THE CONTRACEPTION MANDATE AND THE FORGOTTEN CONSTITUTIONAL QUESTION

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Litigation over the Contraception Mandate—which requires all employer insurance plans to include coverage for contraceptives—is quickly becoming one of the largest religious liberty challenges in American history. The most powerful claim raised by some of the litigants is that their status as "religious institutions" exempt them from compliance with the Mandate. But what is a religious institution, and who gets to become one—and why? Should the University of Notre Dame be treated the same as the Archdiocese of the District of Columbia? Should lobbying group Priests for Life be lumped together with Hobby Lobby, a for-profit corporation? Neither commentators nor courts have considered how to assess which of these types of groups—religious universities, religious interest groups, or religiously-based for-profit corporations—should be labeled as a religious institution, free to ignore the Mandate with no governmental recourse, and which groups should not be categorized as such.

This Article carefully disaggregates the nature of the challengers to the Contraception Mandate and the distinct causes of action pleaded by those challengers. Drawing on earlier work that establishes a unique framework for identifying constitutional religious institutions, this Article applies that framework to the various classes of litigants challenging the Contraception Mandate. The framework captures the subset of institutions which, if empowered with rights beyond those granted in the generally applicable Religion Clauses, will most often and effectively use those rights to benefit society as a whole. The goal of this Article,

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therefore, is to provide an application of this framework for identifying constitutional religious institutions to the institutional claimants in the Contraception Mandate litigation.

INTRODUCTION

Few people noticed when a motley group of institutions first made claims that their religious liberty had been violated by the Obama Administration's "Contraception Mandate."[1] But the number of Contraception Mandate challengers quickly grew, creating one of the largest religious liberty challenges in American history and triggering an equally outsized explosion of scholarly and popular commentary.[2]

1. The Affordable Care Act requires that large employers provide health care insurance that offers basic preventive care—including FDA-approved contraception—at no cost to employees. 26 C.F.R. § 54.9815-2713A (2014). For comprehensive and up-to-date information on the contraception mandate litigation, see *HHS Mandate Information Central*, BECKET FUND FOR RELIGIOUS LIBERTY, http://www.becketfund.org/hhsinformationcentral/ (last visited Sept. 18, 2014) (providing information and updates on the religious liberty challenges to the Contraception Mandate).

2. *See, e.g.*, *Lines Crossed: Separation of Church and State. Has the Obama Administration Trampled on Freedom of Religion and Freedom of Conscience? Hearing Before the H. Comm. on Oversight and Gov't Reform*, 112th Cong. 48–51 (2012) (statement of C. Ben Mitchell, Professor of Moral Philosophy and Southern Baptist

For some commentators, the Mandate challenges are empowering, representing the essence of American religious liberty.[3] For others, the litigation is infuriating, an example of the powerful Christian majority asserting their dominance over the liberties of others.[4] What is surprising about existing commentary, however, is not the broad disagreement over the proper scope of religious liberty, but rather that commentators have failed to adequately disaggregate both the claimants and the various claims of unlawfulness made by those claimants. While scholars and popular commentators alike make statements about corporate religious liberty,[5] the high level of generalization masks numerous and legally

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Minister) ("The policy is an unconscionable intrusion by the State into the consciences of American citizens. . . . [t]his is not only a Catholic issue . . . . [n]ot just a Baptist issue; it is an American issue, enshrined in our founding documents."); *see also id.* at 59 (statement of Craig Mitchell, Professor of Christian Ethics and Baptist Minister) ("[The Contraception Mandate] is wrong because it violates the Constitution. It is wrong because it violates religious liberty. It is wrong because it forces people to violate their consciences. . . . This ruling is just plain wrong for America."); Letter from Anthony R. Picarello & Michael F. Moses, Assoc. Gen. Counsel, U.S. Conference of Catholic Bishops, to Ctrs. for Medicare & Medicaid Servs., Dept. of Health & Human Servs. (Mar. 20, 2013), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/2013-NPRM-Comments-3-20-final.pdf; Timothy Dolan, *HHS Contraception Mandate Un-American*, USA TODAY, http://usatoday30.usatoday.com/news/opinion/forum/story/2012-01-25/dolan-hhs-health-contraceptive-mandate/52788780/1 (last visited Sept. 7, 2014).

3. *See*, *e.g.*, Jeremy M. Christiansen, *"The Word Person . . . Includes Corporations": Why the Religious Freedom Restoration Act Protects Both For- and Non-Profit Corporations*, 2013 UTAH L. REV. 623; Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1 (2013) [hereinafter Colombo, *Naked Private Square*]; Scott W. Gaylord, *For-Profit Corporations, Free Exercise, and the HHS Mandate*, 91 WASH. U. L. REV. 589 (2014); Michael A. Helfand, *What is a "Church"?: Implied Consent and the Contraception Mandate*, 21 J. CONTEMP. LEGAL ISSUES 401 (2013); Andrew B. Kartchner, *Corporate Free Exercise: A Survey of Supreme Court Cases Applied to a Novel Question*, 6 Regent J. L. & Pub. Pol'y 85 (2014); Mark L. Rienzi, *God and Profits: Is There Religious Liberty for Money-Makers?*, 21 GEO. MASON L. REV. 59 (2013); Jonathan T. Tan, *Nonprofit Organizations, For-Profit Corporation, and the HHS Mandate: Why the Mandate Does Not Satisfy RFRA's Requirements*, 47 U. RICH. L. REV. 1301 (2013); Robert K. Vischer, *Do For-Profit Businesses Have Free Exercise Rights*, 21 J. CONTEMP. LEGAL ISSUES 369 (2013).

4. *See, e.g.*, James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565, 1575 (2013); Thomas E. Rutledge, *A Corporation Has No Soul—The Business Entity Response to Challenges to the Contraception Mandate*, 5 WM. & MARY BUS. L. REV. 1, 51–52 (2014); Elizabeth Sepper, *Contraception and the Birth of Corporate Conscience*, 22 AM. U. J. GENDER SOC. POL'Y & L. 303, 342 (2014); Caroline Mala Corbin, *Corporate Religious Liberty*, (Univ. of Miami Law Sch., Working Paper), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2384963&download=yes.

5. *See, e.g.*, Moran Cerf, Aziz Huq & Avital Mentovich, *Do Americans Think Corporations Have the Right to Religious Freedom?*, SLATE, http://www.slate.com/articles/news_and_politics/jurisprudence/2014/07/do_americans_think_corporations_have_the_right_to_religious_freedom.html (last visited Oct. 3, 2014).

distinct constitutional and statutory challenges that apply disparately depending on the institutional nature of the claimants involved.

The importance of disaggregating both the Mandate challengers and the various causes of action stated by those challengers cannot be understated. For one class of litigants, the core issue is whether they are protected by the leading religious freedom statute, the Religious Freedom Restoration Act (RFRA)[6]—in essence a question of statutory interpretation, albeit against the backdrop of the First Amendment Religion Clauses.[7] For another class of litigants, the critical cause of action is whether they are "persons" for the purposes of the First Amendment Religion Clause—a question of constitutional interpretation—thereby entitled to hold the rights protected therein.[8] If successful, these claims potentially entitle the litigants to judicial balancing of their religious interest vis-à-vis the government's interest as stipulated in the Contraception Mandate.[9]

The importance of disaggregating the litigants and claims, however, becomes most apparent in the context of those Mandate challengers that make the claim that they are constitutional religious institutions.[10] This

6. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 (2011).

7. *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1120–21, 1134–35 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013) (holding that for-profit corporations may bring a claim pursuant to the First Amendment Religion Clauses); *infra* notes 93–96 and accompanying text (discussing the contours of a RFRA claim).

8. *See Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 381 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013) (holding that "a for-profit, secular corporation cannot assert a claim under the Free Exercise Clause").

9. *See* § 2000bb-1(b) ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest."). The constitutional situation is more complicated, and the Court will only apply a strong balancing test in certain contexts. For an explanation of the constitutional standards under the Free Exercise Clause, see *infra* notes 76–82 and accompanying text (discussing the structure of the First Amendment Religion Clauses).

10. *See infra* notes 109–16 and accompanying text (discussing the Court's new religious institutionalism). *See generally Roman Catholic Diocese of Fort Worth v. Sebelius*, No. 4:12-CV-00314, 2013 WL 9600145 (N.D. Tex. Jan. 31, 2013); *Franciscan Univ. of Steubenville v. Sebelius,* No. 2:12-CV-440, 2013 WL 1189854 (S.D. Ohio Mar. 22, 2013); *Roman Catholic Diocese of Dall. v. Sebelius*, 927 F. Supp. 2d 406 (N.D. Tex. 2013); *Conlon v. Sebelius*, 923 F. Supp. 2d 1126 (N.D. Ill. 2013); *Archdiocese of St. Louis v. Sebelius*, 920 F. Supp. 2d 1018 (E.D. Mo. 2013); *Roman Catholic Archbishop of Washington v. Sebelius*, 920 F. Supp. 2d 8 (D.D.C. 2013); *Persico v. Sebelius*, 919 F. Supp. 2d 622 (W.D. Pa. 2013); *Diocese of Fort Wayne-South Bend v. Sebelius*, 988 F. Supp. 2d 958 (N.D. Ind. 2013); *Univ. of Notre Dame v. Sebelius*, No. 3:12CV253RLM, 2012 WL 6756332 (N.D. Ind. Dec. 31, 2012); *Catholic Diocese of Biloxi, Inc. v. Sebelius*, No. 1:12CV158–HSO–RHW, 2012 WL 6831407 (S.D. Miss. Dec. 20, 2012);

cause of action, pleaded by some, but not all, of the institutional challengers, claims that the institution is entitled to special constitutional solicitude and potentially absolute constitutional protection from the government's attempt to force provision of contraceptives and abortifacents.[11] That is, once a claimant can demonstrate it is a constitutional religious institution and that the conduct engaged in is protected by the First Amendment, no balancing is required—the conduct is absolutely protected.[12]

This aspect of the challenges to the Contraception Mandate has gone unnoticed by commentators and has been largely ignored by the courts.[13] One of the primary reasons for this failure to consider the unique constitutional argument is that it is a relatively new cause of

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Roman Catholic Archdiocese of New York v. Sebelius, 907 F. Supp. 2d 310 (E.D.N.Y. 2012); *Zubik v. Sebelius*, 911 F. Supp. 2d 314 (W.D. Pa. 2012).

11. *See infra* notes 84–87 (describing the religious institutionalism cause of action).

12. *See Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.,* 132 S. Ct. 694, 705–06 (2012) (adopting a ministerial exception, precluding the application of employment discrimination laws to "ministers" in religious institutions, and stating that the right of religious institutions to constitutional protection is absolute); *see also* Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor*, 108 NW. U. L. REV. (forthcoming 2014) ("[O]ne criticism of the ministerial exception was that it was absolute, that it involved no balancing."); Jack M. Balkin, *The "Absolute" Ministerial Exception*, BALKANIZATION (Jan. 13, 2012, 8:59 AM), http://balkin.blogspot.com/2012/01/absolute-ministerial-exception.html ("One of the curious features of the ministerial exception is that the rule is stated in absolute terms that eschew all attempts at balancing.").

13. Commentators have focused on either the Free Exercise Clause claim (that the institution's free exercise of religion has been violated) or that RFRA has been violated. *See, e.g.*, Caroline Mala Corbin, *The Contraception Mandate*, 107 NW. U. L. REV. COLL. 151, 152 (2012) (arguing that the Mandate does not violate the Free Exercise Clause or RFRA); Kent Greenawalt, *Religious Toleration and Claims of Conscience,* 28 J.L. & POL. 91, 91 (2013) (examining the issues raised by government recognition of religious claims of conscience); Andrew Koppelman, *Freedom of the Church and the Authority of the State*, 21 J. CONTEMP. LEGAL ISSUES 145, 157–64 (2013); Holly Fernandez Lynch, *Religious Liberty, Conscience, and the Affordable Care Act*, 20 ETHICAL PERSPECTIVES 118, 122–23 (2013) (noting that courts are split as to whether the Mandate violates the Free Exercise Clause or RFRA); Jonathan T. Tan, *Nonprofit Organizations, For-Profit Corporations, and the HHS Mandate: Why the Mandate Does Not Satisfy RFRA's Requirements*, 47 U. RICH. L. REV. 1301, 1302–03 (2013); Edward Whelan, *The HHS Contraception Mandate vs. The Religious Freedom Restoration Act*, 81 NOTRE DAME L. REV. 2179, 2180–81 (2012); Steven D. Smith & Caroline Mala Corbin, Debate, *The Contraception Mandate and Religion Freedom*, 161 U. PENN. L. REV. ONLINE, 261, 261–62, 268 (2013), http://www.pennlawreview.com/online/161-U-Pa-L-Rev-Online-261.pdf (debating whether the Mandate violates RFRA); *The Bishops & Religious Liberty*, COMMONWEAL, https://www.commonwealmagazine.org/bishops-religious-liberty (May 30, 2012), (untitled essays by William A. Galston, Cathleen Kaveny, Douglas Laycock, Michael P. Moreland, Mark Silk & Peter Steinfels).

action.[14] The core reason, however, is that there remains significant confusion in the lower federal courts about how to distinguish between institutions that attract the mantle of a constitutional religious institution and those that do not.[15] In order to recognize unique protections for religious institutions, courts must figure out who or what a constitutional "religious institution" is.

The Contraception Mandate illustrates the problem. Among the challengers to the Mandate include institutions that act in ways that might seem religious in nature.[16] One for-profit corporation might set

14. *See Hosanna-Tabor*, 132 S. Ct. at 705–06 (holding that there is a ministerial exception under the First Amendment and acknowledging that, until 2012, the Supreme Court had not considered the ministerial exception). Although, note that the lower federal courts have recognized a "ministerial exception" in the Religion Clauses since 1972. *See, e.g.*, *McClure v. Salvation Army*, 460 F.2d 553, 555 (5th Cir. 1972) (first case recognizing the ministerial exception); *see also* Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 21 (2011) (indicating that every federal circuit and many states have adopted a form of the ministerial exception).

15. While no court has attempted to define a constitutional religious institution, lower courts have faced the question of what constitutes a "religious institution" in various statutory contexts. *See, e.g.*, 29 U.S.C. § 1002(33)(C)(iv) (2006) (defining organizations for the purposes of the Employee Retirement Income Security Act as "associated with a church or a convention or association of churches" where the organization "shares common religious bonds and convictions with that church or convention or association of churches"); 42 U.S.C. § 2000e-l(a) (2006) (stating that Title VII of the Civil Rights Act of 1964 does not apply "to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities"); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225–26 (6th Cir. 2007) (indicating that Methodist Healthcare is a religious institution in part because religious institutions are not limited to traditional organizations, but rather include other entities such as religious schools, corporations, and hospitals); *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 310 (4th Cir. 2004) (concluding "that a religiously affiliated entity is a 'religious institution' for purposes of the ministerial exception whenever that entity's mission is marked by clear or obvious religious characteristics"); *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360, 362 (8th Cir. 1991) (concluding that the defendant is a religious institution for the purposes of Title VII and the Age Discrimination in Employment Act). For limited scholarly discussions on defining a "religious institution" in statutory contexts, *see* Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1539–40 (1979); Michael A. Helfand, *What Is a "Church"?: Implied Consent and the Contraception Mandate*, 21 J. CONTEMP. LEGAL ISSUES 401, 401–11 (2013) (discussing religious employer exceptions to the Affordable Care Act).

