1. INTRODUCTION

Religious institutions—entities that facilitate or enable development and actualization of religious preferences—are front and center of modern religious liberty debates. While churches have always been afforded some modicum of constitutionally directed deference in church property or clerical hiring decisions, the Supreme Court’s decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*¹ elevated a somewhat thin conception of church autonomy to a more robust and constitutionally secure conception of religious institutionalism.² In *Hosanna-Tabor*, the Supreme Court held that religious institutions have a constitutional right to fire ministers without regard for employment discrimination laws.³ According to the Court, the text of the Constitution gives “special solicitude” to the rights of religious institutions.⁴ With this statement, the Court in *Hosanna-Tabor* fundamentally changed the

¹ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012).
² *Id.* at 705–06 (2012).
³ *Id.*
⁴ *Id.* at 706.
framework of the First Amendment Religion Clauses, recognizing for the first time a cause of action exclusively available to religious institutions.\(^5\)

Since *Hosanna-Tabor*, the federal courts have been faced with a slew of institutional claimants arguing that they are “religious institutions” entitled to constitutionally mandated exemptions from a variety of generally applicable civil restrictions.\(^6\) While many of the claims mirror the *Hosanna-Tabor* litigation in that they are brought by “churches” arguing for a “ministerial exception” from employment discrimination prohibitions, some claims go beyond the scope of *Hosanna-Tabor*, raising a host of questions left unresolved by the Court’s decision.\(^7\) Of most immediate importance are two boundary issues: First, what institutions are entitled to First Amendment protections for religious institutions; and second, whether the scope, or the coverage, of those protections is limited to a “ministerial exception” for employment related decisions or, instead, is broader, extending to other activities of the institution.

The litigation in *Burwell v. Hobby Lobby Stores, Inc.*\(^8\) raised both of these questions. While the Court’s ultimate decision in *Hobby Lobby* was not based on constitutional grounds—instead resolving the litigation under the Religious Freedom Restoration Act (RFRA)—the broader *Hobby Lobby* litigation efforts illustrate the direction in which many proponents of broad constitutional rights for religious institutions are attempting to expand those protections. Often buried at the back of the complaint, many challengers to the Obama Administration’s “contraception mandate” argued that they should be exempt from the mandate because it interfered with the institution’s right to make decisions about its internal affairs, a right the claimants established in *Hosanna-Tabor*.\(^9\) Among these challengers include institutions, such as schools and universities, that go beyond the core house of worship that one might presume is the exclusive rights holder for the purposes of *Hosanna-Tabor*. And the mandate challengers’ characterization of the scope of the right as one that extends to

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\(^5\) Id.; see Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 HARV. J.L. & PUB. POL’Y 821, 837 (2012) (concluding that it “may be the broader doctrinal implications of *Hosanna-Tabor* that have the most lasting significance.”).

\(^6\) See infra Part 3 (discussing the various institutional claimants arguing that they are a “religious institution” entitled to the right articulated in *Hosanna-Tabor*).

\(^7\) See infra Part 4 (discussing the various claims made with respect to the scope of the right articulated in *Hosanna-Tabor*).


the “internal affairs” of the religious institution seems to extend beyond the boundaries of the Court’s decision in Hosanna-Tabor.\(^{10}\) Coupled with other litigation efforts, the Hosanna-Tabor component of the Hobby Lobby litigation suggests a strong push for an expansion of constitutional rights for religious institutions.

All this leaves definitional puzzles with potentially significant implications for the constitutional arrangement between church and state. First, who or what is a religious institution for the purposes of this newly recognized constitutional right? Is the right limited to churches, or does it extend to schools, not-for-profits, or even for-profit corporations? Second, what is the scope of that right? Is it limited to a ministerial exception, or does it extend more broadly to the “internal affairs” of the organization, as many of the challengers to the contraception mandate claimed? Drawing on the Hobby Lobby litigation, as well as other less well-known cases, this chapter highlights the complicated definitional questions that will necessarily arise as a doctrine of religious institutionalism develops in the courts, as well as preliminarily sketching potential limits of that doctrine.

To that end, the chapter proceeds in three main parts. Part 2 sets the groundwork, situating the Court’s decision in Hosanna-Tabor in the broader structure of First Amendment protections. This part also disaggregates the statutory and constitutional rights relied on in Hobby Lobby. Part 3 turns to the question of defining the right holder—religious institutions—specifying the importance of identifying the right holder independent of any consideration of the scope of the right and suggesting a framework for determining who or what is a religious institution for constitutional purposes. Finally, Part 4 examines the analytically distinct question of the scope of the right. While on the narrowest construction, Hosanna-Tabor speaks only of a “ministerial exception,” the decision left room for broader coverage, extending to “internal affairs,” something that has been noticed and strategically employed in numerous cases before the lower federal courts. This part, then, examines litigant attempts to expand the scope of the right and analyzes the voracity of these claims.

