## 1AC

### 1AC---Doctrinal Stability ADV

#### Advantage 2 is DOCTRINAL STABILITY.

#### CBR-related religious exemption fights are imminent AND impactful.

A.J. Schumann 25, MA, Fellow, Americans United for Separation of Church & State, "When Religious Employers Get a Pass, Workers Pay the Price," OtherWords, 05/28/2025, https://otherwords.org/when-religious-employers-get-a-pass-workers-pay-the-price/.

Five years ago, the National Labor Relations board established a broad standard for religious exemptions to the 1935 National Labor Relations Act, which grants employees the right to unionize. Following this, Saint Xavier University in Chicago and Florida’s Saint Leo University dissolved faculty unions that had weathered over 40 years of collective bargaining. Marquette University in Milwaukee is currently relying on the same exception to block their faculty from unionizing.

These legal maneuvers distort the true meaning of religious freedom. The First Amendment was meant to shield houses of worship from state interference, not to provide religious organizations with a sword to cut down the rights of others whenever it suits their interests.

If left unchallenged, this string of rulings will create a two-tiered system of worker protections: one set of rights for people working for secular employers, and another — far weaker — set of rights for those working in religious settings.

The consequences are far-reaching. Religious organizations employ an estimated 1.2 million people nationwide. Nearly 20 percent of hospital beds in the U.S. are in religiously affiliated facilities. Catholic schools alone employ tens of thousands of teachers and staff members.

If these employers are allowed to claim broad exceptions to labor laws, millions of workers could find themselves without protections. And if secular employers are allowed to claim religious motivation and take advantage of religious exemptions, the number of workers denied civil rights protections could increase exponentially.

#### The existing legal framework ensures opacity, incredible bargaining rights, AND expansion of ad-hoc exemptions.

Charlotte Garden 16, JD, Associate Professor, Law, Seattle University, "Religious Employers and Labor Law: Bargaining in Good Faith?" Boston University Law Review, Vol. 96, No. 109, January 2016, Nexis Uni.

As just described, there exists a patchwork of potentially applicable exemptions from the NLRA. Some non-profit, religiously affiliated [\*127] employers - certainly parochial schools, maybe religiously affiliated universities, and doubtfully other religiously affiliated nonprofits - can continue to claim exemption from the Act under Catholic Bishop, though continued litigation about what that case means is a near certainty. And then there is RFRA, which covers nearly all employers, including non-profit and closely held for-profit employers 111 that are not eligible for an exemption under Catholic Bishop. 112 \*\*\*FOOTNOTE BEGINS\*\*\* Tucker, supra note 111 (arguing that Hobby Lobby's reasoning "is broadly stated with no distinction and will prove to be powerful arrows in the quiver of future litigants wanting to extend the scope of the holding to other entities"). \*\*\*FOOTNOTE ENDS\*\*\* Finally, where statutory exemptions fail, it is possible that employers could make freestanding First Amendment arguments. These are outside the scope of this article, but could include ministerial exemption claims as to qualifying employees as well as possible church autonomy claims, and conceivably even Free Exercise Clause claims, were a Court to determine that the NLRA was not neutral and generally applicable.

This state of affairs is both normatively and doctrinally undesirable. First, it leaves a tremendous amount of uncertainty for religiously affiliated employers and their employees; the passage of thirty-five years has failed to resolve the proper application of Catholic Bishop, and Hobby Lobby adds to the mix a host of unresolved questions about RFRA. Thus, when employers arguably qualify for an exemption, unions, employers, and employees may fight a contentious battle over whether employees should vote in favor of union representation at all, only to have a cloud of uncertainty hover over their ultimate decision for the years that it can take to conclusively resolve the threshold question of NLRA applicability. 113 Even if the NLRA is ultimately deemed to apply, [\*128] employees' initial support for union representation may have eroded over time - possibly to the point of non-existence - by the time the decision is final. Conversely, where an employer is found to be exempt from the NLRA (either in general or with respect to a particular set of employees), the initial union drive and its attendant collateral damage will have been unnecessary. 114

Second, this uncertainty is compounded by the fact that some applications of Catholic Bishop are inconsistent with principles espoused by Justice Kennedy, a potential swing vote in any case concerning religious exemptions from labor law. The Court - and in particular Justice Kennedy - has expressed significant distaste for statutory schemes that dispense civil liberties protections based on corporate form. This distaste is most well known in the First Amendment context. 115 However, Justice Kennedy's Hobby Lobby concurrence expressed [\*129] much the same sentiment, criticizing the Department of Health and Human Services ("HHS") for "distinguishing between different religious believers - burdening one while accommodating the other … ." 116 That some of these believers adopted the corporate form for the purpose of making profits while others did not was irrelevant to Justice Kennedy, just as it has been in the speech context.

It is not surprising, then, that Catholic Bishop has been criticized from all sides. 117 \*\*\*FOOTNOTE BEGINS\*\*\* See, e.g., Mark Rienzi, God and the Profits: Is There Religious Liberty for Money-Makers?, 21 Geo. Mason L. Rev. 59, 99 n.262 (2013) (noting that, while courts exclude for-profit employers from exemptions under Catholic Bishop, there are few religious schools that operate on a for-profit basis). \*\*\*FOOTNOTE ENDS\*\*\* At the same time, while Catholic Bishop's reading of the NLRA is weak in the context of nonprofit, religiously affiliated employers, it is utterly unsupportable in the context of closely held, for-profit employers. The NLRA has applied to innumerable such employers since its enactment in 1935, with no plausible suggestion that the religious commitments of their owners bore any relationship to NLRB jurisdiction. This incongruity simply illustrates the problematic nature of Catholic Bishop; there is no principled stopping place because the case lacks a sturdy foundation.

Yet, the Court has not revisited Catholic Bishop during the intervening decades, and there is no indication that it will do so soon. Moreover, the tension between the Catholic Bishop rule and the Court's rule against discrimination based on corporate form is not so severe as to permit the conclusion that the Court has sub silentio eviscerated Catholic Bishop. The question, then, is whether interested parties must wait for the Court to reverse Catholic Bishop, or whether there is another way forward.

#### It evicerates religious freedom (or RF) by undermining pluralism, inviting backlash, AND diluting otherwise legitimate protections. RFRA (or Religious Freedom Restoration Act) balancing is key.

Angela C. Carmella 15, JD, Professor, Law, Seton Hall Law School, "After Hobby Lobby: The Religious For-Profit and the Limits of the Autonomy Doctrine," Missouri Law Review, Vol. 80, No. 2, pg. 381-450, Spring 2015, HeinOnline. [italics in original; OCR error edited by Jordan]

It is critical that *Hobby Lobby* not be read broadly as a grant of autonomy protection to for-profit corporations. Surely it is a path-breaking decision, but it need not be a dam-breaking one. To constrain *Hobby Lobby*, it should be quite enough that the case was argued and decided under RFRA – a statute that embodies the balancing approach.7 6 Going forward, the case should be interpreted to mean that for-profit free exercise claims should be adjudicated (if they are adjudicated at all) within a balancing framework, with full attention to impacts on identifiable individuals and groups. 77 In fact, the Court's recent decision in *Holt v. Hobbs* unanimously reinforced the notion that RFRA requires a balancing and an impacts inquiry.78 In that case, which interpreted a RFRA-like "sister statute, ' 79 the Court pointed to both *O Centro* and *Hobby Lobby* to demonstrate its consistent understanding that statutory balancing requires it to "scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants .... ,,80 To depart from this highly structured approach and adopt "autonomy" in its place would introduce a disastrous expansion of a doctrine that is meant to be limited in scope and application.

II. THE APPLICABILITY OF THE AUTONOMY DOCTRINE TO CHURCHES AND RELIGIOUS NONPROFITS

One of the most significant functions of the Religion Clauses of the First Amendment is to ensure the autonomy of religious institutions - that is, the ability of churches to "manag[e] their own institutions free of government interference." 81 Autonomy under the Free Exercise Clause protects decisions regarding the religious identity and mission of those institutions we would consider to be jurisgenerative. 82 Freedom for such institutions to define and constitute themselves in order to generate and reinforce norms, in turn, furthers the religious exercise of individuals because it protects their voluntary decisions to affiliate with (or exit) religious communities. Obviously this autonomy is not without limits, but it is capacious enough to provide churches with the freedom to "select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions." 83 The Establishment Clause, which first and foremost expresses a fundamental jurisdictional independence of church and state, also bolsters this notion of autonomy: the state is not competent to "set up a church' 84 - to be involved in clergy selection, doctrinal determinations and ecclesiastical decisions. As a consequence, churches are free to function as significant non-state mediating institutions in civil society. The recognition of church autonomy thus furthers individual and collective free exercise, a healthy institutional independence of church and state, and a more diverse and vibrant civil society.

The importance of autonomy reveals itself wherever the core religious identity of a church might be vulnerable to state interference. Its origins can be traced to a Supreme Court decision made shortly after the Civil War that recognized that civil courts were incompetent to adjudicate religious questions, and so must defer to religious tribunals on matters of religious law; church members had impliedly consented to such internal church processes.85 Indeed, in a case in which a state court set aside a church's decision to defrock a bishop and ordered the church to reinstate him, the Supreme Court found this "an impermissible rejection of the decisions of the highest ecclesiastical tribunal of this hierarchical church," even though the church's conduct had been appallingly arbitrary. 86 While a complex body of "church autono my" jurisprudence has evolved over time to address church schisms and property disputes, the broader autonomy concept allows churches the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." 87 The doctrine ensures that state and federal governments steer clear of church beliefs; decisions regarding structure, governance, and mission; issues of church membership and leadership; many aspects of the church employer-employee relationship; and church decisions regarding sponsorship or affiliations with other institutions, charitable and educational, formal and informal. 88 Even the constitutionality of tax exemptions for churches is grounded in the notion that an exemption preserves the jurisdictional independence of church and state, as taxation of churches poses a far greater risk of excessive state entanglement in the life of churches than does the exemption.8 9

In the context of these protections for churches, and often for religious nonprofits as well, we find exemptions that have real, and often negative, impacts on identifiable individuals - employees, religious leaders, and members - whose participation in the life of the church may be conditioned upon "conforming to certain religious tenets., 90 In connection with this freedom in the employment context, Justice Brennan provided reasons for why this must be acceptable:

The [church's] authority to engage in this process of self-definition inevitably involves what we normally regard as infringement on [an individual's] free exercise rights, since a religious organization is able to condition employment in certain activities on subscription to particular religious tenets. We are willing to countenance the imposition of such a condition because we deem it vital that, if certain activities constitute part of a religious community's practice, then a religious organization should be able to require that only members of its community perform those activities. 91

In certain circumstances, the autonomy concept has also allowed religious institutions to tailor the provision of social, educational and health services to the public in ways that comport with their beliefs. While the application of autonomy considerations tends to be more nuanced and less consistent - and more contested - in this context (given the greater engagement with those outside the faith community), autonomy continues to ground many such accommodations. Whatever the context, autonomy-based exemptions will result in impacts on identifiable person and groups who will be without recourse to complain and who may suffer harms that are without legal redress.92

*A. Clergy and Other Employees*

The Supreme Court unanimously and enthusiastically reaffirmed the autonomy doctrine as applied to the selection of ministers, broadly defined, in the recent case of *Hosanna-Tabor Evangelical Lutheran Church* and *School v. Equal Employment Opportunity Commission*, where the Court recognized a robust "ministerial exception" to anti-discrimination laws.93 That doctrine prohibits government interference in the selection of its ministers, which is "an internal church decision that affects the faith and mission of the church itself",94 Cheryl Perich, a teacher at a church-sponsored elementary school, had been fired from a position that required a "call" from the church.95 Perich sued the church for reinstatement and damages on the grounds that the church had fired her in retaliation for threatening to bring suit under the Americans with Disabilities Act.9 6 The government urged the Court to reject the concept of the ministerial exception, which, up until this case, had been developed in the federal courts of appeals.97 In its place, the government argued that the generalized concept of "freedom of association" would sufficiently protect churches from government intervention in religious affairs.98

The Court found that Perich's duties - as they were regarded and functioned in the life of the church - made her a "minister" within the meaning of the exception. 99 The Court also rejected the government's argument, declaring that it "cannot accept the remarkable view that the Religion Clauses have nothing to say about the religious organization's freedom to select its own ministers."' 00 The Court explained that Perich's action "intrudes upon more than a mere employment decision":

Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions. 101

In short, allowing the teacher to seek legal recourse would constitute government interference in "faith and mission." 10 2 Thus, the *Hosanna-Tabor* Court concluded that "[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers."' 0 3

For clergy and any employees who are considered "ministers," 10 4 there is a startling lack of legal protection from virtually any kind of employment discrimination. 1 0 5 A church could engage in actual discrimination, having nothing to do with its exercise of religion, but the employee who is harmed would have no recourse. Indeed, ministerial exception cases usually involve allegations of discrimination based on race, 1 0 6 sex, 1 0 7 pregnancy, 1 0 8 age, 1 0 sexual orientation' 10 and disability.I"' We also see this story repeated outside the church context, as courts have applied the ministerial exception to religiously affiliated nonprofits like universities, I 1 2 hospitals"' and nursing homes114 on the theory that "an entity can provide secular services and still have substantial religious character."115 Yet dismissing these claims without further examination is required by both Religion Clauses." l6 For over forty years, courts have reaffirmed that the harmful effects of unredressed discrimination are simply outweighed by the necessary institutional freedom for a church or nonprofit to define its identity, faith and mission. 117 If we are to have vibrant religious communities and robust individual free exercise, religious institutions must have the ability to define and constitute, to perpetuate and reform, themselves. And so it is with many other exemptions that are either explicitly or implicitly driven by autonomy protections: their negative impacts on identifiable persons and groups are ignored.

Even employees who are not considered "ministers" can find themselves without legal recourse in cases of *religious* discrimination. Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination, and the Americans with Disabilities Act ("ADA"), which prohibits disability discrimination in a variety of contexts, including employment, both contain autonomy-based exemptions for religious entities." 8 Title VII's exemption allows "religious organizations" to discriminate on the basis of religion in favor of their own members or in favor of a particular faith, regardless of the religious or secular nature of the employment. 119 The exemption protects eligible religious organizations from all employment-related challenges, whether the claims involve hiring, discharge, harassment or retaliation. 20 In addition to churches, many religious nonprofits qualify for the exemption; 12' they do not have to be sponsored by or affiliated with a particular church.122 Moreover, the qualifying "religious organization," even if church-sponsored, does not have to require church membership in order to make employment decisions on religious grounds.123 Indeed, some courts have defined the exemption broadly so that it applies to cases in which employees have failed to comport their personal behavior to the religious employer's rules of conduct and moral standards.12 4

The main decision regarding Title VII's exemption is *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*. 125 In that case, employees working at church-affiliated facilities - including a janitor and a seamstress - were fired because they were no longer members in good standing of the Mormon Church.126 They challenged the Title VII religious exemption as a violation of the Establishment Clause on the grounds that their jobs were secular and that churches should be subject to anti-discrimination laws with respect to such secular positions. 27 The Court rejected the argument. 28 Justice White justified the broad exemption on autonomy grounds: it "alleviate[d] significant governmental interference with the ability of religious organizations to define and carry out their religious missions. ' 29 Justice Brennan's concurrence noted that government decisions regarding the religious-secular distinction would involve case-by-case inquires resulting in "excessive government entanglement ... and [would] create the danger of chilling religious activity."' 130 He went on to justify the exemption in terms of religious autonomy:

For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. *Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself*. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.13 '

Employees of church-affiliated entities may also find themselves without labor law protection, in particular without the protection of collective bargaining and the ability to unionize. In *National Labor Relations Board v. Catholic Bishop of Chicago*, the Court read the National Labor Relations Act to not authorize board jurisdiction over lay faculty at church schools in order to avoid the constitutional issues.' 32 The Seventh Circuit had concluded on the merits that National Labor Relations Board ("NLRB") jurisdiction "would impinge upon the freedom of church authorities to shape and direct teaching in accord with the requirements of their religion" and to control the "religious mission of the schools" in violation of the Free Exercise and Establishment Clauses.' 33 In contrast, the Supreme Court avoided reaching the merits, noting that "[i]t is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions."', 34 The decision was driven in particular by autonomy concerns over government entanglement in the relationship between the church and teachers in its schools.' 35

