<sup>22</sup> they are jurisdictional limitations on what a court can do.<sup>23</sup>

17. Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders*, 7 GEO. J.L. & PUB. POL’Y 119, 122 (2009).

18. *Id.* at 138; see also Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789, 1815.

19. Lupu & Tuttle, *supra* note 17, at 123.

20. See, e.g., Carl H. Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J.L. & POL. 445, 455 (2002) (“[R]ights, because they are personal, can be waived by the rights-holder. Whereas structure, because it is there to benefit the entire body politic, cannot be waived.”).

21. See Horwitz, *Act III*, *supra* note 13, at 161–62.

22. Esbeck, *supra* note 13, at 58 n.236 (“A free exercise right could be

Indeed, this approach to church-state relations made quite a lot of sense in the wake of *Employment Division v. Smith*. In *Smith*, the Supreme Court held that individuals had no free exercise right of accommodation from facially neutral and generally applicable laws.<sup>24</sup> Such a holding appeared to undermine doctrines like the ministerial exception: If the Free Exercise Clause did not require accommodation of religious practices otherwise prohibited by facially neutral and generally applicable laws, then why should the constitution shield religious institutions from liability under employment discrimination statutes when such statutes were undeniably facially neutral and generally applicable?<sup>25</sup>

A jurisdictional approach provided a very easy answer. The Free Exercise Clause requires accommodation of neither individuals nor institutions.<sup>26</sup> However, the Establishment Clause does deprive courts of subject-matter jurisdiction over claims that implicate religious doctrine, practice, discipline and governance.<sup>27</sup> This is a limitation on judicial authority—not a right granted to religious institutions.<sup>28</sup>

However, this jurisdictional picture of judicial authority and institutional autonomy came undone somewhat abruptly in footnote four of *Hosanna-Tabor v. EEOC*. In *Hosanna-Tabor*, the Court affirmed the ministerial exception, which exempts re-

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waived by the claimant. But if the operative principle is a constitutional limit on the Court's power, then the objection to judicial inquiry into religious doctrine cannot be waived. Thus, it can be inferred that the rule of law in these cases is structural in origin.”); Lupu & Tuttle, *supra* note 18, at 1815 (“Religious entities cannot waive this jurisdictional limitation, which we believe resides most comfortably in the Establishment Clause (even as it furthers Free Exercise values).”).

23. See generally Howard M. Wasserman, *Jurisdiction, Merits, and Procedure: Thoughts on a Trichotomy*, 102 NW. U. L. REV. 1547, 1547–48 (2008) (describing the conventional view of the merits/jurisdiction distinction).

24. Emp't Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990).

25. See Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 BYU L. REV. 1633, 1654 (noting the need for courts to shift the rationale underpinning the ministerial exception post-*Employment Division v. Smith*); Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1194–95 (“In those jurisdictions that recognize the ministerial exception, it is unlikely to be reversed in the near future, but it is in tension with the Court's most recent cases clarifying the Free Exercise Clause.”).

26. See *infra* Part I.B.

27. See *infra* Part I.B.

28. See *infra* Part I.B.; see also Esbeck, *supra* note 13, at 3–4; Lupu & Tuttle, *supra* note 17, at 122.

religious institutions from complying with various employment statutes in the hiring and firing of “ministers.”<sup>29</sup> Accordingly, much of the subsequent commentary has focused on *Hosanna-Tabor* as a resounding victory for religious liberty.<sup>30</sup> But the Court’s decision in *Hosanna-Tabor* did more than simply endorse the ministerial exception. Despite the lack of briefing by the parties,<sup>31</sup> footnote four of the Supreme Court’s decision resolved a split among the federal courts of appeals<sup>32</sup> and held the following:

A conflict has arisen in the Courts of Appeals over whether the ministerial exception is a jurisdictional bar or a defense on the merits. . . . We conclude that the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar. That is because the issue presented by the exception is “whether the allegations the plaintiff makes entitle him to relief,” not whether the court has “power to hear [the] case.”<sup>33</sup>

This footnote represents far more than a point of civil procedure.<sup>34</sup> For a doctrine to serve as a jurisdictional bar, it must

29. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (“We agree that there is such a ministerial exception.”).

30. See, e.g., Richard Garnett, *A Win for Religious Freedom*, NAT’L REV. ONLINE (Jan. 11, 2012, 12:21 PM), <http://www.nationalreview.com/bench-memos/287858/win-religious-freedom-richard-garnett>; Michael Stokes Paulsen, *Hosanna in the Highest!*, PUB. DISCOURSE (Jan. 13, 2012), <http://www.thepublicdiscourse.com/2012/01/4541>.

31. Howard M. Wasserman, *Prescriptive Jurisdiction, Adjudicative Jurisdiction, and the Ministerial Exemption*, 160 U. PA. L. REV. PENNUMBRA 289, 308, 310 (2012).

32. Compare *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007), *abrogated by Hosanna-Tabor*, 132 S. Ct. at 709 n.4 (characterizing the ministerial exception as jurisdictional), and *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1038 (7th Cir. 2006), *abrogated by Hosanna-Tabor*, 132 S. Ct. at 709 n.4 (same), with *Petruska v. Gannon Univ.*, 462 F.3d 294, 302 (3d Cir. 2006) (characterizing the ministerial exception as an affirmative defense), and *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 654 (10th Cir. 2002) (same), and *Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940, 951 (9th Cir. 1999) (same), and *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1576 (1st Cir. 1989) (same).

33. *Hosanna-Tabor*, 132 S. Ct. at 709 n.4 (quoting *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010)).

34. In an important article, Howard Wasserman has argued that as a matter of civil procedure the ministerial exception must be considered an affirmative defense. See Wasserman, *supra* note 31, at 304. Wasserman reaches this conclusion because on his view that the ministerial exception “arises not from an absence of core adjudicative power, but from an absence of existing legal rules to be applied and enforced, which in turn arises from an absence of prescriptive authority to enact those rules.” *Id.* If true, then footnote four of *Hosanna-Tabor* fits into a larger civil procedure narrative and does not signal a rejection of the prevailing jurisdictional view of the relationship between church and state. While Wasserman’s claims identify how *Hosanna-Tabor* fits

serve to circumscribe “the court’s raw, baseline power and legitimate authority to hear and resolve the legal and factual issues” being presented.<sup>35</sup> By contrast, for a doctrine to serve as an affirmative defense, it must speak to the merits of the claim, contesting whether the defendant’s “real-world conduct” can provide “a basis for suit” or a basis for legal liability.<sup>36</sup>

Thus, by conceptualizing the ministerial exception as an affirmative defense, the Court implicitly rejected the jurisdictional approach to judicial intervention in cases implicating religious matters. Instead of viewing the ministerial exception as

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into a larger civil procedure narrative, they seem to rest on a contestable view of the ministerial exception. According to Wasserman, the ministerial exception speaks to the merits of a claim because it is premised on a “regulatory disability” whereby “government institutions, especially legislatures, are disabled from enacting legal rules that regulate particular real-world conduct and actors.” *Id.* at 303. Wasserman further contends that the ministerial exception cannot be jurisdictional because it is not, first and foremost, related to the adjudicative disability of courts. Instead, he contends that “the limitation on judicial decisionmaking is incidental to the broader limitation on legislative power and on the reach and scope of the substantive law Congress can enact.” *Id.* at 304. It is not clear why this must be the case. In fact, it is precisely this claim that scholars have contested when arguing that the Establishment Clause is structural, Esbeck, *supra* note 13, at 2–11, and premised on an adjudicative disability, Lupu & Tuttle, *supra* note 17, at 134–39. Indeed, according to such scholars, the ministerial exception is not merely incidental to “the limitation on judicial decisionmaking,” but is directly linked to the adjudicative disability of courts to resolve such claims. And if the ministerial exception were based on this “limitation on judicial decisionmaking,” then it would amount to a jurisdictional bar precluding judicial resolution of such claims.

In this way, the jurisdictional paradigm provides a potential foundation for the ministerial exception—one that cannot be rejected simply on civil procedure grounds and one that as a normative matter precludes judicial resolution of such claims. As a result, for the Court to hold that the ministerial exception functions as an affirmative defense—and not a jurisdictional bar—represents an implied attack on the jurisdictional paradigm on normative grounds that trace to the nature of church autonomy. Indeed, it is precisely this move that has opened the door for judicial adjudication of religious disputes where a court had deemed the ministerial exception waived. *See infra* note 44. Wasserman notes that understanding the ministerial exception as an affirmative defense does not preclude the possibility that parties should not be authorized to waive the defense. *See* Wasserman, *supra* note 31, at 315. However, this is not how courts addressing waiver in the wake of *Hosanna-Tabor* have applied the doctrine. *See* *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1318 (11th Cir. 2012) (holding that the defendant waived the ministerial exception by failing to raise it in its brief before the court of appeals); *Petschonek v. Catholic Diocese of Memphis*, No. W2011-02216-COA-R9-CV, 2012 WL 1868212, at \*6 (Tenn. Ct. App. May 23, 2012) (holding that the defendant’s failure to raise the ministerial exception before the trial court prevented consideration of the defense on appeal).

35. *See* Wasserman, *supra* note 23, at 1547–48.

36. *Id.* at 1548.



a doctrine requiring judicial abstention, the Court refashioned the ministerial exception as an affirmative defense to be asserted by the defendant that simply contests the underlying merits of the claim.<sup>37</sup> And as a defense to be asserted, the ministerial exception—and, in turn, the religious clauses upon which it is based—now appears to provide an affirmative right to religious institutions shielding them from various forms of discrimination-based liability. Moreover, as an affirmative defense to be asserted, the ministerial exception can be waived by a religious institution, apparently authorizing a court to adjudicate the dispute so long as no defense is raised.<sup>38</sup> Indeed, courts have already begun adopting this approach in the wake of *Hosanna-Tabor*, holding the ministerial exception defense waived when the defendant has failed to raise it before the trial court.<sup>39</sup>

Given this shift in *Hosanna-Tabor*, it is not surprising that the Court struggled to articulate why individuals have no right to accommodation from facially neutral and generally applicable laws, but institutions can avoid liability from employment discriminations statutes. According to the Court, “a church’s selection of its ministers is unlike an individual’s ingestion of peyote.”<sup>40</sup> “*Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself.”<sup>41</sup> Commentators have puzzled over the Court’s invocation of “outward physical

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37. See Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 350 (2012) (“[T]he Court reached out to pronounce that the First Amendment’s ministerial exemption to federal employment law is a constitutional affirmative defense to the merits of a discrimination claim and not a limit on the court’s adjudicative jurisdiction, continuing its drive to clarify the line between jurisdiction and merits.”). *But see supra* note 34.

38. See 2-8 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 8.27[3] (2d ed. 1996) (“If a party fails to plead an affirmative defense when required to do so by Rule 8(c), the defense is waived.”).

39. See *Hamilton*, 680 F.3d at 1318; *Petschonek*, 2012 WL 1868212, at \*6. In addition to the implications for waiver, some are predicting that the Court’s deeming the ministerial exception an affirmative defense will have significant impact on the costs of such litigation because “resolution of these claims will take longer and be more expensive and contentious.” Mark E. Chopko & Marissa Parker, *Still a Threshold Question: Refining the Ministerial Exception Post-Hosanna-Tabor*, 10 FIRST AMENDMENT L. REV. 233, 299 (2012).

40. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 707 (2012).

41. *Id.* at 697.

acts”; is termination of an employee not also an outward physical act?<sup>42</sup>

More fundamentally, commentators have struggled to explain how *Hosanna-Tabor* could have endorsed the constitutionally protected autonomy of religious institutions over matters of “faith and mission” and yet simultaneously characterized the ministerial exception as merely an affirmative defense subject to waiver by the parties.<sup>43</sup> If institutions are to retain autonomy over core religious matters, how then can courts be allowed to adjudicate religious disputes where parties have waived the affirmative defense of the ministerial exception?<sup>44</sup>

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42. See, e.g., Michael C. Dorf, *Ministers and Peyote*, DORF ON LAW (Jan. 12, 2012, 12:30 AM), <http://www.dorfonlaw.org/2012/01/ministers-and-peyote.html> (responding to the Supreme Court’s attempt in *Hosanna-Tabor* to distinguish *Employment Division v. Smith* by querying “With due respect: huh???”); Jeffrey Pasek, *Ministerial Exemption Is Shrouded in Uncertainty*, JURIST—HOTLINE (Jan. 21, 2012), <http://jurist.org/sidebar/2012/01/jeffrey-pasek-ministerial-ada.php> (“arguing the internal-external distinction is new and hardly self-explanatory,” but the “*Hosanna-Tabor* opinion said little to illuminate or defend it”); see also Caroline Mala Corbin, *The Irony of Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 106 NW. U. L. REV. COLLOQUY 96, 104 (2011) (analyzing *Hosanna-Tabor* under the *Smith* standard); Carl H. Esbeck, *A Religious Organization’s Autonomy in Matters of Self-Governance: Hosanna-Tabor and the First Amendment*, 13 ENGAGE (forthcoming 2013), available at <http://ssrn.com/abstract=2016930> (analyzing the Court’s distinction between the ministerial exception and *Employment Division*).

43. See, e.g., Chopko & Parker, *supra* note 39, at 291.

44. It is important to note here that footnote four poses a challenge to the jurisdictional understanding of the religion clauses because it allows for the possibility of waiver. The normative commitments of advocates of the jurisdictional paradigm have long entailed a view that parties could not waive the ministerial exception because courts were either adjudicatively disabled from resolving such claims or because the Establishment Clause served as a structural bar prohibiting courts from resolving such claims. See, e.g., Esbeck, *supra* note 13, at 58 n.236 (“A free exercise right could be waived by the claimant. But if the operative principle is a constitutional limit on the Court’s power, then the objection to judicial inquiry into religious doctrine cannot be waived. Thus, it can be inferred that the rule of law in these cases is structural in origin.”); Lupu & Tuttle, *supra* note 17, at 135–36 (“The disabling effect of the necessity to decide certain questions is jurisdictional in the strong sense—that is, it cannot be waived or conferred by consent of the parties.”).

To be sure, some civil procedure scholars have argued that there is no clear line differentiating affirmative defenses and jurisdictional bars. See, e.g., Scott Dodson, *Hybridizing Jurisdiction*, 99 CALIF. L. REV. 1439, 1454–55 (2011). On this account, some jurisdictional bars might have some attributes typically associated with affirmative defenses and some affirmative defenses may, at times, take on the characteristics of jurisdictional bars. This view, of course, is not the conventional view. See *id.* at 1445 (“[J]urisdiction typically is

What becomes clear in the wake of *Hosanna-Tabor*'s footnote four is that some alternative theory must animate the Court's vision of religious institutional autonomy. The theory must account for the Court's rejection of the jurisdictional approach to the ministerial exception; it must explain why the Court appears willing to allow lower courts to resolve disputes implicating religious matters where the constitutional concerns have not been raised by the parties; and it must explain why the Court sees a fundamental difference between individual claims for accommodation and institutional claims for autonomy.

Footnote four gestures towards such an alternative theory by reorienting our religion clause jurisprudence away from the structural and jurisdictional limitations we place on courts and towards the autonomy and authority we grant religious institutions.<sup>45</sup> This Article aims to build on this shift embedded in footnote four by mining the Supreme Court's articulations of the doctrine in its early church property cases.<sup>46</sup> In short, this Article claims that far from the jurisdictional approaches to church-state relations, the Supreme Court's decision in *Hosanna-Tabor* lays the groundwork for reconceptualizing church autonomy as a constitutionalized version of arbitration.<sup>47</sup>

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characterized by a rigid set of effects that place it beyond the control of the parties: A jurisdictional rule can be raised at any time, including for the first time on appeal; it obligates the court to police compliance *sua sponte*; and it is not subject to principles of equity, waiver, forfeiture, consent, or estoppel . . . [N]onjurisdictional rules usually are defined as having all the inverse effects of jurisdictionality—they can be waived, forfeited, or consented to, and they are subject to equitable exceptions, estoppel, and judicial discretion.”). To the extent that courts interpret footnote four as categorizing the ministerial exception as an affirmative defense, but still having all the characteristics typically associated with jurisdictional bars, the Supreme Court's holding in *Hosanna-Tabor* may not unsettle the jurisdictional paradigm. Not surprisingly, however, courts thus far have not taken this route, concluding that the ministerial exception can be waived. See *Hamilton*, 680 F.3d at 1318 (holding that the defendant waived the ministerial exception by failing to raise it in its brief before the court of appeals); *Petschonek*, 2012 WL 1868212, at \*6 (holding that the defendant's failure to raise the ministerial exception before the trial court prevented consideration of the defense on appeal). And these instances of waiver highlight why footnote four is likely to require a rethinking of the normative foundations of both the ministerial exception in particular and church autonomy more broadly.

45. See *supra* notes 13–22 and accompanying text.

46. See *infra* Part II.

47. See *infra* Part II.

The hallmarks of arbitration include two primary features: (1) parties grant arbitrators authority through consent<sup>48</sup> and (2) the decisions of duly appointed arbitrators, while granted substantive deference, are subject to review for misconduct, fraud, or other forms of adjudicative “naughtiness.”<sup>49</sup> Importantly, the deference and authority granted arbitrators has nothing to do with the incompetence of courts or an attempt to emphasize the limited nature of state power; arbitrators have authority because parties jointly choose to place their disputes within the jurisdiction of an alternative forum for resolution.<sup>50</sup>

In the Court’s early articulations, church autonomy followed a similar script. On the one hand, the Court originally grounded church autonomy in the “implied consent” of the religious institution’s members.<sup>51</sup> And the Court’s early decisions recognized that the decisions of religious institutions “are accepted in litigation before the secular courts as conclusive,” but only after a “marginal civil court review”<sup>52</sup> ensuring “the absence of fraud, collusion, or arbitrariness.”<sup>53</sup> Between implied consent and marginal civil court review remained a space for autonomous decision-making on the part of religious institutions. Moreover, this autonomy functioned as a right of the religious institution to govern matters properly placed within its authority by the implied consent of its members.<sup>54</sup> Put differently, the Court’s early church autonomy cases understood reli-

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48. See generally Stephen J. Ware, *Arbitration and Unconscionability After Doctor’s Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1001–03 (1996) (explaining the contractual approach to the unconscionability doctrine used in arbitration contexts); Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 145–46 (1996) [hereinafter Ware, *Employment Arbitration*] (emphasizing the importance of voluntary consent in employment and securities arbitration).

49. See 9 U.S.C. § 10 (2006) (listing the statutorily required grounds for vacatur); see also Amina Dammann, Note, *Vacating Arbitration Awards for Mistakes of Fact*, 27 REV. LITIG. 441, 470–75 (2008) (collecting state grounds for vacatur); cf. Arthur A. Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 487 (1967) (describing unconscionability as prohibiting “bargaining naughtiness”).

50. See H.R. REP. NO. 68-96, at 1–2 (1924) (“Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. . . . An arbitration agreement is placed upon the same footing as other contracts, where it belongs.”).

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

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

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

54. See *infra* Part II.

gious institutions as retaining a right to remain free from judicial interference in religious matters and a right to deference in its resolution of religious questions.<sup>55</sup>

Reconceptualizing the church autonomy doctrine as a constitutionalized version of arbitration provides two lines of inquiry for answering the lingering unresolved questions post-*Hosanna-Tabor* regarding the scope of the autonomy granted religious institutions. Using arbitration as a blue print, the early church property cases limit the church autonomy doctrine to instances where there is a basis for finding the implied consent of the parties<sup>56</sup> and where the institution governs and adjudicates in the absence of fraud, collusion or arbitrariness.<sup>57</sup> Put more simply, religious institutions retain authority over cases where the institution's jurisdiction can both be justified on the front end via implied consent<sup>58</sup> and justified on the back end via marginal review for adjudicative improprieties.<sup>59</sup>

Indeed, while the Court unanimously decided *Hosanna-Tabor*, doing so came at the cost of leaving unresolved questions of who is a minister for the purposes of the ministerial exception<sup>60</sup> and whether courts can investigate pretext in the context of ministerial exception.<sup>61</sup> Leveraging this emphasis on implied consent and marginal review, an arbitration approach to church autonomy rejects overly mechanical approaches to

55. For further discussion of the distinction between the Supreme Court's early and more recent church autonomy cases, see Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 494, 521–41 (2013).