2. DEFINING CONSTITUTIONAL RELIGIOUS INSTITUTIONALISM

The term “religious institutionalism,” which has received much attention in recent years, has been used to denote two distinct concepts that are important to disaggregate. First, religious institutionalism is used to refer to the bundle of legal rights available to religious institutions. These rights include any constitutional rights, but also, importantly, statutory rights—both general and specific—that exempt religious institutions from otherwise generally applicable laws. Second, religious institutionalism refers to the constitutional rights of religious institutions, specifically the exclusive First Amendment right for religious institutions recognized in

\(^{10}\) See infra Part 4 (discussing the nature of the claims that extend beyond the facts of the decision in Hosanna-Tabor).
From Freedom of the Church to Corporate Religious Liberty

Hosanna-Tabor. The distinction is important, because each concept implicates different definitional issues, and therefore choices. Importantly, for the purposes of this chapter, by religious institutionalism I mean constitutional religious institutionalism. That is, the exclusive category of First Amendment rights reserved for constitutional religious institutions. This conception of religious institutionalism focuses specifically on the Court’s determination that the Constitution singles out religious institutions as special rights holders. Before turning to the definitional issues, though, it is worth stepping back to examine the full bundle of rights available to religious institutions.

Turning first to constitutional rights. Generally speaking, all constitutional persons are protected by the First Amendment Religion Clauses, and litigants can claim that the government has violated either or both the Free Exercise Clause or the Establishment Clause. Pursuant to the Establishment Clause, litigants can claim that the government is “establishing” religion by either preferring one religious sect over another, or benefiting one religion by, for example, requiring or permitting prayer in public schools or permitting religious symbols in the public square. Under the Free Exercise Clause, there are two alternatives for litigants who claim that their religious liberty has been burdened by the government. First, litigants can argue that the government has burdened their religious belief, which if accepted by the court, will result in absolute constitutional protection, without any judicial recourse to balancing tests. Second, litigants can claim that the government has burdened their religious action, in which case the constitutional protection afforded will depend on the nature of the burden. When religious action is burdened via a discriminatory


12 See Robinson, Religious Institutions, supra note 11, at 181–83.

13 See U.S. CONST. amend. I.

14 See, e.g., Larson v. Valente, 455 U.S. 228, 244 (1982) (“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”).


18 See, e.g., McDaniel v. Paty, 435 U.S. 618, 629 (1978); Torcaso, 367 U.S. at 495. The vast majority of Free Exercise Clause litigation involves a claim that a person’s ability to act in accordance with her beliefs has been burdened. See Michael W. McConnell et al., Religion and the Constitution 87–91 (2d ed. 2006).

law, the resulting protection is strict scrutiny.\textsuperscript{20} When the burden is the effect of a nondiscriminatory law (i.e., a generally applicable law), the religious action will be afforded no protection absent a showing of a “hybrid claim” or an individualized governmental determination.\textsuperscript{21}

In addition to these rights, which are inclusive in the sense of applying generally to all persons under the Religion Clauses,\textsuperscript{22} the Court’s decision in Hosanna-Tabor recognized an additional doctrinal path for institutional litigants.\textsuperscript{23} This right is exclusive because it applies only to “religious institutions.”\textsuperscript{24} This means that if the litigant can claim to be a religious institution for First Amendment purposes, then, to the extent of the coverage of the institutional right—in Hosanna-Tabor, either a ministerial exception (read narrowly) or a right to govern internal affairs (read broadly)—the institution is afforded constitutional protection.\textsuperscript{25} This is a powerful right for any religious group and one that has the potential to change the landscape of constitutional rights in the United States.\textsuperscript{26}

Although the purpose of this chapter is to examine the indeterminate boundaries of constitutional rights for religious institutions, in light of the Hobby Lobby decision, it is useful to briefly describe the statutory protections afforded litigants who believe that their religious liberty has been violated. The primary statutory protection—and the one at issue in Hobby Lobby—is the general exemption contained in the Religious Freedom Restoration Act (RFRA).\textsuperscript{27} RFRA was passed in the wake of the Supreme Court’s decision in Employment Division v. Smith,\textsuperscript{28} where the Court significantly weakened constitutional free exercise protections. Before Smith, persons were at least theoretically entitled to exemptions from any law that substantially burdened their religious practice unless the law passed strict scrutiny review.\textsuperscript{29} Smith upended