Further, in the context of higher education, courts have denied NLRB's jurisdiction, making it impossible for faculty to unionize at religiously-affiliated colleges and universities.136 \*\*\*FOOTNOTE BEGINS\*\*\* *See, e.g.*, Univ. of Great Falls v. NLRB, 278 F.3d 1335 (D.C. Cir. 2002). NLRB currently asks whether a religiously affiliated university has a "substantial religious character" in order to determine if it has jurisdiction for purposes of collective bargaining. *See id* at 1337. Because of concerns that such an inquiry could lead to entanglement and possible denominational preferences, the court has mandated a blanket exemption for all religiously-affiliated universities, without further inquiry, so long as they are nonprofit and hold themselves out to be religious institutions. *See id.* at 1341, 1347 (reasoning that in trying to determine whether a university had a "substantial religious character," the NLRB "engaged in the sort of intrusive inquiry that *Catholic Bishop* sought to avoid"); *see also* Pac. Lutheran Univ. & Serv. Emps. Int'l Union, 361 N.L.R.B. No. 157 (2014), 2014 WL 7330993 (Member Johnson, dissenting) (detailing cases). \*\*\*FOOTNOTE ENDS\*\*\*

*B. Members and Dissenters*

In addition to choices regarding clergy and employees, decisions regarding membership are central to a church as it defines and constitutes itself. It should therefore come as no surprise that autonomy considerations justify impacts on persons in the context of church membership. Of course churches usually "open their doors to all."' 137 Regardless of a church's openness or exclusivity, however, no court will tell a church that it must accept or reinstate a particular person as a member, or tell a church that it must reconsider a decision to exclude or change the status of a member. And yet the harm suffered by those without recourse is unmistakable. A particularly heart-rending case is *Anderson v. Watchtower Bible and Tract Society of New York*, in which a married couple who had been active in the Jehovah's Witness community for decades was expelled, or "disfellowshipped," because the wife was found guilty of causing unrest and division within the church when she publicly criticized the way the church was handling sex abuse claims."' As a result of the expulsion, the couple was "shunned" by other church members (including family). Their suit for $20 million in damages on multiple tort claims - including defamation, false light invasion of privacy, interference with business, breach of fiduciary duty, fraud, intentional infliction of emotion distress, and wrongful disfellowshipping - was dismissed in its entirety on church autonomy grounds. 139 As members, the plaintiffs had implicitly consented to the church's rules and governance structure. 140 "[T]he freedom of religious bodies to determine their own membership is such a fundamentally ecclesiastical matter that courts are prohibited from adjudicating disputes over membership or expulsion.' 4 1 Courts cannot review the correctness or fairness of such decisions; and the impacts from shunning, including real economic impacts resulting from loss of business from customers known through church membership, are not cognizable because the practice of shunning is "integrally tied to the decision to expel a member. ,,42 These claims simply could not be "adjudicated without inquiry into the religious doctrine and practice of the Jehovah's Witnesses and without resolution of underlying religious controversies."' 143

In addition to expulsion claims, numerous tort claims brought by members against churches have been similarly dismissed on autonomy grounds. 14 4 These are, in the author's view, unjustified under autonomy considerations, yet the hands-off approach persists.145 Attempts to create a standard of care for clergy counseling and mental health services, for instance, have been met with resistance: no state recognizes "clergy malpractice."1 46 Indeed, for a very long time, autonomy considerations obstructed negligence claims against churches in the clergy sex abuse litigation. 147 Although this has eroded in the context of massive scandals involved in moving pedophile priests from church to church, some tort claims continue to be dismissed despite egregious conduct by church defendants. 148

Some of the most emotionally-charged situations involve members challenging theological or financial decisions made by the church, which are gen erally not justiciable. 149 As noted above, there exists a long line of cases involving church schisms, where dissenting factions claim to be the "true" church and claim rightful ownership of church property. Dissenters in these cases will be turned away because even if they could "prove" that they were right on theological grounds, civil courts are not competent to adjudicate such questions.150 Beyond these classic dissenters from church doctrine, church members or parents of children who attend a religiously affiliated school sometimes challenge the legality of a church's decision to close its sanctuary or school. While the impassioned criticism and bad publicity occasionally pressure a church into changing its decision, there is little that can be done through litigation.152

Likewise, new rights to marry recognized in the civil sphere do not authorize courts to order a church to perform a religious ceremony for a samesex couple.' 53 Under both Religion Clauses, government is powerless to compel a church or clergy person to perform a religious ceremony or confer a religious privilege.' 54 This would strike at the heart of a church's autonomy. State statutes that recognize marriage equality typically include a section providing that no church or clergy person could ever be required to celebrate, solemnize or recognize such a marriage. 155 These provisions are politically necessary and have the value of clarity,156 but in reality they are redundant. While the couple might be able to sue a wedding photographer who refuses their business, 157 they cannot sue a church that refuses to marry them, regardless of the dignitary harm.

*C. Patients of Religious Health Care Facilities*

Religiously affiliated hospitals, like secular nonprofit and for-profit hospitals, hire professionals, serve the public, receive government monies, and are heavily regulated to ensure safety. It is not surprising, then, that as "commercial" nonprofits competing in the same market with nonreligious hospitals and treating patients without regard to religious affiliation, religious hospitals enjoy only very narrow autonomy protection: they may refuse to perform abortions and sterilizations in accordance with their institutional faith and mission. 158 These provisions are part of a larger set of conscience laws enacted to protect anyone - individual or institution - from being coerced into participating in these procedures or being penalized for refusing to do so. 159 Federal law, passed in 1973 in response to *Roe v. Wade*, and numerous state-level conscience clauses, give hospitals the right to refuse to perform abortions and sterilizations; 16 more recent legislation in some states has extended these protections to those refusing to provide contraceptive drugs and devices. 161 Laws regulating physician-assisted suicide, where in place, also exempt individual and institutional objectors from participation.162

These conscience laws protect the autonomy of churches, like the Catholic Church, that have defined and constituted themselves over the centuries not only as a worshipping community but also as multiple outreach ministries - including health care services - that give concrete expression to faith and mission.' 63 With one-sixth of all hospital patients cared for at Catholic hospitals, the Church's commitment to health care is substantial.' 64 Obviously a woman cannot obtain an abortion, sterilization or contraception in Catholic hospitals.' 65 Other facilities might provide these services, although in some communities there may be few or no alternatives. 166

*D. Contested Application of the Autonomy Doctrine*

The previous sections have described the autonomy doctrine and its broad categorical exemptions for religious employment and membership decisions, as well as its limited conscience protection for health care providers. These sections describe the potential and real consequences to employees, members, and patients. Yet the obvious must be stated: autonomy is at its strongest in the context of churches and their close affiliates, where consent to those consequences by members and employees can be more easily implied. Once we move to religious nonprofits, whether or not church-related, the appropriateness of the autonomy doctrine becomes more vigorously contested and less evenly applied. The consent of employees and others is more attenuated (or downright absent) in some of the nonprofit employment and service contexts. Indeed, many religious nonprofits whose mission involves pursuits that are not exclusively or primarily religious - like health care, education, and social services - may not be viewed as warranting the same level of identity and missional protection that churches and their close affiliates need. Especially in situations where employees are hired without regard to faith, where the public is served, where public monies finance at least some part of the operations, and where economic power is comparable to secular nonprofit or for-profit actors, religious nonprofits find themselves vulnerable to being treated like their nonreligious counterparts.' 67

Autonomy is a contested matter even in the Title VII and NLRB contexts. 168 Although it is true that the religious exemption to Title VII is applied broadly to eligible institutions, it is significant to note that the definition of an eligible religious organization is not settled. 169 Federal courts of appeals have developed at least five different tests for determining whether a religious organization is eligible for the exemption. 17 The Ninth Circuit, for instance, refuses to apply the exemption to nonprofits that charge more than a nominal fee for services, thereby rendering religious hospitals, day care cen ters, camps, and religious publishers ineligible.'7 1 The Fourth Circuit analyzes whether the mission of a religiously affiliated nonprofit has become secular over time. 172 Furthermore, even though some courts have read the exemption broadly to allow religious organizations to make employment decisions that involve sex discrimination because of the connection to church teachings, 173 other courts have held to the contrary. 74

Similar variations exist in the context of NLRB jurisdiction over religious colleges and universities. Despite the D.C. Circuit's *Great Falls* decision, which generally exempted religiously-affiliated nonprofit educational institutions, 175 the NLRB continues to use the "substantially religious character test" to distinguish between those religious institutions exempt from its collective bargaining requirements and those that fail the test and come within its jurisdiction. Indeed, it recently asserted jurisdiction over adjunct faculty members at religious institutions who are not held out as performing a "religious function." 76

The contested application of autonomy to religious nonprofits can also be seen in two specific contexts: the provision of employee benefits and the provision of social services to the public.

1. Employee Benefits

Until recently, churches and religious nonprofits were free to tailor their health insurance benefits to their religious teachings. 1 7 This allowed Catholic institutions, for instance, to provide insurance coverage for prescription drugs but not birth control. 178 Within the last two decades or so, more than half the states began to require that employers provide employees with insurance coverage for contraceptives as part of gender equity legislation.17 9 While most of these states had some kind of accommodation or opt-out for churches and religious nonprofit employers opposed to the coverage, 180 some state legislatures, like those of California and New York, provided an autonomy-based exemption only to churches and their close affiliates. 181 This narrow religious employer exemption was based on the assumption that employees in those settings would likely share the faith and consent to the withholding of coverage; in contrast, the assumption did not apply to employees of those religious nonprofits that hired without regard to faith.182 This meant that most religious nonprofits were not eligible for the exemption and were required, notwithstanding a moral opposition, to include contraception in their insurance packages.

In two high profile cases, the highest courts of California and New York held that religious nonprofits that did not qualify for the exemption had no constitutional right to be included within it, primarily because they had a religiously diverse workforce.1 83 Both courts refused to extend the autonomy principle because employees had not consented to be governed by their employer's faith. 184 Like the California and New York statutes, the ACA's contraception mandate provides the same type of narrow, autonomy-based exemption for church employers and affiliates. 185 Of course what differs is that although the broader class of religious nonprofits does not get the benefit of this exemption, it does enjoy the HHS Accommodation.' 86

A similar narrowing is underway in the context of the church plan exemption to the federal Employment Retirement Income Security Act ("ERISA"). 187 Church pension plans are exempt from many of ERISA's requirements, including prohibitions on benefit reductions, certain funding and vesting requirements, and insurance protection for pensions.' As a result, church employees with pensions do not enjoy the same level of retirement security enjoyed by employees with pensions subject to ERISA's requirements. Although it had been common for courts to allow the church plan exemption to apply to nonprofits associated with churches, recent judicial opinions have begun to reject this position and to narrow the church plan exemption to pension plans of churches. 1 89

2. Beneficiaries of Social Services

One might assume that autonomy is grounded in implied consent to be bound by the faith and internal organization and rules of a church. This is certainly a common theme that can be identified in many cases involving the ministerial exception, membership, and employment. 190 The jurisdictional nature of autonomy protection - placing the church and other religious nonprofit entities within a sphere of independent activity - seems to depend heavily on a notion of shared faith and mission among the members of a community. 191 And the jurisgenerative nature of autonomy also seems to depend upon this voluntarism: generating and reinforcing norms within a community and facilitating common belief and mission for an individual and group involves the choice to affiliate with a community.92

But as we have seen, autonomy protections are also extended to contexts outside a church community of "consenting" believers, to religious nonprofits that hire outside the faith and serve the public.1 93 Critics focus on the unfairness of exemptions that disadvantage employees and third parties - patients, clients, and students - who do not share the faith of the employer. 194 In the absence of consent, critics contend that autonomy should be limited to a narrow purpose: to protect the identity and mission of a particular church and to allow it the right to define and constitute itself. Indeed, Justice Ginsburg's dissent in *Hobby Lobby* proceeded on the assumption that the autonomy doctrine should apply only to hiring and serving within one's own community.1 95 Such a narrow conception of religious autonomy is unprecedented in both law and practice.

Defenders of autonomy-based exemptions (at least with respect to targeted issues) for religious nonprofits that hire and serve outside the faith offer several justifications. For these types of entities, the purpose of autonomy is to foster institutional free exercise broadly and to facilitate the participation of morally diverse non-state actors in civil society, as well as to promote the Establishment Clause's command of neutrality among different religions., 96 When the state is the only source of norms and requires all non-state actors to conform, then the jurisgenerative function of religious communities is subverted and the jurisdictional line obliterated. 97 In order to foster participa tion of diverse religious groups in the civil society and support truly voluntary choices, there must be some acceptance of moral diversity, at least on specific issues. 198 The argument goes like this: for groups that serve the public but tailor that service to their religious beliefs, the absence of specific consent is mitigated when there are other nonprofits offering the same services. In the overall scheme of non-state providers, then, more diversity supports the voluntary decisions of individuals to make choices.' 99 This conception is reflected in the faith-based initiatives of the Bush and Obama administrations, where beneficiaries of social services are supposed to have options among religious and secular providers. 200

The idea of diversity among service providers has been at the core of the exemption claims by Catholic adoption agencies that are morally opposed to placing children in same-sex households. 2 0 1 They have argued that same-sex couples have plenty of options for adopting, and that an exemption for agencies with objections would not impair anyone's ability to adopt.2 °2 This argument failed in Massachusetts and Illinois, where exemptions were denied on the grounds that government has an interest in eradicating the independent harm of discrimination, despite the availability of other adoption agencies to assist same-sex couples. 2 0 3 In response, several Catholic Charities agencies decided to terminate their involvement in adoption services altogether. 20 4 Harvard Law School Dean Martha Minow bemoaned the state's failure to negotiate some workable solution to retain these adoption services, because when Catholic Charities ceased to offer adoptive services the state lost an organization that had over a century of expertise in the field.2 °5

In contrast, however, Virginia and North Dakota recently enacted autonomy-based exemptions, which protect religious nonprofit adoption providers that object to placing children with same-sex couples. 2 0 6 Under these laws, objecting providers retain their licenses as well as government funds and contracts. 20 7

From the foregoing, it should be clear that churches as well as many religious nonprofits enjoy broad latitude in decision-making while ministers, members, employees, patrons, clients and patients might have very compelling stories of exclusion or harm which, in a different context, could give rise to various claims of discrimination, tort, or breach of contract. Autonomy considerations remain closely tied to the religious freedom of religious institutions and individuals: in a system of voluntary religious exercise, with individual rights to enter and exit churches, it is essential to preserve the freedom of churches to organize and perpetuate themselves. 20 8 On occasion, this autonomy is further extended to facilitate the larger project of ensuring diversity of non-state actors within a civil society. Where autonomy governs, courts and legislatures have decided that the consequences to identifiable persons and groups are overshadowed by paramount considerations of individual and institutional freedom. Obviously, the precise outer boundaries of the autonomy doctrine are highly contested, but the battles over line-drawing are being fought in the *nonprofit* context. To extend autonomy to businesses would fuel doctrinal confusion and invite an unprecedented lack of accountability.

III. WHY BALANCING, AND NOT AUTONOMY, IS APPROPRIATE IN THE FOR-PROFIT CONTEXT

*Hobby Lobby* should be read narrowly as a balancing case, rather than as an autonomy case for several reasons. First, the Court's decision is rooted in the assumption that employees will not be affected at all by the RFRA exemption. 2 0 9 In clear contrast, autonomy-based exemptions ignore the disadvantages that befall persons and groups left without legal protections. Second, *Hobby Lobby* makes no suggestion that employees have consented, even impliedly, to be governed by the faith of the corporate owners. In clear contrast, autonomy principles apply in very specific contexts of church membership and mission and in the delivery of many types of services through nonprofit organizations. 2 1° Autonomy is, at its heart, a consent-based concept; even where consent is attenuated or lacking - as in the case of nonprofit delivery of some kinds of services - the support for numerous diverse non-state actors in civil society is ultimately intended to promote consent by fostering multiple alternatives. 2 11

The jurisprudence of for-profit religion over the last fifty years, though admittedly sparse, suggests a clear demarcation between churches and religious nonprofits, on the one hand, and for-profit activities on the other.2 12 Balancing has always been the prevailing approach in the for-profit context. 213 Courts have resisted making connections between for-profit claimants and their religious communities, even where it would have been plausible to do so. 214 Courts have been unwilling to pull commercial enterprises into the religious sphere or to link them to the jurisgenerative function of religious communities and have denied recognizing any jurisgenerative function of their own. 215 Put bluntly, businesses are not churches.

