

TIES THAT BIND? THE QUESTIONABLE CONSENT JUSTIFICATION FOR *HOSANNA-TABOR*

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I. INTRODUCTION

Professor Christopher Lund's article, *Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor*,¹ identifies an eminently sensible settlement over the contentious issue of when and to what extent the government can regulate church employment and participation issues that touch on public laws. The settlement includes a zone of protection for church autonomy, grounded in Free Exercise and Establishment Clause principles, that can be overcome only where churches have asked for or waived their rights to refuse state involvement. This bargain carefully balances the interests of churches, as independent rights-bearing entities, against those of the state. But it is problematic in one very important way. It does not justify forcing individuals—who are purportedly bound by church norms as a function of their membership—to forfeit their ability to assert their legal rights simply because a matter is deemed “religious.” Lund's particular line of reasoning focuses on protecting religious organizations from the state but fails to provide a persuasive rationale for denying individuals the protection of the law.

Consent and voluntariness are central to Lund's article. For example, Lund explains that a church's right to autonomy derives from the individual free exercise right, which is itself grounded in consent and voluntariness.² The bedrock principle of First Amendment doctrine is that “[n]o one gets to control another person's religious conduct; no one has the right to force his religion on someone else.”³ This simple rule then helps to explain why churches need not listen to dissenters and may continue to enforce their own rules in the face of contrary internal claims; to allow dissenters to win would be to allow them to control the group members' religious exercise.⁴

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¹ Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor*, 108 Nw. U. L. REV. 1183 (2014) [<http://perma.cc/DJ4T-CZTX>].

² See *id.* at 1197.

³ *Id.*

⁴ *Id.* at 1198.

The lynchpin here is evidently consent. Because no one can force the dissenters to become or remain members of the church, it follows that no one can be forced to worship with anyone who does not share her beliefs.⁵ Moreover, if anyone has the right to exit the church at any time, members can be understood to have submitted to its rules rather than those of civil society—at least when an issue touching on matters of religious doctrine or internal church governance is involved.⁶ Indeed, Lund repeatedly grants “constitutional” status to the concept of consent in supporting autonomy for churches from certain externally imposed requirements, such as employment discrimination laws, in intra-church disputes.⁷ Consent is the crucial element that allows church rules to be binding on their members when they conflict with legal rules, especially in cases sounding in employment discrimination, labor, or tort.⁸ Nonmembers, who have not consented to the church’s authority, are not so bound.

Of course, Lund is not the only one to rely on members’ consent to play by the rules of their church as a basis for granting churches a degree of autonomy from secular regulation. The consent rationale for affording churches autonomy from legal regulation is a venerable one. Indeed, the concept of voluntariness is in many ways central to the American understanding of religion and of the religion clauses of the Constitution. As James Madison proclaimed in his influential *Memorial and Remonstrance Against Religious Assessments*, for example,

“Religion or the duty which we owe to our Creator and the Manner of discharging it, can be directed only by reason and conviction, not by force or violence.” The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.⁹

Madison’s conception of religious exercise is profoundly voluntaristic; individuals must be free to follow their own conscience where it leads them and cannot be forced into any particular system of belief or religious conduct. As it has long been understood, the freedom of religion thus includes not only the right to exercise the religion of one’s choice, but also to change or to leave one’s religion, as well as to exercise no religion at

⁵ See *id.* at 1203.

⁶ *Id.* (discussing the “constitutional right to exit” and the distinction between internal and external matters).

⁷ *Id.* at 1195 (using the term “constitutional” and “constitutionalized” in connection with the consensual nature of church-employee relations).

⁸ *Id.* at 1203.

⁹ See JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS ¶ 1 (1785), reprinted in 2 WRITINGS OF JAMES MADISON, 1783–87, at 183–91 (Gaillard Hunt ed., 1901) (quoting VA. DECLARATION OF RIGHTS art. 16 (June 12, 1776)) [<http://perma.cc/34RY-YD3G>]. For another critique of the consent rationale, see Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 957–62 (2013) [<http://perma.cc/NGG3-GGLA>].