\begin{itemize}
\item \textsuperscript{20} See Church of Lukumi, 508 U.S. at 531; Sherbert, 374 U.S. at 406 (invalidating a state law burdening the free exercise of religion).
\item \textsuperscript{21} See Employment Div. v. Smith, 494 U.S. 872, 884 (1990) (holding that special accommodations for religious practices are not constitutionally mandated except for claims combining a free exercise claim and a claim arising from another constitutional provision—i.e., “hybrid” claims—or for claims in contexts that “invite consideration of . . . particular circumstances”).
\item \textsuperscript{22} See Zoe Robinson, Constitutional Personhood, 84 Geo. Wash. L. Rev. (forthcoming 2016) (on file with editors).
\item \textsuperscript{23} Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 705–06 (2012).
\item \textsuperscript{24} Id. at 706.
\item \textsuperscript{25} Importantly, what this does not mean is that the religious liberty of a constitutional religious institution is protected only to the extent of the coverage of the institutional right. Instead, to the extent that the institutional litigant claims protection from government intrusion on religious action that falls outside the scope of the institutional category, that action may well be protected by the generally applicable religion clauses. See Robinson, Religious Institutions, supra note 11, at 231–33.
\item \textsuperscript{26} Id. at 204 (“The institutional category enshrined by Hosanna-Tabor is . . . a powerful extension of the previously settled Religion Clause doctrine.”).
\item \textsuperscript{28} 494 U.S. 782, 884–85 (1990) (holding that burdens on religious action imposed by neutral laws of general application, such as the federal drug law that prohibited the use of peyote at issue in Smith, were not subject to strict scrutiny).
\item \textsuperscript{29} See, e.g., Sherbert v. Verner, 374 U.S. 398, 406–07 (1963) (applying strict scrutiny and holding that the Constitution mandated that the plaintiff be exempted from the generally applicable law). But see
this protection, holding that neutral and generally applicable laws do not, as a general matter, violate the Free Exercise Clause.\(^30\) In other words, the Constitution does not compel exemptions from generally applicable laws even when they burden a person’s religious practice. RFRA was enacted to “restore” the pre-\(Smith\) standard against which federal laws would be measured: The government must exempt a religious person from a generally applicable law that substantially burdens her religious practice unless the government meets strict scrutiny.\(^31\) Of course, one of the critical interpretive questions in \(Hobby Lobby\) was whether corporate claimants were entitled to the protections of RFRA (i.e., whether the statute vested a legal right in the corporation-plaintiff), but upon deciding that for-profit corporations are “persons” within the rights-holding scope of the statute, the protections also extend to corporate entities. Finally, in addition to RFRA, religious institutions have a variety of specific exemption options. For example, the Civil Rights Act and the Americans with Disabilities Act contain exemptions that permit a designated rights holder to disregard the directives of the otherwise applicable law.\(^32\)

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As indicated above, if we set aside statutory rights claims, as well as inclusive rights available under the Religion Clauses, the most pressing boundary questions for defining constitutional religious institutionalism involve identifying the rights holder and specifying the scope of the right.

As a precursor, in addressing these questions, it is important to acknowledge that attempts to define these boundaries are contested among scholars who have considered the meaning of religious institutionalism.\(^33\) For example, in this volume, Professors Lupu and Tuttle propose an approach to religious institutionalism (both narrowly and broadly conceived) that would undertake no examination of the identity of the appropriate rights holder.\(^34\) Lupu and Tuttle claim that to determine

\(^{30}\) \(Smith\), 492 U.S. at 884–85 (1990).

\(^{31}\) See, e.g., Douglas Laycock & Oliver S. Thomas, \(Interpreting the Religious Freedom Restoration Act\), 73 Tex. L. Rev. 209, 210–12 (1994) (explaining how RFRA was passed in direct reaction to \(Smith\)).


\(^{33}\) See Ira C. Lupu & Robert W. Tuttle, Chapter 18, \(Religious Exemptions and the Limited Relevance of Corporate Identity\), in this volume; Lawrence Sager, Chapter 5, \(Why Churches (and, Possibly, the Tarpon Bay Women’s Blue Water Fishing Club) Can Discriminate\), in this volume; Michael A. Helfand, \(Religious Institutionalism, Implied Consent and the Value of Voluntarism\), 88 S. Cal. L. Rev. 539 (2015); Kathleen Brady, \(Religious Organizations and Free Exercise: The Surprising Lessons of Smith\), 2004 BYU L. Rev. 1633.

\(^{34}\) Lupu & Tuttle, supra note 33.
who (or what) can assert the right independently of the content of the right establishes a binary approach whereby some institutions are made constitutional insiders and others constitutional outsiders. For Lupu and Tuttle, the demarcation of the rights holder question creates incentives for institutions with religious identities to strengthen their religious character in order to qualify as a rights holder and requires secular judgments about religious identity. Furthermore, for the question of the boundaries of the right, Lupu and Tuttle claim that “an even more important argument against the binary approach is the absence of a reliable link between the religious character of an institution and the specific claim of legal privilege at issue.” This view seems to assume that identifying an institution as religious for constitutional purposes means that all of the institution’s activities will be covered by the right in question.

But to identify an institution as a rights holder for the purposes of religious institutionalism is not to determine the scope of the right. This assumption conflates the analytically separate questions of identifying the rights holder and determining the scope of the right. That is, being identified as a constitutional religious institution does not mean that the institution is constitutionally exempt from, for example, the licensing of daycare facilities. Instead, being designated a constitutional religious institution imbues the rights holder with some limited zone of interference from government action, something that itself must be determined independently of the identity of the rights holder. That is, a claim to be a protected religious institution does not entitle the rights holder to protected status for all of its activities, only those that fall within the scope of the right, something that was left undetermined by the Court in Hosanna-Tabor. And while the modes of analysis might overlap when answering each of these questions, each question presents an analytically separate inquiry.

The approach that Lupu and Tuttle propose in their chapter—whereby institutions with asserted religious identities are entitled to constitutional protection when engaged in “distinctively religious activities”—serves to conflate these questions, potentially resulting in institutional overinclusion and, consequently, substantive underprotection for those institutions at the core. It does so by creating a “feedback loop” whereby the broader we define constitutional religious institutions, the less substantive protections they will likely receive. Philip Hamburger notes this phenomenon in his study on the definition of religion under the Free Exercise Clause.