16. *See, e.g.*, *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1122 (10th Cir. 2013) (describing one corporate plaintiff as a for-profit bookstore which sells only "Christian books and materials"); *Tyndale House Publishers, Inc. v. Sebelius*, No. 13-5018, 2013 WL 2395168 (D.C. Cir. May 3, 2013) (describing the for-profit corporate plaintiff as engaged in the publication of "Christian books ranging from Bible commentaries to books about family issues to Christian fiction"), *interlocutory appeal dismissed*, No. 13-5018, 2013 WL 2395168 (D.C. Cir. May 03, 2013).

aside physical space and times for prayer during the work day.[17] Another might mandate that business is closed on certain days of the week in accordance with a specific denominational belief.[18] Yet another might establish rules of service, whereby customers that, for example, are gay, might be refused services on the basis of religion.[19] Then there are the claims of religious universities and the not-for-profit institutions—sometimes formally associated with a denominational house of worship, and sometimes not.[20] Some of the universities might mandate religion classes, others may not.[21] Some not-for-profit groups may follow specific dictates of a church, and others may not.[22]

Are they all "religious institutions"? Are only some of them? In an earlier article, I made the case that identifying who or what is a constitutional religious institution was a critical threshold question to giving independent meaning to the Court's new, exclusive right for religious institutions.[23] Guidance on this question, I claimed, is critical in light of the absolute constitutional protection afforded those institutions that are labeled constitutional religious institutions.[24] The article advanced the idea of institutional exceptionalism—that there exists a

17. *See, e.g.*, *Monaghan v. Sebelius*, 931 F. Supp. 2d 794, 801 (E.D. Mich., 2013) (describing how religion is built into the daily life of the corporation by, for example, offering a daily Catholic Mass service, a Catholic bookstore, a Catholic credit union, and food options that offer Catholic food).

18. *Id.* Other examples of corporations that close for religious purposes include Chick-fil-A. *Why We're Closed on Sundays*, CHICK-FIL-A, http://www.chick-fil-a.com/Company/Highlights-Sunday (last visited Sept. 18, 2014) (describing a Christian rationale for closing the fast food outlets on Sundays).

19. *See, e.g.*, *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (where a photography company refused to offer services to the plaintiff because of her sexual orientation).

20. *See infra* notes 63–66 and accompanying text (discussing in detail the not-for profit and educational claimants).

21. *See, e.g., About the Liberal Studies Program*, DEPAUL, http://academics.depaul.edu/liberal-studies/about/Pages/default.aspx (last visited Sept. 18, 2014) (requiring courses in "Religious Dimensions"); *Approved Courses*, MARQUETTE UNIV., http://www.marquette.edu/core-of-common-studies/approved-courses.php (last visited Sept. 18, 2014) (requiring six credits of theology); *University Requirements*, UNIV. OF NOTRE DAME, http://fys.nd.edu/incoming-students/first-year-requirements/curriculum-requirements/ (last visited Sept. 18, 2014) (requiring two courses in theology).

22. *See, e.g., Ave Maria Found. v. Sebelius*, 991 F. Supp. 2d 957, 962 (E.D. Mich. 2014) ("Plaintiffs are five nonprofit organizations 'founded, organized, and . . .maintained in conformity with and/or for furtherance of the teachings of the Catholic Church.'") (quoting Monaghan Decl. ¶ 28, ECF No. 3–2); *see also infra* notes 63–66 and accompanying text (discussing the not-for-profit challengers to the Mandate).

23. Zoë Robinson, *What is a "Religious Institution"?*, 55 B.C. L. REV. 181 (2014).

24. *Id.* at 183, 203–04 (outlining the protection afforded to religious institutions whose activities fall within the coverage of the institutional right).

certain category of institutions that claim to be religious who fulfill unique and important roles in our democracy.[25] A constitutional "religious institution" comprises a limited group of institutions that share common attributes, most notably the valuing of individual conscience, protection of group rights, and provision of desirable social structures.[26] These values, the Supreme Court has explained, undergird those institutions that are unique in our constitutional and societal structures.[27]

Drawing on the framework I established in my earlier article,[28] I examine the claims of the various challengers to the Contraception Mandate that they are constitutional "religious institutions" entitled to special and absolute constitutional protection from the reach of the Mandate. The framework takes a holistic approach to identifying a constitutional religious institution, and identifies a set of factors that draws on the articulated values of protection of religious group rights, valuing individual conscience, and provision of desirable social structures. The consequent factors rely on the cues of third parties and institutional functionality, as well as the voluntariness of the institution in terms of entrance and exit rights as key indicators for identifying which institutions are best fulfilling the values of constitutional religious institutions.

I develop these ideas in three parts. Part I briefly explores the reach of the Contraception Mandate before disaggregating the litigants into four distinct classes: Catholic Archdiocese and other denominational houses of worship, religious universities, for-profit corporations, and religious lobby groups. This Part also disaggregates the various causes of action pursued by the different litigants, first explaining the variety of religious liberty challenges that are available to litigants, and then outlining which litigants followed each cause of action and explaining the importance of these litigation choices for each class of litigants.

Part II narrows the focus into one of these specific litigation choices, namely the claim that the institutional challenger is a constitutional religious institution. The Part considers how the courts might answer the critical threshold question of who, or what, is a constitutional religious institution. Drawing on an earlier article, this Part articulates a unique framework, designed to provide guidance to courts faced with this difficult question.

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25. *Id.* at 205–06 (arguing that there are certain religious institutions that fulfil a unique and important role in our constitutional democracy).

26. *Id.* at 206–24 (discussing the three constitutional values in-depth).

27. *Id.* at 194–202 (outlining the Court's cases that establish and elaborate constitutional religious institutionalism).

28. *Id.* at 224–29 (elaborating a framework based on the constitutional values implicit in the Court's religious institutionalism decisions).

Part III is the core of the Article and returns to the institutional challengers of the Contraception Mandate. This Part dovetails the framework with the lived reality of the Mandate litigation, applying the framework outlined in Part II to the challengers of the Mandate. In doing so, the goal of this Part is to determine which, if any, of the Mandate challengers have a colorable claim to the absolute constitutional protection for religious institutions provided for in the First Amendment Religion Clauses.

I. THE CONTRACEPTION MANDATE AND THE INSTITUTIONAL CLAIMS

The goal of this Part is to briefly address the contours of the Contraception Mandate. To this end, Section A discusses the structure of the Mandate. Section B delineates the classes of litigants that the Mandate affects. Finally, Section C focuses on and disaggregates the different claims made by the litigants outlined in Section B. By breaking down the various causes of action pleaded by the Mandate challengers, Section C demonstrates that the cause of action with which we should be most concerned is the claim by some litigants to be a constitutional religious institution. This Section highlights the unique potential of the religious institutionalism claim and the potential power that would vest in any designated constitutional religious institutionalism that successful institutionalism claim would yield.

A. The Structure of the Mandate

On March 23, 2010, President Barack Obama signed the Patient Protection and Affordable Care Act (ACA) into law.[29] The ACA affected a variety of significant changes to the healthcare system in the United States, with the primary goal being to increase the number of Americans covered by health insurance and decrease the cost of health care.[30] As part of that mandate, the ACA requires that all health insurance issuers

29. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029. This Article refers to these laws collectively as the "ACA," which is the preferred term in contemporary literature. *See, e.g.*, Timothy Stoltzfus Jost, *Loopholes in the Affordable Care Act: Regulatory Gaps and Border Crossing Techniques and How to Address Them*, 5 ST. LOUIS U. J. HEALTH L. & POL'Y 27, 27 (2011). On June 28, 2012, the U.S. Supreme Court, in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, upheld the ACA's individual mandate as a constitutional exercise of Congress's taxing power, while striking down a portion of the ACA's Medicaid expansion as exceeding Congress's authority under the Spending Clause. 132 S. Ct. 2566, 2608 (2012).

30. *Fact Sheet, The Affordable Care Act: Secure Health Coverage for the Middle Class*, WHITE HOUSE (June 28, 2012), http://www.whitehouse.gov/the-press-office/2012/06/28/fact-sheet-affordable-care-act-secure-health-coverage-middle-class.

and non-grandfathered group health plans that offer group or individual coverage include coverage for certain preventive care services for women without cost-sharing.[31] The ACA stipulates that the required preventive care coverage that health insurance issuers and group health plans are required to provide are to be "provided for in comprehensive guidelines supported by the Health Resources and Services Administration" (HRSA),[32] a component of the Department of Health and Human Services.[33]

In order to develop recommendations for the required guidelines for implementation of preventive health care for women, HRSA commissioned the Institute of Medicine (IOM).[34] The IOM, an

31. *See* Pub. L. 111-148 § 2713, 124 Stat. 131 (Mar. 23, 2010), *codified at* 42 U.S.C. § 300gg-13(a) (2011). The "Contraception Mandate" is distinct from the ACA's "individual mandate" (which taxes most individuals who do not purchase health insurance) and the "employer mandate" (which taxes employers with more than fifty employees that do not provide group health insurance to their employees). *See* Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 344, 350 n.26 (2014) ("Cost sharing is defined by the Department of Health and Human Services as "any contribution consumers make towards the cost of their healthcare."); Brief for Church-State Scholars as Amici Curiae Supporting Respondents, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2387895.

32. § 300gg-13(a)(4). Section 2713 included within the definition of preventive healthcare services "such additional preventive care and screenings" not otherwise covered, "as provided for in comprehensive guidelines supported by the Health Resources and Services Administration." *Id.* HRSA subsequently adopted women's coverage guidelines which included "contraceptive methods and counseling," defined as "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." *Women's Preventive Services: Required Health Plan Coverage Guidelines*, HEALTH RESOURCES & SERVS. ADMIN., http://www.hrsa.gov/womensguidelines/ (last visited Sept. 19, 2014) [hereinafter *HRSA Coverage Guidelines*]. These Guidelines were adopted by the Department of Health and Human Services on July 2, 2013. 45 eC.F.R. § 147.130(a)(i)(iv)(A); *see* Coverage of Certain Preventive Services Under the Affordable Care Act: Final Rules, 78 Fed. Reg. 39869, 39870–72 (July 2, 2013) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pts. 2510 & 2590 & 45 C.F.R. pts. 147 & 156). This Article cites to the final Mandate rules, as codified by the U.S. Government Printing Office for the Department of Health and Human Services. 45 eC.F.R. §§ 147.130–31 (Sept. 12, 2013), *available at* http://www.ecfr.gov/cgi-bin/text-idx?SID=7b1c7a85b492b6025ef3085f499b0434&node=pt45.1.147&rgn=div5.

33. *About HRSA*, HEALTH RESOURCES & SERVS. ADMIN., http://www.hrsa.gov/about/index.html ("The Health Resources and Services Administration (HRSA), an agency of the U.S. Department of Health and Human Services, is the primary Federal agency for improving access to health care by strengthening the health care workforce, building healthy communities and achieving health equity.").

34. INST. OF MED. OF THE NAT'L ACADEMIES, CLINICAL PREVENTATIVE SERVICES FOR WOMEN: CLOSING THE GAPS (July 2011), *available at* http://www.iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx.

independent non-profit organization whose goal is to provide unbiased advice to government decision makers, was tasked with recommending which services for women should be mandatory for inclusion in group health plan coverage.[35] The IOM report recommended that any HRSA guidelines on women's preventive care include, *inter alia*, "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity."[36] Included in the list of Food and Drug Administration (FDA) approved contraceptive methods include oral contraceptive pills, emergency contraceptives with abortifacient effect (including Plan B, the "morning-after pill," and Ella, the "week after pill"), diaphragms, and intrauterine devices.[37]

On August 1, 2011, HRSA adopted the IOM's recommendations,[38] and on February 15, 2012, the Department of Health and Human Services (HHS), the Department of Treasury, and the Department of Labor published rules that finalized HRSA guidelines.[39] The one departure that HRSA made from the IOM recommendations was to authorize an amendment to the interim final regulations issued on August 1, 2011, granting a limited exemption for certain religious employers.[40] Under the exemption encapsulated in this early version of the guidelines, to qualify as a "religious employer," an employer needed to satisfy the following criteria: (1) the inculcation of religious values is the purpose of the organization; (2) the organization primarily employs persons who share the religious tenets of the organization; (3) the organization serves primarily persons who share the religious tenets of the organization; and (4) the organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.[41]

This definition of a "religious employer" was an extremely narrow definition and excluded many of the complainants who are challenging the Contraception Mandate.[42] This included the University of Notre

35. *Id*. at 1.

36. *Id.* at 3 (recommendation 5.5).

37. *See* BIRTH CONTROL GUIDE, FDA OFF. OF WOMEN'S HEALTH, *available at* http://www.fda.gov/downloads/ForConsumers/ByAudience/ForWomen/FreePublications/UCM356451.pdf.

38. *See* 76 Fed. Reg. 46621 (Aug. 3, 2011); 45 C.F.R. § 147.130 (2011).

39. Coverage of Preventive Services Under the ACA, 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (to be codified at 29 C.F.R. pt. 54).

40. *See* 76 Fed. Reg. 46621; 45 C.F.R. § 147.130.

41. *See* 45 C.F.R. § 147.130(a)(1)(iv)(B).

42. *See* Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State,* 53 B.C. L. REV. 1417, 1419 (2012) (discussing the limited scope of the initial exemption for religious employers under the Contraception Mandate); *see also* Carol

Dame (who did not meet at least criteria's (2), (3), and (4));[43] all of the for-profit religious institution complainants;[44] and many of the Archdiocese-complainants, who through their schools, charities, and social services (including hospitals) employ and serve persons who do not share the religious tenets of the organization.[45] While there was a temporary enforcement safe-harbor provision in effect—such that non-grandfathered group health plans sponsored by certain non-profit organizations with religious objections to provision of contraception coverage did not immediately have to provide coverage—this temporary safe-harbor did not cover many of the above-mentioned institutions.[46]

In light of these problems, and in the face of strong lobbying efforts by religious groups, the Obama Administration expanded the definition of those religious employers that are completely exempt from the Mandate.[47] Under the final rule, the requirements that a "religious employer" have the purpose of inculcation of religious values, the employment of persons sharing its religious tenets, and that the organization primarily serve persons sharing its religious tenets have been eliminated.[48] This means that a wider range of employers claiming to be religious employers fall within the scope of the exemption.[49] The result of the exemption is that exempt employers may continue to operate as if the Mandate was not in existence, refusing to extend health plans to include contraception coverage without any question or consequences—

Keehan, *Something Has to Be Fixed*, CATHOLIC HEALTH WORLD, Feb. 15, 2012, at 1. Religious groups not falling within the scope of the Mandate complained that they were marked as "second class citizens." *See* Letter from Thomas J. Olmstead, Catholic Bishop of Phx., to Brothers Sisters in Christ (Jan. 15, 2012), *available at* http://www.diocesephoenix.org/uploads/docs/RELIGIOUS-LIBERTY-INSURANCE-LETTER-013012.pdf.

43. *See* Complaint at 41, *Univ. of Notre Dame v. Sebelius*, No. 3:12-CV-253-RLM, 2012 WL 6756332 (N.D. Ind. Dec. 31, 2012) [hereinafter Complaint, *Notre Dame*], *available at* http://uc.nd.edu/assets/69013/hhs_complaint.pdf; *see also HRSA Coverage Guidelines*, *supra* note 32.

44. *See, e.g.*, Complaint at 28–29, *Monaghan v. Sebelius*, 931 F. Supp. 2d 794 (E.D. Mich. 2013) (No. 12–15488) [hereinafter Complaint, *Monaghan*], *available at* http://www.becketfund.org/wp-content/uploads/2012/05/Dominos-Complaint.pdf; *see also HRSA Coverage Guidelines*, *supra* note 32.