Now that the Court has explicitly held that for-profit entities are capable of exercising religion, free exercise claims from closely-held, secular businesses owned and operated by people with religious convictions will likely surface. As for this class of claimants, an explicit autonomy argument is difficult to make; courts may more easily stay within the *Hobby Lobby* balancing framework. But *religious for-profits* - a potentially large class of entities - could make a plausible claim for the categorical protections offered by the autonomy doctrine. Religious for-profits, which provide religious goods and services or provide educational, health care and social services traditionally within the domain of nonprofits, are free-standing religious institutions rather than simply extensions of family businesses. In some instances, they function 216 in the same markets alongside religious nonprofits. These entities are made all the more possible by new corporate forms that facilitate combinations of charitable and religious mission alongside profit-making. 2 17 But despite the changes in corporate law that blur the traditional divide between nonprofits and for-profits, the religious for-profit is not capable of meeting the jurisdictional and jurisgenerative prerequisites for autonomy protection. Further, the harms to persons and groups that accompany autonomy exemptions would multiply in number and intensity if an entire class of market actors, wielding economic power over access to goods, services and jobs, were permitted to act without regard to those they employ and serve. And, finally, once the doctrine is expanded, protection will likely become diluted across the board. Churches and those religious nonprofits that warrant autonomy protection will see the doctrine eroded even in its core application. Courts must recognize that for all these reasons, the autonomy doctrine should not be extended to for-profits.

*A. The Blurring of Lines Between Nonprofit and For-Profit Entities*

The autonomy jurisprudence has developed in the context of nonprofit institutions. For centuries, churches and religiously affiliated educational, healthcare and charitable institutions have been the backbone of what is now called the nonprofit sector. 2 1 Because of society's heavy dependence on these institutions, their independence and protection came to be concretized in law.219 Indeed, traditionally there has been a comfortable fit between the nonprofit corporate form as an indicator of religiosity, and the for-profit form as an indicator of secularity. As Justice Brennan noted in *Amos*:

The fact that an operation is not organized as a profit-making commercial enterprise makes colorable a claim that it is not purely secular in orientation .... [U]nlike for-profit corporations, nonprofits historically have been organized specifically to provide certain community services, not simply engage in commerce. Churches often regard the provision of such [nonprofit] services as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster. 220

Both Justice Brennan and Justice O'Connor, in *Amos* concurrences, gave nonprofit organizations and activities a presumptive connection to religious mission. Justice Brennan noted that autonomy-based exemptions allowing religious-based employment discrimination for nonprofits "is particularly appropriate for such entities, because *claims that they possess a reli gious dimension will be especially colorable*.'' 221 And Justice O'Connor, expressing the traditional skepticism toward coupling profit motive with religiosity, noted, "It is not clear . . . that activities conducted by religious organizations solely as profit-making enterprises will be as likely to be directly involved in the religious mission of the organization." 222 Although Justice Brennan was willing to speculate that a religious nonprofit could be eligible for autonomy-based exemptions for some type of for-profit activity that had a "religious character," 223 no case law had developed that concept. In fact, a few years after Amos, when the Court of Appeals for the Second Circuit evaluated a claim by a church that wanted to demolish one of its historic buildings to construct a forty-seven-story commercial office tower, the court denied an exemption from historic preservation regulations - even though the revenues earned from this venture would have been used for ministry.224

Developments in corporate law, however, have resulted in a blurring of lines between nonprofits and for-profits. Many religious nonprofits are "commercial" nonprofits. 225 For instance, religiously affiliated hospitals and universities provide services to the public in exchange for money; they operate within markets in which they compete with secular nonprofits and for226 profits. In fact, many nonprofits do earn profits; rather than distribute them to shareholders, they are required to reinvest them in the corporation or spend 227 them to advance the corporation's purpose.

Even more significant are changes within the for-profit sector. The movement for corporate social responsibility (initiated largely by religious activists in the 1970s) has succeeded in getting many entities to embrace communitarian values in addition to, and even at the expense of, profitmaking.228 Many corporations have become leaders in advocating for a diverse workforce, paying just wages and benefits beyond legal minimums, and supporting social and charitable causes. 229 And while charitable works are still usually pursued through the nonprofit corporate form, a for-profit corporation is free to have a mission traditionally associated with non-profits. Google's establishment of the first "for-profit charity" provides a clear illustration of how for-profit and nonprofit categories have become increasingly interconnected.23 °

The Court mentioned these trends in *Hobby Lobby*. Responding to the statements of some federal courts that said for-profit corporations could not exercise religion because they were solely concerned with making money, Justice Alito wrote:

[M]odern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so. For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives.... In fact, recognizing the inherent compatibility between establishing a forprofit corporation and pursuing nonprofit goals, States have increasingly adopted laws formally recognizing hybrid corporate forms. Over half of the States, for instance, now recognize the "benefit corporation," a dual-purpose entity that seeks to achieve both a benefit for the public and a profit for its owners. 2 3 1

From this, Justice Alito extrapolated a principle: if for-profits can pursue nonprofit goals, "there is no apparent reason why they may not further religious objectives as well.''232 And indeed, long before the concept of the benefit corporation was introduced, some for-profit corporations have embraced an explicitly religious message. 233 Hobby Lobby's corporate documents commit it to operate in accordance with "Biblical Principles," which means that all 500 of its arts and crafts stores are closed on Sundays, at great financial cost to its owners; it does not engage in transactions that promote alcohol; it proselytizes through newspaper ads; and it contributes generously to Christian ministries. 234 As Professor Lyman Johnson noted, "[F]aith and spiritual values have influenced" even large companies, with a "leavening effect that a focus on non-economic values can have in a corporate culture.' ' 23 5 And like nonprofits, for-profits with goals beyond profit can function as mediating institutions between the individual and the state in civil society. 2 3 6

*B. The Use of Balancing in For-Profit Religion Jurisprudence*

Given the blurring of lines between the nonprofit and for-profit sectors, partnered with the Court's explicit holding that religious exercise is possible in the for-profit corporate context, the question turns to whether the autonomy approach available to religious nonprofits might also be available to forprofits. The relevant case law has remained and should remain squarely within the balancing paradigm.

Over the last fifty years, religious freedom claims made in connection with for-profit activities have fallen into two categories. The first involved individuals or entities claiming an exemption from a regulation that made it more expensive to practice their religion. 237 Because exemptions to remedy economic burdens often result in a competitive advantage for religious claimants over secular businesses in the same market,23 8 these claims were general y unsuccessful. The second category involved individuals or entities with conscience claims, as in Hobby Lobby, objecting to a law that forces participation in an activity the individual or entity considers sinful or immoral.

Those conscience claims came in a variety of areas, and the results have been mixed. In the 1990s, some landlords refused to rent apartments to cohabiting couples (which they were required to do under state anti239 discrimination laws). More recently, several pharmacists have refused to stock and sell emergency contraception; 240 several businesses have refused to 241 provide goods or services for same-sex weddings; 2 1 and some taxi drivers have refused to transport passengers carrying alcohol.242 And, perhaps most notably, the owners of the corporations in *Hobby Lobby* refused to direct their companies to pay for contraceptive coverage within the employee insurance 243 package. Such claims for exemptions do not give rise to the same "competitive advantage" noted above in the economic burden claims; indeed, refusals to provide a product or serve a customer tend to generate negative publicity against the objecting business. This became especially evident recently in Arizona and Indiana where business leaders vociferously opposed state legislation intended to protect the conscience claims of small businesses. 244

Some of these courts assessing conscience claims, as part of the balancing approach, considered not only an exemption's discriminatory impacts in the provision of commercial goods and services, but also possible mitigation of those impacts. The impacts on customers deprived of emergency contraception were mitigated by the practice of referring the customer to another pharmacy (as is commonly done when a drug is not in stock).24 ' And of course the *Hobby Lobby* Court assumed a total mitigation of impacts by an expanded HHS Accommodation. 246

*C. The Divide Between For-Profit Activity and Church*

Both the jurisdictional and jurisgenerative prerequisites for institutional autonomy claims have been missing in the for-profit religion jurisprudence. The Supreme Court has repeatedly resisted re-making businesses into churches or church-affiliated entities, even where it might have been plausible to do so, and has neither recognized the links between businesses and churches nor protected church-like internal operations of businesses. 247 The Court has been careful not to align businesses with churches in the autonomy discourse and has been careful not to suggest that a business is central to creating or reinforcing norms for a community of believers. 248 *Hobby Lobby* continues this restraint. In *Hobby Lobby*, the corporations were secular, commercial entities owned and operated by families with religious scruples, and the analysis centered on protecting the *owners'* religious exercise. True, the Court protected the corporate exercise of religion by finding an identity with the owners' faith; 249 but there was no discussion of a symbiotic relationship between the corporation and a church, nor was there talk of a church community created within the corporation.

*Hobby Lobby* is thus consistent with the Court's historic treatment of for-profit free exercise claims. In the 1961 case *Braunfeld v. Brown*, Orthodox Jewish business owners in Philadelphia sought an exemption from Sunday closing laws because their businesses were closed on Saturdays. 250 Closing on both weekend days meant serious financial loss and economic disadvantage. The Court held that "the Sunday [closing] law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive. ' 252 This "imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself .... ,,253 The Court noted a further justification: an exemption allowing these business owners to open on Sundays would give them an "economic advantage over their competitors" - those businesses that are required to close on Sundays.2 54 Thus, in an implicit balancing, the Court considered the exemption's harm to third parties - those businesses that were required to close on Sundays.

While *Braunfeld* is usually considered a simple case of economic burden, there is more to it. The holding suggests the irrelevance of any autonomy considerations. 255 No regard was shown for the local Orthodox Jewish community the businesses likely served - those customers who are now deprived of the ability to shop on Sundays. Had there been an Orthodox nonprofit whose activities were similarly curtailed on Sundays, it would have been easier to argue that its schedule should comport to the community it serves. But the Court never mentioned this. It was concerned only that Jewish businesses open on Sundays could take business away from merchants whose stores were closed. 256 In the for-profit context, the business is not understood to function like a worshipping community or like a religious nonprofit. Instead, the rules of commerce govern. 257

Two decades later, the Court considered several for-profit cases in which the employer and employees shared the same faith. A common faith could have justified an autonomy-based exemption on the grounds that it would have promoted the freedom of a religious community's identity and mission. But the Court used a balancing analysis instead, and declined to carve out exemptions, in part because of the strong desire to protect employees from the potential harmful impacts of such an exemption: employer coercion of faith and economic exploitation. The commercial context, with its commitment to a diverse workforce, prevented the Court from viewing the workplace in communal religious terms.

In the first decision, *United'States v. Lee*, an Amish farmer/carpenter employer sued for a refund of taxes, arguing that paying social security taxes violated his rights under the Free Exercise Clause as well as those of his em258 ployees, all of whom were Amish. The Amish refuse government assistance in caring for the elderly in their communities and therefore oppose paying into the social security fund.259 The Court found that while coerced participation in the social security system created a burden on Amish beliefs, that burden was justified because "mandatory and continuous participation in and contribution to the social security system" is "essential to accomplish[ing] an overriding governmental interest. 2 60 The Court analogized social security payments to more general taxation, noting that "religious belief in conflict with the payment of taxes affords no basis for resisting the tax. ' 26 1 Congress had already granted a narrow exemption to self-employed Amish, but to extend the exemption to everyone employed by an Amish employer could undermine the larger tax system. 26 Thus, the Court implied that the narrow exemption fulfilled the requirement that the government advance its interest in the least restrictive manner.

[E]very person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees. 263

This concern about an employer imposing his or her faith on the employees was unusual because all of the employees in this case were Amish.264 Since Edwin Lee had brought the case not only for himself but also on behalf of his employees, it appeared that this was not an element of the case before the Court. Indeed, it is clear that the identification of the burden implicated the Amish community generally. It was not only a burden on the employer's faith, but also a burden on "the Amish faith," Mr. Lee's faith, and the faith of 265 his employees. Although the Court refused to grant the exemption under the weight of the government's interest, it was acutely aware of communal meaning of the religious claim - that an exemption would protect the identity and faith of the religious community.266 In earlier case law the Court had been emphatic that the Amish faith pervaded every aspect of their lives,267 so, in this case, it would have been easy for the Court to acknowledge that a law regulating the workplace could threaten the religious community. But it did not, choosing instead to describe the employer and employee in adversarial terms. 268

Potential autonomy considerations also present themselves in *Tony and Susan Alamo Foundation v. Secretary of Labor*.269 The Alamo Foundation was a Christian nonprofit that served as a rescue mission and religious community to the poor and sick.270 The Foundation operated nearly forty commercial businesses to train its "associates" - converted criminals and addicts who did not consider themselves "employees. ' " 27 1 The Foundation did not pay the associates wages, but it did provide food, clothing and shelter. 272 The Labor Department characterized the relationship differently, arguing that these businesses were subject to wage and other terms of the Fair Labor Standards Act ("FLSA") and that the associates were employees entitled to the statute's protections. 273 The Foundation sued, challenging the applicability of the FLSA as a violation of the associates' free exercise and its own right to be free from government entanglement. 274 The Court found that the FLSA did apply and that Labor Department regulations explicitly provided that commercial activities of religious nonprofits were subject to its terms in order to avoid any competitive advantage. 275 The Court found that applying the FLSA to the Foundation caused no excessive entanglement in church affairs; it further found that free exercise rights of the associates were not burdened.276 The associates claimed quite vehemently that they did not want 277 to be paid wages. Their claim, on its face, was about their connection to the religious community and the religious freedom of the community.78 But the Court found that because the associates were already receiving in-kind benefits, and because the wage requirement could be met by in-kind pay ments, no actual burden resulted from inclusion in the FLSA statutory program. 279

Like the Amish employer and employees in *Lee*, the Alamo Foundation and its associates, though tied in a commercial relationship, were fundamentally connected to each other as a religious community. Both cases involved religious identity and mission. But the Court in both cases was concerned about harm to identifiable persons. In Lee, even though the employer and employees shared the same faith, the Court was concerned that an exemption would have the effect of allowing an employer to impose its faith on the employees. 280 And in *Alamo*, even though the associates claimed that they were volunteers doing work as part of their ministry, with no expectation of compensation, the Court was concerned that exemptions opened the door to exploitation or coercion by employers - in fact, there was some suggestion in the record that associates had suffered injustices in hours worked and punishments for poor work. 28 1 The Court in both cases refused to treat the workplace as a church, even in the face of what looked like shared faith among employees. 282

This resistance to analogizing a business to a church is reflected in lower federal court decisions as well. A year after the 1987 Amos decision, a forprofit corporation argued that it should enjoy the benefit of the Title VII exemption. In *Townley v. EEOC*, a manufacturing company defended a religious discrimination claim brought by a former employee by arguing that it was a "religious corporation" capable of making religion-based employment decisions. 283 The Townleys, owners of this closely held corporation, were religious and held weekly devotional services that employees were required 284 to attend. The Ninth Circuit rejected the argument that the business was a religious corporation, noting that the company was for-profit and not church affiliated, produced a secular product, and had no religious purpose in its 285 corporate documents. The fact that the Townleys were religious (and engaged in many religious acts through the company) was not enough to make the corporation "religious" within the meaning of the statute (or under the Constitution for that matter).2 86 While the Townleys were not required to abandon the devotional services, they were required by law to accommodate employees who did not want to attend.287 Protecting the rights of the owners would have negative impacts on identifiable persons: their employees.