all.¹⁰

However, consent also plays a central role in Lund's argument in a second, more innovative way. Lund argues that churches should, within limits, be free to exercise autonomy with respect to "imposed" legal obligations, such as the prohibition against child abuse or workplace safety rules, but not with respect to "assumed" legal obligations, like those that arise from entering into contractual, property, or corporate transactions.¹¹ The rationale for this distinction is again based on consent. With respect to "assumed (or *voluntary*) legal obligations . . . [t]he parties assume the duties created . . . ; [they] *choose* to enter into contracts, trusts, and corporate arrangements."¹² Because of the voluntary nature of such transactions, churches can decide to order their affairs so as to anticipate, avoid, or even selectively submit for judicial resolution any future disputes that may arise; if they fail to do so, they must be understood to have agreed to civil society's intervention.¹³ By contrast, in the case of imposed legal obligations, churches have no choice in the matter, so they should have greater freedom to order their own affairs, at least where litigation threatens to affect the church's religious beliefs or practices.¹⁴ Law's intrusion is greatest where the church neither consented to its intervention nor had the ability to arrange its own affairs so as to avoid inviting the intrusion.

Consent (or voluntariness) therefore dictates the extent to which civil society can interfere in church affairs. In other words, it can intrude on intra-church disputes only to the extent that the church can be understood to have invited that intrusion through its own voluntary assumption of legal (contractual or property-based) obligations. And indeed, Lund spends much of his article expressing concern that, because of problems of legal intent and of "dead hands," the degree of legal intervention into church affairs will not perfectly reflect the extent to which the church has truly, intentionally, and voluntarily invited that intervention.¹⁵

While Lund's consent rationale is nuanced and thoughtful, it does not adequately take account of the individuals whose interests are also at stake. First, the consent rationale does not appear to recognize that believers' relationships with their religious institutions are not always entirely consensual in nature. Rather, those relationships may be shaped by various kinds of pressure that are informal and subtle, but nonetheless real and substantial. Second, the consent rationale is rooted in a particular Protestant worldview that it is not universally shared by all religions. Third,

¹⁰ See, e.g., Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197 (1992) (discussing the implied right to embrace no religion as a corollary of religious freedom).

¹¹ Lund, *supra* note 1, at 1201, 1220.

¹² *Id.* at 1200 (emphasis added).

¹³ *Id.* at 1220–22.

¹⁴ *Id.* at 1202–03, 1220.

¹⁵ *Id.* at 1220–29.

individuals often have no meaningful way to determine exactly what they are consenting to when they affiliate with a given religion. Finally, it is often difficult to determine just who counts as an insider of a church and who gets to say exactly what that church's doctrine actually is. This means that the consent rationale may justify why religious organizations deserve autonomy from the state but fails to justify why churches can deny their members and employees the protection of the law.

II. THE PROBLEMATIC CONSENT RATIONALE

A. *The Power of Religious Affiliation*

There are several reasons to doubt the force of the consent rationale for refusing to vindicate the rights of individuals who are wronged by their churches. First, although Lund speaks of a constitutional right to exit any congregation, it may not always be the case that church membership is truly consensual: Jews mostly enter Judaism by birth; Catholics mostly become Catholics through infant baptism.¹⁶ Similarly, exit may not always be a meaningful option, even if it is theoretically possible. People's identities are often profoundly tied to their religious affiliations. For example, a Methodist minister who was recently suspended from the church for officiating at the wedding of his son to another man, after being asked whether he considered leaving the church because of its views on homosexuality, put it this way:

It's not as easy as that. . . .

I mean, it's—that would be like, you know, if I were a homosexual and lived in a state that doesn't allow for gay marriage . . . I don't uproot myself and take myself out of my family and my surrounding, my friends and go to another state. I try to stay put. I have roots in the state.

And that's the same with the church. I mean, I've been a part of the Methodist Church for 20 years. I love this church, you know, except for this discriminatory law that we have. I love the church. . . .

You don't just go and uproot yourself and your family out of a faith tradition.¹⁷

¹⁶ Cf., e.g., ROBERT D. PUTNAM & DAVID E. CAMPBELL, *AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US* 136 (2010) (noting that approximately three-quarters of Americans identify with the religious tradition in which they were raised, though not all of those actively practice); PETER W. WILLIAMS, *AMERICA'S RELIGIONS: FROM THEIR ORIGINS TO THE TWENTY-FIRST CENTURY* 59 (2d ed. 2002) (noting that infant baptism is the norm in Roman Catholicism); EGON MAYER, BARRY A. KOSMIN & ARIELA KEYSAR, *AMERICAN JEWISH IDENTITY SURVEY 2001*, at 20 (2d ed. 2003), available at <http://www.simpletoremember.com/vitals/ajisbook.pdf> (indicating that most religious Jews surveyed had at least one Jewish parent) [<http://perma.cc/NK3R-EXUG>].