45. *See, e.g.*, Complaint at 4, *Roman Catholic Archdiocese of N.Y. v. Sebelius*, 907 F. Supp. 2d 310 (E.D.N.Y. 2012) (No. 1:12-cv-02542-BMC) [hereinafter Complaint, *Archdiocese of N.Y.*], *available at* http://www.archny.org/media/links/FreedomofReligion_Lawsuit2012.pdf; *see also HRSA Coverage Guidelines*, *supra* note 32.

46. *See* 77 Fed. Reg. 8725, 8726–27 (Feb. 15, 2012).

47. *See* 45 eC.F.R. § 147.131(a) (2013); 78 Fed. Reg. at 39873–74 (2013).

48. *See id.* The Mandate exempted those religious institutions falling within the Internal Revenue Code provisions defining religious organizations. *See* I.R.C. §§ 6033(a)(3)(A)(i), (iii) (2011) (defining religious nonprofit entities for purposes of the federal income tax code).

49. *See* Gedicks & Van Tassell, *supra* note 31, at 376.

that is, exempt employers are wholly relieved from the burdens of the Mandate.[50]

In addition, the final rule provides for accommodations for other non-profit religious organizations objecting to the Mandate (and not falling within the exemption), namely that the employers are not required to directly provide for contraception coverage.[51] Instead, the Mandate makes provision for coverage directly from health insurers.[52] Non-exempt religious employers are entitled to this accommodation if they meet four criteria: (1) they have religious objections to providing contraceptives, (2) they are non-profit organizations, (3) they hold themselves out to be a religious organization, and (4) they "self-certify" that they meet criteria (1) through (3).[53] Additionally, these non-exempt employers must notify their health plan insurer that they object to contraception coverage in order to avail themselves of the accommodation.[54]

B. The Litigation and the Varieties of Challengers

In the face of the Contraception Mandate, numerous challenges to the Mandate have been filed in federal court. To date, over 100 complaints, with over 300 plaintiffs, have been filed in federal district court.[55] Those religious institutions that are challenging the contraception mandate claim that funding, facilitating, or paying for contraception violates the religious beliefs held by the religious institution.[56]

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50. *Id.*

51. 45 eC.F.R. § 147.131(b) (2013); *see* 78 Fed. Reg. at 39874.

52. § 147.131(c)(1)(i); *see* Religious Employer Exemption, 78 Fed. Reg. at 39873, 39875 (to be codified at 26 C.F.R. 54.9815-2713A, 29 C.F.R. 2590.715-2713A, 45 C.F.R. 147.131).

53. § 147.131(b); *see* 78 Fed. Reg. at 39874–75.

54. § 147.131(c); Gedicks & Van Tassell, *supra* 31, at 351; *see also* 78 Fed. Reg. at 39875. The health plan administrator or insurer is prohibited from asking for evidence supporting the self-certification and cannot otherwise question the eligibility of the employer for the accommodation. *See* 78 Fed. Reg. at 39875. For discussion of the cost-shifting burden that this accommodation imposes on health insurers, see Gedicks & Van Tassell, *supra* note 31, at 351–52; Frederick M. Gedicks, Issue Brief, *With Religious Liberty for All: A Defense of the Affordable Care Act's Contraception Coverage Mandate*, 6 ADVANCE: THE J. OF THE ACS ISSUE GROUPS 135, 145 n.47 (2012) (summarizing the argument and data on the cost neutrality of shifting the coverage burden to third-party insurers).

55. *See generally HHS Mandate Information Central*, *supra* note 1.

56. *See, e.g.*, Complaint, *Archdiocese of N.Y.*, *supra* note 45, at 54 ("The Catholic Church views abortion, sterilization, and contraception as intrinsically immoral, and prohibits Catholic organizations from condoning or facilitating those practices.").

The complainants can be roughly sorted into four categories.[57] First, there are complaints filed by numerous Catholic Archdioceses.[58] To be clear, these complaints are not limited to a challenge that the various Catholic houses of worship should not have to provide contraception coverage (indeed, these houses of worship clearly fall within the auspices of the religious exemption to the HSRA guidelines). Instead, these complaints represent the Archdioceses and their related not-for-profit institutions, including Catholic charities that operate hospitals or provide other social services—such as the Catholic Mutual Relief Society of America, Catholic Charities of D.C., and the Catholic Health Services of Long Island—as well as the related Catholic primary and secondary schools under the control of the Archdiocese, for example, Pius X Catholic High School.[59] The Archdiocese complaints stipulate a religious objection to both traditional contraceptives and abortifacients.[60] Notably, the complaints of the houses of worship themselves have either been dismissed or gone inactive after HHS expanded the original exemption and eliminated the overly burdensome conditions for churches and other houses of worship.[61] However, many of the complaints relating to the

57. *See* Gedicks & Van Tassell, *supra* note 31, at 353–55 (classifying the Mandate challengers into three categories: (1) churches, integrated auxiliaries, and associations; (2) nonprofit religious organizations; and (3) for-profit businesses owned by religious individuals).

58. *See, e.g.*, Complaint, *Archdiocese of N.Y.*, *supra* note 45; Complaint, *Roman Catholic Archbishop of Wash. v. Sebelius*, 920 F. Supp. 2d 8 (D.D.C. 2012) (No. 12-0815-ABJ); Complaint, *Persico v. Sebelius*, 919 F. Supp. 2d 622 (W.D. Pa. 2012) (No. 1:12-cv-123-SJM); Complaint, *Zubik v. Sebelius*, 911 F. Supp. 2d 314 (W.D. Pa. 2012) (No. 2:12-cv-00676); Complaint, *Roman Catholic Diocese of Dall. v. Sebelius*, 927 F. Supp. 2d 406 (N.D. Tex. 2012) (No. 3:12-cv-1589-B); Complaint, *Diocese of Fort Wayne-South Bend v. Sebelius*, 988 F. Supp. 2d 958 (N.D. Ind. 2012) (No. 1:12-cv-159-JD); Complaint, *Archdiocese of St. Louis v. Sebelius*, 920 F. Supp. 2d 1018 (E.D. Mo. 2012) (No. 4:12-cv-00924-JAR); Complaint, *Wenski v. Sebelius*, No. 1:12-cv-23820-DLG, U.S. Dist. LEXIS 55941 (S.D. Fla. Oct. 19, 2012); Complaint, *Roman Catholic Archdiocese of Atlanta v. Sebelius*, No. 1:12-cv-03489-WSD, 2014 WL 125673 (N.D. Ga. Oct. 5, 2012); Complaint, *Catholic Diocese of Nashville v. Sebelius*, No. 3:12-cv-00934, 2012 WL 5879796 (M.D. Tenn. Sept. 12, 2012); Complaint, *Roman Catholic Diocese of Fort Worth v. Sebelius*, No. 4:12-cv-00314-Y, 2013 WL 9600145 (N.D. Tex. Aug. 16, 2012); Complaint, *Catholic Diocese of Peoria v. Sebelius*, No. 1:12-cv-01276, 2013 WL 74240 (C.D. Ill. Aug. 9, 2012); Complaint, *Catholic Diocese of Biloxi, Inc. v. Sebelius*, No. 1:12-cv-158HSO-RHW, 2012 WL 6831407 (S.D. Miss. May 21, 2012).

59. *See, e.g.*, Complaint, *Nebraska v. U.S. Dep't of Health & Human Servs.*, 877 F. Supp. 2d 777 (D. Neb. 2012) (No. 4:12-cv-3035) [hereinafter Complaint, *Nebraska*].

60. *Id.*

61. Gedicks & Van Tassell, *supra* note 31, at 354; *see, e.g.*, *Roman Catholic Diocese of Dall. v. Sebelius*, 927 F. Supp. 2d 406 (N.D. Tex. 2012); *Catholic Diocese of Biloxi, Inc. v. Sebelius*, No. 1:12-cv-158HSO-RHW, 2012 WL 6831407 (S.D. Miss. May

churches' interrelated non-profit groups continue as these associations maintain that even the current accommodation violates their religious liberty.[62]

Second, there are those complaints filed by religious universities.[63] These include both Catholic universities (for example, the University of Notre Dame and the Catholic University of America), who object to traditional contraception as well as abortifacients, and non-Catholic universities, who, while often not having an objection to traditional contraception, have a religious objection to abortion-inducing drugs.[64] The non-Catholic university complainants include Wheaton College,[65] Colorado Christian College, Geneva College, Louisiana College, Grace College and Seminary, Biola University, East Texas Baptist University, and Houston Baptist University.[66]

Third, there are those complaints filed by the owners of for-profit companies, claiming that the contraception mandate infringes on their institutional religious liberty by forcing religiously-devout business owners to provide, without co-pay, contraceptive coverage for their

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21, 2012). For a comprehensive listing of the status of each case, see *HHS Mandate Information Central*, *supra* note 1.

62. Gedicks & Van Tassell, *supra* note 31, at 354. For a list of these continuing cases, see *HHS Mandate Information Central*, *supra* note 1.

63. *See generally* Complaint, *Liberty Univ. v. Geithner*, 671 F.3d 391 (4th Cir. 2011) (No. 10–2347), *vacated*, 133 S. Ct. 679 (2012); Complaint, *Wheaton Coll. v. Sebelius*, 703 F.3d 551 (D.C. Cir. 2012) (No. 12–5273, 12–5219) [hereinafter Complaint, *Wheaton*]; Complaint, *Grace Sch. v. Sebelius*, 988 F. Supp. 2d 935 (N.D. Ind. 2013) (No. 3:12–CV–459–JD) [hereinafter Complaint, *Grace Sch.*]; Complaint, *Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402 (W.D. Pa. 2013) (No. 2:12-cv-00207) [hereinafter Complaint, *Geneva Coll.*]; Complaint, *E. Tex. Baptist Univ. v. Sebelius*, 988 F. Supp. 2d 743 (S.D. Tex. 2013) (No. H–cv–03009) [hereinafter Complaint, *E. Tex. Baptist Univ.*]; Complaint, *S. Nazarene Univ. v. Sebelius*, No. CIV–13–1015–F, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013); Complaint, *Franciscan Univ. of Steubenville v. Sebelius*, No. 2:12-cv-440, 2013 WL 1189854 (S.D. Ohio Mar. 22, 2013); Complaint, *Colo. Christian Univ. v. Sebelius*, No. 11-cv-03350-CMA-BNB, 2013 WL 93188 (D. Colo. Jan. 7, 2013) [hereinafter Complaint, *Colo. Christian Univ.*]; Complaint, *Belmont Abbey Coll. v. Sebelius*, 878 F. Supp. 2d 25 (D.D.C. 2012) (No. 1:11-cv-01989) [Complaint, *Belmont Abbey Coll.*]; Complaint, *Notre Dame*, supra note 43; Complaint, *Ave Maria Univ. v. Sebelius*, No. 2:12-cv-88-FTM-29SPC, 2012 WL 3128015 (M.D. Fla. July 31, 2012); Complaint, *La. Coll. v. Sebelius*, No. 1:12-cv-00463, 2012 WL 3061500 (W.D. La. July 26, 2012) [hereinafter Complaint, *La. Coll.*].

64. *See, e.g.*, Complaint, *Colo. Christian Univ.*, *supra* note 63; Complaint, *Notre Dame*, *supra* note 43. *See generally HHS Mandate Information Central, supra* note 1.

65. Wheaton is an evangelical Christian college in Illinois. *About Wheaton,* WHEATON COLLEGE, http://wheaton.edu/About-Wheaton (last visited Sept. 7, 2014).

66. *See, e.g.*, Complaint, *Wheaton*, *supra* note 63; Complaint, *Colorado Christian Univ.*, supra note 63; Complaint, *Geneva Coll.*, *supra* note 63; Complaint, *La. Coll.*, *supra* note 63; Complaint, *Grace Sch.*, *supra* note 63; Complaint, *E. Tex. Baptist Univ.*, *supra* note 63. *See generally HHS Mandate Information Central*, *supra* note 1.

employees.[67] The for-profit businesses suing over the contraception mandate include Hobby Lobby Stores, Inc.,[68] Annex Medical, Inc., Korte, Autocam, Hercules (Newland), Legatus, O'Brien, Senneca Hardwood Lumbar Company, Tyndale House Publishers, Grote Industries, Griesedieck, and Domino's Farms.[69] For these litigants, the Mandate provides neither an exemption nor an accommodation. This class of litigants pressed both First Amendment and statutory (RFRA) claims before the federal courts, with the statutory claim succeeding in the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc*.[70]

Finally, there are complaints filed by a variety of religious lobby groups—for example, Priests for Life, a pro-life, non-profit organization for Catholic clergy and laity.[71] A number of states have also joined the complaints filed by the various religious institutions.[72]

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67. *See, e.g.*, Complaint, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356); Complaint, *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357, 2014 WL 4401187 (8th Cir. Sept. 8, 2014); Complaint, *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013) (Nos. 12-3841, 13-1077); Complaint, *Autocam Corp. v. Sebelius*, 730 F.3d 618 (6th Cir. 2013) (No. 12-2673), *vacated*, 134 S. Ct. 2901 (2014); Complaint, *Newland v. Sebelius*, 524 Fed. Appx. 706 (10th Cir. 2013) (No. 12-1380), *cert. denied*, 134 S. Ct. 2902 (2014); Complaint, *Annex Med., Inc. v. Sebelius*, No. 13-1118, 2013 WL 1276025 (8th Cir. Feb. 1, 2013); Complaint, *Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402 (W.D. Pa. 2013) (No. 2:12-cv-00207); Complaint, *Monaghan*, *supra* note 44; Complaint, *Tyndale House Publishers, Inc. v. Sebelius*, No. 13-5018, 2013 WL 2395168 (D.C. Cir. May 3, 2013); Complaint, *Legatus v. Sebelius*, 901 F. Supp. 2d 980 (E.D. Mich. 2012) (No. 12-cv-12061); Complaint, *Grote Indus., LLC v. Sebelius*, 914 F. Supp. 2d 943 (S.D. Ind. 2012) (No. 4:12-cv-00134-SEB-DML); Complaint, *Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs.*, No. 12-3459-CV-S-RED, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012). *See generally HHS Mandate Information Central*, *supra* note 1.

68. Hobby Lobby Stores, Inc., is a privately held retail chain with more than 600 stores in the United States. *Our Company*, HOBBY LOBBY, http://www.hobbylobby.com/our_company/ (last visited Sept. 7, 2014).

69. *See Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (denying request for injunctive relief); *Annex Med., Inc.*, 2013 WL 1276025 (preliminary injunction granted); *Korte*, 735 F.3d 654 (injunction granted pending appeal); *Autocam Corp.*, 730 F.3d 618 (denying request for injunction); *Newland*, 524 Fed. Appx. 706 (preliminary injunction granted); *Legatus*, 901 F. Supp. 2d 980 (preliminary injunction granted for Weingartz plaintiffs); *O'Brien*, 2014 WL 4401187 (injunction granted pending appeal); *Geneva Coll.*, 929 F. Supp. 2d 402; *Tyndale House Publishers, Inc.*, 2013 WL 2395168; *Grote Indus., LLC*, 914 F. Supp. 2d 943 (injunction granted pending appeal); *Am. Pulverizer Co.*, 2012 WL 6951316 (preliminary injunction granted); *Monaghan*, 931 F. Supp. 2d 794.

70. 134 S. Ct. 2751, 2785 (2014).