The Townleys had tried to create a religious community at their workplace. They thought of the exemption claim for their corporation in autonomy terms: just like a church can control its membership, they wanted to control the company's pool of employees using religious criteria. 288 Each employee had to sign a statement agreeing to attend the devotional services and recognizing that they could be fired for failing to do so.289 The Townleys argued that with these signatures, employees waived their rights to seek accommodations for their own religious needs; further, the Townleys argued that the corporation was "founded to 'share with all of its employees the spiritual aspects of the company. ' 9° But the court held that the Townleys had to protect the religious rights of employees who objected to participation. 29 1 In rejecting the statutory and constitutional claims, the court made clear that in 292 the for-profit context, employers could not create a church. In essence, the court said - like the Supreme Court implied in *Lee* and *Alamo* - that the defendants, running a secular business, did not deserve the kind of autonomy enjoyed by a church.

Neither the Court nor the plaintiffs in *Hobby Lobby* suggested that the corporate plaintiffs or their owners were trying to create a church in the workplace. The owners incorporated to establish a business that would balance profit seeking and religious mission according to their own beliefs. 293 Their conscientious objection to providing contraceptive coverage to employees was not framed as a shared belief among employees. 294 The Court was quite clear that the thousands of employees of the objecting companies that are eligible for the coverage should and will receive it.295 In keeping with *Braunfeld*, *Lee* and *Alamo* (and consistent with *Townley*), the Court resisted any notion that the owners are doing anything other than demanding their own religious freedom in seeking to run their corporations in accordance with their faith.296

IV. THE TEMPTATION TO EXTEND AUTONOMY TO THE "RELIGIOUS FOR-PROFIT" AND WHY COURTS SHOULD NOT GIVE IN

Nearly all the businesses challenging the contraception mandate were closely-held corporations operated in accordance with religious beliefs but engaged in *nonreligious* endeavors like manufacturing and retail. 297 These "secular" for-profits stand in contrast to the category of "religious" forprofits, which are defined in this Article as corporations that provide explicitly religious goods and services or that engage in work traditionally undertaken by nonprofits. Indeed, two of the businesses challenging the mandate - a religious publishing house and a religious bookseller - are religious forprofits under this definition.298

It is impossible to know how *Hobby Lobby* will be applied to the free exercise claims of secular for-profits - whether narrowly, under a balancing paradigm, or broadly, under an autonomy paradigm. Obviously from the remarks thus far, this Article would argue that free exercise claims of secular for-profits should be constrained within a balancing framework. But the ultimate contention of this Article is that *balancing should apply even to those free exercise claims of for-profit entities that appear to make a plausible claim for autonomy: the religious for-profit*. Religious for-profits differ substantially from secular businesses like arts and crafts stores or cabinet manufacturers owned and directed by religious people. Religious for-profits need not be conceptualized as an extension of their owners' faith but can be viewed independently as entities possessing faith and mission, as entities with a religious character. 299 A religious for-profit might even have an unmistakable connection to a church or identifiable religious community or tradition.3 00 But even if it does not, it can still function to support or enliven a distinct religious community or tradition. Indeed, these entities would not exist *but for* a religious community or tradition. And because they are entities that endure past the lifespans of any individual, they can be established and organized in a way that ensures continuity of their religious identity, purpose and function. 301

Because of these characteristics, a court might be tempted to consider religious for-profits to be institutions that warrant autonomy protection. But the decision to do so would be dangerous. Autonomy gives religious entities protections that are categorical in nature, as a matter of constitutional design, and the negative consequences on identifiable individuals and groups are not taken into account. For-profits wield too much economic power and too many people would be made vulnerable to the harmful impacts of exemptions. It would be a mistake to add an entirely new class of entities to the class of religious institutions that currently enjoy autonomy protection. It is especially unwise to expand the circle of autonomy protection to include forprofits at a time (like now) when courts and legislatures are struggling to determine whether and when to grant autonomy protections to religious *nonprofits* that hire and serve beyond their faith communities and/or that wield economic power in ways similar to for-profit entities. 3 0 2 Are we really ready for business entities to claim protection under the ministerial exception for decisions regarding "positions of substantial religious importance, 30 3 or under the Title VII exemption, NLRB exemption, or other autonomy-based exemptions?

At first glance, the obstacles to viewing the claimants in *Braunfeld*, *Lee*, *Alamo* and *Hobby Lobby* as connected to and generating norms for a religious community do not seem to exist when we look at religious for-profits. Religious for-profits, unlike secular for-profits, are by their own definition connected to larger religious communities and traditions. Surely they create - or at least reinforce - norms and "are organized around a religious mission with a guiding doctrine and goal to facilitate individual and collective religious belief.'' 30 4 Does this render them jurisgenerative institutions that fall within the "church" jurisdiction on the church-state divide? In other words, are they similar enough to churches and religious nonprofits that they should receive protection under an autonomy approach? In this Article's view, the answer is no. Countervailing considerations, which will be described below, like the distribution of profits to owners, the role of for-profits in the economy, and the potential widespread impacts resulting from categorical protections, argue against the extension.

The discussion below focuses on the kinds of businesses that might press autonomy claims. As a preliminary matter, this Article entertains and rejects the possibility of a "for-profit church." After that, it considers two categories of entities most eligible for a "religious for-profit" designation. The first is comprised of for-profits engaged in traditional commerce: exclusively providing religious goods and services. The second category is comprised of for-profits with traditional missions: education, social services, and health care. Even with autonomy protections for nonprofits in certain circumstances, and even in the face of obvious analogies in the case of missiondriven for-profits, countervailing considerations must constrain the extension of autonomy.

*A. For-Profit Churches?*

It is well established that churches - core faith communities that gather for worship and that pass beliefs on from generation to generation - enjoy immunity from lawsuits under the ministerial exception and other autonomybased protections of their employment and membership decisions. Could a church, as we know it, be organized as a for-profit entity? One could imagine a person or group deciding to forego the benefits of federal tax exempt status (which is dependent upon a nonprofit form of organization) and organize a "church" as some form of business entity in which they would own shares, act as (or hire) ministers and open its doors to members. The for-profit entity would pay taxes and be free to participate in politics unencumbered by the Internal Revenue Code's restrictions. 30 5 But would the autonomy precedents protect it? Could the owners hire and fire ministers with impunity? Could it exclude anyone from membership? Could it discriminate in hiring nonministers on the basis of their faith? In short, could such an entity function primarily as a community of faith, analogous to a "church" as it is commonly understood? 30 6

Such an entity would likely be viewed as a business engaged in political speech.30 7 Perhaps if it made and distributed very little profit, for instance, and functioned in every way like a church organized as a nonprofit, it might be considered a "church." But if it was not intended to make a profit, why would it choose to organize as a for-profit in the first place? It need not organize as a for-profit in order to reject tax exempt status; it can take on a nonprofit corporate form under state law, pay federal taxes and speak freely. Taking on a for-profit form suggests that profit-motive is involved. If the entity functioned primarily as a profit-making entity whose owners were religiously motivated, then it would likely be viewed more like the corporations in *Hobby Lobby* - and would enjoy religious freedom under a balancing approach, if available, but not autonomy. If it were so committed to making money, in fact, the sincerity of the faith claim would be called into question, and it would likely be viewed as a secular business with no religious claim at all. 308

In any event, organizing a church as a for-profit is not a realistic option for practical reasons. First, the tax-exempt status of churches, itself justified on autonomy grounds,30 9 is deeply interconnected with many other federal and state religious exemptions. 31 The whole web of protections, intended to further the independence of church and state, is built on the nonprofit nature of the religious community. 311 This pervasive nonprofit identity and the expectations built upon that identity create substantial precedent. Of course, one could challenge the government's use of "nonprofit" as a traditional indicator of religiosity in the new environment of blurred lines between nonprofits and for-profits and argue for unbundling the tax-exempt status, nonprofit form, and availability of other exemptions. But prevailing on such a claim would be difficult, given the predilection of courts to resist any recognition of authentic faith community in the context of commercial enterprise. 312

Even beyond the practical legal obstacles a for-profit church may face, the for-profit nature of the entity creates insurmountable obstacles to any "church" trying to function as a worshipping community. The notion that a church would be "owned" by someone, and that a product or service would be sold and the profits distributed to those owners is antithetical to our basic notions of a faith community. 313 Professor Usha Rodrigues elaborates:

The benefits of religion include spiritual experience, social support, a sense of identity and belonging, and a framework for dealing with existential questions. These attributes are simply inconsistent with a profit motive. It is unlikely that a congregant would derive a satisfactory spiritual experience or a sense of deep belonging from a church that sought primarily to make money or to advance the earthly interests of its owners. And it is difficult to imagine that a congregant would feel socially supported by a church that charged market rates for spiritual counseling or participation in group activities. The concept of a for-profit church is incoherent because what churches purport to offer is incompatible with maximizing profits. 314

In my view, while religion and profits may co-exist in some contexts, they do not when it comes to the core faith community.

*B. For-Profit Entities That Provide Goods and Services Exclusively to Churches or Distinct Religious Populations*

While it may not be practical or even possible to operate a church for profit, there are many businesses that serve the particular religious needs of churches and other distinct religious communities or populations; some of these businesses might even be church-owned or sponsored. Although they would not seek autonomy protections regarding members, they might seek categorical freedoms on questions regarding employment. They might seek 315 immunity under the ministerial exception or under Title VII's exemption. A federal district court recently held the ministerial exception inapplicable to a business; but the analysis from other courts faced with similar claims in the future is, of course, unknown.316 The Ninth Circuit has ruled out Title VII protection for any entity that charges beyond nominal fees, leaving both forprofits and many religious nonprofits outside the exemption; but the Third Circuit simply considers the for-profit/nonprofit nature of the corporation one of many factors in deciding if an entity is an eligible religious corporation. 317

When a for-profit entity exists for a religious purpose, it differs from the typical for-profit that is created for any legal purpose with a goal of earning profits. Consider a kosher or halal grocery. This business has a religious identity and purpose (the provision of religious goods); it performs an important function in the life of a religious tradition by serving an identifiable religious community and enabling members of that community to exercise their religion. It cannot abandon its commitment because of demographic or market changes, assuming its corporate documents ensure its continued religious commitments. These "religious for-profit" businesses seem to be jurisgenerative insofar as they reinforce religious norms and facilitate individual and collective religious belief.

Several courts have already recognized the independent religious character of such entities, and have afforded autonomy protection under the Establishment Clause, by striking laws regulating fraud in the kosher food industry.318 Although almost half the states have regulations protecting consumers from kosher fraud and mislabeling, 319 the courts that have invalidated such regulations found them to excessively entangle the government with religion, *inter alia*. The courts cited church autonomy cases as well as entanglement cases, which - like autonomy cases - are all about maintaining jurisdictional lines: church and state must not intervene in each other's affairs so that "each is left free from the other within its respective sphere. 32 ° Like autonomy cases, entanglement cases are categorical. Because entanglement is an Establishment Clause doctrine, it does not take into account impacts on identifiable persons or groups. So it is not surprising that in response to these decisions, many Orthodox Jews were concerned that they were deprived of basic consumer protection for the food they must purchase. 321

Consider another example of a provider of religious goods: a religious book publisher. When Tyndale Publishers challenged the contraception mandate, it described a business that is quite restricted to religious identity and purpose: it publishes and distributes Christian literature. 32 The publisher stood in sharp contrast to most all of the other businesses that challenged the mandate, which provided secular goods and services like arts and crafts supplies or wood cabinets. 323 As is clear from the amicus brief submitted by Christian, Mormon and Orthodox Jewish publishers in the *Hobby Lobby* litigation, religious book publishers and book sellers perform a critical function in the life of a religious community. 324

*Amici* provide ready examples of for-profit corporations intended to serve religious communities: Deseret Book is both a for-profit corporation intended to generate a return for the LDS Church and an instrument of the Church itself Religious publishers and booksellers such as Feldheim, Tyndale House, and [Christian Booksellers Association]'s members are for-profit businesses, but they also must select which books and other items are consistent with their religious persuasions, and a retailer typically needs to hire sales staff with compatible religious views. Other for-profit corporations exist precisely to serve religious communities with specific religious needs - such as kosher butchering, Islamic finance, or pagan supply stores. For these corporations, following religious practices dictated by religious law is essential. 325

While the brief argued only for recognition of for-profit religious exercise under RFRA's balancing test, the quoted language suggests an expectation of autonomy protection for this industry, at least with respect to employment.326 Would these businesses defend an employment decision using the ministerial exception? Would they invoke Title VII's exemption to hire only co-religionists? Indeed, Deseret Book might argue that Justice Brennan had precisely this type of church-affiliated publishing in mind when he noted in the *Amos* concurrence that it was "conceivable that some for-profit activities could have a religious character, so that religious discrimination [in employment] with respect to these activities would be justified in some cases.”11327

Keep in mind, however, that not all church-owned or church-sponsored for-profits are necessarily "religious for-profits," as the term is being used here, especially those that primarily earn money through secular, commercial 328 pursuits. The LDS Church owns multiple businesses, all organized as forprofits, with annual earnings in the billions.329 These include very lucrative real estate holdings and developments, agricultural enterprises like ranches and timber, media of all sorts - print, radio, television, digital - and an insurance business.33 ° With the exception of Deseret Book (and other media businesses, assuming they are devoted to the Mormon faith), the "religious forprofit" designation would not be appropriate.

Businesses that are religious for-profits act as significant, and in some cases necessary, adjuncts to the life of a religious community. Jews could not keep kosher without businesses that provided kosher food; likewise for Muslims and their halal diet. Numerous religious traditions rely on publishers that offer texts - both old and new - of a faith tradition. The faithful rely on religious television and radio stations for edifying programming. But do such businesses warrant autonomy in their employment decisions? Let's assume one of these businesses wanted to use the ministerial exception to defend a suit brought by a terminated employee whose duties involved core religious faith. For example, consider a supervisor of a kosher kitchen in a for-profit facility who claims he was terminated solely on the basis of age discrimination. Should the business be able to invoke the ministerial exception to defend the suit?331 Should these types of businesses be able to invoke the autonomy-based Title VII exemption to allow faith-based hiring when age discrimination is at issue?

Unless there are independent Establishment Clause or classic "church autonomy" reasons for providing such protection (as in striking kosher regulations because they involve the state in religious decisions), autonomy principles should not be available by constitutional mandate to these religious forprofits, even with the important role the businesses play in the life of a religious community. There are several reasons for this conclusion.

First, the distribution of profit to owners compromises the jurisgenerative nature of the entity. To qualify for autonomy, the institution must be "organized around a religious mission with a guiding doctrine and goal to facilitate individual and collective religious belief. 33 2 The fact that the enterprise is owned means it cannot be completely directed towards those goals; profit is a substantial goal.

Second, for-profits wield power in the economy, and impacts of categorical protections can be harsh on people who need to participate in that economy. There may be many commercial establishments with religious exercise claims, all the way from a small kosher butcher serving a local population to a national book publisher supplying numerous retail outlets. (Indeed, the book publisher's brief noted that even retail religious bookstores have to hire employees compatible with their message.) All told, these businesses, as market actors, have power within the economy. Excluding workers in entire sectors from certain types of legal protection (like some or all antidiscrimination laws) will have negative impacts on specific persons and groups, perhaps in numerous markets.

Denying autonomy protection to these businesses does not mean they enjoy no protection whatsoever. They are still businesses involved in religious exercise. Rather than the ministerial exception or the autonomy-based Title VII exemption, they might be able to rely on a balancing approach under statutory or constitutional provisions, if available, to protect a given employment decision. More specifically, these businesses might be able to rely on Title VII's bona fide occupational qualification protection. Under Section 703(e)(1) of Title VII, employers have the right to discriminate on the basis of "religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. 333 A kosher or halal business, or a Christian or Mormon book publisher or media company, may have compelling reasons for making a particular employment decision based upon religious qualifications - knowledge, experience, training, expertise. Between general balancing approaches and more targeted protections (including legislative solutions), there may be sufficient accommodation in the law without placing businesses within the autonomy framework. Indeed, one of the three corporate entities in *Hobby Lobby* itself, Mardel, is a chain of Christian bookstores. This is a religious for-profit, yet the Supreme Court treated it just like the other secular businesses in the litigation: within RFRA's balancing framework.