56. See *infra* Part II.A.

57. See *infra* Part II.B.

58. See *infra* Part II.A.

59. See *infra* Part II.B.

60. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 707 (2012) (“We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister. It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment.”).

61. The only mention of pretext came towards the end of the Court's decision in a short paragraph dismissing the issue. See *id.* at 709. Significant discussion of such issues were only addressed in *Hosanna-Tabor's* concurring opinions. See *id.* at 715 (Alito, J., concurring) (“What matters is that respondent played an important role as an instrument of her church's religious message and as a leader of its worship activities . . . For civil courts to engage in . . . pretext inquiry . . . would dangerously undermine the religious autonomy that lower court case law has now protected for nearly four decades.”); *id.* at 710 (Thomas, J., concurring) (“I write separately to note that, in my view, the Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization's good-faith understanding of who qualifies as its minister.”).

deciding who is a minister, instead inquiring whether a particular employment dispute falls within the core religious matters where members impliedly consent to the self-government of the religious institution.<sup>62</sup>

Similarly, determining whether a particular decision of a religious institution is pretextual should not be understood to per se undermine the constitutionally required sphere of autonomous adjudication and self-government granted religious institutions.<sup>63</sup> Instead, religious institutions should receive deference over the substance of their decisions like the deference granted to arbitrators, but courts should still employ the procedural review for fraud, collusion, and arbitrariness embraced in the early church property decisions even as it has fallen out of favor in more recent Supreme Court pronouncements.<sup>64</sup>

This Article proceeds in three parts. Part I describes the doctrinal developments that gave rise to and entrenched the jurisdictional approach to the religion clauses. Part II provides an alternative vision of the religion clauses in the wake of *Hosanna-Tabor*'s footnote four. Specifically, this Part articulates how the principles of implied consent and marginal judicial review provide a vision of church autonomy that tracks the structure of arbitration. Part III applies the implied consent/arbitration model of church autonomy to some of the remaining questions regarding the ministerial exception left unresolved by the Supreme Court in *Hosanna-Tabor*.

### I. CHURCH AUTONOMY AS JURISDICTIONAL

As an umbrella term that captures a range of approaches to the religion clauses, jurisdictional approaches to the religion clauses have generally shared certain important similarities. At their core, jurisdictional theories envision a fortified wall between church and state, which captures the notion that religion and state each inhabit different and independent jurisdictions.<sup>65</sup> But this “dual jurisdiction” approach often has a partic-

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62. See *infra* Part III.A.

63. See *infra* Part III.B.

64. See *infra* Part III.B.

65. See, e.g., Horwitz, *Act III*, *supra* note 13, at 161–62 (“[C]ourts, and the state itself, are simply not authorized to intervene in life at the heart of churches. At a deep level, these questions lie beyond the reach of the state altogether. The two kingdoms of temporal and spiritual authority, of church and state, constitute two separate sovereigns.”); Horwitz, *Churches as First Amendment Institutions*, *supra* note 13, at 114 (concluding that under “a sphere sovereignty approach to religious entities,” religious institutions

ular spin; these “jurisdictional” approaches do not focus directly on the scope of autonomy constitutionally granted to religious institutions.<sup>66</sup> Instead they focus on the constitutionally required limitations placed on governmental intervention in religious institutional life.<sup>67</sup>

To some degree this emphasis on governmental limitations as opposed to institutional rights tracked a larger shift in constitutional scholarship away from the Free Exercise Clause and towards the Establishment Clause.<sup>68</sup> But the factors propelling

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“would coexist alongside the state . . . serving a vital role in furthering self-fulfillment, the development of a religious community, and the development of public discourse”); Mark DeWolfe Howe, *Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91, 94 (1953) (interpreting the Supreme Court’s church property cases and concluding that “the Court may have been persuaded that a church must enjoy prerogatives of sovereignty which are not to be conceded to other social groups.”); Steven D. Smith, *Freedom of Religion or Freedom of the Church* 30–31 (San Diego Legal Studies, Working Paper No. 11-061, 2011), available at <http://ssrn.com/abstract=1911412> (arguing that courts and scholars have erroneously discarded the core jurisdictional and institutional impulse behind the religion clauses).

66. See, e.g., Esbeck, *supra* note 13, at 55 (“If the law is to order two entities (‘separation of church and state’), the law must first recognize the existence of both entities. The juridical consequence is that the status of religious entities is acknowledged by the Establishment Clause, and a sphere is reserved in which religious entities may operate unhindered by government in accordance with their own understanding of divine origin and mission.”); Lupu & Tuttle, *supra* note 17, at 122 (arguing that the prohibition against courts adjudicating religious claims is not based on some constitutional desire to “systematically protect the interests of certain classes of parties, defined by religious mission”).

67. See, e.g., Esbeck, *supra* note 13, at 57–58 (“Indeed, in some cases it is the religious rights claimant inviting the Court to make the inquiry into religious doctrine, and it is the Court refusing to do so. Thus, the rule could not be vindicating a free exercise right. Some would even expand the concept of jurisdictional dismissals and dual sovereigns as encapsulating the entire law of government-religion relations.”); Lupu & Tuttle, *supra* note 17, at 122 (arguing that courts avoid intervening in religious disputes because religious “claims would require courts to answer questions that the state is not competent to address”).

68. This shift is most vivid in some of Douglas Laycock’s continued analysis of church autonomy. Compare 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, 1396 (1981) [hereinafter Laycock, *Towards a General Theory*] (arguing that in church schism cases “[w]hen a secular court awards property or an ecclesiastical post on the basis of its resolution of a question of religious doctrine, it establishes the winning faction. But this is merely a consequence of the primary constitutional violation—interfering with the right of the original church, which included both factions, to resolve the controversy itself.”), with Douglas Laycock, *Church Autonomy Revisited*, 7 GEO. J.L. & PUB. POL’Y 253, 262–64 (2009) [hereinafter Laycock, *Church Autonomy*] (considering doctrinal developments related to church au-

this interpretive shift towards a “negative” construction of church autonomy—that is, understanding autonomy as the absence of justified governmental authority—was grounded in a series of doctrinal developments related to both of the religion clauses.

A. FROM INSTITUTIONAL ESTABLISHMENT TO GOVERNMENTAL ENTANGLEMENT

The first of these doctrinal developments pertained to the incorporation of the Supreme Court’s newly minted entanglement doctrine into the church property cases.<sup>69</sup> In the early church property disputes, the Court’s decisions raised establishment concerns, but did so in the context of the affirmative institutional rights of religious organizations. Thus, in its 1871 decision *Watson v. Jones*, the Court famously stated that “[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.”<sup>70</sup> The Court immediately followed this sentence with an affirmative description of the institutional rights guaranteed religious organizations:

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.<sup>71</sup>

Indeed, this strong articulation of institutional autonomy was further buttressed by the Court’s noting that “religious unions” retain a “right to establish tribunals for the decision of ques-

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tonomy and noting that while he does “not have much confidence in the Establishment Clause as a way to do an end run around *Smith*,” the fact that *Employment Div. v. Smith*, 494 U.S. 872 (1990), “shrinks the Free Exercise Clause to a substantial but still undetermined extent, certainly encourages lawyers to look for Establishment Clause explanations [for the ministerial exception]”).

69. The entanglement doctrine primarily draws from the Supreme Court’s decisions in *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (describing the third prong of its analysis as inquiring whether a statute fosters “excessive government entanglement with religion”), and *Walz v. Tax Comm’n of New York*, 397 U.S. 664, 674 (1970) (inquiring whether the government regulation at issue would result in excessive entanglement). Worries of entanglement first appeared in the Supreme Court’s church property cases in 1976 with the Court’s decision in *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976) (“Even when rival church factions seek resolution of a church property dispute in the civil courts there is substantial danger that the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs.”).

70. 80 U.S. (13. Wall.) 679, 728 (1871).

71. *Id.* at 728–29.



tions arising among themselves.”<sup>72</sup> Approximately 70 years later, the Court distilled this notion of church autonomy into a “freedom for religious organizations,” which entailed “an independence from secular control or manipulation” in adjudicating “matters of church government as well as those of faith and doctrine.”<sup>73</sup> In this way, the Court linked the prohibition against government establishing a sect to the affirmative right of religious institutions to establish their own method of dispute resolution and self-government.<sup>74</sup>

This institutional reading of the religion clauses—understanding the prohibition against governmental establishment of religion as tied to the institutional right to establish organs of self-government<sup>75</sup>—largely dissipated in the Supreme Court’s jurisprudence’s since the mid-20th century.<sup>76</sup>

72. *Id.* at 729.

73. *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94, 116 (1952).

74. For a further discussion of this link, see Helfand, *supra* note 55, at 505.

75. To be sure, the Court’s decision in *Watson v. Jones* was grounded in federal common law and not in the First Amendment. *See, e.g.*, Arlin M. Adams & William R. Hanlon, *Jones v. Wolf: Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291, 1292 (1980). However, the Court’s decision in *Watson* was subsequently constitutionalized in *Kedroff*, 344 U.S. at 115–16. Indeed, the Court’s holdings and analyses pre-*Kedroff* continue to be treated as contributing to the contours of contemporary constitutional doctrine. *See, e.g.*, *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 447 (1969) (“In *Kedroff v. St. Nicholas Cathedral*, the Court converted the principle of *Watson* as qualified by *Gonzalez* into a constitutional rule.” (citation omitted)). For a discussion of this non-establishment issue in *Watson*, see Kurt T. Lash, *Beyond Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 447, 456–59 (2009).

76. *See infra* notes 78–83 and accompanying text. Indeed, as I have argued elsewhere, from 1872 (*Watson*) through 1952 (*Kedroff*), lower courts—taking their cue from the Supreme Court—were far more willing than modern courts to adjudicate cases that turned on religious doctrine or practice. *See* Helfand, *supra* note 55, at 559–60; *see also* *Smith v. Pedigo*, 33 N.E. 777, 786 (Ind. 1893) (awarding church property to a minority faction because the majority had departed from the original belief and faith of the church); *Montgomery v. Snyder*, 320 S.W.2d 283, 291 (Mo. Ct. App. 1958) (examining the faiths, fundamental doctrines, and practices of two Baptist organizations, and finding each doctrinally identical); *Fulbright v. Higginbotham*, 34 S.W. 875, 877 (Mo. 1896) (“It . . . sometimes becomes necessary for the civil courts, for the purpose of determining property rights of members, to pass upon questions which are ecclesiastical in their nature.”); *Cohen v. Eisenberg*, 19 N.Y.S.2d 678, 681 (Sup. Ct. 1940) (determining the plaintiff’s kosher poultry trade to have been, in fact, *kosher*, and, in turn, finding the defendant’s public proclamation that the plaintiff’s poultry trade was not kosher to have been defamatory), *aff’d* 24 N.Y.S.2d 1004 (App. Div. 1940); *Philomath Coll. v. Wyatt*, 37 P. 1022, 1024

Instead, the Court recast its Establishment Clause doctrine as circumscribing judicial resolution of religious questions, thereby focusing not on the autonomous space created by the Establishment Clause, but on the inability of courts to address substantive religious claims.<sup>77</sup>

Tracing the origins of this shift from institutional autonomy to judicial abstention begins with a pair of concurrences filed by Justice Brennan. First, in *School District of Abington Township v. Schempp*, Brennan re-characterized the Court's early church property cases as "requiring on the part of all organs of government a strict neutrality toward *theological questions*, courts should not undertake to decide such questions."<sup>78</sup>

Second, in *Maryland & Virginia Eldership of the Churches of God v. Church of God of Sharpsburg, Inc.*, Justice Brennan further argued that the Establishment Clause prohibited judicial inquiry into substantive theological questions: "To permit civil courts to probe deeply enough into the allocation of power within a [hierarchical] church so as to decide . . . religious law [governing church polity] . . . would violate the First Amendment in much the same manner as civil determination of religious doctrine."<sup>79</sup>

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(Or. 1894) ("It is a solemn matter to invade the domain of religious beliefs and dogmas, to explore doctrine, and decide intangible, metaphysical questions pertaining to the Godhead; and courts have a delicacy in entering upon this field of investigation, and will not do so *unless it is necessary for the purpose of determining questions of civil or property rights.*" (emphasis added)); *Schlichter v. Keiter*, 27 A. 45, 57 (Pa. 1893) (determining whether "revision [to the church constitution and statement of faith] made a complete theological departure from the creed of the church" the court wrote: "We have attentively considered the suggestions made to us on the subject by the appellant, we have examined the old and the revised confessions, we have read the testimony of the distinguished theological experts who were called to testify as to the alleged doctrinal differences, and we are satisfied that the master and the court were right" in deciding that there "has been no substantial departure from the ancient belief of the church."); *Deaderick v. Lampson*, 58 Tenn. (11 Heisk.) 523, 535-36 (1872) ("[S]o far as the identity of the respective claimants with the beneficiary to whom the church property was dedicated, may be affected by their doctrines, or by the acts of the General Assembly in that case, the essential coincidence the doctrines and the legal effect of those acts must necessarily be considered for the purpose of deciding the question of title to the property. These principles will sustain the jurisdiction of civil courts in cases like the present . . .") (quoting *Gartin v. Penick*, 68 Ky. (5 Bush) 110, 122 (1868)).

77. See *infra* notes 77-82 and accompanying text.

78. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 243 (1963) (Brennan, J., concurring) (emphasis added).

79. 396 U.S. 367, 369 (1970) (Brennan, J., concurring).

Reformulating the Court's First Amendment jurisprudence in this way altered the trajectory of the church autonomy inquiry away from constitutionally demanded autonomy for religious institutions and toward constitutionally required abstention from judicial inquiry into religious questions.<sup>80</sup> This shift became entrenched in the constitutional landscape with the Court's majority opinion—also authored by Brennan—in *Serbian Eastern Orthodox Diocese v. Milivojevic*, where the Court stated:

The fallacy fatal to the judgment of the Illinois Supreme Court is that it rests upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute, and impermissibly substitutes its own inquiry into church polity and resolutions based thereon of those disputes.<sup>81</sup>

The rationale for this prohibition, however, was not directly tied to the constitutionally protected autonomy of religious institutions. Instead, it rested on the fact that the resolution of intra-church disputes “frequently necessitates the interpretation of ambiguous religious law and usage” and, “in much the same manner as civil determination of religious doctrine,” would “violate the First Amendment.”<sup>82</sup> Put differently, the reason why courts must defer to the religious decision of religious institutions does not rest on the autonomy granted these institutions—such autonomy is simply the by-product of a more basic constitutional prohibition against judicial inquiry into religious questions.<sup>83</sup>

Recasting the Court's Establishment Clause jurisprudence raised two important questions. First, if the rationale underlying judicial deference to religious institutions lay in the consti-

80. Cf. Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 132–33.

81. *Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696, 708 (1976).

82. *Id.* at 708–09 (quoting *Md. & Va. Churches*, 396 U.S. at 369 (Brennan, J., concurring)).

83. See Christopher Lund, *The New Free Exercise Clause*, 108 NW. U. L. REV. (forthcoming 2013) (manuscript at 43) (on file with author) (noting that the “root of the problem” requiring dismissal of a minister's claim for breach of contract is not the impermissibility of judicial intervention in religious questions, but because decisions over matters of internal church governance are properly within the constitutionally protected autonomy of the religious institutions). Disconnecting the church property cases from church autonomy became a source of significant scholarly critique. See, e.g., Adams & Hanlon, *supra* note 75, at 1294–97; Perry Dane, *The Maps of Sovereignty: A Meditation*, 12 CARDOZO L. REV. 959, 969 (1991); John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CALIF. L. REV. 847, 858–68 (1984).

tutional imperative to avoid religious questions, could courts resolve religious questions when the religious institutions before the court waived the constitutionally mandated deference?

The Supreme Court's answer here seemed to be an unequivocal and not particularly surprising "no."<sup>84</sup> Indeed, the Court was quick to couch this response in its newly announced "entanglement" doctrine,<sup>85</sup> explaining that judicial resolution of religious questions violated the First Amendment "[e]ven when rival church factions seek resolution of a church property dispute in the civil courts" because "there is substantial danger that the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs."<sup>86</sup> This refusal was a direct corollary of the Court's Establishment Clause shift; if the Establishment Clause is interpreted to place restrictions on courts—as opposed to providing autonomy to religious institutions—then the fact that parties voluntarily submit their religious dispute to a court is irrelevant. All that matters is whether adjudicating a dispute would potentially "entangle" a court in religious questions.

Inverting the church autonomy inquiry also gave rise to another question: should courts defer to the decisions of religious institutions on church autonomy grounds where the court can avoid resolving the underlying religious doctrinal dispute? Here again the Court built upon in its newly minted Establishment Clause doctrine, holding that courts may resolve religious disputes so long as they rely "exclusively on objective, well-established concepts . . . familiar to lawyers and judges."<sup>87</sup> Thus, deference to religious institutions on matters of self-government and adjudication was not constitutionally necessary where courts could resolve such matters without becoming impermissibly entangled in religious questions. In the words of the Court:

The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method . . . thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice.<sup>88</sup>

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84. See *Serbian E. Orthodox Diocese*, 426 U.S. at 709.

85. See *supra* note 69.

86. *Serbian E. Orthodox Diocese*, 426 U.S. at 709 (emphasis added).

87. *Jones v. Wolf*, 443 U.S. 595, 603 (1979).

88. *Id.* (emphasis added).

In this way, the shift in Establishment Clause jurisprudence from deference toward religious institutions to entanglement in religious questions had two important outcomes. First, entanglement worries could not be waived by the parties to the litigation.<sup>89</sup> Second, where courts could avoid entanglement they could simply ignore the internal decision making of religious institutions.<sup>90</sup> All that mattered from this new perspective was whether courts would impermissibly resolve religious questions.

Framing the doctrine in this way was predicated on a view that courts were judicially incompetent of resolving religious questions.<sup>91</sup> This assumption of judicial incompetence could be based upon two different arguments: either because courts lacked the institutional knowledge and ability to address religious questions<sup>92</sup> or because courts lacked the jurisdictional authority to resolve religious questions.<sup>93</sup> On either count, however, the conception of the Establishment Clause underlying the shift from religious institutions to religious questions was jurisdictional. The autonomy granted religious institutions was a function of the withdrawal of courts from the sphere of religious questions. Thus, courts could not resolve religious questions because they lacked competence, thereby rendering them adjudicatively disabled from addressing claims that turned on religious doctrine or practice. As a result, even if religious institutions wanted courts to resolve a religious dispute, courts could not do so because they lacked jurisdiction over such matters.<sup>94</sup> Put simply, the Establishment Clause worries were all

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89. See *supra* notes 84–86 and accompanying text.

90. See *supra* notes 87–87 and accompanying text.

91. Esbeck, *supra* note 13, at 6 (“Examining the Court’s dismissals for lack of subject matter jurisdiction further reveals the Supreme Court’s view of the Establishment Clause. Such dismissals happen when a court is asked to resolve disputes on topics over which the court deems itself as having no competence.”); Lupu & Tuttle, *supra* note 17, at 138 (arguing that courts avoid intervening in religious disputes because religious “claims would require courts to answer questions that the state is not competent to address”).

92. See, e.g., Lupu & Tuttle, *supra* note 17, at 143–45 (noting, for example, that “[c]ourts cannot decide whether a congregation has engaged in discriminatory conduct toward a ministerial employee without first determining a set of qualifications for holding the role”).

93. See, e.g., Esbeck, *supra* note 13, at 55–56 (“The jurisdictional consequence of [the separation of church and state] is that . . . a sphere is reserved in which religious entities may operate unhindered by government in accordance with their own understanding of divine origin and mission.”).

94. *Serbian E. Orthodox Diocese v. Milivojevich*, 436 U.S. 696, 709 (1976); see also Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Set-*

about what courts could not do; they were not about what religious institutions could do. And reframing the Establishment Clause in this way captured the core of what the jurisdictional view of the religion clauses was all about.