35 Id.
36 Id.
37 Id.
38 See generally Robinson, supra note 22.
39 Lupu & Tuttle, supra note 33; see Robinson, Religious Institutions, supra note 11, at 230–33.
40 I first made this point in Robinson, Religious Institutions, supra note 11, at 230–33. See also Sonja R. West, Awakening the Press Clause, 58 UCLA L. Rev. 1025, 1048–61 (2011) (examining the “more is less” phenomenon in the context of the Press Clause).
41 Philip Hamburger, More Is Less, 90 Va. L. Rev. 835 (2004) [hereinafter Hamburger, More Is Less]. For Hamburger’s consideration of the “more is less” phenomenon in other contexts, see Philip
There, Hamburger argues that “an enlarged definition of any right may invite limitations on the circumstances in which it is available . . . and its effects are apt to be felt with particular regret.”\(^{42}\) Hamburger notes the dangers inherent in an overinclusive right, claiming that “at some point, as the definition of a right is enlarged, there are likely to be reasons for qualifying access [to that right].”\(^{43}\) For example, in the context of the Free Exercise Clause, as the concept of “free exercise” enlarged, access to that right concurrently diminished.\(^{44}\)

Overinclusion in the category of religious institutions will inevitably have a similar effect. The outcome will be that those institutions such as churches that clearly fall within the legal definition of a “religious institution” will suffer from constitutional underprotection.\(^{45}\) The reason is that once every faith-affiliated institution is declared a constitutional religious institution, the initial purpose for carving out religious institutions as something unique under the Religion Clauses becomes lost. Once this occurs, the reasons for giving religious institutions special recognition under the First Amendment are blurred and the institutional protections verge toward constitutional redundancy.

With the importance of delineating and defining these boundary questions of religious institutionalism in mind, the following part turns to examine the rights holder and the threshold question of who, or what, is a religious institution for constitutional purposes.

### 3. Identifying Constitutional Religious Institutions

The first issue left open by *Hosanna-Tabor* was who or what is a constitutional religious institution.\(^{46}\) It is important to remember that what we are doing when we are examining religious institutionalism as a narrow constitutional category is determining the identity of a *specific class of constitutional rights holder*, not determining whether institutions with religious identities have legally protected rights under the Religion Clauses, or under any statutory regime. The search for a constitutional religious institution, then, is pragmatic, a search for the holder of the constitutional right articulated by the Court in *Hosanna-Tabor*.

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\(^{43}\) Id.

\(^{44}\) Id.

\(^{45}\) *See West, supra* note 40 (arguing that a broad definition of the “Press” for First Amendment purposes will lead to underprotection of those entities that fall within the core of the definition of “the Press.”).

\(^{46}\) I discuss this issue in depth in Robinson, *Religious Institutions, supra* note 11, and Robinson, *The Contraception Mandate, supra* note 11.
Hosanna-Tabor after Hobby Lobby

The exceptional constitutional status that the Supreme Court has given to religious institutions presumes some identity-based distinction among religious groups. Following *Hosanna-Tabor*, however, litigants were left with little to no guidance on how to determine whether they qualify as constitutional rights holders within the meaning of that decision. While most of us would readily identify a local house of worship as a religious institution, the question becomes more difficult as we move beyond the core. For example, many local houses of worship belong to hierarchical organizations that mandate conduct and belief. While it seems intuitive that the broader hierarchical religious organizations are themselves religious institutions insofar as they are directly involved in the formulation and dissemination of religious doctrine, it is also necessary to account for the various subsidiary organizations funded and managed by such broader hierarchical organizations. These subsidiary organizations can include hospitals, schools, universities, for-profit businesses, and not-for-profit organizations. In addition, many universities and schools not expressly managed by, or affiliated with, a hierarchical religious order identify as religious. Then there are the many for-profit businesses that claim to be run in accordance with religious doctrine. The question is, which of these organizations is a constitutional religious institution? Are they all within this category, such that they can claim a right to organize at least some of their affairs independent of state regulation? Are only some of them?

The most promising starting point for identifying constitutional religious institutions is to pinpoint the unique functions these institutions fulfill that differ from those fulfilled by other institutions. Examining the Supreme Court’s decisions concerning religious institutions, the Court has made it clear that such institutions fulfill three primary functions: protection of group rights, protection of individual conscience, and provision of desirable societal structures. While other institutions that value religion might at times serve one or more of these functions, constitutional religious institutions have a primary commitment to these roles that reaches far beyond the efforts of other institutions. Elsewhere I have examined each of these values in-depth; however, it is useful to briefly consider each value here, before offering some guidelines based on these values that can help courts to identify those institutions that best fulfill the functions of constitutional religious institutions.

First, undergirding the Supreme Court’s religious institutionalism jurisprudence is the protection of religious group rights. By this, I mean that driving the Court’s decisions is a view that religious institutions are uniquely autonomous in our governmental

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47 For example, the Catholic Church is one such hierarchical organization. See Pope John Paul II, *Catechism of the Catholic Church* 231–37 (2d ed. 2000).