¹⁷ *Same-Sex Marriage Roils Methodist Church*, *HERE & NOW* (Nov. 21, 2013), <http://hereandnow.wbur.org/2013/11/21/methodist-gay-marriage> [<http://perma.cc/9H4X-5C96>].

Similarly, women working within the Roman Catholic Church to convince the hierarchy to accept the ordination of female priests would not remain Catholic if they did not feel a deep identification with the Catholic faith.¹⁸ They would simply join a congregation that matched their own beliefs more fully.

Or take Stephen Daedalus, the Irish Catholic main character in James Joyce's largely autobiographical novel *A Portrait of the Artist as a Young Man*. Stephen refuses to take communion despite his dying mother's plea that he do so.¹⁹ He has lost his faith, and in particular no longer subscribes to the Catholic dogma of transubstantiation, which holds that the communion wafer is actually the body of Jesus Christ. Stephen's friend Cranly questions this particularly cruel act of obstinacy: "What is it for you? You disbelieve in it. It is a form: nothing else. And you will set her mind at rest."²⁰ In other words, if the communion wafer is no more than a bit of unleavened bread to a nonbeliever, why shouldn't he eat it, just to make his dying mother happy? Yet Stephen continues to resist, because he feels it would be somehow sacrilegious to take communion without believing in it. He is still Catholic, in spite of himself.²¹

In addition, informal—but nonetheless real and anguishing—sanctions may ensue for those who make the decision to leave. For example, women in polygamist communities may not leave the community out of fear that they could lose custody of their children.²² It is not clear how such cases fit in with an understanding of religious membership that turns heavily on consent. Emotional anguish and loss of identity resulting from losing one's religious community are not precisely the same as locking a Catholic priest in an asylum until he confesses his sins;²³ they fit poorly with hypotheticals

¹⁸ For example, the organization of Roman Catholic Womenpriests, which claims the right to ordain women as priests, contrary to the teachings of the church hierarchy, describes itself as an "international movement within the Roman Catholic Church" and insists that, "[d]espite what some bishops may lead the faithful to believe, our ordinations are valid because we are ordained in apostolic succession within the Roman Catholic Church." ROMAN CATHOLIC WOMENPRIESTS, <http://www.romancatholicwomenpriests.org> [<http://perma.cc/5D8E-NLPM>]. The desire of the group members to remain within the church and to be consistent with its doctrines is striking. Professor Madhavi Sunder has documented analogous movements by women in traditional Muslim communities to assert claims to sex equality within and through their religious communities, rather than on purely secular grounds. Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1434–57 (2003) [<http://perma.cc/5BCP-E2S8>].

¹⁹ JAMES JOYCE, *A PORTRAIT OF THE ARTIST AS A YOUNG MAN* 263 (Penguin Books 2003) (1916) [<http://perma.cc/S4PU-6P6X>].

²⁰ *Id.*

²¹ *See id.* at 265. Indeed, Cranly then asks Stephen whether he intends to become a Protestant (since Protestant doctrine does not include transubstantiation). Stephen replies (putting a rather fine point on it): "I said that I had lost the faith . . . but not that I had lost self-respect." *Id.*

²² Frederick Mark Gedicks, *The Recurring Paradox of Groups in the Liberal State*, 2010 UTAH L. REV. 47, 59 [<http://perma.cc/QDL9-H6EZ>].

²³ Lund, *supra* note 1, at 1218 (citing *O'Moore v. Driscoll*, 28 P.2d 438 (Cal. Dist. Ct. App. 1933) [<http://perma.cc/DAZ7-6UGC>]).

involving explicit grants or denials of consent.²⁴ Yet, the voluntariness that supposedly ties individuals to their religious communities may often be illusory.