*C. For-Profit Entities That Provide Educational, Health and Social Services to the Public*

Universities, hospitals, social services and other charitable institutions are typically organized as nonprofits; while the outer boundaries of autonomy coverage are contested, these entities do enjoy autonomy protection on specific matters.334 It seems inevitable that for-profit corporations will soon be undertaking these institutional roles alongside nonprofits: the for-profit educational institution has taken its place in society (even if viewed with skepticism); for-profit hospitals are now common; and for-profit charities are bursting on the scene - the result of growing hybrid, "quasi-profit" corporations like the public benefit corporation mentioned earlier and Dan Pallotta's TED Talks. 335 Given these larger trends, it should not be difficult to imagine a for-profit with a religious identity and a religious mission traditionally associated with the non-profit corporate form. Indeed, we already have examples of churches or religious groups with for-profits in education, social services and health care. The question is whether the types of autonomy protection available to religious nonprofits in these areas should extend to religious forprofits.

In the area of education, older precedent exists, albeit created inadvertently. Bob Jones University in Greenville, South Carolina, gained notoriety in the 1970s and 80s with its racially discriminatory admission policies and rules of conduct. When it lost its tax-exempt status in 1983, this religiouslyaffiliated university - which had been considered a religious nonprofit, exercising a traditional nonprofit role as an educational institution - reorganized as a for-profit. Unlike the newer educational for-profits that tend to be technical training schools, this was a university with all the characteristics of a religiously-affiliated university. 336 This was unquestionably a religious forprofit: it had a clear religious identity and purpose, it served the function of educating students within a religious tradition, and its corporate governance ensured continuity with its religious and educational mission.337 Assuming it remains organized as a for-profit entity, should Bob Jones University get the benefit of the ministerial exception for certain positions? The Title VII exemption for religious educational institutions or the NLRB exemption for religious universities? 338 Or does its for-profit corporate form fundamentally change the entity such that it should not be understood to be within the jurisdiction of "church"?

Similar questions are raised in other contexts where intentional efforts to mix business and social responsibility are underway, thereby allowing the development of businesses with religious missions to serve social needs. 339 The "economy of communion" businesses, numbering about a thousand worldwide (with most outside the United States), are based on a model of business development that includes the sharing of resources and profits, improving business to expand job opportunities, and spreading the values of common humanity and gratuity.340 Professors Luigino Bruni and Amelia J. Uelman undertook a case study of over seven hundred of these businesses and concluded that "business endeavors may express religious commitments" through their service to the urban poor. 34 1 Whether these would be called "religious for-profits" would depend, I think, upon the degree of connection between the business and religious mission. For these groups, the profit motive is clearly tempered by communitarian and redistributive commitments; but while social norms are shared, a strong particularist religious identity may be lacking.

For-profits with religious commitments could blossom under the new "benefit corporation" model. Benefit corporations came on the corporate law scene in 2010, and almost forty states have either enacted or are considering enacting legislation that recognizes this corporate form. 342 A "benefit corporation" is a for-profit corporation that is authorized to consider the general or a specified public benefit in addition to profit maximization; indeed, their directors and officers are expected to implement the public mission and to take into account other stakeholders' interests. 343 The benefit corporation is thus free to pursue a social goal without being concerned that a shareholder will sue for failure to maximize profits; instead, shareholder suits are available to "compel the corporation to engage in the social benefit goals it was founded to achieve (even if such activities are at the expense of profits)." 344

Benefit corporations can be "formed in furtherance of religious purposes, much like a religious non-profit." 345 The popularity of the public benefit corporation is increasing, 346 so there is no telling what types of religious forprofits the future may bring. One can foresee any number of religious ministries organized under this corporate form. Marc Greendorfer argues that a benefit corporation "with a religious purpose in its statement of purpose should be seen as identical to a non-profit under the [autonomy] doctrine." 347 That obviously adds an entire class of corporations to the "church" jurisdiction, which would be unprecedented. Further, we have no way of knowing how they will operate in the market, what kind of power they will wield, and how extensive their autonomy impacts might be. Moreover, at a time when the inclusion of some nonprofits within the autonomy circles is contested, the doctrinal instability does not argue in favor of expansion.

Perhaps the most important question is whether public benefit corporations are capable of being jurisgenerative. Professor Usha Rodrigues makes a compelling case in the larger sociological context that these entities, in contrast to nonprofits, will fail to create "social identity." 348 Like any for-profit corporation, they may involve tiered investment, so that some investors expect very little return because of the socially beneficial purposes of the corporation, whereas other investors expect a market rate of return. Because an entity structured like this "could be different things to different investors," it may be "too much of a hybrid to claim to provide any identity benefits." 349 (And even without different classes of stock, investors still expect some return.) This suggests that religious benefit corporations may not be able to generate and reinforce norms of shared identity and facilitate individual and collective beliefs with the focus and intensity of a church or religious nonprofit. 350

Religiously-affiliated health care ministry poses a unique set of circumstances for this Article's inquiry. This ministry is often carried out by multiple entities - both nonprofit and for-profit - that are in various legal and financial relationships to each other, all as part of a larger religious nonprofit health care system. In Catholic health care, for instance, for-profit joint ventures with physicians and for-profit subsidiaries (wholly owned by the nonprofit religious systems) are common. Where they exist, such for-profit entities are part of a larger Catholic nonprofit hospital system and are under its control, share in its charitable mission and adhere to its ethical standards.3 5'

This use of for-profit entities may be wholly unrelated to profit motive; indeed, it may be driven by licensure requirements or the need for capital. For example, a Catholic nonprofit hospital system might set up a for-profit joint venture with physicians or a for-profit subsidiary physician practice because the state's law prohibits physicians from being employed or owned by nonphysicians.352 Or the choice to create a for-profit subsidiary for a managed care plan might result from the very practical difficulties of having one entity comply with both hospital and insurance licensing laws.

Such for-profit entities already come within the protection of health care conscience laws at the federal level and in nearly all states, which apply to individuals and institutions regardless of their nonprofit/for-profit status.353 The implementation of ethical standards for religiously-affiliated health care relies on the existence of conscience protection; and after four decades, forprofit health care entities, and the nonprofit religious health care systems of which they are a part, have come to expect uniform conscience protection. It is reasonable to assume that laws that protect corporate conscience on matters like abortion and physician-assisted suicide will continue to apply regardless of corporate form.

The harder question of course is whether, in areas beyond conscience (like employment), autonomy should be limited to nonprofit corporate forms when profit motive is not the primary driver of for-profit form. Indeed, a wholly-owned subsidiary of a religious nonprofit hospital - though for-profit in form - lacks profit motive. Why not consider such a for-profit entity to have jurisgenerative potential? Or take the following example, presented at a recent symposium on for-profit religious health care, 354 of a for-profit structured in a way that attempts to neutralize the impacts of profit-motive. 355 Despite a rather complex corporate organization, its identity as a Catholic institution is clear and meant to endure. First, the proponents of the model argued that "a for-profit organization can have a charitable mission. The point is, 'for-profit' describes our tax status; it *doesn't* describe our purpose. Our purpose is continuing the healing ministry of Jesus - *that* is our purpose." 356 In this joint venture, 80% is owned by a private equity firm whose investors expect a return and 20% is owned by a religious nonprofit. 357

[That nonprofit owner] has sole authority in perpetuity over compliance with interpretation and application of the Ethical and Religious Directives (subject to the local Ordinary), as well as all other elements of Catholic identity - for example, charity care and community benefit. So if any private-equity partner were to put pressure on you to abandon the mission, to walk away from the poor, walk away from the vulnerable, the answer is [the nonprofit owner] has sole control within the partnership over every element of Catholic identity ... in perpetuity. And so no ownership change in the company going forward can change that ....

An entity known in canon law as a public juridic person (approved by the Vatican) is the sponsor of the 20% nonprofit owner. 359 The hospital is intended to function in the life of the church like any Catholic nonprofit because it will be operated in the same manner as the nonprofits in the same 360 health care system. Thus, the corporate structure ensures that the Catholic mission is consistently maintained - a minority owner with full authority to preserve the religious identity and purpose.

Should such religious for-profits enjoy autonomy protection in the employment context, under the ministerial exception and Title VII exemption? Several federal courts of appeals have applied the ministerial exception to religious nonprofits, 361 outside the context of the church-minister relationship, "whenever that entity's mission is marked by clear or obvious religious characteristics." 362 Two of those cases involved hospital employees with specifically religious roles - a pastoral care associate and a chaplain. A federal district court has applied the Title VII exemption to a nonprofit hospital to allow it to terminate an employee engaging in practices at odds with the entity's religious identity. 363 Should these nonprofit applications of the au tonomy doctrine be available to the religious health care for-profits described above?

Even where profit motive may be lacking or restrained, this Article continues to resist the expansion of the autonomy doctrine. Ensuring the integrity of religious hospital systems that include for-profit entities is an on-going and vital task churches must perform; it is not simply something that is established once and for all time in corporate documents. 364 There is widespread agreement that the mission might be diluted rather than promoted by the inclusion of for-profit corporate forms, which makes it critically important that prudential judgments be made continually.365 Indeed, courts have voiced concern that partnerships or other ventures between financially weak religious nonprofits and strong for-profits might result in the loss of the charitable mission. 366 Given the relative recency of these nonprofit and for-profit collaborations, this Article continues to urge caution: to use a balancing approach on employment matters. When an employer impacts someone's livelihood, it should be required to articulate the religious issues at stake. Indeed, a for-profit entity that is tied to a religious mission might still receive free exercise protection in court or through a legislative or regulatory exemption. But the categorical protections of the autonomy doctrine should be avoided in this context.

#### That undermines the social fabric, triggering civil war.

John Witte Jr. 24, JD, Professor, Law, Emory University. Distinguished Professor, Religion, Emory University. Faculty Director, Center for the Study of Law and Religion, Emory University, "A New Great Awakening of Religious Freedom in America," Journal of Christian Legal Thought, Vol. 14, No. 1, 2024, pg. 44-55. [italics in original]

In a world of growing religious pluralism and anti-religious animus, exemptions are important tools for the protection of religious freedom. They have long been controversial, however, because they seem to favor religion over non-religion in defiance of the Court’s principled insistence on equality, protecting religious individuals or groups more than their secular counterparts. What has made them more controversial of late is when majority faiths seek judicial exemption rather than legislative exemptions. Judicial exemptions used to be justified as a suitable refuge for religious minorities from the tyranny of the legislative majority. What has also made them more controversial is that some exemptions can force third parties to forgo services they find important to access whether website designs or wedding cakes for same-sex weddings or medical procedures for artificial reproduction, contraception, abortion, or sexual transition. Those controversies are mitigated when alternative and equally priced service providers are easily at hand. But they become more acute when there are no easy alternative service providers at hand or no time or funds to access them. They become even more acute when the exempt service provider has government licensing or funding.

Separation of Church and State

A final teaching of the Court’s recent cases is that the principle of separation of church and state is no longer the secular be-all and end-all of the First Amendment as it had become in the last half of the twentieth century. Separation of church and state is an ancient principle of religious freedom.56 It needs to be retained, particularly for its enduring insight of protecting religious communities and organizations from political intrusion and interference. Today, as much as in the past, governmental officials have no constitutional business interfering in the internal polity and property of religious bodies, determining its membership and leadership, or dictating its doctrines and liturgies.

The Court embraced this view of separation of church and state firmly in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* (2012). In that case, a Lutheran church school had dismissed a “called religious teacher” from her employment because her conduct defied the church’s internal procedures of dispute resolution. The teacher claimed this was a retaliatory firing. The Court rejected her claim. Adducing the historical principle and precedents of separation of church and state, going back to Magna Carta, Chief Justice Roberts wrote for the Court: “The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.”57 Later Free Exercise and RFRA cases have fleshed out this separatist principle in other religious employment cases.58

But the recent Court has retreated from its earlier insistence on maintaining “a high and impregnable wall of separation between church and state,” whose “slightest breach” was said to trigger an establishment clause violation.59 Not only was this earlier teaching based on selective history and suspect jurisprudence that has now been thoroughly debunked by the majority of the justices. But absolute separation of church and state is impossible to put in practice today.

Ours is not a distant “night watchman” state, content to limit its activities to defense, policing, postal service, and road maintenance. Today’s modern welfare state is an intensely active and ambitious sovereign from whom complete separation is impossible for any religion that forms even the smallest community. Today’s governments not only enact and enforce thousands of laws, but they also make grants, extend loans, confer licenses, enter contracts, and control access to the civic and economic arenas. And so, both confrontation and cooperation with the modern welfare state are almost inevitable for any organized religion. When a state’s regulation imposes too heavy a burden on a particular religion, the Free Exercise Clause should provide a pathway to relief. When a state’s appropriation imparts too generous a benefit to religion alone, the Establishment Clause should provide a pathway to dissent. But when a general government scheme provides public religious groups and activities with the same benefits afforded to all other eligible recipients, and when governments cooperate with religious agencies to accomplish secular purposes and promote the common good, Establishment Clause objections are unavailing, and Free Exercise rights are vindicated.

Conclusion

“Constitutions work like clock[s],” American founder John Adams reminds us. To operate properly, their “pendulums must swing back and forth.”60 We have certainly witnessed wide pendular swings in First Amendment religious freedom jurisprudence over the past century. But the Supreme Court has quietly ended the long constitutional swing of cases away from religious liberty protection from 1985 to 2010 and is now leading a strong pendular swing back. Since 2010, almost every one of the two dozen Supreme Court cases on point have advanced the cause of religious freedom, and those cases have been echoed, elaborated, and sometimes extended in scores of lower federal court cases. The Court has not always produced clean, clear, clockwork logic, nor settled on a grand unified theory that some justices and academics have advocated. But it has produced a hard swing in favor of religious freedom, even if sometimes wobbly.

This has been a good movement. Religion is too vital a root and resource for democratic order and rule of law to be passed over or pushed out. Religious freedom is too central a pillar of liberty and human rights to be chiseled away or pulled down. And religious freedom litigation is too critical a forum for social stability to be scorned or ignored. In centuries past—and in many regions of the world still today—disputes over religion and religious freedom have often led to violence, and sometimes to all-out warfare. We have the extraordinary luxury in America of settling our religious disputes and vindicating our religious rights with patience, deliberation, due process, and full ventilation of the issues on all sides. We would do well to continue to embrace this precious constitutional heritage and process.

As this process continues to unfold, it is essential, in my view, that the full range of founding religious freedom principles remain in operation—liberty of conscience, free exercise of religion, religious pluralism, religious equality, separation of church and state, and no establishment of religion by law. Religious freedom norms should not be reduced to neutrality or equality norms alone and should not be weakened by too low a standard of review or too high a law of standing.

#### Religious civil war in the US is likely AND overcomes restraints.

Dr. Nilay Saiya 23, PhD, Associate Professor, Public Policy & Global Affairs, Nanyang Technological University, "America Appears to be Heading for a Religious Civil War," Religion Dispatches, 09/27/2023, https://religiondispatches.org/america-appears-to-be-heading-for-a-religious-civil-war/. [italics in original]

Yet, a new American civil war is no longer unthinkable. Political scientist Barbara Walter has identified two specific factors that predict the likelihood of civil war occurrence. Alarmingly, both variables are present in the United States today and are quickly pushing the country to the brink.

The first is “anocracy,” a political science term for countries that mix democratic and autocratic features. These countries are neither democracies nor autocracies, but instead lie somewhere in the middle. Anocracies are prone to conflict because they lack the strong institutions and political channels of robust democracies for citizens to work through; at the same time, they either don’t possess or choose not to use authoritarian tools of repression to undercut violence *a priori*.

And, according to the Polity Project, the United States is today an anocracy. In 2020, Polity, which focuses on procedural democracy,\* downgraded the U.S. score below the “democracy threshold” for the first time in its history. The dramatic drop in America’s democracy score coincided with the Trump administration’s systematic assault on democratic norms and institutions and the 2021 insurrection at the capitol. No longer is the United States the world’s oldest continuous democracy, according to Polity.

Political science research has shown that anocracies are most likely to experience civil war in the first few years of their durations and that transitions into anocracy from democracy (as opposed to transitions into anocracy from autocracy) leave states at a higher risk for civil war. The United States today fits this description perfectly. Indeed, Polity’s analysis places America at “high risk of impending political instability.”

This fact alone is cause for grave concern. But it gets worse.