48 Robinson, *Religious Institutions*, supra note 11, at 206–08 (arguing that the most constitutionally sound way to design a framework for identifying constitutional religious institutions is to ascertain those values that undergird the Court’s institutionalism decisions).

49 Id. at 208.

50 Id.

51 Id. at 206–25.
structures. To that end, the Court has taken a hands-off approach to cases that involve certain intra-institutional decisions, holding that religious institutions are to be accorded special solicitude over at least matters of faith and doctrine. For the Court, there is something special about religious groups *qua* religious groups that requires the Court to cede authority over specific, uniquely religious, matters.

Second, and related, the Court’s jurisprudence reflects the value of religious institutions as *facilitators of individual religious liberty*. Implicit in this value is an understanding of religious liberty that moves beyond a traditional conception of religious freedom as an individual endeavor. The Court has recognized that the exercise of individual religious conscience is frequently a communal endeavor. To that end, when religious individuals band together in a community of faith, the Court has acknowledged the rights of religious institutions as facilitators and protectors of those individuals’ rights. Religious institutions, then, are places where individual religious conscience is practiced, formed, and preserved. Consequently, when individuals form a group to exercise rights of religious conscience, “there is . . . agreement on the fundamentals of the collective form that are necessary to protect [the] individual conscience rights.” In this way, the institution becomes more than a collective of individual rights and evolves into an independent entity that protects a collective expression of faith. The religious institution, then, is not merely a representative of individual conscience; it is essential to the exercise of conscience. Thus, while the rights of religious institutions are parasitic on individual religious liberty, they are also independent of individuals. The Court’s religious institutionalism, then, values the collective expression of faith that a religious institution enshrines.

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52 See Robinson, *Religious Institutions*, supra note 11, at 208–13 (discussing the claim that the Court’s religious institutionalism jurisprudence is at least partially animated by protection of group rights).


54 Id. at 213.

55 Id. at 213–19. On the view that religious institutional freedom derives its validity from the liberty interests of individuals within the institution, see, for example, Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1373 (1981).


58 Id. at 216–18 (stating that religious conscience is fostered and nurtured in groups).


Finally, the Court’s jurisprudence reflects a view that religious institutions provide democratically desirable social structures.\(^{61}\) Along these lines, religious groups provide two distinct social benefits. First, they facilitate social engagement by inculcating groups of people with civic morality.\(^{62}\) Historically, the state has entrusted the development and advancement of civic morals to religious organizations.\(^{63}\) At the same time, the state has traditionally recognized that implicit in the delegation of this social function is an understanding that the state not dictate the work of those institutions, to avoid political coloring of religion.\(^{64}\) Taken to the extreme, if religion is corrupted, so too is the citizenry, and the very fabric of the civil state will unravel.\(^{65}\) Second, symbiotic with the view of religious institutions as protectors of public virtue is the understanding that religious institutions should act to protect the state from religious involvement.\(^{66}\) By carving out autonomous space for religious institutions, the understanding was that civil authorities would be protected from the potentially disruptive influence of religion on government.\(^{67}\) The judicial valuing of religious institutions as private sovereigns, then, recognizes the independent democratic desirability of those structures.\(^{68}\)

What remains is to develop some practical principles from these values—religious sovereignty, individual conscience, democratically valuable structures—in order to articulate workable guidelines for identifying constitutional religious institutions. Drawing on these values, we can identify four factors that courts can use to determine whether any given organization is a constitutional religious institution: (1) whether it is recognized as a religious institution, (2) whether it functions as a religious institution, (3) whether it meets a condition of voluntariness, and (4) whether it is privacy-seeking in the sense of refraining from attempting to influence the government.\(^{69}\) These guidelines act as reliable proxies that can facilitate


\(^{62}\) *Id.* at 220–22 (discussing the social function of religious institutions in American society).


\(^{65}\) Robinson, *Religious Institutions*, supra note 11, at 222.


\(^{69}\) I first articulated this framework in *id.* at 225–29, and applied it in Robinson, *The Contraception Mandate*, supra note 11.
courts in identifying those institutions that best fulfill the unique constitutional functions of religious institutions.

**First: Recognition as a religious institution.** Relying on third-party recognition of what a constitutional religious institution looks like, this factor allows us to capture within the category those institutions that have as their goal uniquely religious objectives. If we value individual religious conscience, it makes sense that a constitutional religious institution is one that third parties recognize as providing space to achieve religious objectives. That is, if a driver of the Court’s special solicitude toward religious institutions is that these institutions facilitate individual religious belief and conduct, then the institution must necessarily be recognizable as a religious institution. Equally, the valuing of religious institutions as facilitators of social engagement suggests that third-party recognition of an institution as a religious institution is important. To the extent that institutions are viewed as a locus of civic virtue, this can buttress any claim for recognition as a constitutional religious institution.

More practically, determining whether an institution is a religious institution through the lens of third-party recognition will involve some consideration of the functional attributes of the institution. That is, assessing whether a third party would consider any given institution a religious institution means looking to the day-to-day functions of the institution with the view toward determining whether a third party would consider the institution as distinctly religious. For example, courts could reference whether the institution publicizes a religious mission, whether the functions of the institution are religiously based or oriented, and whether entry into the institution requires some commitment of conscience on the part of the individual.