#### B. THE DWINDLING SCOPE OF THE FREE EXERCISE CLAUSE

The foundational changes in the Supreme Court's Establishment Clause jurisprudence are only part of the story of how church autonomy morphed from a doctrine about institutional autonomy to a doctrine about governmental limitations. Another key component of this doctrinal shift lay in the Supreme Court's overhaul of its Free Exercise jurisprudence, most notably in its landmark 1990 decision *Employment Division v. Smith*.<sup>95</sup>

In *Smith*, the Supreme Court faced the Free Exercise claim of Alfred Smith and Galen Black, both of whom were denied unemployment compensation because they had been fired for misconduct.<sup>96</sup> Smith and Black, however, argued that such a denial violated their First Amendment rights because the alleged misconduct—smoking peyote—was part of a Native American Church ceremony.<sup>97</sup>

Rejecting the claims of Smith and Black, the Supreme Court held that the Free Exercise Clause does not protect individuals from facially neutral and generally applicable laws;<sup>98</sup> instead, the Free Exercise Clause protects religious practice from being impermissibly targeted by laws for worse treatment.<sup>99</sup> To do otherwise, contended the Court, “would be to

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*tlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1589 (“The First Amendment, with its doctrine of church autonomy, is a recognition . . . that the civil courts have no subject matter jurisdiction over the internal affairs of religious organizations.”).

95. 494 U.S. 872 (1990).

96. *Id.* at 874.

97. *Id.* at 874–75.

98. *Id.* at 878–79 (“Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’” (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring))).

99. *Id.* at 877 (“It would be true, we think (though no case of ours has involved the point), that a State would be ‘prohibiting the free exercise [of religion]’ if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display.” (quoting U.S. CONST. amend. I)).

make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”<sup>100</sup> Such a conclusion would “contradict[] both constitutional tradition and common sense.”<sup>101</sup>

The Court’s decision sent shockwaves through both the political and scholarly communities, leading to new waves of federal legislation<sup>102</sup> and litigation<sup>103</sup> on the one hand and scholarly writing and debate on the other.<sup>104</sup> Among the many questions

100. *Id.* at 879 (citing *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878)).

101. *Id.* at 885.

102. *See, e.g.*, Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc–2000cc-5 (2006); Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488.

103. *See, e.g.*, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006) (finding the government failed to show a compelling interest, under RFRA, to enforce the Control Substances Act against a religious group’s ritual use of hoasca); *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997) (determining Congress exceeded the scope of its enforcement power under section five of the Fourteenth Amendment by enacting RFRA, as it applied to the states’ general authority); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993) (finding a city ordinance restricting the slaughter of animals to neither have been neutral nor generally applicable under *Smith*); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 663 (10th Cir. 2006) (determining “religious exercise” protected under RLUIPA extended beyond merely “fundamental” or “central” religious activities); *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 363 (3d Cir. 1999) (expanding the application of *Smith* beyond criminal prohibitions); *Hamilton v. Schriro*, 74 F.3d 1545, 1554–56 (8th Cir. 1996) (holding that RFRA neither prohibited prison guards from cutting Native American plaintiffs’ hair nor from keeping them from using a sweat lodge, though such acts deprived plaintiffs of their religious practices and customs); *Kissinger v. Bd. of Trs. of the Ohio State Univ., Coll. of Veterinary Med.*, 5 F.3d 177, 181 (6th Cir. 1993) (relying on *Smith*, the court determined that Ohio State’s College of Veterinary Medicine did not violate the plaintiff’s free exercise rights when it required her to take a class which included the killing of animals, despite plaintiff’s objection that such practice was incompatible with her religious conscience and beliefs).

104. *See, e.g.*, James D. Gordon, III, *Free Exercise on the Mountaintop*, 79 CALIF. L. REV. 91, 91 (1991) (setting the argument in dialogue form between a teacher and his student, Gordon presents a religious teacher lamenting over the *Smith* decision, claiming the Court retreated from its precedent, “used shoddy reasoning,” and deprived the free exercise clause largely of its significance); Marci A. Hamilton, *The Belief/Conduct Paradigm in the Supreme Court’s Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct*, 54 OHIO ST. L.J. 713, 749 (1993) (“*Smith* is not radically different from its forerunners; the single change made is a downward adjustment of the level of scrutiny to be applied to regulations of conduct . . . . Given the way in which the paradigm normally tends to devalue conduct and elevates the interest of the state, such a change is not as startling as early

*Smith* raised was what to do about the significant precedent shielding religious institutions' liability under employment discrimination statutes. This shield—referred to as the ministerial exception—had for the most part been understood as based on the Free Exercise Clause<sup>105</sup> and subsequently adopted by the federal courts of appeals.<sup>106</sup> And yet, the Court's holding in *Smith* seemed at odds with the ministerial exception: If the Free Exercise Clause did not require government to provide individuals with accommodation from facially neutral and generally applicable laws, then how could religious institutions be shielded from liability under employment discrimination statutes? Such statutes were undoubtedly facially neutral and generally applicable.<sup>107</sup>

One response to this tension was to distinguish between the scope of the Free Exercise Clause as applied to individuals and as applied to religious institutions.<sup>108</sup> Along these lines, the

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readings of *Smith* declared.”); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1153 (1990) (contending that *Smith* illegitimately reinterpreted the free exercise clause through normative judgments instead of through “the constitutional text, history and precedent”); Michael W. McConnell, *Should Congress Pass Legislation Restoring the Broader Interpretation of Free Exercise of Religion?*, 15 HARV. J.L. & PUB. POL'Y 181, 183–84 (1992) (claiming *Smith* departed from its precedent by forgoing the “compelling state interest” requirement, and that it would benefit Congress to respond by legislatively re-broadening the application of First Amendment protections under its Fourteenth Amendment powers).

105. The ministerial exception was first announced by the Fifth Circuit in *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), where the court found “that the application of the provisions of Title VII to the employment relationship existing between The Salvation Army and Mrs. McClure, a church and its minister would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment.” *Id.* at 560. Prior to *Smith*, courts typically followed suit and discussed the ministerial exception primarily in the context of the Free Exercise Clause. *See, e.g.*, *Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354, 1356 (D.C. Cir. 1990) (examining the ministerial exception in the context of the Free Exercise Clause and noting that it was therefore unnecessary to discuss the potential applicability of the Establishment Clause); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985) (characterizing the ministerial exception as primarily a free exercise doctrine).

106. *See, e.g.*, Brady, *supra* note 25, at 1651 (collecting cases and noting that “[b]eginning with the Fifth Circuit’s decision in *McClure v. Salvation Army*, lower federal courts have uniformly carved out what has become known as the ‘ministerial exception’ to employment discrimination statutes”).

107. *See supra* note 42 and accompanying text.

108. *Petruska v. Gannon Univ.*, 462 F.3d 294, 306 (3d Cir. 2006) (“The Free Exercise Clause protects not only the individual’s right to believe and profess whatever religious doctrine one desires, but also a religious institution’s right



D.C. Circuit emphasized that “the burden on free exercise that is addressed by the ministerial exception is of a fundamentally different character from that at issue in *Smith*” because “[t]he ministerial exception is not invoked to protect the freedom of an individual to observe a particular command or practice of his church. Rather, it is designed to protect the freedom of the church to select those who will carry out its religious mission.”<sup>109</sup> Thus, the Third Circuit noted that notwithstanding *Smith*, the Free Exercise Clause still protected “a religious institution’s right to decide matters of faith, doctrine, and church governance.”<sup>110</sup>

While some courts did highlight the fundamental difference between an individual’s Free Exercise claims and a religious institution’s Free Exercise claims, an increasing number of judicial opinions and scholarly articles resolved the tension between *Smith* and the ministerial exception by emphasizing the role of the Establishment Clause in providing this shield from liability.<sup>111</sup>

One prominent proponent of this approach has been Judge Richard Posner, who interpreted *Smith* as demonstrating that the Establishment Clause—and not the Free Exercise Clause—provides the constitutional basis for the ministerial exception.<sup>112</sup> As noted by Judge Posner,

In reading into statutes of general applicability an exception favorable to religious organizations, the courts may seem to be flouting the doctrine of *Employment Division v. Smith* . . . . But the ministers exception is a rule of interpretation, not a constitutional rule; and though it is derived from policies that animate the First Amendment, the relevant policies come from the establishment clause rather than from the free-exercise clause. The purpose of the doctrine is not to benefit marginal religions that, lacking the political muscle to obtain legislative protections of their rituals and observances, turn to the courts instead; it is to avoid judicial involvement in religious matters,

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to decide matters of faith, doctrine, and church governance.” (internal quotation marks and citation omitted); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 462 (D.C. Cir. 1996); see also *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 349 (5th Cir. 1999) (citing approvingly the court’s analysis in *Catholic Univ.*, 83 F.3d at 462).

109. *Catholic Univ.*, 83 F.3d at 462.

110. *Petruska*, 462 F.3d at 306.

111. See Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 *FORDHAM L. REV.* 1965, 2004–05 (2007). It is worth noting that at least one court has suggested that the ministerial exception falls within *Smith*’s “hybrid-rights” exception. See *Catholic Univ.*, 83 F.3d at 467.

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

such as claims of discrimination that if vindicated would limit a church's ability to determine who shall be its ministers.<sup>113</sup>

Other courts have not been quite so clear in their approach to the ministerial exception post-*Smith*. That being said, prior to *Hosanna-Tabor*, federal courts implicitly pursued a similar approach, relying much more heavily in post-*Smith* decisions on the Establishment Clause when articulating the constitutional foundations of the ministerial exception.<sup>114</sup> As Douglas Laycock has noted, even though he does “not have much confidence in the Establishment Clause as a way to do an end run around *Smith*,”<sup>115</sup> the fact that *Smith* “shrinks the Free Exercise Clause to a substantial but still undetermined extent, certainly encourages lawyers to look for Establishment Clause explanations [for the ministerial exception].”<sup>116</sup> According to Ira Lupu and Robert Tuttle, *Smith* demonstrated that “the ‘ministerial exception’ could no longer rest on a doctrine of free exercise exemptions,”<sup>117</sup> further indicating the Establishment Clause provided a more appropriate grounding for the doctrine.<sup>118</sup>

This jurisprudential migration of the ministerial exception away from the Free Exercise Clause and toward—although not exclusively under—the Establishment Clause further reinforced the jurisdictional conception of the religion clauses.<sup>119</sup> As Lupu and Tuttle note, *Smith* did not lead to judicial rejection of the ministerial exception<sup>120</sup>—far from it.<sup>121</sup> Instead, courts and

113. *Id.*

114. *See, e.g.*, *Rweyemamu v. Cote*, 520 F.3d 198, 205–06 (2d Cir. 2008); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1304 (11th Cir. 2000); *Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940, 948 (9th Cir. 1999); *Scharon v. St. Luke’s Episcopal Presbyterian Hosps.*, 929 F.2d 360, 363 (8th Cir. 1991).

115. *See Laycock, Church Autonomy Revisited*, *supra* note 68, at 264.

116. *Id.* at 262.

117. Lupu & Tuttle, *supra* note 17, at 131.

118. *Id.*

119. Kalscheur, *supra* note 13, at 63–69 (describing this shift toward explaining the ministerial exception as based upon the Establishment Clause).

120. Lupu & Tuttle, *supra* note 17, at 131.

121. *See, e.g.*, *Shaliesabou v. Hebrew Home*, 363 F.3d 299, 306 n.7 (4th Cir. 2004) (“[T]he Supreme Court’s intervening decision in [*Smith*] has not abrogated the ministerial exception.”); *Bryce v. Episcopal Church*, 289 F.3d 648, 657 (10th Cir. 2002) (“[T]he ministerial exception cases . . . extend[] beyond the specific ministerial exception to the church autonomy doctrine generally, and we . . . find that the church autonomy doctrine remains viable after *Smith*.”); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1301 (11th Cir. 2000) (“We conclude the ministerial exception to Title VII survives the Supreme Court’s holding in *Smith*.”); *EEOC v. Roman Catho-*

scholars looked to the church property cases, from *Watson v. Jones* through *Jones v. Wolf*, to locate the ministerial exception within the larger framework of church autonomy as opposed to simply seeing the ministerial exception as another form of religious accommodation.<sup>122</sup>

This relocation also came along with a whole new analytic framework. Doctrines like the ministerial exception were not aimed at creating exceptions for religious institutions from facially neutral and generally applicable laws; to the contrary, doctrines like the ministerial exception were premised on the exclusive jurisdiction of religious institutions to govern their own internal religious affairs.<sup>123</sup> Put differently, religious institutions did not need exceptions from laws impacting the hiring and firing of ministers because government did not, so to speak, have the jurisdiction to pass laws that trespassed on the exclusive right of religious institutions to select ministers, interpret religious doctrine, and impose religious discipline on their members.<sup>124</sup>

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lic Diocese, 213 F.3d 795, 800 n.\* (4th Cir. 2000) (“All circuits to have addressed the question have recognized the continuing vitality of the [ministerial] exception after the Supreme Court’s decision in [*Smith*] . . . .” (citation omitted)); *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 349 (5th Cir. 1999) (“We concur wholeheartedly with the D.C. Circuit’s conclusion that *Smith* . . . did not purport to overturn a century of precedent protecting the church against governmental interference in selecting its ministers.”); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 462 (D.C. Cir. 1996) (“[W]e disagree with appellants’ conclusion that *Smith* requires the rejection of the ministerial exception.”); *Bogan v. Miss. Conference of United Methodist Church*, 433 F. Supp. 2d 762, 766 (S.D. Miss. 2006) (finding the ministerial exception survived *Smith*).

122. See, e.g., Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 58 (2011) (“*Smith* is a free exercise case. But the ministerial exception is grounded just as much in disestablishment concerns as in free exercise.”); see also Lupu & Tuttle, *supra* note 17, at 135–37 (arguing that the ministerial exception derives from the Establishment Clause).

123. See *supra* note 13 and accompanying text; see also Richard W. Garnett, *The Political (and Other) Safeguards of Religious Freedom*, 32 CARDOZO L. REV. 1815, 1826–27 (2011) (arguing that post-*Smith* courts “can and should clearly and carefully vindicate the ideas that religious and political authorities are distinct, independent, and separate; and that the right to religious freedom includes the freedom of religious communities to govern themselves with respect to matters of doctrine, discipline, and polity”).

124. It is worth noting that the Court in *Smith* itself appeared—although somewhat obliquely—to support the continued vitality of the church property cases by citing to them approvingly even as it narrowed the scope of the Free Exercise Clause. See Brady, *supra* note 25, 1637–49; Mark E. Chopko & Michael F. Moses, *Freedom to Be a Church: Confronting Challenges to the Right of Church Autonomy*, 3 GEO. J.L. & PUB. POL’Y 387, 404 (2005); Lund, *supra* note 122, at 58–59.

In this way, reaction to *Smith* amplified the turn to a jurisdictional conception of church-state relations. Thus, the ministerial exception was not a defense to be asserted by a religious institution against enforcement of an otherwise applicable law; *Smith* undermined an analytical framework that spoke in such terms. Post-*Smith*, the ministerial exception was simply a landmark signifying the boundaries of government's jurisdiction. In turn, it made sense to understand the ministerial exception as representing a jurisdictional bar to the assertion of a court's authority.

As a result, *Smith* further bolstered the jurisdictional approach to the religion clauses. It encouraged courts and scholars to emphasize the benefits of conceptualizing religious institutions as jurisdictionally separate from the state<sup>125</sup> and to explore the benefits of this jurisdictional divide.<sup>126</sup> At least until footnote four.

## II. CHURCH AUTONOMY AS CONSTITUTIONALIZED ARBITRATION

Thus far, this Article has outlined the underlying logic and doctrinal developments behind the "jurisdictional" approach to the religion clauses. At its core, the jurisdictional approach understands the religion clauses as fortifying the wall of separation between church and state with each prohibited from trespassing on the authority of the other.<sup>127</sup> Doctrinally, this framework could be applied in a number of ways. Most notably, the jurisdictional approach to the religion clauses understood courts as adjudicatively disabled from resolving religious disputes.<sup>128</sup> Accordingly, even if both parties wanted a court to re-

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125. See *supra* note 108 (collecting cases emphasizing the distinction between *Smith's* focus on individual Free Exercise Claims and the rights of religious institutions that still remained beyond government regulation); *supra* note 13 (collecting articles emphasizing the core jurisdictional underpinning of the religion clauses).

126. See, e.g., Esbeck, *supra* note 13, at 60–75 (describing how a jurisdictional approach to the Establishment Clause promotes core principles of voluntarism and reinforces the limited authority of the state); Kalscheur, *supra* note 13, at 91–97 (describing how a jurisdictional approach to the ministerial exception affirmed the penultimacy of the state).

127. See *supra* note 65.

128. See, e.g., Esbeck, *supra* note 13, at 28–32 (arguing that the Establishment Clause provides a structural and thereby jurisdictional constraint on government intervention in religious affairs); Kalscheur, *supra* note 13, at 99–100 (characterizing doctrines such as the ministerial exception as depriving courts of subject-matter jurisdiction); Lupu & Tuttle, *supra* note 17, at 122

solve their dispute, courts were constitutionally prohibited from adjudicating the matter.<sup>129</sup> On the jurisdictional account, parties could not wish away the incompetence of courts to adjudicate religious questions.

It is against this context that we begin to see the revolutionary—even if inadvertent—impulse in footnote four of *Hosanna-Tabor*. Without briefing from the parties or discussion during oral argument,<sup>130</sup> the Supreme Court held that the ministerial exception must be treated by courts not as a jurisdictional bar, but as an affirmative defense. Importantly, doctrines serve as jurisdictional bars when they circumscribe a court's authority to hear the dispute submitted;<sup>131</sup> by contrast, doctrines give rise to affirmative defenses where they speak to the merits of the claim, contesting whether the defendant's "real-world conduct" can provide "a basis for suit" or a basis for legal liability.<sup>132</sup>

While couched in civil procedure terminology, the Court's holding undermined the growing momentum behind the jurisdictional approach to the religion clauses. As an affirmative defense, the ministerial exception could be waived, enabling parties to authorize courts to resolve disputes over the employment and termination of religious ministers.<sup>133</sup> In this way, casting the ministerial exception as an affirmative defense provided courts with an entrée into the regulation of religious institutional life—so long as they received an invitation to do so. As a result, footnote four appeared to presuppose a far more permeable wall of separation between religion and state than its jurisdictional predecessor.

Indeed, footnote four could not be squared with the view that courts lack the competence to resolve religious disputes. If courts truly were adjudicatively disabled from addressing religious claims then how could the parties waive claims like the ministerial exception? By waiving such claims, courts would be authorized to adjudicate the underlying dispute. Such authority would be impossible if the religion clauses were interpreted

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(concluding that courts are adjudicatively disabled from resolving disputes that turn on religious doctrine or practice).

129. See Esbeck, *supra* note 13, at 42–43.

130. See *supra* note 31.

131. See Wasserman, *supra* note 23, at 1547–48.

132. *Id.* at 1548.

133. Indeed, post-*Hosanna-Tabor* appellate courts have already begun holding the ministerial exception waived when not raised by the religious institution before the trial court. See *supra* note 34.

to support judicial incompetence to resolve religious disputes. To the contrary, a jurisdictional view of the religion clauses would require courts to raise claims like the ministerial exception whether or not the parties chose to do so—an option apparently no longer available in the wake of footnote four.