The second factor identified by Dr. Walter involves the calcification of identity politics among those who had once been politically dominant but now find themselves in decline.

Citizens organizing themselves into an identity-based faction in this way has historically been a warning sign that large scale political violence may be in the offing. People can compromise if the issue at stake is economic or territorial in nature. Land can be divided; money can be reallocated. But how does one compromise on the core issue of identity?

Although the identity fault lines in America are myriad, arguably, the most important cleavage involves race and religion, a cleft created largely by (mostly White) conservative Christians who fear that the country is renouncing its Christian foundations. I have studied cases of mass religious violence around the world in settings as diverse as Egypt, India, Myanmar, Pakistan, and Sri Lanka. At first blush, it may seem that the United States shares little in common with these developing countries. Yet I have found unsettling similarities.

In all these countries, the widespread adoption of a more militant approach stemmed centrally from fears that a historically and culturally dominant religious group was in danger of losing its privileged station. Consequently, these religious communities came to see themselves as the victims of encroachment by minority or non-indigenous religious traditions. Increasingly, members of religious majorities saw violence as an acceptable way to beat back the threat posed by religious heterogeneity.

Whereas religious violence is commonly believed to be a “weapon of the weak” fueled by minority grievances, it is more often a “weapon of the strong” wielded against marginalized and oppressed minority communities. Dr. Walter finds the same when studying the causes of civil war.

We see this same dynamic unfolding in the United States today, the greatest threat stemming from an ideology widely known as “Christian nationalism.” While identity has, of course, always been central to U.S. politics—particularly on the Right—what’s different today is not only the sharp decline in the White Christian majority, but the widespread belief among those who remain that they are persecuted and that their entire way of life is threatened by forces of immigration and social progressivism. As these Christian nationalists scapegoat minorities for the country’s ills, the changing social landscape has led to open calls for violence—the January 6th assault on the capitol complex being only the most infamous example.

According to a survey of more than 6000 Americans conducted earlier this year, adherents of Christian nationalism are almost seven times as likely as rejectors of Christian nationalism to support political violence. Forty percent agreed with the statement “Because things have gotten so far off track, true American patriots may have to resort to violence in order to save our country.” Prominent Christian nationalist leaders, too, such as Mike Huckabee, Rick Joyner, and Greg Locke have warned of or issued calls for mass violence should Christian nationalists not get their way. No longer able to rely on elections to sustain their social and political dominance, an outsized number of Christian nationalists see violence as their last hope.

These voices have been abetted by the rhetoric of far-right politicians. Representative Marjorie Taylor Greene of Georgia has openly called for a “national divorce,” a phrase deliberately chosen to conjure images of the American Civil War. Former president Donald Trump used the apocalyptic language of a “final battle” during his speech at this year’s CPAC conference as a means of framing the 2024 presidential election.

Add to all this the tumult that America has endured over the past decade—an unprecedented global pandemic, a border crisis, an increase in overt and often violent racism, an insurrection, an opioid epidemic, multiple presidential impeachments, the overturn of *Roe v. Wade*, increasing fallout from climate change—and the fact that the United States is a country awash in guns—and the path to a civil war becomes frighteningly clear.

If America does enter a prolonged period of civil conflict, it will not look the same as its first civil war, a war fought between states. Instead, this war is far more likely to be fought within states and resemble an insurgency, a type of decentralized armed rebellion fought by multiple groups who engage in guerrilla warfare.

It will also be incredibly bloody. Combatants in religious civil wars see themselves as fighting on behalf of both country and God, and are therefore more likely to fight to the death and eschew compromise. For this reason, religious civil wars have been found to be much deadlier and last much longer than non-religious civil wars. Indeed, seemingly disparate incidents—the Capitol insurrection, the scheme to kidnap Michigan Governor Gretchen Whitmer and try her for treason, the brutal beating of Paul Pelosi—may be seen not as a prelude to civil war but as part of its opening salvo.

#### It spills over AND goes nuclear. Expert consensus disproves checks.

SLG 12-20, Citing: Preventive Priorities Survey 2026 by the Council on Foreign Relations. Survey Author: Dr. Paul B. Stares, PhD, MA, General John W. Vessey Senior Fellow, Conflict Prevention, Center for Preventive Action, Council on Foreign Relations. Director, Center for Preventive Action, Council on Foreign Relations. Former Vice President & Director Center for Conflict Analysis and Prevention, United States Institute of Peace, "The Next Wars," SL Guardian, 12/20/2025, https://slguardian.org/the-next-wars/.

The international security environment entering 2026 is marked by an intensity, breadth, and complexity of conflict risks unseen since the end of the Second World War. According to the Center for Preventive Action’s Preventive Priorities Survey 2026, the number of armed conflicts worldwide has reached its highest level in decades, with interstate wars once again becoming more common after a long post–Cold War period dominated by internal conflicts. The survey, now in its eighteenth year, reflects the judgment of approximately 620 American foreign policy experts drawn from government, academia, and the policy community, who assessed thirty discrete contingencies judged plausible within the coming twelve months. Their collective assessment underscores a sobering reality: global anxiety about violent conflict remains undiminished, and U.S. policymakers face an increasingly crowded and volatile risk landscape.

One of the most striking findings of the 2026 survey is the persistence of high-likelihood, high-impact contingencies. Five scenarios fall into this most dangerous category, indicating both a strong probability of occurrence and a direct threat to U.S. national interests that could trigger military involvement. Among these, the war between Russia and Ukraine continues to rank as a top concern. Experts warn that the conflict is likely to intensify further in 2026 through expanded attacks on critical infrastructure and civilian population centers on both sides. This evolution reflects the war’s transition from maneuver warfare to a grinding conflict of attrition, with increasingly severe humanitarian consequences and growing risks of escalation involving NATO.

The Middle East occupies a disproportionately prominent place in the highest-risk tier. Renewed fighting in the Gaza Strip is judged to be both highly likely and highly consequential, driven by escalating clashes between Hamas militants and Israeli security forces. The survey highlights that such renewed conflict would deepen an already dire humanitarian crisis and exacerbate instability across the region. Closely related is the situation in the West Bank, where increased violence between Israeli forces and Palestinians is considered highly likely amid ongoing settlement expansion, disputes over political rights, and the spillover effects of the Gaza war. Together, Gaza and the West Bank exemplify how localized confrontations can have regional and global implications, particularly given U.S. strategic commitments to Israel and broader Middle Eastern stability.

Beyond the immediate Israeli-Palestinian theater, experts also assign high priority to the risk of renewed armed conflict between Iran and Israel. Although assessed as moderately likely rather than highly probable, the potential impact of such a conflict is considered severe. Concerns center on Iranian efforts to reconstitute its nuclear program and rebuild its network of regional proxy groups following the June 2025 twelve-day war. Any direct confrontation between Tehran and Jerusalem could quickly draw in the United States and destabilize the wider Middle East, disrupt global energy markets, and provoke retaliation across multiple fronts.

East Asia represents another critical flashpoint. Intensified Chinese military, economic, and political pressure on Taiwan is rated as a moderate-likelihood but high-impact contingency. Experts warn that such pressure could precipitate a severe cross-strait crisis involving not only China and Taiwan but also the United States and regional allies. The Taiwan Strait scenario exemplifies the enduring risk of great power conflict, where miscalculation or escalation could lead to direct confrontation between nuclear-armed states. Similarly, the resumption of North Korean nuclear weapons tests is assessed as moderately likely and highly impactful, with the potential to trigger armed confrontation on the Korean Peninsula involving multiple regional powers and U.S. forces.

Notably, the survey also places domestic instability within the United States itself among the most serious risks. Growing political violence and popular unrest in the U.S. is rated as both highly likely and highly impactful, reflecting heightened political polarization, the potential deployment of domestic security forces, and the broader erosion of democratic norms. This marks a return to the top tier for a contingency that had previously been downgraded, underscoring expert concern that internal instability could undermine U.S. governance, distract policymakers, and weaken Washington’s capacity to respond effectively to international crises.

Beyond the top tier, the survey’s Tier II contingencies reveal a wide array of conflicts that, while less likely to directly trigger U.S. military intervention, nevertheless pose significant humanitarian, regional, or strategic risks. Africa features prominently here, with Sudan identified as the single most likely conflict to escalate in 2026 among all contingencies surveyed. Experts anticipate that further escalation of Sudan’s civil war could lead to mass atrocities, large-scale civilian displacement, and spillover violence affecting neighboring countries. Although the direct impact on U.S. interests is judged to be relatively low, the scale of human suffering and regional destabilization makes Sudan a priority for preventive diplomacy.

Other Tier II risks include worsening violence in Haiti, where clashes between armed groups and security forces are expected to intensify amid political dysfunction and the failure of international stabilization efforts. In South Sudan, further delays in long-postponed elections are likely to trigger renewed fighting between ethnic and political factions, threatening the fragile central government. In Somalia, the potential withdrawal of U.S. security assistance raises the prospect of increased terrorist attacks and expanded territorial control by groups such as Al-Shabaab and ISIS. These cases illustrate how fragile states, weak governance, and international disengagement can combine to produce cascading security crises.

The Middle East again features heavily in Tier II scenarios, particularly in Yemen, Lebanon, and Syria. Houthi attacks on Israel and international shipping lanes are expected to provoke retaliatory actions that further degrade Yemen’s already shattered state capacity and deepen the humanitarian catastrophe. In Lebanon, the government’s failure to disarm Hezbollah, combined with continued Israeli military strikes, risks igniting a wider sectarian conflict. Syria, meanwhile, faces the prospect of renewed civil war driven by growing sectarian violence, a resurgence of ISIS, and military interventions by Israel and Turkey that weaken central authority and accelerate state fragmentation.

South Asia and the Western Hemisphere are not immune to these dangers. Renewed armed conflict between India and Pakistan is considered a moderate-likelihood, moderate-impact contingency, driven by heightened terrorist activity and repression in Indian-administered Kashmir. In the Americas, heightened concern in the United States over illicit drug production and trafficking raises the possibility of direct U.S. military strikes in Mexico, a low-likelihood but high-impact scenario with profound implications for bilateral relations and regional stability. Similarly, the risk of U.S. military operations escalating into direct strikes in Venezuela, destabilizing the Maduro government, is assessed as a high-likelihood, high-impact contingency and marks one of the most notable new additions to the 2026 survey.

Tier III contingencies, while generally assessed as having lower direct impact on U.S. interests, nevertheless represent serious sources of instability and human suffering. These include growing insurgencies across the Sahel, particularly in Mali, persistent state weakness and Islamist terrorism in northeastern Nigeria, intensifying conflict in the Democratic Republic of Congo involving Rwanda-backed militias, and political and religious violence in Bangladesh linked to election delays and governance crises. Myanmar’s accelerating state collapse, Mozambique’s intensifying insurgency, renewed tensions between Ethiopia and Eritrea, and cross-border conflict between Afghanistan and Pakistan further illustrate the breadth of global instability confronting policymakers.

The survey’s overall takeaways paint a bleak picture. Of the thirty contingencies assessed, twenty-eight are judged to be either highly or moderately likely to occur in 2026, and seventeen are expected to have a high or moderate impact on U.S. interests. The distribution of risks is geographically broad, but certain patterns stand out. The Middle East remains central to U.S. security concerns, with six conflicts in the region rated as Tier I or Tier II priorities, all involving Israel to some degree. Africa accounts for the largest number of contingencies overall, reflecting the continent’s vulnerability to state collapse, insurgency, and humanitarian crises, even if many of these conflicts are ranked lower in terms of direct U.S. impact.

The persistence of great power rivalry is another defining feature of the 2026 risk environment. Potential crises involving China over Taiwan or in the South China Sea, and between Russia and NATO, are rated as having the potential to draw the United States into direct military confrontation with peer competitors. While some of these scenarios are judged less likely to occur in the immediate term, their catastrophic potential ensures they remain central to strategic planning.

Equally important are the survey’s findings on conflict prevention and resolution. For the first time, respondents were asked to identify promising opportunities where U.S. action could mitigate or avert conflict. A significant number of experts highlighted the Russia-Ukraine war, Gaza, the Taiwan Strait, and the West Bank as areas where U.S. leverage could still make a difference, either through diplomacy, deterrence, or multilateral engagement. Others emphasized the importance of supporting international peace efforts in Sudan, Haiti, Syria, and the Democratic Republic of Congo, where coordinated action could reduce civilian suffering even if durable political solutions remain elusive.

#### US RF preserves the LIO, stems persecution driven migration, AND is the template for global RF.

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In September 2025, China’s Chairman Xi Jinping hosted Iranian President Masoud Pezeshkian, North Korea’s Supreme Leader Kim Jong Un, and Russian President Vladimir Putin in Beijing to commemorate the end of World War II. While nominally celebrating the allied victory over fascism, their increasing collaboration as a league of tyrants challenges the rules-based international order created by the United States after World War II. Their policies are antithetical to fundamental freedoms and oppress millions, particularly those wishing to pursue the truth as their conscience dictates without fear of discrimination or violence.

If you were to ask passersby on the street to name the most oppressive countries in the world, they would likely name China, Iran, North Korea, and Russia. Not without reason, these four authoritarian regimes are globally renowned for their oppression: they brook no dissent and ruthlessly crack down on any political opposition. In addition to repressing their own citizens, they act aggressively internationally, with Russian and North Korean troops fighting in Ukraine, Iranian agents and proxies targeting regime opponents in the Middle East and beyond, while China steadily expands its debt-trap mercantilist empire and threatens Taiwan with invasion.

The late John McCain wrote, “The character of states can’t be separated from their conduct in the world.” Consequently, it is unsurprising these regimes are also world-class religious persecution machines. Each enforces certain forms of religious practice over its population and punishes those who deviate from the desired spiritual conformity. Despite current repression, these nations have deep historical and cultural connections with many faiths, including Christianity, Judaism, Islam, Buddhism, as well as other beliefs. However, their modern form of governance is notorious for religious persecution, not pluralism, fear and not freedom.

China’s expanding power has enabled levels of repression unseen in the 21st century. The government’s industrial-scale repression of Uyghur Muslims shocks the conscience with its repressive laws, reeducation camps, sterilization, disappearances, and deaths. Xi and the Chinese Communist Party have attempted to erase the entire Uyghur community from existence. But Uyghurs are not alone. Tibetan Buddhists, Christians, and others also face severe punishments if they question the Chinese Communist Party’s Sinicization of faith or resist subordination to Chairman Xi’s right to govern. 3

While China nominally holds to a Communist ideology, the Iranian regime is theocratic. Under the Ayatollahs, the Bahá’í community has suffered extreme persecution. Officials prosecute them with a religious zeal. Others suffer too, including Christian converts, atheists, agnostics, and Sunni and Sufi Muslims. Shi‘a Muslim women resisting hijab mandates and other religious edicts over their lives face jail and torture from the morality police. Iran’s state sponsorship of terrorism has victimized countless individuals through transnational repression and the targeting of Jewish sites in the West. 4

Where Iran is theocratic, North Korea requires worship of the Kim family. Three generations of repressive Kim family policies have transformed North Korea into arguably the most repressive country in the world. Freedom simply does not exist for anyone, including those wishing for religious freedom. Tragically, North Korea was once a place of rich Christian life, with Pyongyang referred to as the Jerusalem of the East. However, the Kim family allows no competing worldviews, especially religious. North Korea’s once large Christian community has withered under decades of persecution, and the remaining faithful must hide underground. 5 6

Russia, while not as ideologically rigid as any of the prior three, exerts control over religious practice across the vast nation. Despite a brief springtime for religious groups after the fall of the Soviet Union, respect for religious freedom has steadily declined. While vibrant religious communities do worship in Russia, unlike in Soviet times, Putin has coopted the Russian Orthodox Church, rendering it a de facto state entity. Russian laws and policies continue to ban and harass minority groups. Similarly, in the occupied areas of Ukraine, Russian forces have worked to purge any non-Russian Orthodox expressions of Christianity or other minority faiths. Even in the regions of Ukraine free from Russian rule, believers must fear attacks, as Moscow purposely targets civilian areas, including religious and cultural sites. 7 8

To address the severe challenge to religious freedom these regimes represent, new ideas for U.S. policy responses are needed. I therefore want to thank the McCain Institute for commissioning this report, which highlights an overlooked global challenge. While domestic religious liberty concerns are increasingly politically fraught, it is important to ensure issues of religious persecution abroad remain a nonpartisan area of agreement. I also appreciate Corban Teague, the Institute’s former director of the Human Rights & Freedom Program, inviting me into this effort. Further, it has been a pleasure to co-edit the report with Senior Program Manager and acting Director, Alexis Mrachek.