**Second: Functions as a religious institution.** An institution claiming the status of constitutional religious institution should be structurally capable of promoting individual conscience and morality. If a feature of constitutional religious institutions

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70 Id. at 225–27 (discussing the recognition factor).
71 Id. at 225.
72 Third-party recognition is similar to the approach taken by the Court in *Hosanna-Tabor*. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 699–700, 707–08 (2012); see also *Sonja R. West, Press Exceptionalism*, 127 Harv. L. Rev. 2434, 2455–56 (2014) (utilizing *Hosanna-Tabor* in uncovering a meaningful approach to defining “the press” for First Amendment purposes).
73 Robinson, *Religious Institutions*, supra note 11, at 226. Lower courts have taken a similar approach in attempts to define a “religious institution” for various statutory provisions. See, e.g., *Collins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225–26 (6th Cir. 2007); *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 310–11 (4th Cir. 2004) (noting that “the Hebrew Home maintained a rabbi on its staff, employed mashghichim to ensure compliance with the Jewish dietary laws, and placed a mezuzah on every resident’s doorpost.”); *Scharon v. St. Luke’s Episcopal Presbyterian Hosps.*, 429 F.2d 360, 362 (8th Cir. 1971) (stating that “[t]he hospital’s Board of Directors consists of four church representatives and their unanimously agreed-upon nominees” and that the defendant’s “Articles of Association may be amended only with the approval of the Episcopal Diocese of Missouri of the Protestant Episcopal Church in the United States of America and the local Presbytery of the Presbyterian Church (U.S.A.)”); *Altman v. Sterling Caterers, Inc.*, 879 F. Supp. 2d 1375, 1384–85 (S.D. Fla. 2012).
is at least partially to generate norms among a group of citizens, it seems essential that the institution somehow perform this function. Thus, while the first factor—third-party recognition—asks whether a person would perceive that the institution is a religious institution, this factor questions whether the institution is in fact fulfilling its role as a religious institution.

Third: Voluntariness. This factor focuses on the value of protecting individual religious liberty, and specifies that for an institution to be considered a religious institution, entrance into that institution must be voluntary. That is, the individual must at least know that she is entering into a religious institution that she can exit at will. In this way, the individual will be given an opportunity to determine whether any given institution will best serve her conscience and opt in, or out, at her choosing. Given a jurisprudence of religious institutionalism that values group rights and allows institutions broad deference in governing their internal affairs, it is critical that individuals have a choice whether to be subject to the constraints of those institutions. Concurrent with the freedom to organize, then, must be the individual’s freedom to choose whether or not to affiliate with and submit to the sovereignty of an institution.

Fourth: Privacy-seeking. Finally, the value of supporting democratically desirable structures suggests that, to be considered a constitutional religious institution, religious organizations should seek disengagement from the formal apparatus of the state.

Applying these factors, we can begin to identify those institutions that best fulfill the unique functions of constitutional religious institutions, which are those that because of their functions deserve exclusive constitutional protections. What remains is to consider how far the scope of this special right extends to those institutions that are properly recognized as having standing to assert it.

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76 This is similar to the approach the Court took in determining whether the plaintiff was a “minister” in Hosanna-Tabor. 132 S. Ct. at 708 (giving weight to the fact that “Perich’s job duties reflected a role in conveying the church’s message and carrying out its mission” and observing that “Perich performed an important role in transmitting the Lutheran faith to the next generation”).
77 Robinson, Religious Institutions, supra note 11, at 228–29.
79 See Jones v. Wolf, 443 U.S. 595, 614 (1979) (Powell, J., dissenting) (describing the Watson rule as requiring that courts “give effect in all cases to the decisions of the church government agreed upon by the members before the dispute arose”); Watson v. Jones, 80 U.S. 679, 726–29 (1871).
80 Robinson, Religious Institutions, supra note 11, at 229.
81 For an application of the framework outlined in this chapter, see Robinson, The Contraception Mandate, supra note 11 (applying the framework to analyze whether for-profit corporations, universities, and religious interest groups are constitutional religious institutions).
4. CONSTITUTIONALLY SPECIAL, BUT TO WHAT EXTENT?

The second definitional question raised by constitutional religious institutionalism—and brought to the fore by the *Hobby Lobby* litigation—is the question of the scope of the institutional right. That is, what are constitutional religious institutions entitled to under the First Amendment? On one reading of *Hosanna-Tabor*, the scope—or coverage—of the right is limited to the facts of *Hosanna-Tabor*: employment discrimination by religious institutions. Recall that Cheryl Perich was dismissed as a minister by Hosanna-Tabor Evangelical Lutheran Church and School and that she sued under the Americans with Disabilities Act. A narrow reading of the Court’s decision would limit constitutional religious institutionalism to decisions related to the dismissal, and presumably hiring, of ministers. Yet, the Court left open the possibility of broader coverage, and some litigants have sought to capitalize on the Court’s decision by expanding the scope of the right it identified. For these litigants, constitutional religious institutionalism is not limited to *employment discrimination*, but rather extends to decisions concerning the *internal governance and affairs* of the rights holder.