Not surprisingly, commentators have struggled to understand what theory of the religion clauses might explain the Supreme Court's simultaneous endorsement of church autonomy in *Hosanna-Tabor* and also the Court's abandonment of the jurisdictional paradigm.<sup>134</sup> For example, Mark E. Chopko and Marissa Parker criticized footnote four as inconsistent with the rest of the Court's opinion in *Hosanna-Tabor*: "If the ministerial exception reflects [as the Court stated in *Hosanna-Tabor*] a rule that denies to civil magistrates the power to reach 'an internal church decision that affects the faith and mission of the church itself,' that issue presents not an affirmative defense, but an exercise of 'competence' as Watson used the word."<sup>135</sup> Accordingly, Chopko and Parker simply wish footnote four away: "[r]egardless of the label, we think these cases will continue to present questions of 'competence' and therefore present threshold legal questions."<sup>136</sup>

Of course, this is just wishful thinking. Footnote four presumes an alternative theory underlying the religion clauses—one that accounts both for the Supreme Court's endorsement of

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134. See Carl H. Esbeck, *A Religious Organization's Autonomy in Matters of Self-Governance: Hosanna-Tabor and the First Amendment*, 13 *ENGAGE* 168, 169 (2012). Esbeck continues to argue that the Establishment Clause provides a structural restraint on government intervention in religious institutional life. *Id.* However, aware that the Supreme Court has characterized the ministerial exception as an affirmative defense, Esbeck contends that judicial inquiry into an assertion of the ministerial exception should be limited to the "Is plaintiff a minister" question. *Id.* at 173 n.33. Esbeck does not address questions of waiver.

For a discussion of the jurisdictional paradigm in the wake of the footnote four of *Hosanna-Tabor*, see Richard W. Garnett & John M. Robinson, *Hosanna-Tabor, Religious Freedom, and the Constitutional Structure*, in *CATO SUPREME COURT REVIEW* 326–30 (Ilya Shapiro ed. 2012) (arguing that footnote four of *Hosanna-Tabor* is compatible with jurisdictional limitations on judicial authority to adjudicate ministerial exception cases); Michael Helfand, *The New Footnote Four?*, *CENTER FOR L. & RELIGION* (May 25, 2012), <http://clrforum.org/2012/05/25/the-new-footnote-4/> (arguing that footnote four of *Hosanna-Tabor* undermines the jurisdictional approach to the religion clauses); Mark Strasser, *Footnote Four to the Rescue? Hosanna-Tabor's Rejection of the Institutional Incompetence Argument* 8–9 (Mar. 2012) (unpublished manuscript) (on file with author).

135. Chopko & Parker, *supra* note 39, at 291.

136. *Id.*

church autonomy and for its refusal to adopt the jurisdictional approach to the religion clauses.

In articulating such an alternative theory, we need not look further than the Supreme Court's early church property cases, which grounded church autonomy not in the adjudicative incompetence of courts but in the affirmative authority granted religious institutions to govern the religious life of their members.<sup>137</sup> In articulating this conception of church autonomy, the Supreme Court understood the authority granted religious institutions as based upon two core principles: first, that the authority of religious institutions derived from the implied consent of its members;<sup>138</sup> and, second, that the decisions of religious institutions would be reviewed by civil courts for "fraud, collusion or arbitrariness."<sup>139</sup> Thus, courts abstained from interfering in religious disputes because the members had impliedly consented to the authority of the religious institution and because courts could still review the decisions of the religious institution for fraud, misconduct, or other forms of procedural naughtiness.<sup>140</sup>

To be sure, the early church property cases only provide the foundational principles of an alternative view. These principles must be fleshed out and applied to contemporary concerns in order to provide a workable method for analyzing the scope of church autonomy.<sup>141</sup> But by building a new paradigm on these twin principles—consent on the front end and civil court review on the back end—the early church property cases crafted a framework that largely tracks our longstanding sys-

137. See *infra* Parts II.A–B.

138. See *infra* Part II.A.

139. See *infra* Part II.B.

140. See Ira Mark Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CALIF. L. REV. 1378, 1387 (1981) (describing this as *Watson's* "contract principle" and noting the relationship between consent and review for fraud and collusion). Ellman also claims that the *Watson* decision was guided by a principle of "strict deference"—a jurisdictional principle—which he admits stands in tension with the "contract principle." *Id.* at 1388. However, as I have argued here and elsewhere, *Watson's* discussion of deference should not be read as precluding the possibility of judicial resolution of religious disputes, but as linked to the underlying logic of implied consent. Helfand, *supra* note 55, at 525–29; see also *infra* note 260 and accompanying text. Cf. Kent S. Bernard, *Churches, Members, and the Role of the Courts: Toward a Contractual Analysis*, 51 NOTRE DAME LAW. 545, 547–59 (1976) (discussing how principles of arbitration informed early common law conceptions of church autonomy);

141. See *infra* Parts II.A.1–3 (providing contemporary applications of the implied consent rationale).

tem of commercial arbitration.<sup>142</sup> Arbitrators draw their authority not from the incompetence of courts, but from the consent of the parties to enter an alternative forum for adjudication.<sup>143</sup> And while courts largely refrain from reviewing the substantive merits of an arbitrator's decision,<sup>144</sup> courts do patrol arbitration proceedings to ensure that decision is not the result of fraud, collusion, or other forms of misconduct.<sup>145</sup>

Importantly, the two principles of consent and review are fundamentally linked. It is precisely because parties consent to an alternative forum for adjudication that courts must conduct a review of the process.<sup>146</sup> If the process does not represent genuine adjudication on the merits, then the resulting decision can no longer claim legitimacy on the basis of the consent of the

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142. Cf. Bernard, *supra* note 140, at 547–52. Bernard argues that principles of contract and arbitration informed early common law understandings of church autonomy. *Id.* However, Bernard's article—which predates many of the important contemporary church property cases—links these principles to institutional autonomy by framing institutional authority as based upon explicit and implied contracts capable of judicial interpretation without inquiry into religious doctrine or practice. Accordingly, Bernard fits his theory within the framework of the neutral principles of law approach. *See id.* at 562–67. As a result, Bernard's view runs contrary to the view advanced in this article. *See infra* Part II.A.3.

143. *See, e.g.,* Alan Scott Rau, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1, 5 (2002) (describing the assertion that "consent to arbitration is a necessary condition of enforcement" as a "truism").

144. *See, e.g.,* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 563 (1976) ("[Courts] should not undertake to review the merits of arbitration awards but should defer to the tribunal chosen by the parties finally to settle their disputes."); United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 596 (1960) ("The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards."). Indeed, arbitrators are granted wide authority in fashioning equitable resolutions to the disputes submitted before them. *See, e.g.,* Reliastar Life Ins. Co. v. EMC Nat'l Life Co., 564 F.3d 81, 86 (2d Cir. 2009) ("Where an arbitration clause is broad, arbitrators have the discretion to order such remedies as they deem appropriate.").

145. *See* 9 U.S.C. § 10 (2006); *see also* Dammann, *supra* note 48, at 470–75 (2008) (collecting state grounds for vacatur).

146. Ellman, *supra* note 140, at 1391 ("Justice Brandeis' other qualification in *Gonzalez*—'in the absence of fraud, collusion, or arbitrariness'—also seems to follow from the use of contract principles. A court should always be available to determine whether an organizational decision has been made in the manner contemplated by the agreement, for otherwise the member could not be said to be bound by it. Few agreements would contemplate decisions made fraudulently or arbitrarily."); Note, *Judicial Intervention in Church Property Disputes—Some Constitutional Considerations*, 74 YALE L.J. 1113, 1120 (1965) ("[T]he consent of the members to be governed by the church authorities did not envision fraudulent, arbitrary, or collusive action by these authorities.").



participants. Individuals submit to the authority of another forum because they seek merits-based adjudication and regulation performed in good faith. Parties do not consent to decision making that is corrupted by misconduct.<sup>147</sup>

Moreover, once we unmoor church autonomy from judicial incompetence and instead hitch church autonomy to the consent of the parties, *Hosanna-Tabor's* footnote four comes into focus.<sup>148</sup> If religious institutional authority is grounded in an implied agreement between the institution and its members, then surely those very same parties can employ that same consent mechanism to authorize courts to resolve intractable religious disputes. Thus, to conceptualize the ministerial exception as an affirmative defense also empowers religious institutions and their employees to jointly agree to waive such defenses. Like the authority of an arbitrator, institutional autonomy is not inherent or mysterious—and it is not based on judicial inability to resolve the dispute. Footnote four, in understanding the ministerial exception as an affirmative defense, opened the door for courts to resolve religious disputes at the request of the parties. Put differently, church autonomy functions simply as an implied arbitration clause where religious institutions are impliedly authorized to govern religious matters and resolve religious disputes. But because such authority is based on consent, religious parties can also opt out.

In this way, the early church autonomy cases endorsed a constitutionalized version of arbitration. The autonomy of religious institutions derived from implied consent and courts policed the decisions of religious institutions for misconduct.<sup>149</sup> But to understand how these principles might be applied to the contemporary dilemmas of church autonomy requires further

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147. Ellman, *supra* note 140, at 1391.

148. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 709 n.4 (2012).

149. Indeed, even Carl Esbeck has conceded that the implied consent logic of *Watson* does not fit within a jurisdictional approach to the religion clauses. Esbeck, *supra* note 13, at 51 n.208 (“It must be conceded that in one small respect the rationale behind these cases is tied to individual free exercise rights. Specifically, the Court implies that when an individual first joins a church, the membership arrangement is somewhat like a contract . . . . An implied term of that contract is consent to the resolution of any religious disputes that should arise by the highest ecclesiastical adjudicatory. Therefore, the Court reasons, the dissenting member’s religious rights are not violated when the internal resolution of a dispute goes against that member. In all other respects, the Court’s rationale is structural.”).

elaboration and bringing these principles into more direct conversation with principles of arbitration.

#### A. IMPLIED CONSENT

Few concepts have played a more foundational role to the political theory of liberalism than consent. Most pronounced in early social contract theories,<sup>150</sup> philosophers such as John Locke<sup>151</sup> and Thomas Hobbes<sup>152</sup> grounded their theories of political legitimacy in consent; on such accounts, it was the consent of the governed that rendered government legitimate—a premise of central importance in the Declaration of Independence as well.<sup>153</sup>

The allure of consent as a cornerstone of political legitimacy stemmed from the connection between consent and autonomy.<sup>154</sup> By predicating political and legal authority on the consent of the governed, liberal political theory sought to ensure that political and legal obligations remained a function of individual choice and not oppression and coercion.<sup>155</sup>

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150. For some of the foundational secondary works addressing the primary role of social contract theory in political theories of legitimacy and obligation, see generally J.W. GOUGH, *THE SOCIAL CONTRACT* (2d ed. 1967); C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* (1962); see also Ernest Barker, *Introduction*, in *SOCIAL CONTRACT* i, vii (Ernest Barker ed., 1948).

151. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 348 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690) (“MEN being, as has been said, by Nature, all free, equal and independent, no one can be put out of this Estate, and subjected to the Political Power of another, without his own consent.”).

152. THOMAS HOBBS, *LEVIATHAN* 113 (Michael Oakeshott ed., Basil Blackwell 1947) (1651) (“From this institution of a commonwealth are derived all the *rights*, and *faculties* of him, or them, on whom the sovereign power is conferred by the consent of the people assembled.”).

153. *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776) (“Governments are instituted among Men, deriving their just Powers from the Consent of the Governed . . .”).

154. See, e.g., Lea Brilmayer, *Consent, Contract, and Territory*, 74 *MINN. L. REV.* 1, 21 (1989) (“Consent is a seductive notion because it seems to explain obligations in terms of the obligated individual’s voluntary choice.”). That consent can successfully justify political obligation, however, remains a highly contested proposition with critics who note that individual choice is often limited because of historical circumstances and exit costs. See *id.* at 22–24. For a justification of consent theory, see Ilya Somin, *Revitalizing Consent*, 23 *HARV. J.L. & PUB. POL’Y* 753 (2000); see also Randy E. Barnett, *A Consent Theory of Contract*, 86 *COLUM. L. REV.* 269, 319 (1986) (noting that a consent theory of contract places importance on individual will and autonomy, but also promotes other principles such as reliance and efficiency).

155. Economic theorists also emphasize consent, albeit for a different reason. See Nathan B. Oman, *A Pragmatic Defense of Contract Law*, 98 *GEO. L.J.*

These considerations of consent and fears of coercion have long framed the place of religion and religious associations within political liberalism<sup>156</sup> and, in particular, the American political tradition.<sup>157</sup> Most famously, John Locke defined the very essence of a church as “a voluntary society of men, joining

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77, 103 (2009) (arguing that economic theorists “tend to defer to consensual transactions, not because consent does any justificatory work per se, but rather because consent is an epistemic marker, an observable indicator that a redistribution of resources results in a non-observable increase in welfare”).

156. See *supra* note 150. Of course, liberalism—and especially classical liberalism—has endured significant criticism for its reliance on unproblematic principles of voluntarism. Some of this criticism has come from feminist scholars who have emphasized that voluntarism’s presumption of exit is dubious. See, e.g., SEYLA BENHABIB, *THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA* 82–104 (2002) (discussing cases in which multicultural associations often work to the detriment of women); SUSAN MOLLER OKIN, *IS MULTICULTURALISM BAD FOR WOMEN?* 7–24 (Joshua Cohen et al. eds., 1999) (arguing that multicultural group rights tend to reinforce subordination of women due to inequalities within the groups themselves); AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN’S RIGHTS* 60–63 (2001).

Another prominent criticism of voluntarism has come from so-called communitarian political theorists who have contended that liberalism assumes the priority of the individual instead of recognizing that individual identity is tightly bound to social and cultural contexts—a fact that undermines claims of voluntary association. See, e.g., ALASDAIR MACINTYRE, *AFTER VIRTUE* 204–25 (3d ed. 2007) (discussing the role of traditions and virtues in forming individual identities); MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 1–24 (1996) (discussing the public philosophy of contemporary liberalism); CHARLES TAYLOR, *SOURCES OF THE SELF* 185–98, 502–06 (1989) (discussing the complex conceptions of modern identity); MICHAEL WALZER, *SPHERES OF JUSTICE* 31–63 (1983) (arguing that group membership structures all of our individual choices); 2 CHARLES TAYLOR, *Atomism, in PHILOSOPHY AND THE HUMAN SCIENCES* 187, 205 (1985) (“[T]he free individual or autonomous moral agent can only achieve and maintain his identity in a certain type of culture . . . .”); Michael J. Sandel, *The Procedural Republic and the Unencumbered Self*, 12 *POL. THEORY* 81, 90–91 (1984) (“To imagine a person incapable of constitutive attachments . . . is not to conceive an ideally free and rational agent, but to imagine a person wholly without character, without moral depth . . . . Denied the expansive self-understandings that could shape a common life, the liberal self is left to lurch between detachment on the one hand, and entanglement on the other.”).

157. See, e.g., Esbeck, *supra* note 13, at 63–67 (discussing the centrality of voluntarism in Establishment Clause jurisprudence); Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 *N.Y.U. L. REV.* 346, 348–51 (2002) (highlighting the role of freedom of conscience and voluntarism in the early conceptions of religious freedom and the religion clauses); David C. Williams & Susan H. Williams, *Volitionalism and Religious Liberty*, 76 *CORNELL L. REV.* 769, 853–58 (1991) (describing the role of volition in the writings of Thomas Jefferson and James Madison on religion and religious liberty).

themselves together of their own accord”<sup>158</sup>—a formulation subsequently echoed by Thomas Jefferson.<sup>159</sup>

It is therefore not surprising that the Supreme Court’s early church property cases built on this framework of consent and voluntarism.<sup>160</sup> In its 1871 decision *Watson v. Jones*, the Supreme Court noted “[t]hat in so far as the law can regard them, the powers of the church judicatories are derived solely from the consent of the members of the church.”<sup>161</sup> Similarly, in its 1929 decision *Gonzalez v. Roman Catholic Archbishop*, the Supreme Court explicitly grounded church autonomy in the consent of the religious institution’s members, holding that “the decisions of the proper church tribunals on matters purely ecclesiastical . . . are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise.”<sup>162</sup>

And yet, *Watson* and *Gonzalez* do not employ the generic language of consent. Instead, in language unreflectively incorporated into subsequent Supreme Court decisions,<sup>163</sup> *Watson* and *Gonzalez* predicate the authority of religious institutions on *implied* consent.<sup>164</sup> The shift to implied consent, of course, is not novel. Political philosophers from John Locke<sup>165</sup> to John

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158. See JOHN LOCKE, *A Letter Concerning Toleration*, in THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION 129 (J. W. Gough ed., 1947) (1689).

159. See THOMAS JEFFERSON, *Notes on Religion*, in 2 THE WRITINGS OF THOMAS JEFFERSON 101 (Paul Leicester Ford ed., 1893) (1776).

160. See *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16–17 (1929); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1871).

161. *Watson*, 80 U.S. (13 Wall.) at 710.

162. *Gonzalez*, 280 U.S. at 16. The court continued by noting that “[u]nder like circumstances, effect is given in the courts to the determinations of the judicatory bodies established by clubs and civil associations.” *Id.* at 16–17.

163. See, e.g., *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 713 (2012) (quoting significantly from *Watson*, including the “implied consent” language); *Jones v. Wolf*, 443 U.S. 595, 617 (1979) (same); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 711 (1976) (same); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 446 (1969) (same).

164. *Gonzalez*, 280 U.S. at 16–17 (referencing the implied consent of *Watson*); *Watson*, 80 U.S. (13 Wall.) at 729 (introducing the concept of implied consent).

165. LOCKE, *supra* note 151, at 366 (“And to this I say, that every Man, that hath any Possession, or Enjoyment, of any part of the Dominions of any Government, doth thereby give his *tacit consent*, and is as far forth obliged to Obedience to the Laws of that Government, during such Enjoyment, as any one under it . . .”).

Rawls<sup>166</sup> have deployed various forms of tacit or hypothetical consent in order to avoid some of the problems of basing political obligation on actual consent—most notably, that there rarely is actual consent on the part of those governed.<sup>167</sup>

But grounding the authority of religious organizations in the implied consent of their members does say something significant about the nature of church autonomy. In the words of *Watson*, “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>168</sup> Thus, according to the *Watson* Court, those who join a church or other religious institution recognize that becoming a member entails implicitly authorizing the institution to self-govern and resolve internal disputes.<sup>169</sup> The rationale for this implied consent is directly tied to the substantive objectives of religious institutions: “It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.”<sup>170</sup> The key here is *Watson*’s argument for the unique role of implied consent in the context of religious institutions—as opposed to secular associations—which links the reason why individuals join religious institutions to the authority of religious institutions to self-govern.

In advancing this claim, *Watson* built upon an argument tracing back to the founding period<sup>171</sup> and, in turn, to John Locke.<sup>172</sup> Indeed, it was Locke who explicitly connected the vol-

166. JOHN RAWLS, *A THEORY OF JUSTICE* 12 (1971) (“It is understood as a purely hypothetical situation characterized so as to lead to a certain conception of justice.”).

167. For further discussion of some of the problems posed by tacit consent, see A. John Simmons, *Tacit Consent and Political Obligation*, 5 *PHIL. & PUB. AFF.* 274, 275–76 (1976). See also John Dunn, *Consent in the Political Theory of John Locke*, 10 *HIST. J.* 153, 155–57 (1967) (arguing that Locke’s acceptance of tacit consent, among other considerations, demonstrates that consent did not play as prominent a role in Locke’s theory as typically understood).

168. *Watson*, 80 U.S. (13 Wall.) at 729.

169. *Id.*

170. *Id.*

171. See Williams & Williams, *supra* note 157, at 853–58 (describing the role of volition in the founding era); see also JEFFERSON, *supra* note 159, at 101 (noting that individuals join a church “in order to the public worshipping of god in such a manner as they judge acceptable to him & effectual to the salvation of their souls . . . . The hope of salvation is the cause of his entering into it.”).

172. See Feldman, *supra* note 157, at 378 (“By the late eighteenth century,

untary nature of religious institutions to the need for the membership's consent to institutional rule-making authority.<sup>173</sup> According to Locke, individuals voluntarily join churches to achieve "the salvation of their souls," and this "hope of salvation" serves as the motivation for "members voluntarily uniting" into a church.<sup>174</sup> However, Locke notes that in order to accomplish such objectives the church must "be regulated by some laws, and the members all consent to observe some order."<sup>175</sup> Thus, on Locke's account, the membership must consent to both be "regulated by some laws" and "observe some order"<sup>176</sup>—what we might see as necessary consent to the regulatory and adjudicative authority of a religious institution.