71. *See* Complaint at 3, 12, *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-01261, 2013 WL 6672400 (D.D.C. Dec. 19, 2013) [hereinafter Complaint, *Priests for Life*], *available at* http://www.priestsforlife.org/hhsmandate/priests-for-life-v-sebelius.pdf; *see also* Complaint, *Am. Family Ass'n v. Sebelius*, No. 1:13–cv–00032-SA-DAS (N.D. Mo. Feb. 20, 2013); Complaint, *Right to*

C. Challenging the Mandate: Disaggregating the Statutory and Constitutional Causes of Action

When a litigant claims that her religious liberty has been violated, there are numerous causes of action available to her, both constitutional and statutory. This Section will disaggregate each of the core religious liberty protections available to litigants. In so doing, it will become clear that the cause of action with which commentators should be most focused on is the constitutional claim of religious institutionalism. This cause of action has the most potential to shift the locus of power from the government and individual citizens to powerful private entities without any possibility of constitutional review.

1. CONSTITUTIONAL CAUSES OF ACTION

As I described in an earlier article, 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.[73] Pursuant to the Establishment Clause, litigants can claim that the government is "establishing" religion by either preferencing one religious sect over another,[74] or benefiting one religion by, for example, requiring or permitting prayer in public schools or permitting religious symbols in the public square.[75]

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,[76] which if accepted by the court, will result in

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Life Michigan v. Sebelius, No. 1:13-CV-01202 (W.D. Mich. Nov. 4, 2013). *See generally HHS Mandate Information Central*, *supra* note 1.

72. *See, e.g.*, Complaint, *Nebraska*, *supra* note 59. *See generally HHS Mandate Information Central*, *supra* note 1.

73. *See* U.S. Const. amend. I. The Establishment and Free Exercise Clauses are contained within the First Amendment, which reads in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *Id.*; *see* Robinson, *supra* note 23, at 202–03 (first articulating the description outlined here).

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

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

76. *See, e.g.*, *Davis v. Beason*, 133 U.S. 333, 342–43 (1890); *Reynolds v. United States*, 98 U.S. 145, 162 (1879).

absolute constitutional protection, without any judicial recourse to balancing tests.[77] Second, litigants can claim that the government has burdened their religious action,[78] with the constitutional protection afforded that religious action being dependent on the nature of the burden.[79] Where religious action is burdened via a discriminatory law, the resulting protection is strict scrutiny.[80] Where the burden on the religious action is the consequence of a non-discriminatory law (i.e., a generally applicable law), the burden will be afforded no protection absent a showing of a "hybrid claim" or an individualized governmental determination.[81] Importantly, under both the Free Exercise and Establishment Clauses, so long as the litigant can show that her "religion" is burdened, the rights contained in the Religion Clauses are applicable to the litigant if that litigant is a constitutional person.[82]

In addition to the generally applicable Religion Clauses, the Supreme Court has recently recognized an additional doctrinal path for litigants to follow.[83] However, unlike the generally applicable Religion Clauses, the institutional category is exclusive and applicable only to "religious institutions."[84] 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, the institution is afforded absolute

77. *See Torcaso v. Watkins*, 367 U.S. 488, 495–96 (1962).

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

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

80. *See Church of Lukumi Babalu Aye, Inc.*, 508 U.S. at 531; *Sherbert*, 374 U.S. at 406 (invalidating a state law burdening the free exercise of religion); *see also* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 870 (2006) ("Strict scrutiny is always fatal to laws intentionally discriminating against religion . . . .").

81. *See Emp't Div. v. Smith*, 492 U.S. 872, 884 (1990) (holding that special accommodations for religious practices are not constitutionally mandated except for claims combining a free exercise claim and a claim arising from another constitutional provision—i.e., "hybrid" claims—or for claims in contexts that "invite consideration of . . .particular circumstances"). For commentary on the *Smith* doctrine, see 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 80–81 (2006) (noting that *Smith* "marks a crucial divide in free exercise law"); Adam Samaha, *Litigant Sensitivity in First Amendment Law*, 98 NW. U. L. REV. 1291, 1335 (2004).

82. *See* LESLIE C. GRIFFIN, LAW AND RELIGION 17 (2d ed. 2010); *see also* Zoë Robinson, *Constitutional Personhood* (draft on file with author).

83. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 705–06 (2012).

84. *Id.* at 706.

constitutional protection.[85] 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.[86]

2. STATUTORY CAUSES OF ACTION

In addition to the three core constitutional causes of action, litigants who believe that their religious liberty has been violated also have access to a statutory cause of action pursuant to the Religious Freedom Restoration Act (RFRA).[87] RFRA was passed in the wake of the Supreme Court's decision in *Employment Division v. Smith*,[88] where the Court significantly weakened the constitutional free exercise protections.[89]

Before *Smith*, people were at least theoretically entitled to exemptions from any law that substantially burdened their religious practice unless the law passed strict scrutiny review.[90] *Smith* upended this protection, holding that neutral and generally applicable laws do not, as a

85. 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, *supra* note 23, at 231–33 (discussing the "fallback protections" that the generally applicable Religion Clauses provide to those institutions not classified as a constitutional religious institution).

86. *Id.* at 204 ("The institutional category enshrined by *Hosanna-Tabor* is . . .a powerful extension of the previously settled Religion Clause doctrine."); *see also* 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").

87. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 (2011).

88. 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).

89. *See* H.R. Rep. No. 103-88, at 2 (1993) ("The *Smith* majority's abandonment of strict scrutiny represented an abrupt, unexpected rejection of longstanding Supreme Court precedent.").

90. *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 United States v. Lee*, 455 U.S. 252, 257 (1982) (holding that the government met strict scrutiny and no accommodation was constitutionally mandated); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247 (1994) (specifying that while strict scrutiny usually means "strict in theory, fatal in fact," in the context of the Free Exercise Clause it is more apt to describe the test as "strict in theory but feeble in fact").

general matter, violate the Free Exercise Clause.[91] 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.[92]

* * *

The overwhelming focus of commentators responding to the Contraception Mandate has been on the statutory—RFRA—cause of action.[93] In fact, almost every litigant challenging the Contraception Mandate has pleaded a RFRA cause of action.[94] However, the class of litigants that has come under the most scrutiny in the context of the RFRA violation claim is the for-profit corporation class. The specific question for the for-profit litigant class is whether the protective auspices of the statute extend to for-profit corporations. Specifically, the question is one of statutory interpretation—namely whether RFRA's protection for "persons"[95] should be construed as extending to corporate (i.e., non-natural) persons. As noted above, in the context of the for-profit corporation class, the Supreme Court recently held that RFRA's protections extend to cover corporations, and, pursuant to the statute's terms, this class's religious liberty was violated by the Contraception Mandate.[96]

Beyond the RFRA claim, commentators tend to morph the constitutional causes of action into one indistinct "religious liberty violation" claim rather than separating out the analytically distinct constitutional claims. This is an error and has led to the many religious institutionalism claims made by various classes of litigants being

91. *Smith*, 494 U.S. at 884–85 (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).

92. *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*).

93. *See, e.g.*, Christiansen, *supra* note 3, at 623–24; Corbin, *The Contraception Mandate*, *supra* note 13, at 1474–83; Gedicks & Van Tassell, *supra* note 31, at 343–44; Sepper, *supra* note 4, at 309–11; Vischer, *supra* note 3, at 371–74.

94. *See HHS Mandate Information Central*, *supra* note 1.

95. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(a) (2011) ("Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided for in subsection (b).").

96. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759–60 (2014).

ignored. In a number of the claims, litigants claim that their institutional rights have been violated. For example, religious university Belmont Abbey College claims that:

> The Free Exercise Clause and the Establishment Clause 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 . . . . Belmont Abbey College has made an internal decision, dictated by its Christian faith, that any health plans it makes available to its employees may not subsidize, provide, or facilitate access to abortifacient, sterilization, or contraceptive drugs, devices, or related services.[97]

Numerous other Mandate challengers, including other religious universities (for example, the University of Notre Dame and Wheaton College)[98] and litigants from the other litigant classes defined in the above section, make similar claims.[99] The lower federal courts have by and large ignored the institutionalism cause of action, focusing instead on the generally applicable Religion Clauses and/or the RFRA claims.[100] The courts that have addressed the question have done so tentatively, and many seem at a loss as to how to answer the baseline question of whether the institutional complainant is a religious institution within the scope of the First Amendment.[101] And the Supreme Court ignored all constitutional claims in its recent *Burwell v. Hobby Lobby* decision.[102] The following Part provides guidance as to how to answer this critical question, outlining a framework for courts to employ to address this threshold question before turning to assessing the specific classes of Mandate challenges that claim to be constitutional religious institutions in Part III.

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97. Complaint *Belmont Abbey College*, *supra* note 63, at 232, 235.

98. *See supra* note 10 (collecting cases).

99. *See supra* note 10 (collecting cases).

100. *See, e.g.*, *Conestoga Wood Specialties v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 381 (3rd Cir. 2013), *rev'd*, *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751.

101. *See generally supra* note 15 (outlining the approach of various lower courts to the question of defining a "religious institution").

102. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014) (deciding the issues on a more limited statutory ground).

II. HOW DO WE IDENTIFY WHICH MANDATE CHALLENGERS ARE CONSTITUTIONAL "RELIGIOUS INSTITUTIONS"?

To answer the claim made by some of the Mandate litigants that they are "constitutional religious institutions" and entitled to "absolute constitutional protection" from the reach of the Contraception Mandate, we need some kind of framework to answer the threshold question: who, or what, is a constitutional religious institution? The problem, of course, is figuring out how to make constitutional distinctions between institutions that are constitutional religious institutions and those that are not. This Part outlines a framework to make these determinations before applying it to the classes of Mandate challengers in Part III.[103]

A. What is Religious Institutionalism?

Broadly speaking, religious institutionalism refers to the rights of religious institutions independent of the rights of individuals.[104] More specifically, religious institutionalism also refers to the exclusive category of First Amendment rights reserved for constitutional religious institutions.[105] The story of religious institutionalism dates back to the Supreme Court's 1871 decision of *Watson v. Jones*,[106] where the Court determined that it could have no role in adjudicating intra-church property disputes in order to preserve the autonomy of churches.[107] *Watson* and its progeny have been collectively described as the Court's

103. The following Part draws substantially from an earlier article, which articulates in depth the phenomenon of religious institutionalism and the appropriate framework for identifying constitutional religious institutions. *See* Robinson, note 23, at 189–93 (examining in depth the issue of identifying constitutional religious institutions). What follows is the relevant portions of that article necessary to identify those constitutional mandate litigants that should be considered constitutional religious institutions.

104. *See id.* at 206–08.

105. *Id.* at 182 (discussing constitutional religious institutionalism); *see also* Howard M. Wasserman, *Prescriptive Jurisdiction, Adjudicative Jurisdiction, and the Ministerial Exemption*, 160 U. PA. L. REV. PENNUMBRA 289, 289–93 (2012). *Compare* Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 919–21 (2013) (arguing that religious institutions do not give rise to a special set of rights, autonomy, or sovereignty separate from individual rights of conscience), *with* Paul Horwitz, *Defending (Religious) Institutionalism*, 99 VA. L. REV. 1049, 1061–63 (2013).

106. 80 U.S. 679 (1871). For an excellent overview and greater illumination of the decision and its importance, see Kurt T. Lash, *Beyond Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 447, 456–59 (2009); Lund, *supra* note 14, at 12–15.

107. *Watson*, 80 U.S. at 729.

"hands-off" approach to religious institutions, requiring the government to defer to the will of the institution.[108]

The story of modern religious institutionalism was heralded by the Court in its 2012 decision of *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*[109] *Hosanna-Tabor* involved the firing of an elementary school teacher, Cheryl Perich, from the religiously-affiliated Hosanna-Tabor Evangelical Lutheran Church and School.[110] Perich was employed as a "called teacher"—a teacher voted as such by the congregation after satisfying religious education requirements—and fired after she refused to step down following an extended disability leave.[111] After she was fired, Perich filed an EEOC complaint that Hosanna-Tabor defended by claiming the suit was barred by the First Amendment religion clause's "ministerial exception."[112]

In agreeing with Hosanna-Tabor, the Court held that the internal governance of a religious institution is absolutely protected by the First Amendment.[113] In other words, the Americans with Disabilities Act (or any other employment law) cannot be applied to restrict the conduct of religious institutions when it infringes on the institution's ability to "shape its own faith and mission."[114]

Religious institutionalism, then, refers to the entrenched constitutional principle of institutional separation, whereby the

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108. *See Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696, 697–98 (1976); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 445–47 (1969); *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190 (1960); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 114–16 (1952); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16–17 (1929); *Shepard v. Barkley*, 247 U.S. 1, 2 (1918). On the development of the Court's religious institutionalism, see Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837, 845 (2009) (describing the "cluster of [church autonomy] cases that seem to illustrate and confirm the hands-off rule"); Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property*, 98 COLUM. L. REV. 1843, 1847 (1998) (describing *Watson* as "[t]he [o]rigin of a '[h]ands-[o]ff' [a]pproach"); Lund, *supra* note 14, at 16; *see also* Joanne C. Brant, *"Our Shield Belongs to the Lord": Religious Employers and a Constitutional Right to Discriminate*, 21 HASTINGS CONST. L.Q. 275, 299–300 (1994) ("[T]he Court's early church property decisions indicate that courts should not attempt to resolve 'internal' church disputes."); William Johnson Everett, *Ecclesial Freedom and Federal Order: Reflections on the Pacific Homes Case*, 12 J.L. & RELIGION 371, 382 (1996) ("A long series of legal precedents ha[s] confirmed that civil courts cannot interfere in internal church disputes.").

109. 132 S. Ct. 694 (2012).

110. *Id.* at 699–700.

111. *Id.*

112. *Id.* at 701.

113. *Id.* at 706.

114. *Id.*

institutions of church and state are to be separate and distinct.[115] More broadly, however, religious institutionalism singles out religious institutions as special rights holders.[116] The threshold, antecedent question, then, is which institutions are religious institutions for the purposes of this special constitutional protection.

B. Are All Associational Forms Constitutional "Religious Institutions"?

While most of us would readily identify a local house of worship as a religious institution, the question becomes more complicated as we pan out from the core. For example, many local houses of worship belong to hierarchical organizations that mandate conduct and direct belief.[117] 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, the issue becomes increasingly complicated once we try to account for the various subsidiary organizations funded and managed by the broader hierarchical organization. These subsidiary organizations can include hospitals, for-profit businesses, schools, universities, 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.[118] Then there are the slew of for-profit businesses that claim to be run in accordance with religious doctrine.[119]

The question is, which of these institutions is a constitutional religious institution? Are they all constitutional religious institutions, able to organize at least some of their affairs independent of state regulation? Are only some of them?

In an earlier article, I suggested that the most promising starting point for identifying constitutional religious institutions is to pinpoint the unique functions these institutions fulfill that differ from those fulfilled

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115. For a discussion of the historic origins of institutional separation, see Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic,* 2004 BYU L. REV. 1385, 1497.

116. *See* Robinson, *supra* note 23, at 181–83. For a discussion of the normative question of religious institutions as special constitutional rights holders, see, for example, Schragger & Schwartzman, *supra* note 105, at 925–26.

117. For example, the Catholic Church is one such hierarchical organization. *See* POPE JOHN PAUL II, CATECHISM OF THE CATHOLIC CHURCH ¶¶ 874–96 (2d ed. 2000), *available at* http://www.usccb.org/beliefs-and-teachings/what-we-believe/catechism/catechism-of-the-catholic-church/epub/index.cfm.

118. *See* complaints cited *supra* note 63 (outlining examples of educational institutional complainants).