B. *Distinctly Protestant Roots*

Secondly and relatedly, it is important to recognize that the classic, liberal, voluntaristic conception of religion is itself an outgrowth of a particular Protestant theology and that it is not necessarily a universal approach to spirituality. The bedrock principle of voluntariness grows out of Protestant theology, not just Lockean liberalism.²⁵ The Baptists, for example, were early advocates of both a highly voluntaristic approach to religion and the separation of church and state.²⁶ Indeed, Madison's *Memorial and Remonstrance* itself may be viewed as a controversial and theologically charged document, in part due to its voluntaristic bent.²⁷ Many denominations are far less voluntaristic in their orientations than Protestantism, however.

For example, as Professor Alan Brownstein points out, anti-Catholic sentiment in early America stemmed in part from an association of Catholicism with “religious tyranny”—a top-down approach to faith that required unthinking adherence to church authority and to one official interpretation of the Bible, which made it “inconsistent with core principles of religious liberty.”²⁸ Of course, to characterize the Catholic Church in these terms today would be caricature; nonetheless, those raised in a traditional Catholic family can attest that there is very little that actually seems voluntary about the Catholic tradition.²⁹ Other faith traditions, such as Mormonism and orthodox Judaism, require adherence to detailed codes of conduct, thus de-emphasizing pure religious voluntarism, according to which individuals can choose their faith tradition like they choose their universities or extracurricular activities.³⁰ The picture of religious affiliation as purely consensual, while appealing, is thus far too simple.

²⁴ See *id.* at 1202–03 (citing *Doe v. Moe*, 827 N.E.2d 240 (Mass. App. Ct. 2005) [<http://perma.cc/KEB8-YMRA>]).

²⁵ Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 4 (2000) [<http://perma.cc/895H-C65H>].

²⁶ See, e.g., Mark S. Scarberry, *John Leland and James Madison: Religious Influence on the Ratification of the Constitution and on the Proposal of the Bill of Rights*, 113 PENN ST. L. REV. 733 *passim* (2009) [<http://perma.cc/DX4M-S75F>].

²⁷ Steven D. Smith, *Blooming Confusion: Madison's Mixed Legacy*, 75 IND. L.J. 61, 66 (2000) [<http://perma.cc/7BYC-GHHH>].

²⁸ Alan E. Brownstein, *Protecting the Religious Liberty of Religious Institutions*, J. Contemp. Legal Issues (forthcoming) (manuscript at 16–22), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2220899.

²⁹ Cf. WILLIAMS, *supra* note 16, at 60, 63–66 (noting the nonconsensual and binding nature of certain Catholic doctrines and Catholicism's perception as “overly rigid and spiritually deadening”).

³⁰ *Id.* at 392–95 (discussing the detailed requirements of Mormonism).

C. *Consenting to What?*

There are other reasons to doubt that believers, in choosing to affiliate with particular communities, are consenting to the church's jurisdiction rather than civil jurisdiction in cases of conflict. One is that consent is fairly meaningless if the consenter is not on notice of the actual terms of the agreement.³¹ Like their physical embodiments in the Church of St. John the Divine in New York or the Sagrada Familia in Barcelona, many religious faiths are perpetually under construction. To say simply that becoming a member of a religion means that an individual will accept whatever church authorities say the doctrine will be, no matter how novel, bizarre, or remote from the original doctrine, is an extreme, if not unrecognizable, understanding of implied consent. Of course, some readers may still feel that it would be fine, say, for the Catholic Church to suddenly reject the doctrine of transubstantiation in favor of consubstantiation and to put believers to the choice of either accepting the change or separating from the church. Civil courts would hardly be competent to judge the appropriateness of such a move. But if a church tells an employee that she has waived her right to nondiscrimination on the basis of sex by joining the church—even if the church's official, stated doctrine does not require or permit sex discrimination—the reason for upholding the church's right to do so certainly has nothing to do with consent as that term is commonly understood.³²

Indeed, Lund is concerned that sometimes churches may accidentally waive their rights to autonomy if the legal rules are vague or if churches make contracts with terms that they did not actually intend to be legally enforceable.³³ But he worries much less about the individuals contracting with churches, who themselves may intend that their contract terms *are* legally enforceable or who may not understand the meaning of vague religious terms. The case of Christa Dias, a non-Catholic unmarried teacher at a Catholic school in Cincinnati who was fired when she informed her employer that she was pregnant, illustrates this point.³⁴ Dias had signed an employment contract with the school requiring her to “comply with and act consistently in accordance with the stated philosophy and teaching of the

³¹ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 5, cmt. a (1981) (“The terms of a promise or agreement are those expressed in the language of the parties or implied in fact from other conduct.”).