The report’s assembled expertise represents some of the sharpest analysis on religious persecution in these countries. The following chapters will delve further into the nature and scope of how each regime represses religious freedom. However, far from merely admiring the problem, authors provide ideas for how the United States can respond. In fact, a common recommendation is for the Trump Administration to more actively and forthrightly promote these American values in U.S. foreign policy. The authors’ ideas are worthy of consideration by the Administration and members of Congress, as only the United States has the power, influence, and commitment to press these countries to reform.

The U.S. government is familiar with the problem. The U.S. Department of State has repeatedly recognized the dismal records of these four countries, with each government currently designated a “country of particular concern” for their particularly severe religious freedom violations. China and Iran were among the first designated in 1999, with North Korea added in 2001, while Russia was a more recent addition in 2020. In addition to persecution, each tries to leverage historical religious connections to manipulate faith as a form of soft power projection abroad.

For over 25 years, the United States has been the global leader in protecting and promoting religious freedom internationally, across Republican and Democratic administrations. During Trump’s first administration, U.S. efforts reached unprecedented levels, marked by hosting two ministerial-level events and the launch of an alliance of nations committed to freedom of religion or belief. However, the second Trump administration has not pursued religious freedom advocacy with the same vigor. Its decision to slash foreign assistance funding and curtail diplomatic expertise—while shrinking the religious freedom and human rights offices and delaying their reports— further limits the United States’ ability to advocate for religious freedom abroad.

However, a renewed commitment by the second Administration to the priorities of the first could help bring an end to these recurring instances of persecution, thereby preventing the expansion of global challenges and leading to a safer and more secure United States. In addition, President Trump’s personal diplomacy with Xi Jinping, Kim Jong Un, and Vladimir Putin provides unique opportunities to press concerns about religious persecution. The opposite is also true: the absence of presidential support will undermine other efforts, as his foreign policy reflects his personal interests to an exceptional degree. As diplomacy unfolds with each, the president and his envoys must include concerns about religious freedom in their engagements.

Some argue it is not for the United States to meddle in the internal affairs of other nations. But including human rights in U.S. foreign policy advances U.S. values and interests. The religious persecution by this league of tyrants will impact the bilateral relationship, regarding human rights and more. If governments fail to respect the fundamental freedoms of their people, why should we expect them to respect international agreements or trade pacts? It is folly to believe oppressors can be trusted. If people face violence on account of their faith, they will flee to other countries. Religious persecution is one of the key push factors leading to unprecedented levels of global migration. 10

In this complex world, the U.S. government must not shy away from advancing U.S. values centered on religious freedom and human rights. It must not fall into the trap of moral relativism because these regimes have a different worldview, or be shamed into silence about human rights concerns with bogus charges of cultural imperialism. Instead, robust human rights diplomacy should remain a distinctive feature of U.S. foreign policy. The United States has every right to bring its values into foreign affairs, as they reflect the nation’s identity and principles.

The United States is the indispensable actor in promoting religious freedom and related human rights. Its history—the good and the bad—positions it to share best practices while challenging repressive systems. Moreover, its prosperity might require nations to listen. How the United States responds to global religious persecution matters. John McCain said it well: “What matters most is that we remain confident in our principles, mindful that they are not ours alone, and that we recognize that to be on the right side of history is to support people denied their basic rights.” 11

[Citations omitted]

In discussions of global religious freedom, the focus is often—and understandably—on violations: repression of minority faiths, state interference in religious practice, or outright persecution. Yet a parallel development deserves equal attention: the strategic use of religion by authoritarian states to project influence and shape international norms. Russia, China, and Iran—three of the United States’ principal geopolitical rivals—are increasingly deploying religious engagement as a form of soft power. These regimes are not merely repressing religion at home; they are mobilizing religion abroad to advance foreign policy objectives and challenge the liberal international order. Understanding this phenomenon is critical to any serious reassessment of U.S. religious freedom diplomacy.

Russia: Orthodoxy and the Projection of “Traditional Values”

Over the past two decades, the Russian state has cultivated a close alliance with the Russian Orthodox Church (ROC), positioning it as a key vehicle of cultural diplomacy. Under President Vladimir Putin, this partnership has facilitated the export of a civilizational narrative rooted in Orthodoxy and “traditional values,” explicitly positioned against what Moscow characterizes as the moral decadence of Western liberalism. The ROC has expanded its presence in countries where Orthodoxy has historical roots, including the Balkans, Greece, and Cyprus, but also in Africa, where the Moscow Patriarchate has sought to supplant the authority of the Ecumenical Patriarchate of Constantinople following the 2019 schism over Ukraine. These ecclesiastical maneuvers have geopolitical implications: ROC parishes abroad often become nodes of pro-Russian messaging and platforms for fostering relationships with political and civil society actors sympathetic to Moscow’s worldview.

At the multilateral level, Russia has used religious discourse to promote its conservative agenda. For example, Moscow has lobbied the United Nations to emphasize the defense of “traditional values” as a human rights concern, effectively reframing international religious freedom norms. This approach enables Russia to pose as a defender of persecuted Christians globally, even as it restricts religious freedom domestically.

Additionally, the Kremlin’s religious outreach aligns with broader strategies of disinformation and hybrid warfare. ROC-affiliated non-governmental organizations and media outlets often promote anti-Western narratives couched in moral and spiritual terms, appealing to audiences disillusioned with liberalism. The ROC thus functions not merely as a religious institution but also as a key actor in a state-directed ecosystem of ideological influence. The ROC’s growing footprint in Africa is particularly notable. Following the decision by the Alexandria Patriarchate to recognize the independence (autocephaly) of the Orthodox Church of Ukraine (OCU) in 2019, Moscow responded by establishing its own exarchate on the continent—an unprecedented move that introduced parallel ecclesiastical jurisdictions and heightened intra-Orthodox tensions. This development is more than theological posturing; it reflects Russia’s broader ambitions to assert influence in regions where the West has a declining presence. Policy implications for the United States include the need to recognize religious institutions abroad may be co-opted into geopolitical contests. Efforts to promote religious freedom must be sensitive to the ways in which adversarial powers embed themselves in transnational religious networks under the guise of spiritual or cultural solidarity.

China: Repression at Home, Export of Religious Governance Abroad

China’s domestic religious policy is defined by tight control and coercion. From the mass internment of Uyghur Muslims in Xinjiang to crackdowns on house churches and restrictions on Tibetan Buddhist practices, the Chinese Communist Party (CCP) seeks to subordinate all religious life to party authority. But Beijing’s ambitions do not end at the country’s borders.

Through its Belt and Road Initiative (BRI), China is increasingly exporting its model of religious governance. In countries across Central Asia, Southeast Asia, and Africa, Chinese officials promote “Sinicized” religion as a framework that integrates religious expression into national development agendas. Chinese surveillance technologies developed for Xinjiang are now being marketed abroad as tools for monitoring religious extremism, often finding receptive audiences among governments wary of religious dissent.

Moreover, China is positioning itself as a spiritual leader in the Buddhist world. It has funded transnational Buddhist conferences and monasteries while promoting a version of Buddhism aligned with socialist values. This strategy serves to counterbalance Indian influence in the region and expand Beijing’s moral authority in Asia. The growing tensions between China and India over the Dalai Lama’s successor represents an additional layer of religious geopolitics in the region. China has also partnered with multilateral organizations and regional fora to promote its religious governance model as a counterweight to liberal rights-based frameworks. At venues such as the Shanghai Cooperation Organization, Chinese officials have framed religious extremism as a security threat best addressed through state-centered regulation and surveillance—a framing that resonates with authoritarian regimes wary of faith-based dissent.

In some cases, China’s religious engagement abroad takes on an explicitly diplomatic dimension. For instance, Chinese embassies and Confucius Institutes have hosted interfaith dialogues where Buddhism is highlighted as a vehicle of peace and harmony in line with Chinese civilization. These efforts often downplay domestic religious repression of Tibetan Buddhism and instead showcase a carefully curated image of state-sanctioned spirituality. The challenge for the United States is to contest China’s normative influence not only by highlighting abuses but also by offering alternative models of religious freedom that resonate with local concerns. This includes supporting civil society efforts in BRIpartner countries and building partnerships with religious communities that resist authoritarian co-optation.

Iran: Revolutionary Theology and Transnational Shi‘a Networks

Iran has long leveraged religious networks as instruments of state power. The Islamic Republic’s clerical establishment sponsors seminaries in Qom that attract students from across the Muslim world, creating ideological linkages that extend Tehran’s influence. Iran also mobilizes pilgrimage networks, particularly to sites in Iraq and Syria, to cultivate loyalty and disseminate revolutionary narratives.

The Islamic Revolutionary Guard Corps (IRGC) plays a key role in this effort, often operating through affiliated clerics and institutions to channel support to aligned groups in Lebanon (Hezbollah), Iraq (Popular Mobilization Forces), Yemen (Houthis), and beyond. These connections fuse religious identity with geopolitical allegiance. Iran also positions itself as a defender of global Islam, particularly on issues such as Palestine and Kashmir, enabling it to appeal to Sunni audiences despite sectarian divides. By invoking the language of religious justice and anti-imperialism, Tehran crafts a soft power narrative that resonates across the Global South. 8

Qom’s seminaries remain central to Iran’s influence strategy, producing generations of clerics who return to their home countries imbued with Tehran-aligned theology. In countries such as Nigeria, Pakistan, and Indonesia, these clerics serve both religious and political functions, advocating for positions consistent with Iranian foreign policy while embedding themselves in local Shi‘a communities. This long-term investment in ideological infrastructure gives Iran a durable base of influence that extends well beyond episodic geopolitical events. Iran’s use of media to amplify its religious messaging is also significant. Outlets like Al-Alam, Press TV, and a host of Arabic-language satellite channels broadcast content designed to frame Iran’s religious ideology as a just and anti-imperial alternative to Western-backed models of governance. This narrative is reinforced by cultural centers and clerical exchanges across Africa, South Asia, and Latin America.

Iran’s use of religion gives it soft-power influence with Muslim communities in many strategic contexts. For U.S. policymakers, engaging Muslim-majority societies should involve more than countering extremism or promoting religious freedom in isolation. It requires recognizing and supporting forms of religious leadership and theological education that foster pluralism and resist state instrumentalization by outside actors like Iran.

Strategic Contestation in the Arena of Religion

What unites the religious strategies of Russia, China, and Iran is their shared effort to redefine the global discourse on religion in ways that challenge the liberal international order. They are not simply violating religious freedom; they are reimagining religion’s role in global politics to advance illiberal visions of governance, identity, and sovereignty. This dynamic requires a shift in how the United States approaches religious freedom. Too often, U.S. efforts have focused narrowly on violations, without grappling with the broader geopolitical uses of religion by authoritarian states, or shied away out of an excessive concern of the First Amendment. U.S. policy must evolve to incorporate a greater capacity for strategic religious engagement alongside its human rights advocacy, including new approaches to faith partnership that lean into the religious sector while still respecting necessary legal guardrails. This means equipping diplomats with religious literacy skills and fostering partnerships with independent religious actors abroad. It also involves investing in civil society initiatives promoting inclusive religious narratives and resisting authoritarian religious models. The United States should support pluralistic religious education, fund research on transnational religious networks, and create platforms for interreligious dialogue which advance democratic values.

#### Liberal order forestalls numerous existential risks (nuclear war, climate change, AI, pandemics, asteroids, deforestation).

Dr. James Pattison 25, PhD, Professor, Politics, University of Manchester, "The Duty to Confront Global Authoritarianism," European Journal of Political Theory, OnlineFirst, 04/15/2025, SAGE. [italics in original]

The past decade has seen a marked rise in authoritarianism. Authoritarian powers that reject liberal democratic values, most notably China, have increased in global influence. Many previously liberal democratic states such as Benin, Hungary, the Philippines, the United States, Tanzania, and Turkey have taken authoritarian turns, weakening and abandoning key aspects of their liberal democracies. Democratic gains made over the past 30 years have been eroded, with 72% of the world's population now living in autocracies, an increase from 49% in 2004 (V-Dem, 2025). A post-liberal order appears to be emerging in which authoritarian actors have greater influence. According to Freedom House, ‘[t]he global order is nearing a tipping point, and if democracy's defenders do not work together to help guarantee freedom for all people, the authoritarian model will prevail (2022: 1). It is clear that rising global authoritarianism poses a major emerging challenge. This is exacerbated by the more supportive posture of the second Trump Administration towards authoritarian actors.

Yet, despite the dangers posed by global authoritarianism, efforts to respond to rising global authoritarianism have often taken a back seat as states have prioritised other areas. Democracy aid comprises only 10% of total Official Development Assistance (ODA) by OECD countries (Cheeseman and Desrosiers, 2023), with some OECD countries giving very little democracy aid. For instance, the United Kingdom cut its budget for electoral assistance from 6% to 1% of ODA between 2010 and 2020 (Independent Commission for Aid Impact, 2023: 2). Although states have reacted more robustly to coup d'états (e.g. the United States has in the past immediately cut aid after a coup d'état), they have often overlooked the more gradual erosion of democracy and the increase in global authoritarianism (Cheeseman and Desrosiers, 2023).

The aim of the paper is straightforward: to explicate the duty to confront rising global authoritarianism, what it means, and why it should often be taken even more seriously than other global responsibilities. The paper argues, overall, that states are morally required to take much more seriously the threats posed by rising global authoritarianism. In doing so, the paper highlights the threat to the fulfilment of other global responsibilities posed by rising global authoritarianism, arguing that this helps to show most clearly why the duty to confront global authoritarianism is weighty.

The paper aims to contribute to the literature by explicating the duty to confront rising global authoritarianism, which has been largely overlooked. It is widely accepted, by both cosmopolitans and noncosmopolitans alike, that states have several global responsibilities, stemming from global duties of justice and humanity respectively. Indeed, political philosophers have ascribed a wide range of duties to states to respond to major current challenges. These include, most famously, duties to respond to mass atrocities, tackle global poverty, provide refuge to displaced persons, and reduce communicable and noncommunicable diseases.1 Some have extended this to argue that agents have weighty duties to tackle emerging and future challenges, such as those posed by climate change, artificial intelligence, future pandemics, and asteroids.2 \*\*\*FOOTNOTE BEGINS\*\*\* 2. Examples include Bostrom (2013), Cripps (2022), MacAskill (2022), and Singer (2015). Bostrom N (2013) Existential risk prevention as global priority. Global Policy 4(1): 15–31. Cripps E (2022) What Climate Justice Means and Why We Should Care. London: Bloomsbury. MacAskill W (2022) What We Owe to the Future: A Million Year View. London: OneWorld Publications. Singer P (2015) The Most Good You Can Do: How Effective Altruism Is Changing Ideas About Living Ethically. New Haven: Yale University Press. \*\*\*FOOTNOTE ENDS\*\*\* Yet, unlike these other areas, the emerging challenges posed by rising global authoritarianism have been largely underexplored. Of the work in political philosophy that does consider growing authoritarianism, it focuses on the challenges posed by democratic backsliding *domestically* (and especially within the EU), rather than the rise in authoritarianism globally.3

In what follows, the paper first sets out the duty to confront rising global authoritarianism, including its targets, agents, and forms, before outlining its central three bases. Crucial here is that this duty comprises not only self- and other-defence, but also to redress the spillover effects of the rise in global authoritarianism. The paper then goes on to consider how a duty to confront rising global authoritarianism relates to duties to respond to other emerging threats. It argues that the duty to confront global authoritarianism is an ‘indirect duty’ and so should be viewed as very weighty since it is necessary for the fulfilment of other global responsibilities. In the final section, the paper considers what sorts of means could be permissibly adopted to tackle global authoritarianism, focusing on the question of whether it is permissible to adopt measures that themselves violate liberal norms if it appears they will help to tackle authoritarian threats.