119. *See generally supra* notes 55–72 and accompanying text (outlining the classes of litigants challenging the Contraception Mandate).

by other institutions.[120] Examining the body of the Supreme Court's religious institutionalism decisions, I claimed that, when speaking of religious institutions, the Supreme Court has made it clear that constitutional religious institutions fulfill three primary functions.[121] These functions are: protection of group rights, protection of individual conscience, and provision of desirable societal structures.[122] 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 reach far beyond the efforts of other institutions. While my earlier article examines each of these values in-depth,[123] it is useful to briefly consider each value here, before turning to identify functional guidelines based on these values that aim to guide the courts in identifying 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 religious institutionalism decisions is a view that religious institutions are uniquely autonomous in our governmental structures.[124] To that end, the Court has taken a hands-off approach to cases that involve certain intra-institutional decisions, holding that the Constitution directs that religious institutions are to be accorded special solicitude over at least matters of faith and doctrine.[125] For the Court,

120. Robinson, *supra* note 23, at 206–08 (specifying 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).

121. *Id.* at 208 (outlining the three values undergirding the Court's religious institutionalism jurisprudence).

122. *Id.*

123. *Id.* at 206–25 (examining each of the values in depth).

124. *See* Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 149 (2003); Robinson, *supra* note 23, at 208–13 (outlining in detail the claim that the Court's religious institutionalism jurisprudence is at least partially animated by protection of group rights); *see also* Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937). For various perspectives on how private organizations exercise governmental power, see Harold I. Abramson, *A Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 HASTINGS CONST. L.Q. 165, 169–74 (1989) (analyzing categories of private exercise of government power according to the formality of the relationship between the government and private actor); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 547 (2000) (conceiving of governance as a set of negotiated relationships between private and public actors); David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 694–95 (1986) (outlining a proposal for a due-process analysis of private delegations of public power).

125. *See* Robinson, *supra* note 23, at 212 (discussing *Hosanna-Tabor*); *see also* Hills, Jr., *supra* note 124, at 149–52; Wasserman, *supra* note 105, at 297. Note that in his characterization of the rights of religious institutions, Paul Horwitz uses the term "sphere

there appears to be something special about religious groups qua religious groups that itself requires the Court cede jurisdictional authority over specific, uniquely religious, matters.[126]

Second, and relatedly, the Court's religious institutionalism jurisprudence reflects the valuing of religious institutions as *facilitators of individual religious liberty*.[127] In this way, the special constitutional solicitude accorded religious institutions is justified on the basis that the institution both supports and promotes individual religious choice.[128] Implicit in this value is an understanding of religious liberty that moves beyond a traditional conception of religious freedom as an individual endeavor. Instead, the Court's religious institutionalism jurisprudence recognizes that exercise of individual religious conscience is frequently a communal endeavor.[129] To that end, when religious individuals band together in a community of faith, the Court has been willing to recognize the rights of religious institutions as facilitators and protectors of those individual rights. Religious institutions, then, are places where individual religious conscience is practiced, formed, and preserved.[130] 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

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sovereignty." Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 83 (2009). Horwitz derives this term from a unique and very specific reference, the Calvinist theorist Abraham Kuyper. *Id.* Despite the narrow derivation, sphere sovereignty is terminology that could also be apt in this context, as it is used to describe an institution that has a specified sphere of authority, to the exclusion of all other entities. *Id.* at 94.

126. Robinson, *supra* note 23, at 213.

127. *Id.* at 213–19 (examining in depth the proposition that the Court's religious institutionalism jurisprudence reflects a concern for individual religious liberty).

128. On the view that religious institutional freedom derives its validity from its individual belief-enforcing function, see, for example, Bagni, *supra* note 15; 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). *Compare* Mark F. Kohler, Comment, *Equal Employment or Excessive Entanglement? The Application of Employment Discrimination Statutes to Religiously Affiliated Organizations*, 18 CONN. L. REV. 581, 589–90 (1986), *with* Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 395 (1987).

129. *See, e.g.*, Kathleen A. Brady, *Religious Group Autonomy: Further Reflections About What Is at Stake*, 22 J.L. & RELIGION 153, 155 (2006); Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of* Smith, 2004 BYU L. REV. 1633, 1675 [hereinafter Brady, *Religious Organizations*] (stating that religious groups are connected to individual religious convictions because "[i]ndividuals express and exercise their beliefs in religious communities, and religious organizations also play an essential role in shaping the beliefs that individuals hold").

130. Brady, *Religious Organizations*, *supra* note 129, at 1675; *see also* Robinson, *supra* note 23, at 216.

rights."[131] 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.[132] In this way, while the rights of religious institutions are parasitic on individual religious liberty, they are also independent of individuals.[133] The Court's religious institutionalism project, then, values the collective expression of faith that a religious institution enshrines.

Finally, the Court's religious institutionalism jurisprudence reflects a view that religious institutions provide *democratically desirable social structures*.[134] Undergirding the special solicitude accorded religious institutions is an understanding that religious groups provide two distinct social benefits. First, religious institutions facilitate social engagement by inculcating groups of people with civic morality.[135] Historically, the state has entrusted the development and advancement of civic morals to religious organizations.[136] 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 in that respect to avoid political coloring of religion.[137] Taken to the extreme, if religion is corrupted, so too is the citizenry, and the very fabric of the civil state will unravel.[138] Second, symbiotic with the view of religious institutions as protectors of public virtue is the understanding

131. Robinson, *supra* note 23, at 216–18 (stating that religious conscience is fostered and nurtured in groups).

132. Colombo, *Naked Private Square*, *supra* note 3, at 53–54, 65; Paul C. Fricke, *The Associational Thesis: A New Logic for Free Exercise Jurisprudence*, 53 HOW. L.J. 133, 161 (2009) (discussing how Locke's *Letter* demonstrates his belief that "religion starts and ends with a community of believers; it is thoroughly associational"). Many religion scholars have sided with Locke's associational view of religion. *Id.* at 173–74.

133. *See* sources cited *supra* note 132. *Compare* Schragger & Schwartzman, *supra* note 105, *with* Steven D. Smith, *Freedom of Religion or Freedom of the Church?*, 28–30 (Univ. of San Diego Sch. of Law Legal Studies Research Paper Series, Paper No. 11-061, 2011) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1911412., *and* Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 HARV. L. REV. 1869, 1878–80 (2009).

134. Robinson, *supra* note 23, at 219–24.

135. *See id.* at 220–22 (discussing the social function of religious institutions in American society).

136. *See* Esbeck, *supra* note 115, at 1395.

137. Robinson, *supra* note 23, at 221–22; *see also* JOSEPH RAZ, RIGHTS AND INDIVIDUAL WELL-BEING IN ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 6 (1994); John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 386 (1996).

138. Robinson, *supra* note 23, at 222.

that religious institutions should act to protect the state from religious involvement.[139] 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.[140] The judicial valuing of religious institutions as private sovereigns, then, recognizes the independent democratic desirability of those structures.[141]

What remains is to identify some tangible principles from these values—religious sovereignty, individual conscience, democratically valuable structures—in order to articulate workable guidelines for identifying constitutional religious institutions.

C. Guidelines for Identifying Constitutional "Religious Institutions"

Drawing on the values summarized in the above section, my earlier article proposed a set of guidelines, comprising four discrete factors that courts can use to determine whether any given religious institution is a constitutional religious institution: (1) recognition as a religious institution, (2) functions as a religious institution, (3) voluntariness, and (4) privacy-seeking.[142] These guidelines act as reliable proxies, based on a secure theoretical foundation, that will facilitate courts in identifying those institutions that best fulfill the unique constitutional functions of the religious institution. While my earlier article examined each factor and their relationship to the various values in depth, this Section provides a summary of the core features of each factor, before turning to apply the guidelines to the claimants in the mandate litigation in Part III.[143]

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139. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 703 (2012) (emphasizing the Religion Clauses's purpose as prohibiting a federal religion); *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); PETER J. BERGER & RICHARD JOHN NEUHAUS, TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY 29 (1977) (describing "'no establishment of religion'" as meaning that the state does not favor any religious institution over others); Zoë Robinson, *Rationalizing Religious Exemptions: A Legislative Process Theory of Statutory Exemptions for Religion*, 20 WM. & MARY BILL RTS. J. 133, 144 (2011).

140. Robinson, *supra* note 23, at 222–23; *see also* Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 53 (2002); Robinson, *supra* note 139, at 144–45.

141. Robinson, *supra* note 23, at 219.

142. This framework was first articulated in *id.* at 225–29.

143. For an in-depth discussion of the relationship between the values and the consequent guidelines, see *id.* at 224–30.

Recognition as a religious institution. The first factor relies on third-party recognition of what a constitutional religious institution looks like.[144] This factor allows us to capture within the category those institutions that have as their goal uniquely religious objectives.[145] 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.[146] 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 acts, 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.[147] 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. Courts could reference for

144. *Id.* at 225–27 (discussing the recognition factor).

145. Robinson, *supra* note 23, at 225. Recognition as a religious institution is a critical measure for many courts asking the question of what a religious institution is in various statutory contexts. For lower court attempts to answer the question of who—or what—is a "religious institution" in various statutory contexts, see *supra* note 15 (outlining prior attempts of lower federal courts to define a "religious institution" in various statutory contexts).

146. Third-party recognition is similar to the approach taken by the Court in *Hosanna-Tabor*. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 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).

147. Robinson, *supra* note 23, at 226. Lower courts have taken a similar approach in attempts to define a "religious institution" for various statutory provisions. *See, e.g.*, *Hollins 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 mashgichim 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.*, 929 F.2d 360, 362 (8th Cir. 1991) ("The hospital's Board of Directors consists of four church representatives and their unanimously agreed-upon nominees" and that 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).

example, 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.

Functions as a religious institution. The second factor is intimately related to the first and requires that the institution claiming the status of constitutional religious institution be structurally capable of promoting individual conscience and morality.[148] If a feature of constitutional religious institutions is at least to partially generate norms among a collective of citizens, it seems essential that the institution somehow functions as a religious institution.[149] 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.[150]

Voluntariness. The third factor focuses on the value of protection of individual religious liberty, and specifies that for an institution to be considered a religious institution, entrance into that institution must be voluntary.[151] That is, the individual must at least know that she is entering into a religious institution that she can exit at will.[152] 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. With the Court's religious institutionalism jurisprudence valuing group rights and leaving governance of that group to each institution, it is critical that individuals have a choice whether to be subject to the constraints of that private sovereignty.[153] Concurrent with

148. Robinson, *supra* note 23, at 225, 227–28.

149. *See* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 11–14 (1983).

150. This is similar to the approach the Court took in determining whether the plaintiff was a "minister" in *Hosanna-Tabor*. *See 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"); West, *supra* note 146, at 2455–56 (analyzing *Hosanna-Tabor* for the purposes of establishing a framework for identifying the "press" for First Amendment purposes).

151. Robinson, *supra* note 23, at 228–29.

152. *See Torcaso v. Watkins*, 367 U.S. 488, 495 n.10 (1961) (quoting 4 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, 194 (2d ed. 1836)); *United States v. Ballard*, 322 U.S. 78, 86 (1944); JOHN RAWLS, POLITICAL LIBERALISM 221–22 (1996); Esbeck, *supra* note 115, at 1395–97; Hills, Jr., *supra* note 124, at 151; Laycock, *supra* note 128, at 1403.

153. *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).

the freedom to organize, then, must be the freedom of choice of individuals whether to affiliate with and submit to the sovereignty of an institution.

Privacy-seeking. Finally, in light of the religious institutionalism value of supporting democratically desirable structures, to be considered a constitutional religious institution, the institution claiming to be a constitutional religious institution should seek disengagement from the formal apparatus of the state.[154]

* * *

Having set out a preliminary framework for determining what types of institutions fall within the First Amendment's religious institutionalism category, the following Part circles back to the Contraception Mandate and examines the claims of the various classes of litigants that they are constitutional religious institutions and, therefore, potentially free from the obligation to comply with the terms of the Mandate.

III. USING THE MANDATE CHALLENGERS TO EXPERIMENT WITH IDENTIFYING CONSTITUTIONAL RELIGIOUS INSTITUTIONS

Using the framework outlined in Part II, this Part will apply that framework to three classes of religious institutions who have brought claims challenging the Contraception Mandate: religious universities, religious-based businesses, and religious interest groups. Each of these institutional forms requires nuanced line-drawing, with each class presenting its own difficulties.

A. Religious Universities

The United States has a long and rich tradition of institutions of higher education dating back to the foundation of Harvard College in 1636.[155] At the advent of the Revolutionary War, there were nine colleges in the colonies, some public and some private.[156] The number of both public and private universities in the United States grew quickly

154. Robinson, *supra* note 23, at 229.

155. JUDITH AREEN, HIGHER EDUCATION AND THE LAW: CASES AND MATERIALS 27 (2d ed. 2009); *History of Harvard University*, HARV. U., http://www.harvard.edu/history (last visited Sept. 15, 2014).

156. AREEN, *supra* note 155, at 27; *History*, RUTGERS, http://uwide.rutgers.edu/about/history (last visited Sept. 15, 2014).

after the nation's founding and continued to expand rapidly following the passage of the Morrill Act of 1862, which established the land-grant universities.[157] Many of these institutions were founded on religious principles. For example, Harvard was founded by Congregationalists, and one of its specified goals was: "Let every student be plainly instructed and earnestly pressed to consider well the main end of his life and studies is to know God and Jesus Christ, which is eternal life, and therefore to lay Christ in the bottom, as the only foundation of all sound knowledge and learning."[158] However, over one hundred years ago, Harvard, like many of the early American universities founded on religious principles,[159] removed almost all vestiges of religion from the institution and has surrendered its religious commitment.[160]

A significant number of American universities, however, remain intentionally religiously conscious. These intentionally religious universities—of which there are an estimated 800 to 1,000—comprise more than one-third of the colleges and universities in the nation.[161] The relationship between the educational institution and the affiliate religion is varied, ranging from formal control by religious church authorities and religious orders to civilly-controlled incorporated entities that follow the faith and doctrine of the religion voluntarily.[162]

Importantly, by "religiously conscious" I mean that these universities still hold on to a "serious commitment to the church while simultaneously striving for a respectable measure of academic

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157. Gregory J. Vincent, *Reviving the Land-Grant Idea Through Community-University Partnerships*, 31 S.U. L. REV. 1, 1 (2003).

158. FREDERICK EBY, CHRISTIANITY AND EDUCATION 67–74 (1915); Larry Lyon et al., *Making Sense of a "Religious" University: Faculty Adaptations and Opinions at Brigham Young, Baylor, Notre Dame, and Boston College*, 43 REV. RELIGIOUS RES., 326, 326 (2002) (quoting EBY, *supra*, at 67).

159. For example, Princeton was founded by Presbyterians, Brown by Baptists, and Yale by Congregationalists. *See* GEORGE M. MARSDEN, THE SOUL OF THE AMERICAN UNIVERSITY: FROM PROTESTANT ESTABLISHMENT TO ESTABLISHED NONBELIEF 52–53, 56–57 (1994); Stephen L. Carter, *The Constitution and the Religious University*, 47 DEPAUL L. REV. 479, 479 (1998); Lyon et al., *supra* note 158, at 326.

160. *See* William B. Adrian Jr., *The Christian University: Maintaining Distinctions in a Pluralistic Culture*, *in* MODELS FOR CHRISTIAN HIGHER EDUCATION: STRATEGIES FOR SUCCESS IN THE TWENTY-FIRST CENTURY 445 (Richard T. Hughes & William B. Adrian eds., 1997); Carter, *supra* note 159, at 479.