Of course, to speak of a *need* to consent, at first glance, smacks of a contradiction; consent rests on notions of voluntarism, something that cannot be of necessity.<sup>177</sup> But religious institutions aim to accomplish a unique set of goals, such as faith and salvation, which civil society is ill-suited to achieve. Indeed, as Locke notes, civil society seeks to "procur[e], preserv[e], and advanc[e] . . . civil interests," such as "life, liberty, health and indolency of body; and the possession of outward things, such as money, lands, houses, furniture, and the like."<sup>178</sup> By focusing its efforts and energies on "outward things," a civil society avoids taking sides on how its citizens should lead the good life, leaving room for the deep value-pluralism that typifies the liberal nation-state.<sup>179</sup>

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some version of Locke's basic view of the nature of the liberty of conscience had been formally embraced by nearly every politically active American writing on the subject of religion and the state."); Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1858–60 (2009) (discussing John Locke's views on church-state relations in the context of the founding period); Williams & Williams, *supra* note 157, at 857–58 (noting that in defining a church, Jefferson echoed Locke almost verbatim); *see also infra* notes 174–78 and accompanying text.

173. *See infra* notes 174–78 and accompanying text.

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

175. *Id.* Examples of such necessary rules include "[p]lace and time of meeting . . . rules for admitting and excluding members . . . distinction of officers, and putting things into a regular course." *Id.*

176. *Id.*

177. *See, e.g.,* Brilmayer, *supra* note 154, at 21 (noting that consent "explains obligation in terms of . . . voluntary choice").

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

179. The association between modern political liberalism and pluralism is most frequently associated with John Rawls. *See generally* JOHN RAWLS, POLITICAL LIBERALISM (1993).

By contrast, religious associations are formed in order to pursue a particular conception of the good life, tied up in specific notions of faith and salvation. To use Locke's phrasing, "every one joins himself voluntarily to that society in which he believes he has found that profession and worship which is truly acceptable to God."<sup>180</sup> Thus, religious associations form precisely because their membership hopes to pursue a particular religious path. This is not a goal that civil society aims to accomplish; liberal civil society simply does not aim to regulate and adjudicate in order to promote particular conceptions of faith and salvation.<sup>181</sup> Indeed, members of religious communities would likely view such intervention from civil society with deep skepticism. Members of religious associations typically see civil society as without authority to provide rules and resolves disputes over matters that turn on religious doctrine or practice.<sup>182</sup> This is because joining a particular religious association frequently entails granting authority over religious matters to the religious institution.<sup>183</sup> Indeed, it might be seen as contradictory to join a religious community, but to maintain that promulgation, interpretation and application of the relevant religious doctrine to be within the purview of the secular nation-state.

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

181. To be sure, noting that civil society is ill-suited or does not aim to achieve religious ends does not conflict with a rejection of the jurisdictional paradigm that claims courts are incapable of resolving religious disputes. To claim that civil society does not pursue religious ends speaks to its desire to promote alternative goals, such as, for example, religious pluralism. Put differently, claiming that civil society is ill-suited to pursue religious ends is simply a statement of what civil society desires to accomplish as opposed to what it could accomplish. By contrast, versions of the jurisdictional paradigm grounded in adjudicative disability see courts as incapable of resolving disputes over religious doctrine even when motivated to do so by the request of the parties. *See supra* notes 134–36 and accompanying text.

182. *See supra* notes 14–15 and accompanying text (conceptualizing the competing jurisdictions of church and state as dual sovereigns).

183. Some religious groups would discourage, and even condemn, submitting disputes to secular courts as an offense against the religious authorities within the given religious community. *See, e.g.,* Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1243–52 (2011) (discussing the aversion to secular adjudication in Jewish and Islamic Law). Indeed, this precise issue stood at the center of the controversy between the parties in *Hosanna-Tabor*. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 700 (2012) (noting that Hosanna-Tabor's grounds for terminating Perich included "the damage she had done to her 'working relationship' with the school by 'threatening to take legal action'" (citation omitted)).

While religious communities and associations vary in their notions of rules and authority, the *Watson* Court built its theory of church autonomy on the assumption that by joining a religious community, the members impliedly consented to the community's authority over promulgating religious rules and adjudicating religious disputes. As the Court explained, "it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed."<sup>184</sup>

To be sure, this inference only made sense in the context of religious institutions as opposed to their secular counterparts. *Watson* presumed that individuals who join religious communities see civil society as ill-suited to promote the pursuit of faith and salvation. Moreover, selecting a particular religious association, and thereby choosing a particular conception of faith and salvation, frequently entails an underlying submission of religious matters to the sovereignty of the community's religious authorities. As put by the *Watson* Court, "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>185</sup>

In this way, implied consent simultaneously captured the voluntary nature of joining a religious institution and the implicit submission to the institution's regulatory and adjudicative authority over the religious sphere. Thus, on the one hand, religious institutions remain undeniably voluntary in origin.<sup>186</sup> However, religious institutions also aim to accomplish a unique set of goals—such as faith and salvation—which civil society is ill-suited to achieve. Accordingly, in order to accomplish the religious objectives of faith and salvation, membership also requires vesting rule-making and adjudicative authority within the religious institution. Indeed, Locke worried that without granting religious institutions this authority, the "church . . . will presently dissolve and break in pieces."<sup>187</sup>

Thus, by relying on implied consent, the *Watson* Court articulated a theory of church autonomy that was, on the one hand, individualistic and yet, on the other hand, also provided religious institutions with significant authority. At its core, a

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

185. *Id.*

186. See Laycock, *Church Autonomy*, *supra* note 68, at 1405 ("Voluntary affiliation with the group is the premise on which group autonomy depends.").

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



religious institution's authority derives from the consent of the members.<sup>188</sup> At the same time, the *Watson* Court established a default rule that allowed courts to presume individual members had consented to the self-governing and adjudicative authority of religious institutions in the absence of actual consent.<sup>189</sup> In this way, the *Watson* Court provided religious institutions with a sphere of jurisdiction or sovereignty, but grounded this authority on voluntaristic principles.<sup>190</sup>

It is here where we begin to see how early understandings of church autonomy tracked the arbitration model. Like the *Watson* Court's model of church autonomy, arbitration is fundamentally voluntaristic; that is, an arbitrator's authority derives from the consent of the parties.<sup>191</sup> The parties choose to exit the realm of judicial adjudication and select instead a new forum for alternative dispute resolution. Thus, the adjudicative authority of arbitrators is not inherent and it does not derive from the inability of courts to resolve a particular claim; like *Watson's* version of church autonomy, it is adjudicative authority that derives from the consent of the parties.<sup>192</sup>

Beyond its voluntaristic foundations, arbitration doctrine also makes use, at times, of implied consent in order to effectuate the overall goals of arbitration. Thus, as part of consenting to the arbitrator's authority, parties implicitly and by necessity grant the arbitrator power to decide any number of procedural

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188. See *supra* notes 171–75 and accompanying text (discussing the role of consent in religion).

189. On this point, the argument presented differs in an important way from the argument in Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. (forthcoming 2013), available at <http://ssrn.com/abstract=2152060>. Like Schwartzman & Schragger, I locate the authority of religious institutions in the consent of the members. However, unlike Schwartzman & Schragger, I endorse the *Watson* Court's heuristic of implied consent, which provides religious institutions with a wide range of authority because of the default presumption that individuals transfer autonomy of religious matters to religious institutions as a function of joining the institution's membership.

190. Indeed, in many ways, this analytic move tracks John Locke's own political theory, which employed tacit consent in order to justify political obligation in circumstances where actual consent was an impossibility. LOCKE, *supra* note 151, at 365–66. Locke's theory of tacit consent, not surprisingly, has been much maligned. See Dunn, *supra* note 167, at 155 (arguing that Locke's acceptance of tacit consent, among other considerations, demonstrates that consent did not play as prominent a role in Locke's theory as typically understood); Simmons, *supra* note 167, at 288 (arguing that "none of Locke's 'consent-implying enjoyments' is in fact a genuine consensual act").

191. See *supra* note 143 and accompanying text.

192. See *supra* note 143 and accompanying text.

matters,<sup>193</sup> all necessary to ensuring that the arbitrator can accomplish the primary goal of the arbitration: to effectively and efficiently resolve the dispute of the parties.<sup>194</sup>

In addition, if doubts arise as to the scope of the issues submitted to arbitration, courts resolve such doubts in favor of arbitration; the rationale for this rule is not simply based on standard principles of contract interpretation, but because the substantive policies favoring arbitration enable courts to imply the consent of the parties where the agreement is ambiguous.<sup>195</sup>

That implied consent plays a significant role in both church autonomy and commercial arbitration should not be surprising. Both contexts involve the granting of adjudicative authority over a circumscribed scope of substantive matters that would otherwise be resolved in court. However, the actual consent of

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193. See, e.g., *Finley Lines Joint Protective Bd. Unit 200 v. Norfolk S. Ry. Co.*, 312 F.3d 943, 947 (8th Cir. 2002) (“Arbitrators have broad procedural discretion.” (citing *Gunther v. San Diego & Ariz. E. Ry.*, 382 U.S. 257, 262–63 (1965))); *Nordahl Dev. Corp. v. Salomon Smith Barney*, 309 F. Supp. 2d 1257, 1265 (D. Or. 2004) (“[A]rbitrators have wide discretion in making procedural decisions.”); see also IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* § 34.1 (1994) (describing the discretion exercised by arbitrators in the realm of discovery); Barbara Black, *The Irony of Securities Arbitration Today: Why Do Brokerage Firms Need Judicial Protection?*, 72 U. CIN. L. REV. 415, 433 (2003) (“Arbitrators have broad discretion in managing the arbitration process, and procedural defects are not grounds for vacating an award so long as the arbitration process was ‘fundamentally fair.’”).

194. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626 (1985) (“The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983))).

195. See *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 945 (1995) (“And, given the law’s permissive policies in respect to arbitration . . . one can understand why the law would insist upon clarity before concluding that the parties did *not* want to arbitrate a related matter.”). It is also worth noting that implied consent animates the doctrine of separability—which allows courts to “separate out” and enforce arbitration provisions contained in agreements whose very validity is being challenged. See Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819, 849–51 (2003) (describing and criticizing the role of implied consent in arbitration doctrine). That is, courts enforce the arbitration provision on the assumption that given the existence of the provision, the parties would have also submitted challenges regarding the contract’s validity to arbitrators as well. See, e.g., *Ware, Employment Arbitration*, *supra* note 48, at 131 (“[T]he separability doctrine pretends that the party also alleges a fictional contract consisting of just the arbitration clause, but no other terms.”).

the parties—whether when joining the membership of a religious institution or selecting an arbitrator to resolve disputes—frequently fails to explicitly address questions regarding the scope of authority granted.<sup>196</sup> Thus for both church autonomy and arbitration, implied consent fills the gap, serving as a doctrine that expands the scope of the authority or autonomy granted in order to promote the parties' underlying purpose.

Relying on *Watson's* implied consent doctrine provides a framework for church autonomy that employs principles of voluntarism in answering questions of scope. Indeed, the implied consent framework can provide such guidance because it does not link the authority of religious institutions to the incompetence of courts to address religious questions, but instead grounds such authority in the implicit consent that comes along with membership in religious institutions.

Of course, once we locate church autonomy within an implied consent framework, the Supreme Court's attempts in *Hosanna-Tabor* to distinguish the ministerial exception from individual claims for accommodation is far more comprehensible.<sup>197</sup> Under an implied consent framework, individual claims for accommodation look nothing like institutional claims for autonomy.<sup>198</sup> Institutions retain a sphere of autonomy to make religious rules and resolve religious disputes because they have been implicitly granted this right by their membership. In raising doctrines like the ministerial exception, they do not seek an exception from an otherwise generally applicable and facially neutral rule; religious institutions simply aim to enforce the implied agreement between themselves and their membership

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196. See Ware, *Employment Arbitration*, *supra* note 48, at 131 (“[I]mposing duties based on speculations about what the parties would have voluntarily consented to is profoundly different from imposing duties based on what the parties did, in fact, voluntarily consent to.”).

197. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 707 (2012) (“*Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself.”).

198. This claim differs from the distinction some courts have drawn between individual claims for accommodation and the constitutional rights of religious institutions. See *supra* notes 108–10 and accompanying text. The implied consent framework differentiates between individual and institutional constitutional claims because institutional claims function as a form of forum selection clause whereby institutions are granted authority over a sphere of claims by the consent of their membership.

whereby they were granted the authority to adjudicate and govern the religious life of their community.

In this way, *Hosanna-Tabor* accurately described that which differentiates doctrines like the ministerial exception from individual claims for accommodation: they protect religious institutions from “interference with an internal church decision that affects the faith and mission of the church itself.”<sup>199</sup> As a result, the Court’s holding in *Smith* that the Free Exercise Clause does not require government to provide individuals with accommodations from otherwise valid laws tells us little about to what extent government can intrude on the autonomy of religious institutions.<sup>200</sup> Such autonomy does not derive from simple claims of accommodation; institutions retain such autonomy through the implied consent of their members who—joining together in the pursuit of faith and salvation—grant the institution authority because it is the institution itself that is uniquely capable of addressing core religious matters.<sup>201</sup>

Framed in this way, the implied consent model focuses our attention on the circumstances that allow us to presume that the membership of a religious institution has impliedly consented to that institution’s authority over religious matters. In turn, when inquiring whether the church autonomy doctrine ought to cover a particular set of circumstances, the implied consent model asks whether—given the nature of the parties,<sup>202</sup> the relationship between the parties and the religious institutions,<sup>203</sup> and the substances of the dispute<sup>204</sup>—we can conclude that the parties impliedly consented to the adjudicative and rule-making authority of the religious institution. To better understand how this model would apply to contemporary conflicts over the scope of the church autonomy doctrine, consider the following examples.

#### 1. The Nature of the Parties: What Is a Church?

As described above, the “ministerial exception” exempts the employment relationship between “religious institutions” and their “ministers” from compliance with various employ-

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199. *Hosanna-Tabor*, 132 S. Ct. at 707.

200. See *supra* notes 162–84 and accompanying text.

201. See *supra* notes 162–84 and accompanying text.

202. See *infra* Part II.A.1.

203. See *infra* Part II.A.2.

204. See *infra* Part II.A.3.

ment statutes.<sup>205</sup> While judicial inquiry into the definition of a minister has received significant attention,<sup>206</sup> the contours of what constitutes a religious institution have been largely left unexplored with limited case law addressing the question.<sup>207</sup>

An examination of the few decisions addressing what constitutes a religious institution for the purposes of the First Amendment uncovers two primary types of considerations. On the one hand, courts often explore the underlying structure of the institution in order to determine whether it is religious in nature. For example, in *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, the Eighth Circuit considered whether the defendant, a hospital, should be considered a religious institution for the purposes of the ministerial exception.<sup>208</sup> In answering the question in the affirmative, the court highlighted among other considerations that “[t]he hospital’s Board of Directors consists of four church representatives and their unanimously agreed-upon nominees”<sup>209</sup> and the hospital’s “Articles of Association may be amended only with the approval of the Episcopal Diocese of Missouri of the Protestant Episcopal Church in the United States of America and the local Presbytery of the Presbyterian Church (U.S.A.)”<sup>210</sup>

Similarly, in *Shaliehsabou v. Hebrew Home of Greater Washington*, the Fourth Circuit noted that the defendant’s “By-Laws define it as a religious and charitable non-profit corporation and declare that its mission is to provide elder care to ‘aged of the Jewish faith in accordance with the precepts of Jewish law and customs.’”<sup>211</sup> Using such corporate hallmarks in order to define an institution as religious seems reasonable if the underlying theory behind the ministerial exception is jurisdictional; where an institution is of objective religious character, then it should be granted inherent autonomy.<sup>212</sup> However, if

205. See, e.g., *Hosanna-Tabor*, 132 S. Ct. at 705 (noting uniform acceptance of the “ministerial exception” by federal courts of appeals); *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1290 (9th Cir. 2010); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655 (10th Cir. 2002).

206. For further discussion, see *infra* Part III.A.

207. Cf. *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 309–10 (4th Cir. 2004) (noting the lack of authority on the issue in Fourth Circuit precedent).

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

209. *Id.*

210. *Id.*

211. *Shaliehsabou*, 363 F.3d at 310.

212. See, e.g., Bruce N. Bagni, *Discrimination in the Name of the Lord: A*

we approach such questions under an implied-consent framework, then our inquiry must focus less on the corporate structure of the institution and more on the extent to which the religious character of the institution was open and obvious to its employees. For example, the court in *Shaliehsabou* also emphasized various ways in which the defendant conducted business such that it would be obvious to an employee that the institution was religious, explaining 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>213</sup> Building on this type of analysis, a number of courts have described the touchstone of the “religious institution” inquiry as whether the “entity’s mission is marked by clear or obvious religious characteristics.”<sup>214</sup>

Focusing on the extent to which an institution’s mission is manifested in ways “clear” and “obvious” to its employees is vital from the perspective of implied consent. In order to conclude that an employee has impliedly consented to the authority of the religious institution, there first must be evidence that the employee was on notice regarding the religious character of the institution. While explicitly stating the mission of an institution in by-laws and the like does place indications of the institution’s religious character in the public domain, it provides somewhat shaky grounds to support an inference that an employee would have impliedly consented to the institution’s rule-making and adjudicative authority.

Individuals consent to a religious institution’s autonomy because they recognize that the substantive religious aims of the institution are such that they require granting the institution expanded autonomy. But without sufficient indication that an employee was aware of the institution’s unique religious characteristics and objectives, it is difficult to find implied consent. For this reason, an implied consent model of church au-

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*Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1539–40 (1979) (arguing that where a “church acts outside this epicenter and moves closer to the purely secular world [engaging in] church-sponsored community activities, such as adoption agencies, homes for the aged [and] hospitals[,] it subjects itself to secular regulation proportionate to the degree of secularity of its activities and relationships. A church acting outside the epicenter may still enjoy some degree of first amendment protection, but its claims may be evaluated in light of competing, and perhaps more weighty, general societal interests.”).

213. 363 F.3d at 310.

214. *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225–26 (6th Cir. 2007); *Shaliehsabou*, 363 F.3d at 310.

tonomy focuses more naturally on whether the religious character of an institution was clear and obvious to its employees and not simply whether the religious character of the institution can be located on paper.

## 2. The Relationship Between the Parties: Shunning

Another important context where church autonomy can serve as a shield to liability is the practice of some religious communities to “shun members of their religious communities for failing to abide by shared religious rules of conduct.”<sup>215</sup> Such shunning typically “involves the complete withdrawal of social, spiritual, and economic contact from a member or former member of a religious group.”<sup>216</sup>

Some victims of shunning have responded to coordinated communal shunning by filing suit, alleging torts such as defamation and intentional infliction of emotional distress. By and large, such lawsuits have been dismissed on church autonomy grounds.<sup>217</sup> As articulated by the Ninth Circuit, “[c]hurches are afforded great latitude when they impose discipline . . . . ‘[R]eligious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be.’”<sup>218</sup>

These general trends notwithstanding, courts remain divided over whether church autonomy provides a shield against institutional liability only for conduct initiated against a plaintiff who is a member of the religious community<sup>219</sup> or even for conduct initiated against a plaintiff who has withdrawn from

215. Michael A. Helfand, *Fighting for the Debtor’s Soul: Regulating Religious Commercial Conduct*, 19 GEO. MASON L. REV. 157, 181 (2011).

216. Miller, *supra* note 9, at 272.

217. See generally Annotation, *Suspension or Expulsion from Church or Religious Society and the Remedies Therefor*, 20 A.L.R.2d 435–36 (1951) (collecting cases stressing religious liberty as a basis for limiting jurisdiction); see also Helfand, *supra* note 215, at 181; Miller, *supra* note 9, at 287.

218. Paul v. Watchtower Bible & Tract Soc’y, 819 F.2d 875, 883 (9th Cir. 1987) (quoting Prince v. Massachusetts, 321 U.S. 158, 177 (1944) (Jackson, J., concurring)).