We need only look to a critical mass of the complaints filed in the contraception mandate litigation to see the potential implications of this broader coverage of constitutional religious institutionalism. Dozens of claimants argued that the contraception mandate violated their rights as religious institutions to make decisions with respect to their internal affairs and governance without state interference. For example, Little Sisters of the Poor claimed that the Religion Clauses “protect the freedom of religious organizations to decide for themselves, free from state interference, matters of internal governance as well as those of faith and doctrine,” and “the government may not interfere with a religious organization’s internal decision if that interference would affect the faith and mission of the organization itself.”

According to the complaint, the plaintiff organization had “made an internal decision, dictated by its Catholic faith, that the health plans it makes available to its employer members and employees may not subsidize, provide, or facilitate access to contraceptives . . . sterilization procedures, and related education and counseling.” The contraception mandate, the plaintiff claimed, interferes with their faith and mission by directing them to act contrary to their religious convictions.

Other complaints are similar: East Texas Baptist University and Colorado Christian University claimed that they are religious organizations with First Amendment protections from government interference with institutional governance, faith, and

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83 See id.
84 See, e.g., supra note 6.
86 Id.
doctrine, and that the mandate infringes on those protections. Various Catholic dioceses claimed that the contraception mandate violates the protections for internal church governance by artificially splitting the Catholic Church in two, and preventing it from exercising supervisory authority over its constituents in a way that ensures compliance with Church teachings. These plaintiffs argued that the mandate interferes with the ability of the Catholic Church to ensure that their religious affiliates remain faithful to Catholic doctrine.

Beyond the Hobby Lobby litigation, there are other examples of attempts to expand the scope of the right of religious institutions beyond employment discrimination. One recent example is the petition for certiorari in Big Sky Colony, Inc. v. Montana. Big Sky Colony is a Hutterite community located in Montana. In accordance with a tenet of that community’s faith, all remuneration for work is sent to the colony, which provides food, shelter, clothing, and medical care to its members. Members also receive no-fault medical coverage through the Hutterite Medical Trust. Regardless of the reason for any member’s injury or illness, the member is cared for by the colony. Because of this, when enacting the Montana Workers’ Compensation Act, Montana adopted an exemption that released Big Sky Colony from the requirement to purchase workers’ compensation for all employees. As Big Sky Colony moved into the Montana construction market to supplement the colony’s income, however, labor unions and lobbyists complained that the Hutterites received a “competitive advantage” in the market. The Hutterites were able to submit lower bids for jobs because they did not have to account for the costs of workers’ compensation. Subsequently, the Montana legislature revoked the exemption.

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90 Id.


93 Montana initially determined that the colony did not fall within the definition of “employer” under the Workers’ Compensation Act, and the members did not fall within the definition of “employee.” Subsequently, the legislature enacted HB119, which including an amendment to the definition of “employer” to include “a religious corporation, religious organization, or religious trust receiving
In its petition for certiorari, Big Sky Colony claimed that the State of Montana violated its right to govern its affairs, as protected under *Hosanna-Tabor*, by forcing the community to provide workers’ compensation insurance to members who work outside the community. The colony argued that internal church doctrine mandates that the church takes care of its own, and the colony provides full health care for all members. The claim was that the requirement to provide workers’ compensation insurance infringed on that internal church mandate.

Other examples of litigants seeking an expanded institutional right include the Catholic Church of the Diocese of Baton Rouge, which challenged a Louisiana state law requiring disclosure of knowledge of child abuse obtained during the Sacrament of Reconciliation. According to the Diocese’s petition, mandatory reporting requirements on the Church and its ministers violate the principles of institutional autonomy enshrined in *Hosanna-Tabor*. In yet another complaint, the Illinois Bible College Association alleged that the Illinois statutes governing educational standards throughout the state, including those of bible colleges, violate First Amendment protections for religious institutions by infringing on the right of the schools to set standards concerning religious doctrine.

These various efforts to read *Hosanna-Tabor* broadly, beyond the employment discrimination context, will inevitably persist in the courts. Yet, as with the question of identifying the rights holders entitled to constitutional protections for religious institutions, the Court has failed to give any guidance in determining the scope of the right afforded to those institutions. Should the right be limited to employment decisions involving ministers, and if so, why? Should the right be extended to the “internal affairs” of the rights holder, and if so, what does “internal affairs” comprise? Even if something falls within the internal affairs of a religious institution, are there constitutional, pragmatic, or normative reasons to limit the scope of internal affairs? This question is complicated by the fact that the right granted to religious institutions is implied from the text of the Religion Clauses, rather than rooted in a clear textual mandate. This less secure foundation for the new religious institutionalism complicates the potential array of methodological approaches for ascertaining the scope of the right.

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95 Id. at 8–9.


While outlining a normative methodology for determining the coverage of the religious institutional right is beyond the scope of this chapter, we can identify some important options and limits that might come into play in considering the scope of the new religious institutionalism. As we work toward defining the appropriate boundary of the institutional right, we are focusing not on who or what to protect, but on why we want to protect certain rights holders. In doing so, we walk a fine line, attempting to avoid both over- and underprotection.