161. *See* Carter, *supra* note 159, at 480.

162. *See* JOHN J. MCGRATH, CATHOLIC INSTITUTIONS IN THE UNITED STATES: CANONICAL AND CIVIL LAW STATUS 33–36 (1968); *see also* Mary Patricia Golden, *Civil Law and Canon Law—Never the Twain Shall Meet?*, 31 ST. LOUIS U. L.J. 955, 956 (1987); Marjorie R. Maguire, *Having One's Cake and Eating It Too: Government Funding and Religious Exemptions for Religiously Affiliated Colleges and Universities*, 1989 WIS. L. REV. 1061, 1069, 1119; Joseph R. Preville, *Catholic Colleges, the Courts, and the Constitution: A Tale of Two Cases*, 58 CHURCH HIST. 197, 204 n.22 (1989).

excellence."[163] Significant work has been done on identifying non-intrusive indicators of an intentionally religious institution. These indicators include: (1) an institutional mission statement that acknowledges a specific link or relationship to a church or religious heritage,[164] (2) an institutional mission statement that includes at least one explicitly religious goal,[165] or (3) an institutional commitment to a core curriculum that requires a religion course that reflects and supports the institution's religious affiliation or identity.[166]

For example, at the University of Notre Dame, an elite Catholic university in Indiana, all students are required to take a defined religious studies course, another theology course of the student's choosing, and two philosophy courses.[167] The University of Notre Dame specifies that it is a:

> Catholic community of higher learning, animated from its origins by the Congregation of the Holy Cross. The university is dedicated to the pursuit and sharing of truth for its own sake. As a Catholic university, one of its distinctive goals is to provide a forum where through free inquiry and open discussion, the various lines of Catholic thought may intersect with all forms of knowledge found in the arts, sciences, professions, and every other area of human scholarship and creativity.[168]

Similar course and mission commitments can be seen at other institutions, including Baylor in Texas, Boston College in Massachusetts, and Brigham Young University in Utah.[169]

Many students choose to study at these religiously affiliated institutions because they provide an environment that is not only compatible with, but congenial to, religious belief.[170] Similarly, many faculty members choose to work at a religiously affiliated university for the same reasons. The availability of this choice—to study or work at a

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163. Lyon et al., *supra* note 158, at 326.

164. MERRIMON CUNINGGIM, UNEASY PARTNERS: THE COLLEGE AND THE CHURCH 99 (1994).

165. MICHAEL J. BUCKLEY, THE CATHOLIC UNIVERSITY AS PROMISE AND PROJECT: REFLECTIONS IN A JESUIT IDIOM 6–7 (1998).

166. Mark R. Schwehn, *A Christian University: Defining the Difference,* FIRST THINGS, no. 93, May 1999, at 25–26.

167. Lyon et al., *supra* note 158, at 329.

168. *Id.* (quoting COLLOQUY, UNIVERSITY OF NOTRE DAME CATALOGUE (2000)).

169. *See id.* at 329–30.

170. Carter, *supra* note 159, at 480; James D. Gordon III, *Religiously Affiliated Law Schools, Values, and Professionalism*, 59 J. LEGAL EDUC. 151, 151 (2009).

religiously affiliated institution of higher learning—"contribute[s] to the overall freedom of religion" which encapsulates more than belief and worship in a church, but instead "includes the nurturing of a lively plurality, not simply of religious ideals about the life well-lived, but of lives well lived in accordance with religious ideals."[171] This religious freedom is only possible because the autonomy of religious universities has typically been respected, and the religious institution has been able to define its own understanding of morality and the good life. If the state had been able to interfere in the religious university's mission, "[t]he state might become committed to its own meaning and destroy the personal and educative bond that is the germ of meanings alternate to those of the power wielders."[172]

Higher education is exalted in our nation, and, because of this, the intentionally religious university has a unique opportunity to shape and mold students in accordance with religious principles and morals.[173] One specific moral perspective is the one that the Contraception Mandate raises. Of those plaintiffs that have filed challenges against the Mandate, a significant number are universities.[174] One of the most prominent institutional plaintiffs is the University of Notre Dame.[175] The University of Notre Dame was founded in 1842 by a priest of the Congregation of Holy Cross and officially chartered in 1844.[176] The goal of the University of Notre Dame is to "provide a Catholic educational environment that prepares students spiritually and intellectually for their future vocations and careers."[177] In terms of leadership structure, the President of the University of Notre Dame has always been a priest from the Congregation of Holy Cross, and the governance structure contains mandated religious leaders.[178]

The University of Notre Dame is expressly and openly Catholic in its identity and mission and, to wit, ensures that its employee health insurance plans do not include coverage for abortifacients, contraception, sterilization, or related educative services.[179] The University of Notre

171. *See* Carter, *supra* note 159, at 480.

172. Cover, *supra* note 149, at 62.

173. *See* Eugene H. Bramhall & Ronald Z. Ahrens, *Academic Freedom and the Status of the Religiously Affiliated University*, 37 GONZ. L. REV. 227, 250, 252 (2001–02); Carter, *supra* note 159, at 185; Gordon III, *supra* note 170, at 151–52; Douglas Laycock & Susan E. Waelbroeck, *Academic Freedom and the Free Exercise of Religion*, 66 TEX. L. REV. 1455, 1458 (1987–88); Lyon et al., *supra* note 158, at 344–45.

174. *See supra* note 10 (collecting cases).

175. *See* Complaint, *Notre Dame*, *supra* note 43.

176. *Id.* at 5.

177. *Id.*

178. *Id.*

179. *Id.* at 7, 10.

Dame's complaint specifies that faith is "at the heart of Notre Dame's educational mission."[180] The University of Notre Dame's faith-based approach to higher education is based on the apostolic constitution *Ex Corde Ecclesiae*, and accordingly, "Notre Dame believes and teaches that 'besides the teaching, research and services common to all Universities,' it must 'bring to its task the inspiration and light of the Christian message.'"[181] For the University of Notre Dame, "'Catholic teaching and discipline are to influence all university activities . . . [and] any official action or commitment of the University [must] be in accord with its Catholic identity.'"[182] The University of Notre Dame follows one of the central tenets of the Catechism of the Catholic Church, that the "'dignity of the human person is rooted in his creation in the image and likeness of God,'"[183] therefore, "'[h]uman life must be respected and protected absolutely from the moment of conception.'"[184] Consequently, the Catholic Church and the University of Notre Dame believe that contraception and abortion are prohibited.[185] The Contraception Mandate, then, imposes a significant burden on the University of Notre Dame's religious liberty: either it must provide coverage for contraception and abortifacients contrary to religious principles, or bear the financial burden of the penalties, estimated to be in the millions of dollars.[186]

The question is, of course, whether religious universities like the University of Notre Dame and Ave Maria University qualify as religious institutions under the preliminary framework. Based on the above discussion, it seems clear that they do. In particular, the first and second factors—suggesting that an institution will only be considered a constitutional religious institution if they are recognized as a religious institution by third parties and they function as a religious institution—are readily apparent in the case of at least some religious universities.[187]

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180. *Id.* at 27.

181. *Id.* at 28 (quoting *Ex Corde Ecclesiae: Apostolic Constitution of the Supreme Pontiff John Paul II on Catholic Universities*, at *4, *available at* http://www.vatican.va/holy_father/john_paul_ii/apost_constitutions/documents/hf_jp-ii_apc_15081990_ex-corde-ecclesiae_en.html [hereinafter *Ex Corde Ecclesiae*]) (brackets omitted).

182. *Id.* (quoting *Ex Corde Ecclesiae*, *supra* note 181, at *13).

183. *Id.* (quoting POPE JOHN PAUL II, *supra* note 117, ¶ 1700).

184. *Id.* (quoting POPE JOHN PAUL II, *supra* note 117, ¶ 2270).

185. POPE JOHN PAUL II, *supra* note 117, ¶¶ 2271–72, 2370, 2399; *see* Complaint, *Notre Dame*, *supra* note 43, at 28.

186. POPE JOHN PAUL II, *supra* note 117, ¶¶ 2271–72, 2370, 2399; *see* Complaint, *Notre Dame*, *supra* note 43, at 12–13, 47.

187. *See supra* notes 144–50 and accompanying text (discussing the recognition and functional factors).

It seems clear that the University of Notre Dame and the other educational challengers to the Mandate are organizations that openly provide space for individuals to achieve uniquely religious objectives—namely higher education that is both faith-based and faith-directed.[188] If the value of constitutional religious institutions is to provide groups with space to develop and disseminate religious views and to allow individuals who opt into the institution the opportunity to develop their conscience, then religious higher education organizations meet that goal. Institutions like the University of Notre Dame were specifically founded on, and continue in existence with, the mission of providing higher education through the lens of a specific religious viewpoint.[189] The University of Notre Dame and the other institutions hold themselves out as religious institutions that provide an education that is distinct from an education at a secular institution.[190] The institutions in question publicize their distinct religious mission, and the education they provide is directed by that mission.

The University of Notre Dame and other consciously religious universities were deliberately formed and continue to exist as independent facilitators of individual religious conscience and thereby the freedom of individual religious choice.[191] The institutions deliberately nurture, foster, and protect individual faith. While the religious university is an educational institution, it is clear that the institutional commitment is to education through the lens of faith. The purpose of the institution itself is binary: The religious university persists not only to ensure higher education, but to present that education through the lens of a particular faith tradition, and, therefore, to facilitate the dissemination and expression of religious doctrine.

Courts will, of course, need to consider each institution individually and examine the sub-factors discussed in the framework; however, a basic analysis suggests that as a general matter, religious universities should be considered (or at least eligible to be considered) to meet the first factor of third-party recognition.

Relatedly, the voluntary factor seems to be met:[192] attendance and/or employment at consciously religious educational institutions are entirely voluntary, with clear institutional entry and exit points for members of the university. Students and employees who enter a consciously religious university like Notre Dame do so with the knowledge that they are

188. *See* Complaint, *Notre Dame*, *supra* note 43, at 28.

189. *See id.* at 5.

190. *See id.* at 5, 7.

191. *See supra* notes 173–86 and accompanying text.

192. *See supra* notes 151–53 and accompanying text (discussing the voluntary factor).

entering a Catholic university that follows the teachings of the Catholic Church. If those teachings are antithetical to the morality or beliefs of the individuals entering the educational institution, they have the right to exit that institution.

With the individual's choice to opt into a consciously religious university with an openly religious charter and governing documents, then, comes an acceptance of the institutional governance and ordering decisions. If the individual has chosen to continue her education or employment at a consciously religious educational institution, then she must accept that the education and employment environment, and related institutional functions, are provided through the lens of the collective expression of faith of the underlying religious mission. If the student or employee is unhappy with the collective faith, then, much like citizens can lobby the state to change a policy position, she can do the same within the institution's internal governance structures. She can leave the institution. She cannot, however, force the institution to moderate its faith position by using the state as a regulatory tool.

This consideration of the preliminary framework vis-à-vis religious universities seems normatively correct. If we recall the basic values of religious institutions, these values suggest that the First Amendment protects certain religious institutions because of their continuing capacity to contribute to valuable collective goods in a way that the government is unable to do. It seems clear, then, that religious universities should be given religious sovereignty, or what Joseph Raz terms "preemptive authority" to displace state decisions,[193] including the authority to reject the application of the Contraception Mandate to the institution.

B. Faith-Based Businesses

A unique question is raised by for-profit businesses owned or controlled by persons of faith which are increasingly seeking to implement their religious beliefs and practices into the workplace. The arguments in favor of recognizing a right of religious liberty for for-profit corporations range from doctrinal—i.e., building on the Court's evolving corporate First Amendment freedoms[194]—to policy-based—i.e., if the Religion Clauses guarantee the right to live life

193. RAZ, *supra* note 137, at 44–59.

194. *See Citizens United v. FEC*, 558 U.S. 310, 365 (2010) (holding that the First Amendment protects corporate political speech); *see also Prima Iglesia Bautista Hispana of Boca Raton v. Broward Cnty.*, 4502 F.3d 1295, 1305 (11th Cir. 2006) ("[C]orporations possess Fourteenth Amendment rights of equal protection, due process, and through the doctrine of incorporation, the free exercise of religion."); David Graver, Comment, *Personal Bodies: A Corporeal Theory of Corporate Personhood*, 6 U. CHI. L. SCH. ROUNDTABLE 235, 236 (1999).

consistent with one's own faith, that right should traverse the workplace threshold.[195]

The Contraception Mandate challenges serve to highlight the unique issue of faith-based businesses. In the case of *Hobby Lobby, Inc.*, for example, the company had decided not to provide health insurance coverage for contraception or sterilization.[196] What if, however, the company wanted to implement their faith in hiring practices and refused to hire gay and lesbian employees? What if the company wanted to refuse service to Latino or African American customers?

The basic concept of a "corporation" is straightforward: a corporation is a collective of individuals pursuing a shared goal.[197] As a technical matter, as a business entity distinct from other types of business forms, the modern corporation is typified by a number of characteristics, including (but not limited to) limited liability, transferability of ownership, indefinite existence, separation of ownership and control, and separate entity status.[198] Importantly, from very early in the history of corporate law, corporations have been assumed to enjoy the status of "legal person"—i.e., the corporation itself is an entity distinct from its human members and in possession of its own set of rights and obligations.[199] Today, the modern corporation holds various rights

195. *See* Karen C. Cash & George R. Gray, *A Framework for Accommodating Religion and Spirituality in the Workplace*, 14 ACAD. MGMT. EXECUTIVE 124, 124 (2000) ("Business periodicals are filled with articles heralding both the renewed interest in religion and the growing emphasis on spirituality in society in general and in the workplace."); Colombo, *Naked Private Square*, *supra* note 3, at 3; Fricke, *supra* note 132, at 161, 170 (claiming that the associational aspect of religion is imperative); Kenneth D. Wald, *Religion and the Workplace: A Social Science Perspective*, 30 COMP. PAB. L. & POL'Y J. 471, 474, 481 (2009) ("[The] intergralist style of religious commitment . . .contradicts the norms of secularization . . .[and sees] religion not as one isolated aspect of human existence but rather as a comprehensive system more or less present in all domains of the individual's life.").

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

197. Ronald J. Colombo, *Ownership Limited: Reconciling Traditional and Progressive Corporate Law via an Aristotelian Understanding of Ownership*, 34 J. CORP. L. 247, 250–52 (2008) [hereinafter Colombo, *Ownership Limited*] (outlining the history of the corporation generally).

198. Colombo, *Naked Private Square*, *supra* note 3, at 48; Colombo, *Ownership Limited*, *supra* note 197, at 250–52; David A. Skeel, Jr., *Christianity and the Large Scale Corporation*, *in* PUB. L. & LEGAL THEORY RES. PAPER SERIES 2 (Univ. of Pa. Law Sch., Jan. 15, 2007), *available at* papers.ssrn.com/abstract=1025959.