219. See, e.g., Paul, 819 F.2d at 883; Sands v. Living Word Fellowship, 34 P.3d 955, 956–59 (Alaska 2001) (holding that shunning practices are protected by the First Amendment in the context of a suit against non-church members); see also Anderson v. Watchtower Bible & Tract Soc’y, No. M2004-01066-COA-R9-CV, 2007 WL 161035, at \*19 (Tenn. Ct. App. Jan. 19, 2007) (holding that “[s]hunning is religiously based conduct, a religious practice based on interpretation of scripture, and is subject to the protection of the First Amendment” and not differentiating between conduct committee pre-disfellowship and post-disfellowship).

the religious community.<sup>220</sup> Courts that have extended First Amendment protection to include shunning of former members or non-members of a church have largely done so by arguing that the churches have inherent authority to engage in core religious activity.<sup>221</sup> Moreover, some of the more expansive formulations of the First Amendment protections provided for shunning-related conduct have relied upon the jurisdictional bar against judicial interrogation of religious doctrine or practice.<sup>222</sup>

By contrast, the courts that have refused to interpret the First Amendment to shield institutions for shunning-related conduct against former or non-church members have emphasized the implied consent rationale at the core of the church autonomy doctrine.<sup>223</sup> For example, the Supreme Court of Okla-

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220. See, e.g., *Smith v. Calvary Christian Church*, 592 N.W.2d 713, 718 (Mich. Ct. App. 1998), *rev'd*, *Smith v. Calvary Christian Church*, 614 N.W.2d 590, 595 (Mich. 2000) (holding that plaintiff's conduct evidenced his implied consent to the church's practices); *Hester v. Barnett*, 723 S.W.2d 544, 559 (Mo. Ct. App. 1987) (en banc) (holding the First Amendment could shield a pastor from claims of defamation against members of his church, but not against non-members); *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766, 786 (Okla. 1989) (holding that pre-withdrawal discipline was not actionable because plaintiff had consented to such conduct, post-withdrawal discipline was actionable).

221. *Paul*, 819 F.2d at 883 (broadly construing the First Amendment to provide "great latitude" for the imposition of religious discipline); *Sands*, 34 P.3d at 958-59 (holding that the First Amendment shields shunning practices from liability because such practices are religiously based, deeply rooted in religious belief and motivated—at least in the instant case—by sincere religious belief).

222. See, e.g., *Anderson*, 2007 WL 161035, at \*30 ("If, to resolve [a] particular claim brought, a court would need to resolve underlying controversies over religious doctrine, then the claim is precluded."); see also *Klagsbrun v. Va'ad Harabonim*, 53 F. Supp. 2d 732, 742 (D.N.J. 1999) (holding that the defendant could not be found liable for religious defamation because "the Establishment Clause is implicated whenever courts must interpret, evaluate, or apply underlying religious doctrine to resolve disputes involving religious organizations").

223. *Smith*, 592 N.W.2d at 718 (quoting *Guinn's* logic); *Hester*, 723 S.W.2d at 559 (quoting *Rosicrucian Fellowship v. Rosicrucian Nonsectarian Church*, 245 P.2d 481, 487-88 (Cal. 1952)) ("It is perfectly clear that, whatever church relationship is maintained in the United States, is not a matter of status. It is based . . . on voluntary consent . . . it is 'one of contract,' and is therefore exactly what the parties to it make it and nothing more. A person who joins a church covenants expressly or impliedly that in consideration of the benefits which result from such a union he will submit to its control and be governed by its laws, usages and customs whether they are of an ecclesiastical or temporal character to which laws, usages, and customs he assents as to so many stipulations of a contract."); *Guinn*, 775 P.2d at 779 ("Only those 'who unite themselves' in a religious association impliedly consent to its authority over them and are 'bound to submit to it.' Parishioner voluntarily joined the



homa held that the First Amendment could shield a church from liability related to shunning only against members.<sup>224</sup> Thus, the court noted, “[b]y voluntarily uniting with the church, [the plaintiff] impliedly consented to submitting to its form of religious government.”<sup>225</sup> In turn, explained the court, a religious institution’s autonomy is both tied to and circumscribed by the underlying logic of implied consent: “Only those ‘who unite themselves’ in a religious association impliedly consent to its authority over them and are ‘bound to submit to it.’”<sup>226</sup> As a result, the court concluded, the plaintiff “voluntarily joined the Church of Christ and by so doing consented to submit to its tenets.”<sup>227</sup> However, “[w]hen she later removed herself from membership, [the plaintiff] withdrew her consent, depriving the Church of the power actively to monitor her spiritual life through overt disciplinary acts.”<sup>228</sup>

Of course, it may sometimes be hard to determine whether a plaintiff has withdrawn her consent and thereby undermined an institution’s ability to deploy the First Amendment as a shield to liability.<sup>229</sup> Moreover, it is sometimes difficult to determine for how long a religious institution can continue to impose religious discipline after excommunicating a member.<sup>230</sup> But what is clear is that a theory of church autonomy that grounds the authority of religious institutions in the implied consent of its member is deeply skeptical of applying the doctrine where the individual has explicitly chosen to withdraw from the religious community. Where the relationship between

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Church of Christ and by so doing consented to submit to its tenets. When she later removed herself from membership, Parishioner withdrew her consent, depriving the Church of the power actively to monitor her spiritual life through overt disciplinary acts.”).

224. *Guinn*, 775 P.2d at 777.

225. *Id.* at 779.

226. *Id.*

227. *Id.*

228. *Id.*

229. Indeed this is precisely the grounds for the Michigan Supreme Court’s reversal in *Smith v. Calvary Christian Church*, 614 N.W.2d 590 (Mich. 2000), where the court reversed the Michigan Court of Appeals decision because it found that Plaintiff’s conduct evidenced his continued implied consent to the church’s practices even though he was not a member of the church.

230. *Anderson v. Watchtower Bible & Tract Soc’y*, No. M2004-01066-COA-R9-CV, 2007 WL 161035, at \*27 (Tenn. Ct. App. Jan. 19, 2007) (noting that “[w]hen a person voluntarily joins a religious organization and submits to its governance, that person consents to the final decision by that organization’s tribunals without recourse to civil courts. *That consent includes consequences of church discipline that flow from the expulsion process.*” (emphasis added)).

the individual and the community has been severed, there can no longer be a claim of implied consent and therefore no claim of church autonomy.<sup>231</sup>

### 3. The Substance of the Dispute: Neutral Principles

As discussed above, the jurisdictional approach to the religion clauses is tightly linked to a view that the courts are incompetent to resolve religious disputes.<sup>232</sup> In turn, it is because courts relinquish jurisdiction over religious disputes that religious institutions are granted autonomy over religious disputes free from judicial interference.<sup>233</sup>

Few doctrines capture this impulse more than the “neutral principles” approach to judicial resolution of religious disputes.<sup>234</sup> The neutral principles approach authorizes courts to adjudicate religious disputes so long as they rely “exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges.”<sup>235</sup> The Supreme Court has been explicit about the link between the neutral principles approach to religious disputes and the underlying theory of judicial incompetence to adjudicate religious questions; it is because “[t]he method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges” that it “thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice.”<sup>236</sup>

Not surprisingly, the neutral principles doctrine has been criticized by advocates of church autonomy as enabling courts to intercede in religious disputes so long as they can deftly avoid addressing specifically religious questions.<sup>237</sup> On such ac-

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231. Not surprisingly, Laycock—who refuses to justify church autonomy on purely jurisdictional grounds—makes a similar point, arguing that “[a]n organization has no claim to autonomy when it deals with outsiders who have not agreed to be governed by its authority.” Laycock, *Towards a General Theory*, *supra* note 68, at 1406.

232. *See supra* notes 65–68 and accompanying text.

233. *See supra* notes 65–68 and accompanying text.

234. *See Helfand, supra* note 55, at 538.

235. *Jones v. Wolf*, 443 U.S. 595, 603 (1979).

236. *Id.*

237. *See, e.g., Adams & Hanlon, supra* note 75, at 1294–97; Mansfield, *supra* note 83, at 863–68. *But see Brady, supra* note 25, at 1643 (emphasizing that “[t]he use of neutral principles of law permits courts to avoid entanglement in ecclesiastical questions while at the same time securing free exercise values. Through appropriate use of secular language and property concepts, religious organizations can specify the resolution they would prefer in the

counts, employing the neutral principles approach amounts to using technicalities and semantics to trespass on the sovereign authority of religious institutions.<sup>238</sup>

One might assume that a theory of church autonomy grounded in the implied consent of a religious institution's membership would align itself with the critics of the neutral principles doctrine. If the membership has impliedly consented to the authority of the church, then the ability to resolve the dispute using neutral principles should not matter. Indeed, we might even think that this is precisely where the implied consent approach parts ways with the jurisdictional approach; judicial avoidance of religious questions is simply not something that matters from the perspective of an implied consent approach.

But such a conclusion would be far too hasty. An implied consent approach to church autonomy requires considering whether or not church members intend to submit disputes that are susceptible to adjudication on neutral principles grounds for internal religious institutional resolution. While it might be fair at times to think the answer is yes, there may be a variety of instances where the fact that a dispute can be resolved via neutral principles tells us something more fundamental about the dispute. Recall that it is precisely because religious life aims to achieve salvation, faith, and prayer that we can assume individuals impliedly consent to allow such matters to be governed by a religious institution. Accordingly, the fact that a dispute can be resolved through neutral principles may mean that we should not be so quick to conclude that the parties have impliedly consented to have the particular matter adjudicated by the religious institution.<sup>239</sup>

To be sure, the Supreme Court's approval of the neutral principles doctrine does not rest on such a justification.<sup>240</sup> However, the degree to which a particular dispute or issue is suffused with religious doctrinal considerations tells us quite a lot about whether or not the parties impliedly consented to keep the matter within the authority of the church. Conversely, to the extent religion can be removed from the equation in resolv-

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event of a dispute.”).

238. See Dane, *supra* note 83, at 969; see also Perry Dane, “Omalous” Autonomy, 2004 BYU L. REV. 1715, 1737.

239. For a similar point, see Horwitz, *Churches as First Amendment Institutions*, *supra* note 13, at 118. See also Helfand, *supra* note 55, at 540 n.259

240. See *supra* notes 87–88 and accompanying text.

ing the dispute may also undermine claims of implied consent. As a result, evaluating whether the substance of the dispute cannot be extricated from matters of religious doctrine or practice serves as an important consideration in determining the scope of the church autonomy doctrine.

#### B. MARGINAL CIVIL COURT REVIEW

A renewed focus on consent is only half of the church autonomy as constitutionalized arbitration agenda. Emphasizing consent—or, more specifically for current purposes, implied consent—shifts the church autonomy inquiry away from the jurisdictional approach that ties institutional authority to judicial incompetence.<sup>241</sup> Instead, the autonomy of religious institutions is based upon the implied consent of their members. Members, on this account, implicitly grant religious institutions this autonomy so as to enable them to promote the unique substantive aims of religious life, such as faith and salvation.<sup>242</sup>

Accordingly, by joining an institution with uniquely religious goals—what the Supreme Court in *Watson* described as matters of “ecclesiastical cognizance”<sup>243</sup>—members implicitly accept the rule-making and adjudicative authority of the religious institutional leadership over inherently religious matters. In this way, members of religious institutions sign implied arbitration agreements, authorizing religious institutions to govern the religious life of their members both by making rules and resolving disputes that are linked to the core responsibility of the institution: promoting and enhancing the religious life of its membership.

However, basing institutional authority on the implied consent of the membership places important limits on church autonomy. If the membership has ceded authority to the religious institution to make rules and resolve disputes, then such authority can only extend to good faith self-governing and adjudication. By contrast, church autonomy does not require deference to rule-making or adjudication where the results are a function of insider dealing, misappropriation and procedurally flawed governance. The reason for this draws directly from the implied consent rationale; members impliedly consent to the

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241. See *supra* Part I.

242. See *supra* notes 150–204 and accompanying text.

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

exercise of true adjudicative and rule-making authority—it would be perverse to infer implied consent to misconduct.<sup>244</sup>

Indeed, in the years following *Watson*, both the Supreme Court and lower courts extended the underlying logic of implied consent, refusing to grant deference to religious institutional rule-making and adjudication where the institutional rules and decision were the result of misconduct.<sup>245</sup> In fact, only a year after deciding *Watson*, the Supreme Court noted that the majority of a congregational church is considered to represent the church only “if they adhere to the organization and to the doctrines.”<sup>246</sup> Lower courts largely followed suit,<sup>247</sup> most notably in

244. See *supra* note 146.

245. See *infra* notes 246–62 and accompanying text.

246. *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 140 (1872).

247. See, e.g., *Taylor v. Jackson*, 273 F.345, 348 (D.C. Cir. 1921) (requiring the church to act in conformity with the requirements of its own regulations by giving the appellees notice before dropping them from church membership); *Sims v. Green*, 76 F. Supp. 669, 677 (E.D. Pa. 1947) (ruling that civil courts have the duty to determine “the existence of the church law, whether it has been fairly interpreted and applied, and whether there are judicatories which have functioned in practical compliance with the law and within their jurisdiction,” and finding the defendant’s application of church law to not have been a “flagrant violation of the laws of the church”); *Barkley v. Hayes*, 208 F. 319, 328 (W.D. Mo. 1913) (“[Civil courts] will not interfere with the affairs of an ecclesiastical organization, where the rights of property are involved, *unless there has been a palpable attempt by the governmental authorities of the church to abandon altogether the teachings of the original organization.*” (emphasis added)); *Brundage v. Deardorf*, 55 F. 839, 846 (C.C.N.D. Ohio 1893) (finding the majority of a church’s highest judicatory to have committed “[a]n open, flagrant, avowed violation of [church law]” and, therefore, to have ceased to be and represent the church); *Boyles v. Roberts*, 121 S.W. 805, 812 (Mo. 1909) (“[C]ivil courts will investigate and see that the church judicatory has acted, and, if so, whether it has acted within the terms of the constitutional grant of power . . . [and] if beyond the constitutional provisions of the church, the acts will be declared void.”); *Jennings v. Scarborough* 56 N.J.L. 401, 408 (1894) (finding a bishop’s order to terminate the rector of his church irregular, and, thus, set aside the order on grounds that notice to the vestry and the rector did not conform to the requirements of church law, and that the rector was deprived of “a hearing upon proofs presented before the committee”); *Cohen v. Eisenberg*, 19 N.Y.S.2d 678, 681 (Sup. Ct. 1940) (deciding that although a majority of the orthodox rabbinate of New York declared poultry sold in New York was not kosher unless it had seals furnished by the Kashruth Association of Greater New York, Inc., the court refused to defer to the judgment of the rabbinate on the grounds that the plaintiff’s poultry “would otherwise meet every requirement to make it kosher . . . and . . . would be kosher if slaughtered and prepared in any place in the world except the City of New York”), *aff’d*, 24 N.Y.S.2d 1004 (App. Div. 1940); *Wallace v. Tr. of Gen. Assembly of United Presbyterian Church of N. Am.*, 50 A. 762, 763 (Pa. 1902) (voiding the ruling of the general assembly after finding gross irregularity in the religious court’s failure to comply with the procedural requirements of church

*Brundage v. Deardorf* where the court explicitly connected *Watson* to the caveat that religious institutions will not be granted deference or autonomy where their decisions are fraudulent:

Certainly, the effect of *Watson v. Jones* cannot be extended beyond the principle that a *bona fide* decision of the fundamental law of the church must be recognized as conclusive by civil courts. Clearly, it was not the intention of the court to recognize as legitimate the revolutionary action of a majority of a supreme judicatory, in fraud of the rights of a minority seeking to maintain the integrity of the original compact.<sup>248</sup>

The Supreme Court made this caveat explicit in its 1929 decision *Gonzalez v. Roman Archbishop of Manila*, holding that courts must treat the decisions of “the proper church tribunals . . . as conclusive” only in the absence of “fraud, collusion, or arbitrariness.”<sup>249</sup> And in subsequent years, the *Gonzalez* Court’s holding was widely adopted by lower state and federal courts.<sup>250</sup>

In this way, the implied consent framework works as a form of constitutionalized arbitration. Arbitration, at its core, is an alternative method of dispute resolution predicated on the consent of the parties<sup>251</sup> and is policed by courts to ensure the absence of fraud, partiality, and other forms of procedural misconduct.<sup>252</sup> Thus, courts review arbitration awards not to pass judgment on the substance of the arbitrator’s decision, but to ensure that none of the statutory grounds for vacatur—grounds

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law and a lack of evidence which would justify the general assembly’s reversal of the synod); *Landrith v. Hudgins*, 120 S.W. 783, 811 (Tenn. 1907) (inquiring into both the language of a church constitution and the respective doctrines between two church organizations, determining one of the organization’s judicatory did not have the authority to unite the two bodies, and that doing so substantially departed from those doctrines fundamental to the church’s identity); see also *Judicial Intervention in Church Property Disputes—Some Constitutional Considerations*, 74 YALE L.J. 1113, 1122 (1965) (collecting cases and noting that “[b]y 1950, the principles of *Watson v. Jones*, modified to minimize arbitrary action by church tribunals, though not of constitutional status, were widely followed by state and federal courts”).

248. *Brundage*, 55 F. at 847–48.

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

250. Note, *Judicial Intervention*, *supra* note 146, at 1120–22 (collecting cases).

251. See *supra* note 143.

252. See 9 U.S.C. § 10 (2006); see also *Dammann*, *supra* note 49, at 470–75 (collecting state grounds for vacatur).

that focus on process and misconduct<sup>253</sup>—require judicial invalidation of the arbitrator’s decision.

These two principles—consent and review—serve as the pillars of the implied consent model of church autonomy. On the front end, members impliedly consent to the authority of the religious institution to govern religious life.<sup>254</sup> And on the back end, religious institutional decision making is subjected to review on grounds such as fraud, misconduct, or other forms of procedural naughtiness.<sup>255</sup> Of course, this conceptual framework could not survive under the jurisdictional approach to church autonomy. Jurisdictional approaches to the religion clauses conceive of religion as beyond the jurisdiction of the judicial system. Thus, such approaches reject the possibility of courts resolving any sort of claim that turns on religious doctrine or practice, including the review of the decisions issued by religious institutions.<sup>256</sup>

Indeed, in its shift away from the *Watson* and *Gonzalez* line of cases, the Court emphasized this type of jurisdictional logic, concluding that courts were incompetent when it came to addressing religious questions.<sup>257</sup> Focusing on judicial inability to resolve religious questions—as opposed to implied consent to church authority—the Court struggled to reconcile the jurisdictional approach with the Court’s own holding in *Gonzalez* that the decisions of religious institutions would need to survive “marginal civil court review”<sup>258</sup>—that is, judicial review for “fraud, collusion or arbitrariness”<sup>259</sup>—in order to be granted deference.<sup>260</sup> Armed with its jurisdictional logic, the Court simp-

253. Dammann, *supra* note 49, at 470–75.

254. *See supra* Part II.A.

255. *See supra* notes 241–49 and accompanying text.

256. *See supra* Part I.A.

257. *See supra* notes 91–94 and accompanying text.