³² Cf. *Petruska v. Gannon Univ.*, 462 F.3d 294, 300–05 (3d Cir. 2006) (applying the ministerial exception to bar a claim of sex discrimination and retaliation by a woman who had been appointed University Chaplain of a Catholic university and subsequently dismissed because of her gender) [<http://perma.cc/QX94-VZDU>]; *Egan v. Hamline United Methodist Church*, 679 N.W.2d 350, 352 (Minn. Ct. App. 2004) (dismissing, on statutory grounds, suit by church music director for sexual orientation discrimination against a Methodist Church congregation that had an explicit policy against such discrimination) [<http://perma.cc/4X4M-JLPN>].

³³ Lund, *supra* note 1, at 1222–24.

³⁴ *Dias v. Archdiocese of Cincinnati*, 1:11-CV-00251, 2012 WL 1068165, at *1 (S.D. Ohio Mar. 29, 2012).

Roman Catholic Church.”³⁵ Since Catholicism condemns extramarital sex, Dias was fired for becoming pregnant while unmarried.³⁶ Attempting to set the school officials straight, Dias informed them that she had become pregnant through artificial insemination, not sexual intercourse; they then informed her that assisted reproduction also violated Catholic principles—a fact of which she was apparently unaware.³⁷

It seems profoundly unlikely that a non-Catholic teacher hired by a Catholic school would know the details of Catholic doctrine, or understand exactly what she was agreeing to when she signed the vague “morals clause” in her contract. Of course, individuals are generally expected to read and understand the contracts they sign, but there must be some limits to this principle, especially with respect to amorphous and ambiguous terms. And indeed, a jury agreed with this view, awarding her \$171,000 for pregnancy discrimination.³⁸ Nonetheless, the church had tried to claim that the non-Catholic computer instructor was in fact a “minister” of the church and therefore subject to the ministerial exception.³⁹ Thus, in the church’s view, someone who was not even a church member could be considered a minister and therefore an “insider” for purposes of subjecting her to the church’s rules and denying her the protection of the anti-discrimination laws. The notion of consent is complicated here, but Lund’s argument is unclear as to whether he would consider individuals like Dias to be religious and voluntary “insiders” or nonconsenting “outsiders.”⁴⁰

It is thus stretching the idea of consent past the breaking point to treat individuals as consenting to the church’s authority when they did not know that they were foregoing civil enforcement, were not aware of the rules to which they were agreeing, or did not intend to agree to all future rule changes, including the most unforeseeable. Of course, Lund acknowledges that implied consent may not be the most accurate description, suggesting that “this is probably more analogous to assumption of risk.”⁴¹ Still, it is unclear how this observation affects the overall analysis or helps to justify church sovereignty over individuals. Though Lund finds waivers of church

³⁵ *Id.* at *2.

³⁶ *Id.* at *1.

³⁷ *Id.*

³⁸ Lisa Cornwell, *Christa Dias, Ohio Mom, Awarded More Than \$170,000 for Discrimination, Cincinnati Catholic Archdiocese Expected to Appeal*, HUFFINGTON POST (June 4, 2013, 6:54 AM), http://www.huffingtonpost.com/2013/06/04/christa-dias-mom-awarded-_n_3383022.html [<http://perma.cc/EC2G-V7WM>].

³⁹ *Dias*, 2012 WL 1068165, at *3–5.

⁴⁰ Lund provides the example of children in Catholic schools suing over their expulsions and notes that, “although [Catholic schools] educate many non-Catholic students, those students chose a Catholic school.” Lund, *supra* note 1, at 1203–04. Nonetheless, Lund states, “this is a boundary question.” *Id.* at 1204.