The first option is the most straightforward: The scope of constitutional religious institutionalism is limited to the facts of Hosanna-Tabor; that is, limited to institutional determinations as to the employment of “ministers.” While this interpretation of the scope of the right is the most limited of the possible options in terms of the conduct state regulation cannot reach, it still involves difficult questions about, for example, who is a “minister” and any collateral issues concerning employment (e.g., contract, employment torts). In addition, limiting the coverage of the right to employment discrimination presents some conceptual problems. The Court’s rationale in Hosanna-Tabor for the institutional right protecting employment decisions was that employment of those who minister the religious message of the institution is a matter solely within the discretion of the institution, out of the capacity and auspices of the state. The same rationale could be applied beyond employment decisions, more broadly to general “internal affairs” of the institution. For example, in Big Sky Colony the provision of full health coverage to the members of the institution—and the consequent rejection of workers’ compensation insurance for its workers—was directed by the faith teachings of the institution, in the same way Hosanna-Tabor Lutheran Church’s teachings directed that disputes be resolved in particular ways. And in the contraception mandate challenges, it was clear that the provision of contraception and abortifacients were contrary to the teachings of the institutional litigants. When we begin to consider why the Court valued religious institutions in particular, then, it becomes challenging to limit Hosanna-Tabor’s principle to employment discrimination.

However, once we move beyond a narrow conception of the scope of the right limited to employment discrimination, to a more robust conception that relies on “internal affairs” of the institution as its marker, the question of where and how we draw the boundaries of the right becomes more difficult—and more important. As scholars begin to develop accounts of the appropriate coverage of the new religious institutional right, we should consider where the hard limit falls, and what constitutes

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the grey area. As a first order preference, arguably, third-party harm provides a useful guidepost for the hard boundary limit of the right. That is, whatever the “internal affairs” of an institution might comprise, when the institutional claims deleteriously affect third parties, the right is unavailable.  

Of course, third parties are harmed all the time; one need only consider Cheryl Perich in *Hosanna-Tabor* to see this. In this context, then, “third parties” refers to institutional outsiders—those persons who have no affiliation with the religious institution. With third-party harm providing a hard boundary, both *Hosanna-Tabor* and *Big Sky Colony* become easier cases. On one end of the spectrum sits *Hosanna-Tabor*, where a minister of the institution was affected by a decision driven by the internal affairs of the institution; there was, that is, no third-party harm because Perich was affiliated with the institution. At the other end of the spectrum is *Big Sky Colony*. There, the internally directed decision was not to provide workers’ compensation insurance, whereas other contractors in Montana were required to provide such insurance under the law, putting them at a competitive disadvantage. *Big Sky Colony*, then, exemplifies third-party harm and demonstrates how the “internal affairs” guidepost can be limited.

The difficult case is the contraception mandate litigation. There, the impact of the internally dictated decision to deny contraception coverage went beyond institutional members in the sense we saw in *Hosanna-Tabor*, yet the effect was not external in the same way as in *Big Sky Colony*. Instead, the impact of the decision was felt beyond members to institutional affiliates—employees, students, and others who were not religious adherents, yet had exercised at least some degree of choice over their affiliation with the institution. Whether we demarcate third-party harm more narrowly to include only true institutional outsiders or instead more broadly to capture some institutional affiliates is a question that will demand further consideration as courts develop the doctrine of religious institutionalism.

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Finally, it is worth pausing to reflect on the nature of the protection afforded to the activities within the scope of the right. A separate analytic question from that of the scope of the First Amendment’s institutional right, the question of protection refers to the standard of review applied, where the courts weigh the litigant’s interest in the right against the government’s interest in violating the right.  

The question of the level of protection afforded to constitutional religious institutions takes on heightened importance in light of the Court’s decision in *Hosanna-Tabor*. There, the Court held that the protection afforded is *absolute*. That is, the Court did not undertake any balancing of the competing interests, instead holding that the institutional interest in decisions involving internal affairs was so strong that

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101 See Frederick Mark Gedicks & Rebecca G. Van Tassell, Chapter 16, *Of Burdens and Baselines: Hobby Lobby’s Puzzling Footnote 37*, in this volume.


103 Id.
balancing was unnecessary. The question after *Hosanna-Tabor*, then, is whether absolute protection attaches only to decisions involving the employment of ministers, or whether such protection extends more broadly to any subject within the scope of the right. Of course, if it turns out that the coverage of the right is limited to employment decisions, then the question resolves itself. However, if the scope of the right extends more broadly to internal affairs of the institution, it remains to be seen whether in the face of that expanded coverage a tiering of rights will result, whereby some rights are subject to balancing and some are not.

5. CONCLUSION

This chapter has sought to highlight the complex interpretive questions surrounding constitutional religious institutionalism. More specifically, I have tried to distinguish two lines of inquiry, involving, first, who (or what) counts as a religious institution and, second, the scope of the right granted to religious institutions. Line drawing is always a fraught issue in constitutional law, and this is no exception. But as *Hobby Lobby* and the continuing contraception mandate litigation have shown, decisions about these critical boundary questions—about the meaning and limits of *Hosanna-Tabor*—have significant and potentially far-reaching implications for the constitutional rights of religious institutions and indeed for our understanding of religious freedom more generally. It is helpful, in this regard, to know what our options are.