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

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

260. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 712 (1976). In *Milivojevich*, the Court also suggested that *Gonzalez* represented a departure from *Watson* by authorizing courts to review the decisions of religious institutions because *Watson* did not authorize courts to resolve religious questions. *See id.* (“[A]lthough *Watson* had left civil courts no role to play in reviewing ecclesiastical decisions during the course of resolving church property disputes, *Gonzalez* first adverted to the possibility of ‘marginal civil court review.’” (quoting *Hull Mem’l Presbyterian Church*, 393 U.S. at 447)). However, even in *Watson*, the Court expressed a willingness to allow courts to review whether a religious institution has complied with the religious requirements of an express trust even though such an inquiry would undoubtedly require re-

ly discarded *Gonzalez*, explaining in its 1976 decision *Serbian Eastern Orthodox Diocese v. Milivojevic* that:

For civil courts to analyze whether the ecclesiastical actions of a church judicatory are in that sense 'arbitrary' must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else in to the substantive criteria by which they are supposedly to decide the ecclesiastical question.<sup>261</sup>

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solving a religious question. See *Watson v. Jones*, (13 Wall.) 80 U.S. 679, 724 (1871) ("And though the task may be a delicate one and a difficult one, it will be the duty of the court in such cases, when the doctrine to be taught or the form of worship to be used is definitely and clearly laid down, to inquire whether the party accused of violating the trust is holding or teaching a different doctrine, or using a form of worship which is so far variant as to defeat the declared objects of the trust."). Thus, the Court's claims in *Milivojevic* about *Watson*—and, in turn, the novelty of *Gonzalez*—seem largely inaccurate. See also Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1852 (1998) ("The Court's treatment of its first class of cases, express deeds and wills, is curiously dissonant with its treatment of the latter two. If courts may not competently resolve matters of doctrine and practice, even if these are part of a church constitution, how are those same courts competently to enforce express trusts? Standards will not be easier to apply because they appear in an express trust rather than church documents. Given what the Court says about implied trust, perhaps a court should enforce an express religious trust against an otherwise legitimate authority only if the breach of the express trust is transparently clear, as with the Supreme Court's example of Unitarians succeeding to funds devoted to Trinitarian worship. If this limited degree of protection is appropriate for express trusts, why should courts not also protect against acts of higher church authorities that blatantly violate standards found in authoritative church documents other than trusts?"); Note, *When Will Civil Courts Investigate Ecclesiastical Doctrines and Laws?*, 39 HARV. L. REV. 1079, 1080 (1926) ("[*Watson*] distinguished between cases where the property involved had been settled upon trust expressly for the promulgation of a particular set of doctrines, and cases where it had been given to the church without further qualification. There being a trust of the former type and a claim of diversion from the fixed purposes, it was recognized that investigation and comparison of religious doctrines would be unavoidable. This dictum has never been doubted.").

261. *Milivojevic*, 426 U.S. at 713. While the Court did not explicitly overrule *Gonzalez* as it pertained to fraud and collusion, it cast significant doubt on their continued constitutional viability. See *id.* (holding "that whether or not there is room for 'marginal civil court review' under the narrow rubrics of 'fraud' or 'collusion' when church tribunals act in bad faith for secular purposes, no 'arbitrariness' exception is consistent with" the religion clauses); see also *Young v. N. Ill. Conference of United Methodist Church*, 21 F.3d 184, 187 (7th Cir. 1994) (recognizing that the Supreme Court left open the possibility of review for fraud or collusion, but noting the "unlikely significance this 'open issue' might have in some hypothetical case"); *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 2 F.3d 1514, 1541 (11th Cir. 1993) (casting doubt on the constitutional viability of judicial review of religious decisions for fraud or collusion).



And, such an inquiry was impermissible under a jurisdictional approach to the religion clauses:

But this is exactly the inquiry that the First Amendment prohibits; recognition of such an exception would undermine the general rule that religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them.<sup>262</sup>

However, and notwithstanding the Supreme Court's more recent church property cases,<sup>263</sup> we need not relegate courts to the sidelines in any and all religious disputes. To the contrary, the Court's early church property cases carved out a significant—although not expansive—role for courts in the adjudication of religious disputes. While prohibited from interfering in the substance of the religious disputes, *Watson* and *Gonzalez*<sup>264</sup>—not to mention *Bouldin*<sup>265</sup> and a bevy of lower court cases<sup>266</sup>—envisioned courts providing a counter-balance to church autonomy by reviewing the decisions of religious institutions for misconduct and fraud.<sup>267</sup> Like in the context of arbitration, it would simply be too perilous to grant deference to religious institutions without some judicial safeguard.<sup>268</sup> Moreover, the underlying logic of church autonomy—the implied consent of the church membership—could only be extended to instances where the parties received the type of adjudication they consented to—that is, adjudication free of fraud, collusion or misconduct.<sup>269</sup>

To be sure, the Court raises important worries in *Milivojevich*. It is one thing for a court to investigate whether fraud or collusion stands behind the decision of a religious in-

262. *Milivojevich*, 426 U.S. at 713.

263. See Greenawalt, *supra* note 260, at 1853–59 (discussing evolution of the modern view regarding the “fraud, collusion, or arbitrariness” exception).

264. *Gonzalez*, 280 U.S. at 16 (articulating the “fraud, collusion, or arbitrariness” exception); see also *supra* note 260 (discussing the analytical link between *Watson* and the “fraud, collusion or arbitrariness” exception).

265. *Bouldin v. Alexander*, (15 Wall) 82 U.S. 131, 140 (1872).

266. See *supra* note 247.

267. See *supra* note 247.

268. See Ellman, *supra* note 140, at 1391.

269. See *supra* note 146. To be sure, one could envision a religious group that makes decisions that are expressly haphazard and lacking in procedural safeguards. If the contours of such a process were open and obvious, then an implied consent model would grant a broader scope of autonomy to the relevant religious institutions. That being said, it seems reasonable to adopt a default rule whereby individuals are presumed to expect—and thereby impliedly consent—to authority exercised in the absence of fraud or collusion.

stitution;<sup>270</sup> while such an inquiry enables a court to oversee the internal adjudication within a religious institution, the evaluation is limited to questions of deceit and sham dispute resolution. By contrast, the prospect of authorizing a court to evaluate the decision of religious institutions for “arbitrariness” is far more fraught. In 1969, prior to the wholesale shift of Supreme Court doctrine from the implied consent model to the jurisdictional model, Paul Kauper worried that “‘Arbitrariness’ as a standard for review is an indeterminate and flexible term. Much can be poured into it.”<sup>271</sup> Indeed, one can imagine that unlike fraud or collusion, review for arbitrariness might authorize courts to reject the decisions of religious institutions on substantive grounds. Such judicial authority would enable courts to trespass upon the core authority of religious institutions to, in good faith, make rules and resolve disputes that touch upon the religious life of a particular faith community.

Here again, however, relying on arbitration as a framework for church autonomy provides important guidance. Like the “arbitrariness” review proposed in *Gonzalez*, arbitration doctrine in some jurisdictions provides courts with the ability to vacate arbitration awards on the grounds of “irrationality.”<sup>272</sup>

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270. Indeed, despite the fact that the Court implicitly criticized judicial inquiry into religious decision for fraud or collusion, some courts continue to enforce these remaining prongs of the *Gonzalez* inquiry. *See, e.g.*, *Askew v. Trs. of the Gen. Assembly of the Church of the Lord Jesus Christ of the Apostolic Faith, Inc.*, 684 F.3d 413, 418 (3d Cir. 2012) (“In so doing, civil courts accept decisions of the highest religious decision-maker as binding fact, so long as those decisions are not tainted by fraud or collusion.”); *Kaufmann v. Sheehan*, 707 F.2d 355, 358 (8th Cir. 1983) (asserting that the fraud or collusion exceptions are not foreclosed by *Milivojevich*).

271. Paul G. Kauper, *Church Autonomy and the First Amendment: The Presbyterian Church Case*, 1969 SUP. CT. REV. 347, 374. Indeed, Kauper further concluded “it may safely be predicted that future litigation will furnish a rich glossary on “fraud, collusion, or arbitrariness.” *Id.* Of course, this prediction ultimately never came to pass because of the Court’s shift to a jurisdictional interpretation of the religion clauses.

272. *See generally* Kenneth R. Davis, *When Ignorance of the Law Is No Excuse: Judicial Review of Arbitration Awards*, 45 BUFF. L. REV. 49, 102–08 (1997) (discussing court applications of the irrationality standard); Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 789–93 (1996) (discussing evolution of the irrationality ground for vacatur); Murray S. Levin, *The Role of Substantive Law in Business Arbitration and the Importance of Volition*, 35 AM. BUS. L.J. 105, 150–55 (1997) (providing examples of judicial discussion of the irrationality ground for vacatur). The continued viability of the “wholly irrational” ground for vacatur was brought into doubt by the Supreme Court’s decision in *Hall St. Assocs. v. Mattel*, 552 U.S. 576, 586–89 (2008), which held that 9 U.S.C. § 10 (2006) provides an exclusive list of grounds for vacating arbitra-

While the doctrine is not without significant criticism,<sup>273</sup> courts have largely limited its application to instances where an arbitrator's award lacks any factual basis in the record.<sup>274</sup> In so doing, they have continued to uphold broad deference to an arbitrator's substantive decisions, using irrationality to capture cases where the award bears no resemblance to the underlying facts.<sup>275</sup> In this way, irrationality has served as a quasi-procedural ground for vacating awards,<sup>276</sup> only being deployed where there is no possible substantive justification for an arbitral decision.<sup>277</sup>

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tion awards. Compare Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN ST. L. REV. 1103, 1141 (2009) (arguing that the irrationality ground for vacatur is inconsistent with the Supreme Court's holding in *Hall Street*), with Michael H. LeRoy, *Are Arbitrators Above the Law? The "Manifest Disregard of the Law" Standard*, 52 B.C. L. REV. 137, 172–73 (2011) (arguing that the Supreme Court's holding was not clear as it applied to various non-statutory grounds for vacatur, including irrationality); see also *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1288 (9th Cir. 2009) (“We have not elaborated on what ‘completely irrational’ means, but the Eighth Circuit has persuasively indicated that the ‘completely irrational’ standard is extremely narrow and is satisfied only ‘where [the arbitration decision] fails to draw its essence from the agreement.’” (quoting *Hoffman v. Cargill Inc.*, 236 F.3d 458, 461–62 (8th Cir. 2001))).

273. See, e.g., Hayford, *supra* note 272, at 793 (criticizing the “irrationality” ground for vacatur because it “opens the door to substantial judicial evaluation of the merits of commercial arbitration awards by a court that is predisposed to engage in that type of exercise when confronted with an award it believes to be grossly inaccurate or incorrect”).

274. New York case law contains the most significant discussion of irrationality as a ground for vacating awards. See Levin, *supra* note 272, at 151. Courts are clear that it will not apply if there is any basis in the record for the arbitrator's award. See, e.g., *Branciforte v. Levey*, 635 N.Y.S.2d 22 (App. Div. 1995) (refusing to vacate award because “[t]here was some basis in the record for each of the arbitrator's findings”).

275. See, e.g., *Campbell v. N.Y.C. Transit Auth.*, 821 N.Y.S.2d 27, 27–28 (App. Div. 2006) (noting that while an arbitrator's award may be vacated if it is “totally irrational” an arbitrator's award cannot be vacated for errors of fact and law and, in turn, “an arbitration award cannot be vacated if there exists any plausible basis for it”); see also *Graniteville Co. v. First Nat'l Trading Co.*, 578 N.Y.S.2d 183, 185 (App. Div. 1992) (“An arbitration award will be confirmed if any plausible basis exists for the award and mere errors of law or fact will not suffice as a basis for vacatur.”).

276. Levin, *supra* note 272, at 152 (“Many of the irrationality cases relate more to the fact-finding process than the use or misuse of principles of substantive law.”).

277. See, e.g., *Loiacono v. Nassau Cmty. Coll.*, 692 N.Y.S.2d 113, 114 (App. Div. 1999) (vacating award where an arbitrator has made findings contrary to facts agreed upon by all parties); *Spear, Leeds & Kellogg v. Bullseye Secs., Inc.*, 738 N.Y.S.2d 27, 28 (App. Div. 2002) (vacating award where an arbitrator has granted an award on dismissed claims); Levin *supra* note 272, at 150–51 (“[W]hile many cases refer to and seemingly recognize irrationality as a

Such a limited use of irrationality fits with the consent-based authority granted arbitrators. A court should only intervene on irrationality grounds where an arbitrator's award is so far afield that the award can no longer be justified by the consent of the parties; an award that is so exceptionally disconnected from the arbitral record cannot have been authorized by the parties.<sup>278</sup>

Using arbitral irrationality as a blueprint, courts can similarly deploy arbitrariness in the church autonomy context. Like arbitration, our own model of church autonomy is grounded in consent.<sup>279</sup> Accordingly, the Supreme Court's early church property cases envisioned lower courts providing a marginal review of religious institutional decisions before granting them deference.<sup>280</sup> This limited review was meant to reinforce the underlying rationale of church autonomy; members of religious institutions impliedly consent to the institution's authority to make rules and resolve disputes that touch upon the substance of religious life.<sup>281</sup> However, adjudication that is fraudulent or collusive—and even adjudication that is so pervasively arbitrary that it finds no justification in the record—cannot be justified by implied consent.<sup>282</sup>

Along these lines, the arbitrariness exception to religious institutional deference would function like the irrationality exception to arbitral deference. It would apply in an extremely limited set of circumstances where the religious institution's decision lacked absolutely any basis in the relevant facts or doctrine such that it gave strong indication that it was the result of some sort of procedural impropriety. As in the case of arbitration, religious institutions ought to be granted broad deference as it pertains to their substantive adjudication and rule-making; by contrast, courts can play a role by policing religious institutional decisions for gross procedural improprieties or where a decision is so disconnected from the facts and circumstances that it appears to rest on fraud or collusion. Church

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ground for vacation, one has to search long and hard to find a vacation that is actually based on a determination of irrationality.”).

278. See, e.g., *Davis*, *supra* note 272, at 107 (“Focusing on the magnitude (and to a lesser extent on the quality) of the error satisfies the intent of the arbitrating parties who would not condone irrational applications of the very law they instructed the arbitrators to follow.”).

279. See *supra* Part II.A.

280. See *supra* notes 244–70 and accompanying text.

281. See *supra* notes 251–55 and accompanying text.

282. See *supra* note 269 and accompanying text.

members impliedly consent to good faith adjudication, not to decision making that amounts to misconduct.

### III. RESOLVING *HOSANNA-TABOR*'S UNANSWERED QUESTIONS

Thus far, this Article has advanced two general claims. The first of these claims is that recent doctrinal developments have provided strong indications that the religion clauses, and in particular the Establishment Clause, should be understood as jurisdictional;<sup>283</sup> that is, that the religion clauses supported a strong separation between church and state whereby both religion and government were conceptualized as separate sovereigns each without the authority to trespass on the jurisdiction of the other.<sup>284</sup>

The second claim is that footnote four of *Hosanna-Tabor* has undermined this jurisdictional view of the religion clauses by conceptualizing the ministerial exception as an affirmative defense.<sup>285</sup> If the ministerial exception, grounded more generally in broader notions of church autonomy, is an affirmative defense, then it opens the possibility for religious institutions to waive such defenses.<sup>286</sup> And if such defenses are waived, then courts may find themselves authorized to adjudicate cases that rest on disputes over religious doctrine and practice.<sup>287</sup>

This realization that *Hosanna-Tabor* cannot rest on a jurisdictional view of the religion clauses requires a wholesale reevaluation of the theory behind church-state relations and in particular a reconsideration of why it is that religious institutions are provided some scope of autonomy in core religious matters. To fill the void created by footnote four, this Article proposed returning to the doctrinal roots of church autonomy, which conceptualized church autonomy as a form of constitutionalized arbitration; that is, religious institutions derived their authority over rule-making and adjudication from the implied consent of their members.<sup>288</sup> And the rules made and decisions rendered by religious institutions were still subject to civ-

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283. See *supra* notes 65–68 and accompanying text.

284. See *supra* notes 65–68 and accompanying text; see also *supra* notes 13–15 and accompanying text.

285. See *supra* notes 140–49 and accompanying text.

286. See *supra* notes 130–36 and accompanying text.

287. See *supra* notes 130–36 and accompanying text.

288. See *supra* notes 150–204 and accompanying text.

il court review for procedural misconduct.<sup>289</sup> This would ensure that religious institutions were granted authority and autonomy only to the extent that their rules and decisions did not derive from foul play; indeed, tainted rules and decisions lack legitimacy precisely because members could not be understood to have impliedly consented to sham religious proceedings.<sup>290</sup>

Recognizing the import of footnote four—both that it is inconsistent with the jurisdictional view of the religion clauses and that it is consistent with earlier arbitration-based versions of church autonomy—is vital if we are to resolve key questions that remain in the wake of *Hosanna-Tabor*. While the Supreme Court successfully entrenched the ministerial exception by handing down a unanimous decision, it did so at the cost of addressing two crucial and recurring issues that consistently arise in church-state litigation: (1) how are courts to define who is a minister for the purposes of the ministerial exception,<sup>291</sup> and (2) can courts address claims that the decisions of religious institutions of are in reality pretextual.<sup>292</sup>

To address these thorny questions—questions that arose in *Hosanna-Tabor*'s oral argument but were not answered in the Court's opinion<sup>293</sup>—requires extending the logic of footnote four by unpacking the implications of an arbitration-based model of church autonomy and how the model deploys its key concepts of implied consent and marginal civil court review.

#### A. WHO IS A MINISTER?

One of the primary issues left relatively unaddressed in the Supreme Court's *Hosanna-Tabor* decision is the persistent question of who constitutes a “minister” for the purposes of the ministerial exception.<sup>294</sup> This question has bedeviled lower courts,<sup>295</sup> injecting significant uncertainty into the employment

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289. See *supra* Part II.B.

290. See *supra* note 146.

291. See *infra* Part III.A.

292. See *infra* Part III.B.

293. See *infra* notes 317, 319–23 and accompanying text.

294. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 707 (2012) (“We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister. It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment.”).

295. See, e.g., *Rweyemamu v. Cote*, 520 F.3d 198, 208 (2d Cir. 2008) (“Circuit courts applying the ministerial exception have consistently struggled to decide whether or not a particular employee is functionally a ‘minister.’”).

relationships between religious institutions and their employees.<sup>296</sup> Indeed, some courts have even wondered whether answering the “who is a minister” question itself impermissibly entangles courts in religious questions.<sup>297</sup>

Faced with this inquiry, many courts have adopted a “functional approach,” considering whether the primary duties of the employee indicate that the ministerial exception should apply.<sup>298</sup> Accordingly, courts do not exclusively look to whether the employee is a minister,<sup>299</sup> but whether the “employee’s primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship.”<sup>300</sup>

One of the consequences of this functional approach to answering the “who is a minister” question is the focus of judicial inquiry on the relative importance or centrality of an employee to the religious mission of the institution.<sup>301</sup> The logic here is

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296. Note, *The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 HARV. L. REV. 1776, 1788 (2008) (“The difficulty courts have in distinguishing religious from nonreligious job functions produces the second problem with the primary duties inquiry: the test creates inconsistent results that leave religious organizations uncertain whether a court will classify an employee as a minister.”).

297. *Elvig v. Calvin Presbyterian Church*, 397 F.3d 790, 797 (9th Cir. 2005) (Kozinski, J., concurring in the order denying rehearing en banc) (“Religions vary drastically in their hierarchical and organizational structure, and it is often a tricky business to distinguish spiritual from administrative officials and clergy from congregation. The very invocation of the ministerial exception requires us to engage in entanglement with a vengeance.”); see also William S. Stickman, IV, Comment, *An Exercise in Futility: Does the Inquiry Required to Apply the Ministerial Exception to Title VII Defeat Its Purpose?*, 43 DUQ. L. REV. 285, 298 (2005) (arguing that application of the ministerial exception leads to impermissible entanglement).

298. *Petruska v. Gannon Univ.*, 462 F.3d 294, 304 n.6 (3d Cir. 2006) (collecting cases); *Elvig*, 375 F.3d at 958 n.3 (same).

299. See, e.g., *Rweyemamu*, 520 F.3d at 208; *Elvig*, 375 F.3d at 958 (“Other federal circuit courts have adopted similar approaches, looking to the function of the position rather than to ordination in deciding whether the ministerial exception applies to a particular employee’s Title VII claim.”); *Young v. N. Ill. Conference of United Methodist Church*, 21 F.3d 184, 186 (7th Cir. 1994); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985) (holding that the ministerial exception “does not depend upon ordination but upon the function of the position”).

300. *Rayburn*, 772 F.2d at 1169 (citing Bagni, *supra* note 212, at 1545); see also *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007) (same).