⁴¹ *Id.* at 1200. Lund further acknowledges, “[I]t is true that implied consent is not consent, nor even a proxy for consent. Implied consent is a fiction used to operationalize the constitutional right of churches to have control over their own decisions.” *Id.*

autonomy to be problematic when such factors are present, he does not worry about individuals' waivers of their civil rights.⁴²

Take Lund's example of *Pleasant Glade*.⁴³ In that case, a seventeen-year-old girl was twice held down by force and restrained for hours during religious youth group programs while she begged and pleaded to be freed, resulting in psychological trauma.⁴⁴ The Texas Supreme Court held that the First Amendment prohibited the trial court from deciding issues pertaining to emotional damages arising from the church's practice, insofar as they would require the court to pass judgment on matters of internal church doctrine.⁴⁵ In its reasoning, the court explicitly relied on the presence of consent, stating that "religious practices that might offend the rights or sensibilities of a non-believer outside the church are entitled to greater latitude when applied to an adherent within the church."⁴⁶ The court then proceeded to cite cases supporting the notion that consent grounds the immunity of churches from civil suits in some circumstances.⁴⁷

But at no point did the plaintiff's young age enter into the Texas Supreme Court's analysis. Commentators, including Lund, also tend to gloss over this fact.⁴⁸ If anyone's consent is relevant with respect to a minor child, it is the parents'. The parents may have consented in some generalized way to their daughter's church membership and participation in the youth group event, but they did not know what exactly was taking place.⁴⁹ Moreover, her father had specifically expressed concern to church officials when he learned what had taken place and the impact it had had on his daughter.⁵⁰ If this incident of battery, assault, false imprisonment, and

⁴² For example, Lund argues that even where assumed obligations are involved, churches' ability to waive their sovereignty should be extremely limited and narrowly construed. He would essentially adopt a strong presumption in favor of nonintervention even in contract and property disputes, requiring an "explicit mention of judicial resolution" in the relevant documents before courts could adjudicate them. *Id.* at 1227.

⁴³ *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1 (Tex. 2008) [<http://perma.cc/M5R9-58PE>].

⁴⁴ *Id.* at 3–4.

⁴⁵ *Id.* at 13.

⁴⁶ *Id.* at 12.

⁴⁷ *Id.* (citing *Smith v. Calvary Christian Church*, 614 N.W.2d 590, 593 (Mich. 2000) [<http://perma.cc/3V4U-4YUC>]; *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766, 774 (Okla. 1989) [<http://perma.cc/J7KU-5KRY>]).

⁴⁸ Lund, *supra* note 1, at 1217–1219; see, e.g., Cynthia Koploy, Note, *Free Exorcise Clause? Whether Exorcism Can Survive the Supreme Court's "Smith Neutrality,"* 104 NW. U. L. REV. 363, 382–84 (2010) [<http://perma.cc/JVE7-9T4Y>]. But see Jeffrey Shulman, *Who Owns the Soul of the Child?: An Essay on Religious Parenting Rights and the Enfranchisement of the Child*, 6 CHARLESTON L. REV. 385, 440–44 (2012) [<http://perma.cc/7QB6-6CEG>]; Shari-Ann Harris, Note, "Lay a Hand on Me, Brother": *Why Definitional Balancing and Consent Doctrine Should Apply to the Religious False Imprisonment and Assault Claims in Pleasant Glade Assembly of God v. Schubert*, 11 RUTGERS J. L. & RELIGION 406, 427–28 (2010) [<http://perma.cc/LX2S-WV7K>].

⁴⁹ They were out of town during most of the events. *Pleasant Glade*, 264 S.W.3d at 3–4.

⁵⁰ *Id.* at 4.

intentional infliction of emotional distress can be justified by some form of voluntariness or consent by virtue of the fact that the victim was identified as a member of a particular church, then the term has simply been emptied of all its meaning.⁵¹

III. INSIDERS, OUTSIDERS, AND RELIGIOUS EVOLUTION

Finally, while it is easy enough to describe conflicts as playing out between “the church” and “dissenters,” it is not always so easy to say exactly who is which. Religious teachings and even religious identity itself are perpetually being disputed, reconsidered, and modified.⁵² With the exception of the Ten Commandments, most religious doctrines are not etched in stone. Indeed, it is probably the sign of a healthy, thriving church that such change can and does occur. If we as a society are interested in protecting and encouraging religious communities to flourish, it very well may be that allowing individuals to stay in their religious communities and work for change within those communities, or to stay despite dissenting on some issues, serves values that are just as important as allowing churches to refuse to associate with them. After all, what it means to be Roman Catholic (or Lutheran, or Wiccan) is itself often profoundly contested; we should not be too quick to assume that Catholicism or Lutheranism or Wiccanism is simply whatever “the church,” as some sort of monolith, says it is.