199. P.W. DUFF, PERSONALITY IN ROMAN PRIVATE LAW 1–2 (Augustus M. Kelley 1971) (1938); George F. Deiser, *The Juristic Person*, 57 U. PA. L. REV. 131, 131–32 (1908); Skeel, Jr., *supra* note 198, at 2–3; Note, *What We Talk About When We Talk About Persons*, 114 HARV. L. REV. 1745, 1750–54 (2001); *see Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (recognizing that corporations have certain constitutional rights vis-à-vis the state).

encapsulated in the Bill of Rights, including Fourteenth Amendment equal protection rights[200] and First Amendment free speech rights.[201]

Even with its separate legal entity status, the question whether the corporation holds rights under First Amendment Religion Clauses is new.[202] The modern for-profit corporation has typically been assumed to be secular in nature, a place where religion is excluded, and both corporate law and employment law emphasize a religiously neutral workplace for employees.[203] Historically, this was not always the case, and significant historical work has been done that demonstrates the interrelated nature of work, faith, and family prior to the Industrial Revolution.[204] That link was weakened with the advent of the Protestant Revolution, which ripped apart the uniformity of religious belief, and the ensuing Enlightenment era, which instigated the privatization of religion more generally.[205] The shift from an agrarian working life to urbanization and industrialization served to increase the isolation of faith and work.[206]

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200. *See Santa Clara Co. v. S. Pac. R.R.*, 118 U.S. 394, 394 (1886).

201. *See Citizens United v. FEC*, 558 U.S. 310, 319 (2010).

202. *Compare Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1135 (10th Cir. 2013) (holding that for-profit corporations may bring a First Amendment Religion Clauses claim), *with Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs*., 724 F.3d 377, 381 (3d Cir. 2013) ("[A] for-profit, secular corporation cannot assert a claim under the Free Exercise Clause.").

203. *See* Thomas D. Brierton, *An Unjustified Hostility Toward Religion in the Workplace*, 34 Cath. Law. 289, 297 (1991); Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1392 (2009) (commenting that executives are assumed to check morals and faith at the threshold and operate solely to maximize the wealth of shareholders); Colombo, *Naked Private Square*, *supra* note 3, at 6; Francois Gaudu, *Labor Law and Religion*, 30 COMP. LAB. L. & POL'Y J. 507, 512–13 (2009); Lymon Johnson, *Re-Enchanting the Corporation*, 1 WM & MARY BUS. L. REV. 75, 83 (2010) (citing HELEN J. ALFORD & MICHAEL J. NAUGHTON, MANAGING AS IF FAITH MATTERED: CHRISTIAN SOCIAL PRINCIPLES IN THE MODERN ORGANIZATION 12 (2001)) ("Of course, deep-seated patterns of thought, ingrained business practices, and social norms make it difficult to link the spheres of faith and business, leading to what Alford and Naughton call 'a divided life,' where matters of Spirit and finance occupy wholly separate spheres."); Laura S. Underkuffler, *'Discrimination' on the Basis of Religion: An Examination of Attempted Value Neutrality in Employment*, 30 WM. & MARY L. REV. 581, 588 (1989) (commenting that U.S. courts have assumed that "the implementation of religious policies, practices, or values by the employer is inherently discriminatory").

204. *See, e.g.*, HERBERT APPLEBAUM, THE CONCEPT OF WORK 9 (1992); HAROLD J. BERMAN, LAW AND REVOLUTION 322 (1983); MARC BLOCH, FEUDAL SOCIETY 82–83, 86–87 (L.A. Manyon trans., 1961); EILEEN POWER, MEDIEVAL PEOPLE 3–7, 12, 14–15 (1927); Edward Shorter, *The History of Work in the West: An Overview*, *in* WORK AND COMMUNITY IN THE WEST 1, 9 (Edward Shorter, ed. 1973); JAMES WESTFELL THOMPSON, AN ECONOMIC AND SOCIAL HISTORY OF THE MIDDLE AGES 648 (1928).

205. APPLEBAUM, *supra* note 204, at 584; BERMAN, *supra* note 204, at 57; Colombo, *Naked Private Square*, *supra* note 3, at 9–10; Alain Supiot, *Orare/Laborare*, 30 COMP. LAB. L. & POL'Y 641, 643 (2009).

206. APPLEBAUM, *supra* note 204, at 584.

With workers removed from their ancestral home and the land, work became secularized to the "complete inversion of the everyday sense of religion" that had formerly prevailed.[207] One commentator notes that "in industrialized cultures, the world of work is separated and divorced from the home, family life, religious life, and other diverse activities of citizens."[208] In America, with the increasing diversity of religious sects in the face of high levels of religiously diverse immigrant populations, there grew a consensus on the need for a religiously neutral workplace to avoid divisive topics disrupting business operations.[209] The common position was that "religion and business simply don't mix."[210]

The religiously-neutral workplace received federal legal sanction with the advent of Title VII of the Civil Rights Act in 1964.[211] As is well-known, Title VII protects employees from discrimination on the basis of race, sex, national origin, or religion.[212] Intra-corporate decisions based on religion, then, are forbidden unless the employer is a "religious corporation, association, or society" and the decision pertains to "work connected with carrying by such corporation, association, or society of its religious activities."[213] The scope of this exception was broadened in 1972 to exempt qualifying religious employers from Title VII's discrimination prohibitions with respect to all of its work, whether or not it was part of the corporations' religious activities or not.[214] Consequently, unless the employer meets the strict qualifying standards for classification as a religious employer, there is no scope for the employer to "shape the character of its workforce via religiously selective hiring practices."[215] In conjunction with Title VII's requirements that employers accommodate the religious observances of

207. Colombo, *Naked Private Square*, *supra* note 3, at 10; Supiot, *supra* note 205, at 644, 646.

208. APPLEBAUM, *supra* note 204, at 9.

209. NOAH FELDMAN, DIVIDED BY GOD 11–14 (2005); Colombo, *Naked Private Square*, *supra* note 3, at 11.

210. DAVID W. MILLER, GOD AT WORK 3 (2007).

211. The Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000e–2000e-17 (1964). Some states have passed more aggressive legislation. *See, e.g.*, Roger C. Hartley, *Freedom Not to Listen: A Constitutional Analysis of Compulsory Indoctrination Through Workplace Captive Audience Meetings*, 31 BERKELEY J. EMP. & LAB. L. 65, 115–16 (2010) (discussing legislation passed in New Jersey in 2006 and Oregon in 2009).

212. §§ 2000e–2000e-17.

213. *Id.*

214. *Id.*; *see also Amos v. United States*, 483 U.S. 327, 327 (1986).

215. Colombo, *Naked Private Square*, *supra* note 3, at 14; *see also* Steven H. Aden & Stanley W. Carlson-Thies, *Catch or Release? The Employment Non-Discrimination Act's Exemption For Religious Organizations*, 11 ENGAGE J. 4, 4 n.4 (2010); Jon D. Michaels et al., *Faith in the Courts? The Legal and Political Future of Federally-Funded Faith-Based Initiatives*, 20 YALE L. & POL'Y REV. 183, 218 (2002).

their employees only when no more than a *de minimis* cost is imposed on the employer, the Title VII prohibitions result in a workplace "scrubbed of religious influence."[216] Some states have gone even further, making proselytization in the workplace an intentional tort.[217]

In the face of this government-sanctioned, religiously neutral workplace, America is witnessing the rise of the religiously expressive corporation—a business organization that is driven simultaneously by the desire to make a profit and religious values and concerns.[218] A multitude of factors have contributed to the rise of the religiously expressive corporation, including a general revival of public faith amongst the populous generally and the rise of the evangelical movement specifically.[219] Along with the ever-increasing importance of corporations in the political sphere and, conversely, the unprecedented importance of faith in the electoral process, a showing of faith on the part of a for-profit corporation can be seen to be a savvy business decision as well as a matter of religious devotion. Whatever the driving force behind the renewal of the desire for faith in the workplace might be, religious corporatism is increasing. With this comes more opportunity for clashing between workplace religious faith and the regulatory state.[220]

The confluence of corporatism and religion raises heads on the question of the role of the First Amendment Religion Clauses in corporate America. A large number of for-profit corporations have filed

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216. Colombo, *Naked Private Square*, *supra* note 3, at 14.

217. *See* Hartley, *supra* note 211, at 106; *see also* Julie Marie Baworowsky, Note, *From Public Square to Market Square: Theoretical Foundations of First and Fourteenth Amendment Protection of Corporate Religious Speech*, 83 NOTRE DAME L. REV. 1713, 1720–21 (2008) (commenting that under the Oregon and New Jersey legislation it would be impermissible to post religious images in the workplace).

218. *See* RONALD J. COLOMBO, THE FIRST AMENDMENT AND THE BUSINESS CORPORATION 64 (2014).

219. *See* JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, GOD IS BACK: HOW THE GLOBAL REVIVAL OF FAITH IS CHANGING THE WORLD 12–15 (2009) (Religious and spiritual materials that include new-age, Christian, Jewish, and Muslim publications were the fastest growing segment in adult publishing for 1996 and 1997. Religious radio stations have quadrupled over the past 25 years, while religious television shows increased fourfold in the 1980s).

220. Recent examples of such clashes include: (1) Muslim taxi drivers in Minneapolis refusing to transport passengers with seeing-eye dogs on the basis that Muslims believe dogs are unclean, Michael Conlon, *Minnesota Muslim Taxi Drivers Could Face Crackdown*, REUTERS (Jan. 7, 2007), *available at* http://www.reuters.com/article/idUSN1732288320070117; (2) male Muslim employees refusing to shake hands with women based on the religious mandate against touching women, *EEOC Informal Discussion Letter,* U.S. EQUAL EMP. OPPORTUNITY COMMISSION (Nov. 20, 2009), http://www.eeoc.gov/eeoc/foia/letters/2009/religionhandshakeletter.redacted%20for%20posting.final.html; and (3) a butcher who worked at a Kosher butchery who did not follow an Orthodox Jewish life, *Maruani v. AER Servs., Inc.,* No. 06-176, 2006 WL 2666302, at *2–4 (D. Minn. Sept. 18, 2006).

claims in federal district court claiming that the contraception mandate violates the First Amendment rights of the corporation.[221] The most well-known of these for-profit challenges to the contraception mandate is that of Hobby Lobby Stores, Inc., who, along with the Green family (David, Barbara, Steve, and Mart Green, and Darsee Lett) own and operate the Hobby Lobby, a privately held retail business with headquarters in Oklahoma City.[222]

Hobby Lobby owns and operates over 500 stores nationally, with over 13,000 full-time employees.[223] The Green family also owns and operates plaintiff Mardel, Inc., a bookstore and education company that sells Christian-themed materials.[224] Mardel, Inc., operates around 35 stores and has over 370 employees.[225] Hobby Lobby and the Greens claim that their Christian faith obligates them to operate their business in accordance with their faith; "[c]ommitment to Jesus Christ and to Biblical principles is what gives their business endeavors meaning and purpose."[226] For the Greens, their faith translates into their business in numerous ways, including employing fulltime chaplains to provide spiritual support for their employees; monitoring all of their merchandise, marketing, and operations to ensure they are consistent with their faith (including closing on Sundays, even though this is detrimental to profits); and donating company profits to fund missionaries and ministries around the world.[227] For the Greens, Mandel, and Hobby Lobby, compliance with the Contraception Mandate would mean violating their deeply held religious beliefs. Conversely, non-compliance would result in millions of dollars in fines and penalties.

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221. *See, e.g.*, Complaint at 2, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356).

222. *Id.* at 1.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 2.

227. *Id.* The company website specifies that Hobby Lobby is committed to "honoring the Lord in a manner consistent with Biblical principles." *Our Company*, HOBBY LOBBY, http://www.hobbylobby.com/our_company/our_company.cfm (last visited Sept. 14, 2014). The corporation's statement of purpose reads:

> In order to effectively serve our owners, employees, and customers the Board of Directors is committed to: Honoring the Lord in all we do by operating the company in a manner consistent with Biblical principles. . . . Providing a return on the owners' investment, sharing the Lord's blessings with our employees, and investing in our community. We believe that it is by God's grace and provision that Hobby Lobby has endured. He has been faithful in the past, we trust Him for our future.

Our Company: Statement of Purpose, HOBBY LOBBY, http://www.hobbylobby.com/our_company/purpose.cfm (last visited Sept. 14, 2014).

At the time of writing, many of the plaintiffs that had filed complaints in federal court had moved the court for a preliminary injunction.[228] Of those, some have been granted pending a full hearing on the merits,[229] and some have been denied.[230] What is apparent in all of the opinions issued, either denying or granting the temporary relief, is that the federal courts have no clear picture of how to classify these for-profit plaintiffs. Whether the for-profit plaintiffs are a religious institution for the purposes of the First Amendment Religion Clauses religious institutions category, then, is a difficult and open question to which the federal courts are grappling for guidance. The preliminary framework aims to provide some guidance to the courts.

The framework presents a significant challenge for most for-profit corporations. These challenges cut across all four of the guidelines for identifying a constitutional religious institution.[231] For-profit businesses are, at their core, organized to buy and sell goods or services to strangers meeting in the marketplace to compete with each other on the price or quality of the purchases.[232] Facially, for-profit corporations are rarely recognized as a place where the goal of the organization is the meeting of religious objectives; for-profit corporations do not function as a religious institution, jurisgenerative[233] to the end of facilitation of individual conscience; rarely are for-profit corporations voluntary in the sense of individuals electing to enter the business for religious purposes; and

228. *See HHS Mandate Information Central*, *supra* note 1 (detailing the litigation actions taken by each of the complainants).

229. *See, e.g.*, *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357, 2014 WL 4401187 (8th Cir. Sept. 8, 2014) (injunction granted pending appeal); *Newland v. Sebelius*, 524 Fed. Appx. 706 (10th Cir. 2013), *cert. denied*, 134 S. Ct. 2902 (2014) (preliminary injunction granted); *Korte v. Sebelius*, 528 Fed. Appx. 583, 584 (7th Cir. 2012) (injunction granted pending appeal); *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 294, 400 (E.D. Pa. 2013) (denying request for injunctive relief); *Tyndale House Publishers, Inc. v. Sebelius*, No. 13-5018, 2013 WL 2395168 (D.C. Cir. May 3, 2013) (preliminary injunction granted); *Legatus v. Sebelius*, 901 F. Supp. 2d 980, 984 (E.D. Mich. 2012) (preliminary injunction granted for Weingartz plaintiffs); *Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs.*, No. 12-3459-CV-S-RED, 2012 WL 6951316, at *1 (W.D. Mo. Dec. 20, 2012) (preliminary injunction granted).

230. *See, e.g.*, *Autocam Corp. v. Sebelius*, 730 F.3d 618 (6th Cir. 2013) (denying request for injunction); *Grote Indus., LLC v. Sebelius*, 708 F.3d 850, 853–55 (7th Cir. Jan. 30, 2013) (injunction granted pending appeal); *Hobby Lobby Stores, Inc. v. Sebelius*, 2012 WL 6930302, at *2–3 (10th Cir. Dec. 20, 2012) (denying request for injunctive relief).

231. *See supra* notes 164–92 and accompanying text (outlining the framework against which the for-profit corporation's claim to be a religious institution is being measured).

232. GARY BECKER, THE ECONOMICS OF DISCRIMINATION 14 (2d ed. 1971).

233. Cover, *supra* note 149, at 15.

for-profit corporations do not seek privacy in the way we would expect of a religious institution.

All of these factors can be condensed into two fundamental objections to the recognition of for-profit corporations as a constitutional religious institution: (1) they are governed and motivated primarily by the profit-making function that is at the core of any commercial enterprise and (2) the businesses are arranged around outsiders—customers—whose brevity of entrance and exit into the institution constrains the capacity of the business to foster individual religious belief and generate community norms to facilitate expressions of faith.[234]

Taking the second point first, it is important to recognize that in a competitive market, for-profit businesses are necessarily constrained from encouraging their customers, and to some extent their employees, to engage in faith-based activities when religiously motivated products are not among those products or services that the entity is selling. Given the ease of exit from commercial businesses, at least for the customer, there is little to no incentive for the typical customer to linger and engage in religious discourse, let alone religious worship and norm generating activities. Indeed, in highly efficient and competitive markets, then, the constraints of competition and consumer exit will ensure that businesses will rarely challenge customers to remain within the institution for reasons beyond the core transactional purpose.