301. See *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1243 (10th Cir. 2010) (quoting *Rayburn*); *Werft v. Desert Sw. Annual Conference of United Methodist Church*, 377 F.3d 1099, 1101 n.4 (9th Cir. 2004) (same); *Rayburn*, 772 F.2d at 1169 (“This [functional] approach necessarily

sound. To the extent courts conceptualize the ministerial exception as aimed at providing religious institutions with space to pursue their own religious missions, then the protections afforded by the ministerial exception are dependent on the central role played by employees in the pursuit of those missions.<sup>302</sup> Accordingly, a number of courts have held that a church's music director is subject to the ministerial exception because of the central role played by music in religious liturgy and services.<sup>303</sup> Similarly, one court applied the ministerial exception to a communications director because "[t]he role of the press secretary is critical in message dissemination, and a church's message, of course, is of singular importance."<sup>304</sup> In this way, the functional approach extrapolates from the central role of the minister in the religious life of the religious community<sup>305</sup>—the recognition that "the relationship between an organized church and its ministers is its lifeblood"<sup>306</sup>—and seeks to extend the minister paradigm to other employees.

While there is nothing inconsistent about this approach, it requires courts to focus on the central or important components of a religious community's mission in order to apply the ministerial exception<sup>307</sup>—a trend that is likely to continue post-

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requires a court to determine whether a position is important to the spiritual and pastoral mission of the church.").

302. See *infra* notes 303–04; see also *Ross v. Metro. Church of God*, 471 F. Supp. 2d 1306, 1311 (N.D. Ga. 2007) ("[T]here can be little doubt that Plaintiff's position as the director of the Worship Arts Department of the Metropolitan Church falls within the ambit of the ministerial exception. It is clear from Plaintiff's Complaint that his position as Pastor of Worship Services is important to the spiritual and pastoral mission of the church." (internal quotation marks and citation omitted)).

303. See *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1040–41 (7th Cir. 2006) (emphasizing the vital discretionary role played by the plaintiff, a music director, in the religious life of the church), *abrogated by Hosanna-Tabor*, 132 S. Ct. at 694; *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 802–03 (4th Cir. 2000) ("[M]usic is a vital means of expressing and celebrating those beliefs which a religious community holds most sacred. Music is an integral part of many different religious traditions."); *Starkman v. Evans*, 198 F.3d 173, 177 (5th Cir. 1999) (noting that the plaintiff conceded that "for her and her congregation, music constitutes a form of prayer that is an integral part of worship services and Scripture readings").

304. *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 704 (7th Cir. 2003).

305. *McClure v. Salvation Army*, 460 F.2d 553, 559 (5th Cir. 1972) ("The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern.").

306. *Id.* at 558.

307. See, e.g., *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 464 (D.C. Cir.



*Hosanna-Tabor*.<sup>308</sup> On the margins, courts may refuse to apply the ministerial exception where the employee appears to play a minor or marginal role in the community's religious life. This has particularly been the case with reference to teachers in parochial schools who do not, at least at first glance, play a significant role in religious instruction.<sup>309</sup> Indeed, some courts have refused to apply the ministerial exception where a teacher's responsibilities overwhelmingly entail secular instruction and extremely limited religious teaching.<sup>310</sup>

But such a framework appears to miss a far more fundamental point. The fact that teachers of secular subjects are also given responsibility over religious instruction highlights that many parochial schools resist the imposed distinction between secular and religious instruction. To the contrary, some paro-

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1996) (applying the ministerial exception to a member of the Canon Law Faculty because they "perform the vital function of instructing those who will in turn interpret, implement, and teach the law governing the Roman Catholic Church and the administration of its sacraments. Although [the plaintiff was] not a priest, she [was] a member of a religious order who sought a tenured professorship in a field that is of fundamental importance to the spiritual mission of her Church."); *EEOC v. Sw. Baptist Theological Seminary*, 651 F.2d 277, 285 (5th Cir. 1981); *Lukaszewski v. Nazareth Hosp.*, 764 F. Supp. 57, 60 (E.D. Pa. 1991) ("Religious doctrine is a much less important factor in most hospital personnel decisions than it is in religious school decisions to hire and fire teachers.").

308. See *Hosanna-Tabor*, 132 S. Ct. at 708 ("In light of these considerations—the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and *the important religious functions she performed for the Church*—we conclude that Perich was a minister covered by the ministerial exception." (emphasis added)); *id.* at 715 (Alito, J., concurring) ("What matters is that respondent played an important role as an instrument of her church's religious message and as a leader of its worship activities.").

309. See, e.g., *Gallo v. Salesian Soc'y*, 676 A.2d 580, 590–92 (N.J. Super. Ct. App. Div. 1996) (collecting and discussing various cases); see also *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1369–70 (9th Cir. 1986); *EEOC v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1278 (9th Cir. 1982), *abrogation recognized by Alcazar v. Corp. of Catholic Archbishop of Seattle*, 598 F.3d 668 (9th Cir. 2010), *vacated in part, adopted in part*, 627 F.3d 1288 (9th Cir. 2010); *EEOC v. Miss. Coll.*, 626 F.2d 477, 485 (5th Cir. 1980).

310. See, e.g., *Redhead v. Conference of Seventh-Day Adventists*, 440 F. Supp. 2d 211, 221 (E.D.N.Y. 2006) (concluding that "the ministerial exception does not apply in the case at bar, as plaintiff's teaching duties were primarily secular; those religious in nature were limited to only one hour of Bible instruction per day and attending religious ceremonies with students only once per year"); *Guinan v. Roman Catholic Archdiocese of Indianapolis*, 42 F. Supp. 2d 849, 852 (S.D. Ind. 1998) (refusing to apply the ministerial exception where the plaintiff "was not an ordained minister, the vast majority of the classes she taught regarded secular subjects, and she did not lead in religious worship services. Conversely, however, she was a Catechist, taught at least one class in religion per term, and organized Mass once a month.").

chial schools specifically seek to provide an integrated religious experience for their students and thereby seek out teachers that can provide instruction in secular subjects while simultaneously reinforcing the religious ideals of the institution.<sup>311</sup>

By contrast to the functional approach, an implied consent model of church autonomy places far less weight on the centrality or importance of an employee's role in determining whether to apply the ministerial exception. Indeed, on the implied consent model, the entire focus on the "minister," even merely as a paradigm case, is misguided. Instead, courts should focus more directly on whether, in light of the nature of the institution,<sup>312</sup> the relationship between the parties,<sup>313</sup> and the substance of the dispute,<sup>314</sup> the employee should have understood that accepting employment with the religious institution also entailed submitting to the authority of the religious institution's rule-making and adjudicative authority.

In this way, applying the ministerial exception is less about the centrality of the employee in the religious life of the religious institution and far more about determining whether there was, so to speak, an implied arbitration agreement between the parties.<sup>315</sup> To be sure, whether or not the employee actually is a minister will play an important role in that inquiry. Moreover, if the employee does play a central role in the religious life of the community, then it is more likely a court should conclude that the ministerial exception applies. But, in the words of the Second Circuit, the prevailing functional approach is far "too rigid."<sup>316</sup> Indeed, an employee can play a po-

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311. See, e.g., *Gallo*, 676 A.2d at 590–92 (collecting cases where defendants made such claims); see also *EEOC v. Tree of Life Christian Sch.*, 751 F. Supp. 700, 706–07 (S.D. Ohio 1990).

312. See *supra* Part II.A.1.

313. See *supra* Part II.A.2.

314. See *supra* Part II.A.3.

315. This type of analysis was contemplated by the Minnesota Supreme Court in *Trustees of East Norway Lake Norwegian Evangelical Lutheran Church v. Halvorson*, 44 N.W. 663 (Minn. 1890), albeit it not on constitutional grounds. See *id.* at 665 (holding that the decisions of religious institutions are "conclusive" "not because the law recognizes any authority in such bodies to make any decision touching civil rights, but because the parties, by their contract, have made the right of property to depend on adherence to, or teaching of, the particular doctrines as they may be defined by such judicatory. In other words, they have made it the arbiter upon any questions that may arise as to what the doctrines are, and as to what is according to them."); see also Bernard, *supra* note 140, at 558 (discussing *Halvorson* and using it as a foundation for a common law conception of religious institutional authority).

316. *Rweyemamu v. Cote*, 520 F.3d 198, 208 (2d Cir. 2008).

tentially minor role in the religious life of the institution, but the surrounding factors—a pervasively religious institutional culture or job qualifications that indicate the importance of religious fit even for marginal employees—might give us good reason to conclude that the employee impliedly consented to the adjudicative authority of the religious institution when accepting employment. Thus, on an implied consent model, courts would look for indicators of implied consent, not hallmarks of religious importance. While these inquiries may overlap, they can frequently diverge in important ways, especially when it comes to teachers providing secular instruction in parochial schools.<sup>317</sup>

#### B. PRETEXT AND “MARGINAL REVIEW”

Uncertainty regarding the scope of the ministerial exception—that is, who is a minister—was not the only problem left unresolved by the Supreme Court’s opinion in *Hosanna-Tabor*.<sup>318</sup> During the *Hosanna-Tabor* oral argument, the Justices repeatedly asked counsel for both parties whether courts can review the decisions of religious institutions to determine if they were pretextual.<sup>319</sup> The worry here was two-fold. First, a

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

318. See *supra* Part III.A.

319. See, e.g., Transcript of Oral Argument at 5, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (No. 10-553), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/10-553.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-553.pdf) (Sotomayor, J., questioning petitioner) (asking petitioner how it proposes dealing with pretext in the context of reporting sexual abuse); *id.* at 12–13 (Scalia, J., questioning petitioner) (“So you would allow . . . the government courts to probe behind the church’s assertion that this [math teacher] is a minister?”); *id.* at 22 (Alito, J., questioning petitioner) (worrying that pretext analysis necessarily requires judicial inquiry into the centrality of religious teachings); *id.* at 39 (Scalia, J., questioning respondent) (“Would you . . . allow the government to go . . . into the . . . dismissal of the Catholic priest to see whether indeed it . . . was pretextual?”); *id.* at 43–44 (Alito, J., questioning respondent) (worrying that the pretext inquiry will, in

religious institution might, in bad faith, claim that a plaintiff is a minister solely in order to be shielded from liability;<sup>320</sup> second, a religious institution might claim that a plaintiff had been terminated for religious reasons when in fact the termination was motivated by various forms of impermissible discrimination.<sup>321</sup> In each instance, the Justices wondered how a court could simultaneously grant deference to the internal decision-making of religious institutions while still retaining the authority to check such decisions for pretext or bad faith.<sup>322</sup>

Despite the significant focus on the issue at oral argument, the Court's decision did little to address the question.<sup>323</sup> The primary discussion of pretext came in Justice Alito's concurrence in which he argues that a pretext inquiry would "dangerously undermine the religious autonomy" because "[i]n order to probe the *real reason* for respondent's firing, a civil court—and perhaps a jury—would be required to make a judgment about church doctrine."<sup>324</sup> Rendering such a judgment "would require calling witnesses to testify about the importance and priority of the religious doctrine in question, with a civil factfinder sitting in ultimate judgment of what the accused church really believes, and how important that belief is to the church's overall mission."<sup>325</sup>

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some cases, require courts to evaluate religious scholarship); *id.* at 56 (Sotomayor, J., questioning petitioner) ("So you would say with janitors, you can get into the pretext question[?]").

320. *See, e.g., id.* at 12–13 (Scalia, J., questioning petitioner) (asking whether the courts could try whether the church's labeling its employee a minister is a scam); *id.* at 55 (Sotomayor, J., questioning petitioner) (asking whether under petitioner's test the status of the individual matters).

321. *See, e.g., id.* at 5 (Sotomayor, J., questioning petitioner) (asking how to deal with cases where the religious institution fires a teacher for reporting sexual abuse); *id.* at 38–39 (Scalia, J., questioning respondent) (asking whether a court may review a pretext claim where a priest claims he was fired for threatening to sue the church, but the church argues they fired him because he was married); *id.* at 43–44 (Alito, J., questioning respondent) (asking whether the court may try the pretext issue where a female nun claims she was not given tenured position at a Catholic University because of her sex, but the organization claims it was based on an honest evaluation of her canon scholarship).

322. *See, e.g., id.* at 5 (Sotomayor, J., questioning petitioner); *id.* at 12–13 (Scalia, J., questioning petitioner); *id.* at 43–44 (Alito, J., questioning respondent).

323. The only mention of pretext came towards the end of the Court's decision in a short paragraph raising the question. *See Hosanna-Tabor*, 132 S. Ct. at 709. For further discussion, see *infra* notes 333–36 and accompanying text.

324. *Hosanna-Tabor*, 132 S. Ct. at 715 (Alito, J., concurring).

325. *Id.*

Of course, this type of inquiry poses a problem only to the extent we embrace the Supreme Court's jurisdictional turn, which grounds church autonomy in the incompetence of courts to resolve religious questions.<sup>326</sup> This is the interpretation of the Establishment Clause prominent in *Serbian Eastern Orthodox v. Milivojevic* and *Jones v. Wolf*.<sup>327</sup>

But, as described above, such a jurisdictional turn stands at odds with the implied consent model of church autonomy articulated by the Court in its early church property cases.<sup>328</sup> Indeed, the implied consent model embraces judicial review of religious institutional decisions because it ensures that the parties receive the good faith adjudication they implicitly consented to when becoming members of the particular religious institution. Thus, the Supreme Court<sup>329</sup> and a variety of lower courts<sup>330</sup> envisioned a “marginal civil court review” of religious institutions whereby the decisions of religious institutions would be granted deference once a court determined that the decision was not tainted by “fraud, collusion, or arbitrariness.”<sup>331</sup> In contrast to jurisdictional approaches that tied church autonomy to judicial incompetence, an implied consent model *demand*s judicial inquiry into religious questions in order to ensure that religious institutions are making rules and resolving disputes in good faith.<sup>332</sup>

Interestingly, the only discussion of pretext in the majority opinion comes in one short paragraph:

The EEOC and Perich suggest that Hosanna-Tabor's asserted religious reason for firing Perich—that she violated the Synod's commitment to internal dispute resolution—was pretextual. That suggestion misses the point of the ministerial exception. The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter “strictly ecclesiastical” . . . is the church's alone.<sup>333</sup>

In addressing claims of pretext, the majority opinion avoids grounding church autonomy in judicial incompetence. Instead,

326. See *supra* notes 69–94 and accompanying text.

327. See *supra* notes 69–94 and accompanying text.

328. See *supra* notes 69–94 and accompanying text.

329. See *supra* notes 243–70 and accompanying text.

330. See *supra* note 247 (collecting examples).

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

332. See *supra* Part II.A.

333. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 709 (2012) (citation omitted).

the Court focuses on the overall nature of the dispute—that is, the nature of the parties and the relationship between the parties—in concluding that such a matter was undoubtedly within the core authority of the religious institution. Indeed, it is at the end of this paragraph that the Court drops footnote four, the ultimate renunciation of the jurisdictional interpretation of church autonomy. In this way, the Court begins the process of distancing the doctrine from the prevailing jurisdictional approach to the religious clauses; it both avoids arguing from judicial incompetence and simultaneously conceives of the ministerial exception as an affirmative defense, thereby opening the door for judicial adjudication of such disputes in cases of waiver.<sup>334</sup>

On the heels of *Hosanna-Tabor*, lower courts appear willing to pursue this new logic, interpreting the ministerial exception as an affirmative defense.<sup>335</sup> In turn, court opinions are opening the door for an increased judicial role in the resolution of religious disputes.<sup>336</sup> Of course, such an increased role would never have been possible within a jurisdictional framework because religious and judicial institutions inhabit different spheres and are not permitted to trespass on the adjudicative territory of the other; the wall of separation simply did not allow for it. But that was before footnote four.

### CONCLUSION

As many have noted, the Supreme Court's decision in *Hosanna-Tabor* represented a strong endorsement of autonomy for religious institutions over core religious matters.<sup>337</sup> But *Hosanna-Tabor* represents a reformulation of the relationship between church and state, discarding a jurisdictional approach that had become increasingly popular among courts and schol-

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334. See *supra* notes 130–36 and accompanying text.

335. See *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1318 (11th Cir. 2012); *Petschonek v. Catholic Diocese of Memphis*, No. W2011-02216-COA-R9-CV, slip op. at 6 (Tenn. Ct. App. May 23, 2012).

336. *Hamilton*, 680 F.3d at 1318.

337. See, e.g., Robert Barnes, *Supreme Court: Discrimination Laws Do Not Protect Certain Employees of Religious Groups*, WASH. POST (Jan. 11, 2012), [http://www.washingtonpost.com/politics/supreme-court-discrimination-laws-do-not-protect-certain-employees-of-religiousgroups/2012/01/11/gIQAIbO4qP\\_story.html](http://www.washingtonpost.com/politics/supreme-court-discrimination-laws-do-not-protect-certain-employees-of-religiousgroups/2012/01/11/gIQAIbO4qP_story.html); Jess Bravin, *Justices: Ex-Worker Can't Sue Church*, WALL ST. J., Jan 12, 2012, at A7; Adam Liptak, *Religious Groups Given 'Exception' to Work Bias Law*, N.Y. TIMES, Jan. 11, 2012, [http://www.nytimes.com/2012/01/12/us/supreme-court-recognizes-religious-exception-to-job-discrimination-laws.html?\\_r=1&pagewanted=all](http://www.nytimes.com/2012/01/12/us/supreme-court-recognizes-religious-exception-to-job-discrimination-laws.html?_r=1&pagewanted=all).

ars.<sup>338</sup> In its place stands footnote four, which embraces the ministerial exception as an affirmative defense. Accordingly, the ministerial exception can be waived and parties can authorize courts to adjudicate what are, in essence, religious disputes. In so doing, the Supreme Court has presented a far more dynamic view of the relationship between church and state, constructing a wall of separation that is far more permeable than the jurisdictional approach to the religion clauses ever allowed.

This dynamic approach, however, needs its own doctrinal and philosophical foundations. Such a foundation is readily available in the Court's early and long-marginalized church property cases. Those cases built notions of church autonomy on the implied consent of a religious institution's membership. At the same time, these early church property cases recognized that if the authority of religious institutions is tied to the consent of the membership, then such authority can only extend to good faith rule-making and adjudication. Where religious institutions engage in misconduct, there can be no claim to implied consent and, in turn, no claim to autonomy from judicial intervention. Grounded in principles of implied consent and marginal review, this framework for church autonomy mirrored arbitration and tied church autonomy not to the adjudicative disability of courts, but to the membership's implicit decision to have the religious life of their community guided by religious authorities.

Understanding church autonomy in this way has divergent implications. On the one hand, it authorizes courts to review the decisions of religious institutions and authorizes courts to withhold church autonomy where they have determined that religious institutions have employed fraud or collusion. Moreover, it only grants autonomy to religious institutions where the nature of the parties, the relationship between the parties and the substance of the dispute provide sufficient indication that the members impliedly consented to the authority of the religious institution. Such proposals would undoubtedly meet with strong resistance from advocates of a robust version of church autonomy.

At the same time, building church autonomy on an arbitration framework also discourages narrow constructions over which individuals are covered by doctrines like the ministerial exception. Once the surrounding factors justify a finding of im-

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338. See *supra* notes 13, 65–67 and accompanying text.

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plied consent, then the autonomy of the religious institution is far reaching. Whether the member is a minister or a music teacher or a security guard, implied consent to the authority of a religious institution serves to empower the religious institution to make rules and adjudicate disputes that touch upon the religious life of the community. Attempts to differentiate between truly religious parties and those whose role is only of minor religious import are irrelevant once we recognize that the religious institution derives its authority from implied consent; such consent provides institutional autonomy regardless of whether the plaintiff resembles a minister or not.

In this way, understanding church autonomy as a constitutionalized version of arbitration protects institutional autonomy over religious life. Where the institutional rules and decisions are truly the result of religious deliberation drawing on matters of faith and doctrine then the church's autonomy is wide. Where those very same rules and decisions are based upon misconduct such as fraud or collusion then there can be no claim to implied consent and therefore no claim to religious autonomy. Providing wide autonomy to sincere religious decision-making, but withholding autonomy where such decision-making is tainted by fraud or misconduct—this is the legacy of footnote four.