Although the dynamic nature of religious institutions does not directly undermine the consent rationale, it does question it. The consent paradigm assumes that there is a static structure, set of beliefs, or code of conduct to which an outsider agrees upon becoming a member of a church. However, if the religious institution is not simply offering a pre-designed package for consumption, but rather inviting participation in a community, then it is much less accurate to view church members as automatically agreeing, upon entry, to submit to the will of a supposedly dominant group.

Examples abound. As discussed above, women have been excommunicated from the Roman Catholic Church for ordaining women priests. Yet a recent *New York Times/CBS News* poll indicates that roughly seventy percent of Catholics believe the church should allow women to become priests.⁵³ This is not to say that churches should be required to follow the will of a majority of their constituents, or that the courts should

⁵¹ Lund agrees with me that the claims in *Pleasant Glade* should have gone to a jury, but only because it appears that Schubert herself may not have consented to the purported exorcism. Lund, *supra* note 1, at 1218. If she did consent, he maintains, then the claims should fail because she could “leave the church at any time.” *Id.*

⁵² See Sunder, *supra* note 18, at 1402–03 (“[C]ontrary to law’s centuries-old conception, religious communities are internally contested, heterogeneous, and constantly evolving over time through internal debate and interaction with outsiders.”).

⁵³ Laurie Goodstein & Megan Thee-Brenan, *U.S. Catholics in Poll See a Church Out of Touch*, N.Y. TIMES (Mar. 5, 2013), <http://www.nytimes.com/2013/03/06/us/poll-shows-disconnect-between-us-catholics-and-church.html> [<http://perma.cc/FD6F-SRV9>].

intervene in core religious disputes such as this one. But the example does point out that characterizing such intra-church disputes as involving “dissenters” trying to vindicate their rights against “the church” is likely an oversimplification.

Another example is *Egan v. Hamline United Methodist Church*, in which a Methodist music director was hired by a church that had recently voted to be accepting of homosexuality and bisexuality and had an explicit policy forbidding sexual orientation discrimination.⁵⁴ Egan was fired after he complained about a supervisor who had expressed homophobic views toward him.⁵⁵ The Minnesota Court of Appeals held that Egan’s claim could not go forward because the church was statutorily exempt from the state’s anti-discrimination laws and had not waived that exemption by adopting an explicit nondiscrimination policy based on sexual orientation.⁵⁶ The court noted that its reading was grounded in the “constitutional policy” of avoiding judicial involvement in matters of church governance.⁵⁷ Though there may have been good reasons for the court to decline to hear Egan’s claim for discrimination, it is obviously far too simple to characterize the dispute as one involving a dissenter against church authorities, since the plaintiff’s position actually reflected the church’s official view.

Finally, courts and commentators often allude to church organization but rarely spend much time analyzing its importance in identifying dissenters. Some churches are congregational and some are hierarchical in structure. Perhaps the particular church structure should also affect how we think about cases involving the power of dissenting groups within a church. For example, supposed “dissenters” within congregational churches might have stronger claims than those in hierarchical churches, since members of hierarchical churches have presumably agreed from the outset to a lower degree of participation in shaping their institutions. But the consent-based approach seems to assume that, when an intra-church dispute arises, the “church” as an undivided whole generally stands in opposition to its individual followers, whether the religious organization is congregational or hierarchical in nature.

IV. CONCLUSION

The approach embodied in Lund’s persuasive and powerful article certainly has much to recommend it. It brings a large measure of analytic clarity to an area of First Amendment doctrine that sorely needs it. In addition, Lund has likely identified precisely which assumptions unconsciously motivate the courts in deciding to hear, or not to hear, intra-

⁵⁴ *Egan v. Hamline United Methodist Church*, 679 N.W.2d 350, 352 (Minn. Ct. App. 2004).

⁵⁵ *Id.*

⁵⁶ *Id.* at 356–59.

⁵⁷ *Id.* at 358.

church disputes. I argue here that, however accurate and insightful this approach may be as a descriptive matter, it is profoundly flawed as a normative matter to the extent that it relies on consent as the justification for requiring individuals to forego the protection of civil laws in all matters related to religious employment or participation. Of course, it may be the case that some measure of fairness and equality must be sacrificed in order for liberty to thrive. It is possible that the survival of religious associations requires a reduced level of participation by their members in civil society. And it may well be that this tradeoff is worth it in the end. But that is a case that must be made, if it is to be made at all, on grounds other than consent.