Turning to the first point—that for-profit businesses are governed and motivated by profit—it is important to recognize that, as buyers and sellers of goods and services to strangers, commercial enterprises play a crucial role in maintaining the social institution of the market.[235] Attempting to usurp this role with a faith-motivated role has the potential to undermine the institution of the market. Professor Roderick M. Hills argues that while the value of efficient exchange is not challenged by religiously motivated buyers and sellers utilizing the market to propagate their faith-preferences, there is a "by market" that is jeopardized by commercial enterprises "indulg[ing] their external preferences."[236] Writing in the context of freedom of expression, Hills claims that there is a valuable tendency of markets to promote "douceur," roughly translating as something like "polish, urbanity, or polite gentleness."[237] This "douceur" by-market values the lessons of toleration of differences

234. Hills, Jr., *supra* note 124, at 215 (discussing the plausibility of categorizing commercial enterprises as expressive associations).

235. Theda Skocpol, *How Americans Became Civic*, *in* CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY 27, 65–70 (Theda Skocpol & Morris Fiorina eds. 1999); Albert O. Hirschman, *Rival Interpretations of Market Society: Civilizing, Destructive, or Feeble?*, 20 J. ECON LIT. 1463, 1467 (1982).

236. Hills, Jr., *supra* note 124, at 221.

237. *Id.*

in social settings that buying and selling from strangers promotes—i.e., it values social preconditions of market exchanges.

More than any other social setting, then, businesses are a place where people who might otherwise have no contact with members of different religions, races, or economic classes must mingle and cooperate. If for-profit businesses lose focus on the core function of profit-making, then there is a strong possibility that the inherent tendency of markets to produce "douceur" will be diminished. As a matter of structure and purpose, then, for-profit businesses not only fail to meet the faith principle as a descriptive matter, but also as a normative one.

Further, the First Amendment valuing of religious institutions as promoting individual conscience on matters of faith means that a core attribute of the institution seeking First Amendment institutional status must be that the institution generates norms for a definable collective group in order to facilitate individual belief. In other words, to come within the First Amendment's protections, the group must somehow be jurisgenerative, organized around a religious mission with a guiding doctrine and goal to facilitate individual and collective religious belief.

While it seems clear that many of the owners of the for-profit businesses that have filed challenges to the Contraception Mandate have strong faith-based commitments, it is difficult to claim that these businesses have any jurisgenerative role. It may be that the ethos of the business is based on faith principles, but for-profit businesses, because of their internal structures and social role, are ill-suited to the function of a facilitator of collective belief. In other words, for-profit businesses do not meet the faith-principle, not because they are not guided by faithful persons, but because they should not be in the businesses of faith-promotion at all. This sort of institution ought not to be characterized as a constitutional religious institution; their *raison d'être* is profit, not faith.

C. Religious Interest Groups

The third type of religious institution to challenge the Contraception Mandate is the religious interest group. Groups like the Priests for Life, organized specifically to lobby for legislative change in accordance with a religious mission, claim that the Contraception Mandate would require them to violate their religious conscience by providing contraception coverage for their own employees.[238] In addition, these religious interest

238. *See, e.g.*, Dave Bohon, *Pro-Life Group Announces It Will Defy Contraception Mandate*, PRIESTS FOR LIFE, http://www.priestsforlife.org/library/4887-pro-life-group-announces-it-will-defy-contraception-mandate- (last visited Sept. 14, 2014). For a compilation of religious interest groups in the United States, see PAUL J.

groups claim that providing contraception coverage would violate the religious conscience of the donors that fund their operations, as well as force them to act contrary to the very beliefs on which they were founded.[239]

Generally speaking, the term "religious interest group" refers to a membership organization that represents some interest that is based, at least in part, on religion and attempts to influence, or urge the public to influence, politics (i.e., lobby).[240] In other words, a religious interest group is a political interest group specifically established to operate in the political sphere.[241]

While the number of religious interest groups in politics has exploded in recent years, and the prominence of these groups in American politics has likewise grown,[242] interest groups have played a central role in American politics since before the framing of the Constitution.[243] While there are divergent views on the normative value of interest groups,[244] all perspectives accept that interest groups zealously

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WEBER & W. LANDIS JONES, U.S. RELIGIOUS INTEREST GROUPS xi–xiv (1994); *Lobbying for the Faithful,* PEW FORUM ON RELIGION & PUB. LIFE (May 15, 2012) http://www.pewforum.org/2011/11/21/lobbying-for-the-faithful-exec/.

239. *See Two Aspects of Priests for Life*, PRIESTS FOR LIFE, http://www.priestsforlife.org/intro/introbrochure.html (last visited Sept. 14, 2013).

240. DANIEL HOFRENNING, IN WASHINGTON BUT NOT OF IT: THE PROPHETIC POLITICS OF RELIGIOUS LOBBYISTS 21 (1995) (also referred to as parachurches, organized interests, factions, pressure groups, and special interests).

241. *See* Zoë Robinson, *Lobbying in the Shadows: Religious Interest Groups in the Legislative Process*, 64 EMORY L.J. (forthcoming 2015) (describing religious interest groups and discussing their normative voracity in politics).

242. *See Lobbying for the Faithful*, *supra* note 238 (tracing the history of religious interest groups and stating that the number of religious advocacy groups exceeds 212).

243. ANTHONY J. NOWNES, TOTAL LOBBYING: WHAT LOBBYISTS WANT AND HOW THEY TRY TO GET IT 16 (2006).

244. *See, e.g.*, ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 21, 28–29 (1956); ROBERT A. DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY 89, 91–92 (1961); DANIEL A. FARBER & PHILIP P. FRICKEY, LAW & PUBLIC CHOICE: A CRITICAL INTRODUCTION 33–37 (1991); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 285 (1988); William C. Mitchell & Michael C. Munger, *Economic Models of Interest Groups: An Introductory Survey*, 35 AM. J. POL. SCI. 512, 514–15 (1991); Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 48–49 (1985); *see also* LEE EPSTEIN & C.K. ROWLAND, *Introduction*, *in* INTEREST GROUP POLITICS 4–5 (Allan J. Cigler & Burdett A. Loomis eds., 8th ed.) (arguing that government-sponsored interest group pluralism and the stability it provides comes at the expense of genuine flexibility, democratic forms, and, ultimately, legitimacy); CAROLE S. GREENWALD, GROUP POWER: LOBBYING AND PUBLIC POLICY 305 (1977) (claiming that interests are represented unequally and unfairly, with the groups with the greatest resources dominating societal policies); Theodore J. Lowi, *Foreward: New Dimensions in Policy and Politics*, *in* MORAL CONTROVERSIES IN AMERICAN

lobby for whatever policies will best advance the interests of that particular group.[245] Each and every group will act to further their particular group's mission, maximizing their own interests at the expense of others. Under any view, interest groups will seek to maximize their influence on government in order to be able to demand the regulator results that most benefit their interests.

Similarly, religious interest groups are formed to lobby for the best outcomes for the interests they represent. Religious interest groups typically present in two forms, with the distinction being the principal whose interest the religious interest group represents in the political sphere. In its first form, the religious interest group is a representative of a specific religious denomination or church.[246] These religious interest groups are interest groups that are empowered to represent particular religious traditions and/or specific congregations, for example the United State Conference of Catholic Bishops or the American Baptist Church USA.[247] While these denominationally specific interest groups are certainly formal outposts or extensions of various formal church groups, they are by definition separable from them.[248] In its second form, the religious interest group does not exist as a representative of a particular denominational organization or church. Instead, in this second form, the religious interest group represents a collective of individuals whose views derive from and depend on a religious perspective, for example Priests for Life, the National Coalition to Abolish the Death Penalty, or the National Right to Life Committee.[249] Religious interest groups, then, act as an intermediaries between either the leadership group of a specific denomination or a specific church and the state, or as a collection of individuals whose policy goals are based on religious principles.

Priests for Life, one of the challengers to the Contraception Mandate, is a prime example of a religious interest group. Priests for Life was founded in 1991 with the objective of "help[ing] priests around the

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POLITICS: CASES IN SOCIAL REGULATORY POLICY xvi (Raymond Tatalovich & Byron W. Daynes eds., 1998); DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS 519 (2d ed. 1971).

245. Matthew Stephenson & Howell E. Jackson, *Lobbyists as Imperfect Agents: Implications for Public Policy in a Pluralist System*, 47 HARV. J. ON LEGIS. 1, 2 (2010).

246. *See* Robinson, *supra* note 241, at 14–15.

247. *See, e.g.*, *About USCCB,* U.S. CONFERENCE OF CATHOLIC BISHOPS, http://www.usccb.org/about/index.cfm (last visited Sept. 1, 2014); AM. BAPTIST CHURCHES USA, http://www.abc-usa.org (last visited Sept. 1, 2014).

248. *See* ALLEN HERTZKE, THE FUTURE OF RELIGIOUS FREEDOM: GLOBAL CHALLENGES 80–81 (2012); HOFRENNING, *supra* note 240, at 21; ROBERT ZWIER, BORN AGAIN POLITICS: THE NEW CHRISTIAN RIGHT IN AMERICA 99 (1982).

249. NAT'L COALITION TO ABOLISH DEATH PENALTY, http://www.ncadp.org (last visited Sept. 1, 2014); NAT'L RIGHT TO LIFE, http://www.nrlc.org (last visited Sept. 1, 2014).

world spread the Gospel of Life to their people."[250] Relevantly, the Priests for Life specify that its mission is to help clergy "take a more vocal and active role in the pro-life movement, with the predominant emphasis on the issues of abortion and euthanasia."[251] As a religious interest group, then, Priests for Life "exists in order to show the clergy how to fight the culture of death."[252]

The relevant question is, of course: are the Priests for Life and other religious interest groups "religious institutions" under the Religion Clauses? Are the activities of these groups absolutely protected and therefore outside the scope of even the most stringent of lobbying regulations? To answer these questions, we again turn to the guidelines contained in the framework, and these guidelines suggest that the answer is no, religious interest groups are not First Amendment religious institutions.

While it seems that at least the first three factors from the framework could plausibly be claimed to have been met—recognition as a religious institution, functions as a religious institution, and voluntariness[253]—the privacy guideline proves a difficult roadblock for recognizing religious interest groups as constitutional religious institutions.[254]

There are, of course, many reasons why religious groups are politically active. The core reason for most churches and religious individuals is that they feel a responsibility to influence politics with their morals and values, be it to change the status quo, or protect their own interests. In other words, these groups are established in order to engage with the state, not to seek privacy from the state. For example, the head of one prominent religious interest group has said that "the Christian faith and moral teachings have implications for politics. Churches should be active in bringing those values to bear in political life."[255]

For many church groups and related or affiliated advocacy groups, bringing their religious values to the political forum is a (the) way of

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250. Complaint, *Priests for Life*, *supra* note 71, at 12.

251. *Id.*

252. *Id.*

253. *See supra* notes 144–53 and accompanying text (discussing the framework of these three factors).

254. *See supra* note 154 and accompanying text (discussing the framework's privacy factor).

255. Erik J. Ablin, *The Price of Not Rendering to Caesar: Restrictions on Church Participation in Political Campaigns*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 541, 573 (1999); *see also* Dean M. Kelley, *The Rationale for the Involvement of Religion in the Body Politic*, *in* THE ROLE OF RELIGION IN THE MAKING OF PUBLIC POLICY 159, 183 (James E. Wood, Jr. & Derek Davis eds., 1991).

ensuring that society is just, and that members of society are guided "in distinguishing right from wrong, whether practical in, or out of government."[256] A related justification is that religious advocacy groups see themselves as a check on governmental power, an intermediary institution that moderates between government and citizen, providing a moral check against government power as a surrogate for the individual. In this way, religious groups see themselves as a "uniquely qualified moral critic to the policies of government."[257]

This is certainly the case for Priests for Life, whose website notes:

> Elections have consequences, and the consequences for the unborn—and for the battle to protect them—are particularly significant. The options that the pro-life movement has in the legislative, legal, and political arenas, and the probability of success for various initiatives, change as a result of the elections.
>
> Our movement, at the same time, does not look to elected officials to do our work for us. The work of advancing the pro-life agenda remains *our work*. Elected officials either make that work easier or harder. But either way, this is *a movement*. Regardless of the outcome of any local, state, or national election, together we must be proactive—not reactive—and make aggressive plans to ensure that the pro-life cause is moving forward, continually growing in size and effectiveness.[258]

Religious lobbyists, like Priests for Life, tend to be animated by the view that the regulation, legislation, or policy against which they are acting is fundamentally incorrect, and that incremental change through compromise after compromise is unacceptable.[259] Ultimately, then, religious lobbyists seek radical—or fundamental—change in public policy, something that most, if not all, classic lobbyists do not work toward.[260] When religious interest groups agitate for a particular policy outcome, the process becomes winner takes all. As leading political scientist Daniel Hofrenning notes, "[r]eligious lobbyists seek to fundamentally transform the political and social reality of America.

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256. Ablin, *supra* note 255, at 574.

257. *Id.*

258. *Priests for Life Online Pole*, PRIESTS FOR LIFE, http://www.priestsforlife.org/news/poll.aspx (last visited Sept. 1, 2014).

259. HOFRENNING, *supra* note 240, at 52–53.

260. *Id.*

These sweeping goals are rooted in a religious understanding of the achievement of the kingdom of God on earth."[261]

By definition, then, religious interest groups do not seek to protect the state from religious involvement, as the privacy-seeking factor suggests is necessary. Instead, religious interest groups are designed to engage and entangle with the state in order to influence governmental institutions and direct policy outcomes. Religious interest groups cannot be considered constitutional religious institutions, and they fail to attract the categorical First Amendment protections of *Hosanna-Tabor*.

CONCLUSION

With the advent of the Contraception Mandate litigation, we have seen the potential scope of institutions that are claiming to be a constitutional religious institution. This newly recognized right—constitutional religious institutionalism—is immensely powerful, according these institutions absolute constitutional protection to conduct their affairs as they choose. In the context of the Contraception Mandate, the rights holder would be entitled to deny coverage for contraception without any governmental oversight or regulation.[262] That is, the new First Amendment religious institutions category recognizes an absolute right of private ordering for those institutions that validly claim to fall within the auspices of its protection. Yet, this new right does not make all institutions with some religious basis "constitutional religious institutions." However, the Supreme Court has yet to provide any guidance on how to disaggregate those institutions that are constitutional religious institutions and those that are not.

This Article has argued that we need to embrace institutional exceptionalism, and, to that end, has outlined a framework for identifying those institutions that have as their purpose protection of core constitutional values. Applying this framework to the various classes of litigants in the Contraception Mandate challenges, this Article shows that it is possible to identify these special institutions with sufficient (albeit not perfect) specificity. Examining the new religious institutionalism through the lens of the Contraception Mandate demonstrates the critical importance of answering the threshold question of who or what is a constitutional religious institution. Extending the new religious institutionalism to all of the classes of Mandate litigants would result in a constitutional arrangement that is antithetical to the purposes of the Religion Clauses and religious freedom more generally.

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261. *Id.* at 107.

262. *See supra* notes 93–94 and accompanying text (discussing RFRA's impact on the Contraception Mandate).

At times it might seem that all institutions can, in some way, be considered "religious institutions." But they are not, and we should embrace this distinction. Ultimately, everyone benefits by properly protecting those few institutions that truly fulfill a unique and constitutionally recognizable role.