Before beginning, three clarifications are necessary. First, I will use global ‘responsibility’ and global ‘duties’ interchangeably. Second, the paper will often focus on states – and often liberal states – as the holders of the duty to confront global authoritarianism. As I will discuss below, this includes a central role for states in the Global South. However, other types of agents may also possess this duty, including international institutions, civil society actors, and individuals. Third, although there have been longstanding authoritarian actors globally (e.g. Russia and North Korea), the paper is particularly concerned with the massively increasing prevalence of authoritarianism globally, which appears to be a step change from recent times, at least since the end of the Cold War.

Confronting global authoritarianism

I will start by outlining the concept of the duty to confront rising global authoritarianism, focusing on the (1) target of the duty, the (2) sorts of actions required by the duty, (3) the bearers of the duty, and (4) the reasons for framing it as a duty, before turning to its bases in the next section.

First, let us consider the targets. Agents can vary in the degree to which they are authoritarian in their behaviours and over time. For instance, established liberal democratic states, although mostly not authoritarian, can sometimes engage in authoritarian behaviour, such as the Rendition programme during the War on Terror. I will therefore follow Marlies Glasius in focusing on authoritarian *practices*, but depart from her in how we should understand these practices, who suggests that they are ‘*a pattern of actions, embedded in an organized context, sabotaging accountability to people over whom a configuration of actors exerts a degree of control, or their representatives, by disabling their voice and disabling access to information*’ (2023: 22; emphasis in original).4 On the one hand, this understanding is too narrow since authoritarianism might not ‘sabotage’ accountability mechanisms. There may be few existing accountability practices to sabotage. It also limits authoritarianism to only two main means: ‘disabling voice’ and denying access to information. This overlooks the range of other authoritarian means that do not involve silencing and obfuscation, from domination by the executive to undermining of the judiciary. On the other hand, the definition also seems too broad since it does not capture the sense that authoritarian practices involve attempts to develop a strict, highly ordered society and attempts to stop or preclude deviance from the perceived societal norms. In other words, it overlooks the rejection by authoritarianism of pluralism, of different political ideas, religions, or ethnic identities, which is a key part of rising authoritarianism (Freedom House, 2024). It also fails to distinguish authoritarianism from poor or weak democratic governance, and from democratic backsliding states, where there is less access to democratic rights but still acceptance of pluralism and difference. I will therefore follow Giorgios Katsambekis in understanding authoritarianism as ‘a set of practices centred around a rigid notion of authority that is characterised by the employment of actions/policies that aim to consolidate a strictly ordered society, limit accountability and counter deviance' (2023: 423).5 This includes not only the attempts to limit accountability (central to Glasius' understanding of authoritarian practices) but also the repudiation of pluralism.

These authoritarian practices are objectionable and states have some reasons to challenge such practices in other states, stemming from concern about the health of democracy in other states and the undermining of pluralism. Yet, on their own, these reasons are unlikely to be sufficient to generate a weighty duty to confront global authoritarianism. That is, the reasons are unlikely to be sufficiently weighty to generate not simply a *pro tanto* duty but also often an *all-things-considered* duty. For this, we need to understand the extent of rising global authoritarianism, and in turn, the much more serious threat that it poses not only to democracy but also to the fulfilment of numerous global responsibilities. I will present this threat over the next two sections.

Let us now turn to the *global* part of rising global authoritarianism. This has three main elements. The first is *internal*: many former liberal democracies, from Asia to Latin America, Europe to Africa, have elected populist, right-wing governments that have undermined civil and political rights, such as by weakening judicial independence, violating LGTBQIA + rights, and denying the rights of migrants to seek asylum.6 Although many of these states are still not autocracies (i.e. they are still either electoral or liberal democracies), they have adopted many authoritarian practices. The second is *international*: autocratic powers that reject liberal democratic values, most notably China, have been rising in global influence, offering an alternative vision to the liberal international order.7 The third is *transnational*: authoritarian actors are increasingly working together in transnational partnerships, defending authoritarian practices and championing illiberal views, such as in partnerships between authoritarian states, such as China and Russia (BBC, 2024), and between authoritarian political leaders, such as between Viktor Orbán, Donald Trump, and Marine Le Pen. The latter include relations formed at the annual Conservative Political Action Conference (CPAC) as well as more ad hoc relationships between authoritarians, such as between Viktor Orbán and Marine Le Pen.8 In his speech to the CPAC conference in Dallas in 2022, Orbán called for ‘conservatives to make friends’ internationally to defeat ‘globalists’, as well as denouncing gay marriage and immigration, and received a raucous standing ovation from the US Republicans in the room (Abrahamsen and Williams, 2023: 29; Stephan, 2023). It also includes actors such as the Russian private military and security company, Wagner (now known as ‘Africa Corps’), which has been used by Russia to export its kleptocratic governance model, helping to establish an anti-Western coalition across Africa with a partnership of autocrats, and the Russian Association for Free Research and International Cooperation, which sponsored phoney election monitoring in several African nations, including Zimbabwe and Mozambique (Rampe, 2023).9

Accordingly, the duty to confront global authoritarianism has three targets. The first is rising authoritarian practices *in other states*, by challenging these practices with measures such as economic sanctions and diplomatic naming and shaming. The second is to confront *global authoritarian powers*, such as attempts to contain and counteract Russia's influence in Africa, and, more forthrightly, to challenge Russia after its invasion of Ukraine in 2022. The third is to confront *transnational authoritarian partnerships*, such as by challenging their ability to organise.

Let us turn to the sorts of actions required. The duty to ‘confront’ global authoritarianism is a catch all, comprising three ‘c's: *challenging*, *containing*, and *counteracting* rising global authoritarianism. *Challenging* global authoritarianism concerns tackling it head on, trying to stop its march and roll it back. It seems unlikely to be feasible to *fully* tackle global authoritarianism, that is, to *fully* preclude global authoritarianism, at least in the short- to medium-term. What will often be more feasible is *containing* it, reducing the likelihood of some of the worst potential outcomes and rolling back global authoritarianism as far as possible. Importantly, confronting global authoritarianism can also involve attempting to deal with its challenges. That is, rather than attempting to directly roll it back, it can instead concern efforts to respond to the broader, serious spillover effects of the increase in authoritarianism. The duty to confront global authoritarianism therefore involves not simply attempting to tackle rising global authoritarianism but also to *counteract its problematic effects*. As I argue below, these concern the implications for the fulfilment of other global responsibilities.

Confronting global authoritarianism (in all three forms – challenging, containing, and counteracting) can involve several measures. These include naming and shaming authoritarian actors, such as criticism of Orbán's Hungary by human rights organisations, and the launching of economic sanctions, such as the various Western sanctions on Wagner and Russia in the light of Russia's invasion of Ukraine in 2022. It also includes political sanctions, such as expulsion from international bodies and the denial of voting rights10, as well as (some degree of) military support for actors fighting authoritarianism, such as the provision of arms to Ukraine.

The duty to confront global authoritarianism differs from ‘democracy promotion’, which has been seen as a euphemism for the unilateral, forcible *imposition* of democracy, often through regime change, on undemocratic states by powerful actors for self-interested reasons (such as to open up economic markets) (Independent Commission for Aid Impact, 2023). The forcible imposition of democracy has numerous, well-known problems, not least the major difficulties involved in attempting to impose democracy by coercion. Indeed, the coercive imposition of democracy is highly unlikely to be justified, given the low likelihood of success and the fact that democracy aid would be far better spent elsewhere protecting democracy.11

By contrast, following a shift in language used around democracy aid (Independent Commission for Aid Impact, 2023; Leininger, 2022), the duty to confront authoritarianism concerns democracy *protection* (which involves primarily *containing* and *counteracting* global authoritarianism). That is, it concerns protecting democracy under threat from the march of authoritarianism by those who already accept democratic values, rather than the imposition of democracy on those who do not already endorse democratic norms. Although it does contain elements of *supporting* democratic movements in other states, this is not coercively, that is, it does not involve imposing it on those who do not already accept democratic values.

This point also reduces concerns about the lack of a right to confront global authoritarianism in particular cases because of the potential violation of the sovereignty of states that have a degree of legitimacy. Whether there is a right to interfere in states that are not fully democratic has been much discussed; in the most helpful contribution to the debate thus far, Lucia Rafanelli (2021) argues that various forms of interference can be justified even in legitimate states, depending on how much they work through existing institutions (rather than opposing them) and how coercive they are. The more oppositional and more coercive interventions, she argues, are justifiable only when states are illegitimate, but measures that work through existing institutions and are not coercive can be justifiable in even fully legitimate states.12 This is because these measures can bolster recipients' collective self-determination by challenging, in Rafanelli's words, ‘the colonial and other geopolitical hierarchies that rob societies on their bottom rungs of self-determination’ (2021: 6) – and, we can add, the threats posed by global authoritarianism that potentially rob individuals of accountable governance. The point, then, is that democracy protection measures are likely to work through existing institutions and unlikely to be massively coercive, and so will not face concerns about violating legitimate governance.

The most obvious measure here is the provision of *international democracy support*. This involves, for instance, helping others to build the capacity of independent media and civil society, improving accountability through the courts and parliament, helping with elections, and assisting actors wanting to ensure democracy, such as human rights NGOs (Godfrey, 2022; Leininger, 2022). Such support for pro-democratic actors can be partnered with conditionalities and mildly coercive measures.13 For instance, alongside international rebuke, international support of Senegal’s civil society and electoral processes helped to ensure that Abdoulaye Wade did not circumvent term limits in 2012 (as he had attempted) (Leininger and Nowack, 2022). Measures of democracy support are not generally coercive (or at least minimally so) since they aim to support those who already accept democratic values, and those who live in institutions that value democracy and willing to accept external assistance to support democratic protection efforts. In other words, it is not an *imposition* but rather assisting those who already accept democratic values.

For these measures to be justified, they need to meet the relevant criteria, which may be specific to each measure (at least at the nonideal level) (Fabre, 2018; Pattison, 2018, 2019). Whether there can be unifying criteria across all of the various measures is somewhat moot.14 But, without going into this here, we can point to some broadbrush principles that are generally applicable: that the measures need to be *proportionate* – to do more good than harm compared to inaction – and that the measures need to be *necessary* – better than other ways of confronting global authoritarianism. Meeting these broadbrush criteria (as well as, perhaps, any specific formulation of these principles or additional criteria relevant to the particular measure) will provide actors with the *right* to confront global authoritarianism.15 It will also, I will argue in the next section, mean that they have a correlative *duty* to do so (unless otherwise excessively costly).

Third, the *bearers* of the duty to confront global authoritarianism are, most obviously, Western liberal states, given their global influence and resources. But other international institutions, individuals, civil society actors, and other, non-Western, liberal states, such as Botswana, Chile, Costa Rica, Ghana, and South Korea, also bear the duty.16 Indeed, it is worth highlighting that states in the Global South have significantly contributed to the development of the liberal egalitarian elements of the existing international order, and are likely to have vital roles in confronting global authoritarianism. As Marcus Tourinho (2021) argues, although it is often assumed that industrialised democratic states presented a coherent set of norms that was resisted by the Global South and that developing countries diluted liberal principles in favour of sovereigntist ones, this is not actually the case. In the mid-twentieth century, certain ‘contributions of postcolonial Latin American, African, and Asian states made the global order more, not less, liberal’ (Tourinho, 2021: 268; emphasis added). This includes the development of the 1977 Additional Protocols to the Geneva Conventions (Tourinho, 2021: 270–1), the emphasis on global justice and equity, and developing and supporting the responsibility to protect (R2P) doctrine, human security, and transitional justice (Acharya, 2019: 15–16). More recently, in 2019 the Gambia (with the support of the Organisation of Islamic Cooperation) filed a case against Myanmar in the International Court of Justice (ICJ) under the Genocide Convention over genocide of the Rohingya in Myanmar. This was not only the first attempt to subject the genocide of the Rohingya to legal scrutiny, it was the first time that the ICJ had received a case bought by a country from a different continent (International Bar Association, 2019).

All that said, rich Western states are required to bear more of the costs of fulfilling the duty to confront global authoritarianism, potentially supporting action by others. Given their (1) previous culpable multiple injustices (e.g. colonial injustices) and given (2) their greater ability to pay, it seems clear that rich Western states can be asked to bear more of the costs of the measures necessary to confront global authoritarianism. This assumes that we adopt a (fairly standard) model of the distribution of costs that looks to those who are most culpable and most able to bear the costs.17 To be sure, even when Western states do not support the costs of the measure, there are still various, often cheaper measures that less wealthy states in the Global South can be duty-bound to undertake to confront global authoritarianism, such as supporting diplomatic initiatives and providing advice and assistance.

Fourth, why is the duty to confront global authoritarianism a *duty* and what does it mean to call it a ‘duty’? The duty to confront global authoritarianism is not an indefeasible duty; it is pro tanto and can, *on occasion*, be outweighed by other international duties, as I discuss below.18 The duty may also, on occasion, be outweighed by states' fiduciary obligations to look after their own citizens' basic interests, when fulfilling the duty would involve very costly action. In other words, the duty to confront global authoritarianism, like other global duties, has a reasonable costs proviso, meaning that it does not require bearers to bear unreasonable costs in discharging it, or helping others to discharge it.19 That said, the duty is, in most cases, an all-things-considered duty and should be acted upon. This is because, as the third section argues, confronting global authoritarianism should sometimes be prioritised over other issues since this will better enable responses to multiple crises. In addition, as just noted, many measures to confront global authoritarianism are not unduly costly, such as diplomatic support to democracy movements.

Why frame the duty to confront global authoritarianism as a ‘duty’? First, as we will see, the three bases concern considerations of very large magnitude that are not easily outweighed – at stake are the self-determination of millions of people and the fulfilment of global responsibilities to millions of vulnerable individuals. Second, the language of duties and responsibilities is a clear signifier to highlight the importance of tackling global authoritarianism. It emphasises to states, and to other actors, that there is an imperative to respond. Third, the language of duties helps to move beyond seeing the threat posed by global authoritarianism simply as a matter of self-defence and the protection of one's national interests. It emphasises that global authoritarianism poses very serious threats to *others*, including self-determination in *other states* and the fulfilment of global responsibilities, which affects vulnerable individuals globally. I will now unpack these points.

Three bases

There are three bases of the duty to confront global authoritarianism. The first is self-defence, both in terms of the defence of the self-determination of the state and the defence of territorial integrity. This concerns the attempts by authoritarian actors to influence the functioning of democracy in liberal democratic states, from the Russian interference in the election(s) of Donald Trump and the Brexit referendum, to the Chinese influence of the 2019 and 2021 Canadian elections and the Qatari attempts to interfere with the voting of the European Parliament (so-called ‘Qatargate’) (BBC, 2023a). These efforts have seemingly been intended to weaken democracy by encouraging divisive actors and to ensure that the sponsors have in place officials who will not contest their foreign policy goals.

In response to external interference by authoritarian actors, states have a right – and a duty – of self-defence. The right of self-defence is a cornerstone of the UN Charter and is widely held in many leading accounts of just war theory to justify the resort to military force when states are under significant threat (e.g. Walzer, 2015).20 The threats are serious: the risk is to the collective self-determination of states, from being able to freely choose their elected officials and to determine their foreign and domestic policies without illicit interference.21 More straightforwardly still, tackling foreign meddling is crucial for the protection of the values of democracy and human rights. Accordingly, the first basis of the duty to confront global authoritarianism is the domestic duty that states possess to defend their citizens' collective self-determination from authoritarian foreign meddling. This basis is, of course, limited to where there is a threat of foreign meddling, although given transnational authoritarianism this threat is pervasive. There is also, more straightforwardly still, a self-defence rationale because of the risk that rising global authoritarianism will lead to your state being attacked, invaded, and annexed – to territorial integrity as well as self-determination. This is a plausible concern, for instance, for those in Taiwan and the Baltic States.

The second basis concerns the threats posed by global authoritarianism to those *in other states*, as seen most vividly in Ukraine. There are duties of humanity – and potentially duties of justice – to help defend other states from illiberal foreign meddling, from invasion, annexation, and attack, and internal illiberal major events (e.g. the imposition of martial law by a flailing leader), stemming from a general duty of assistance or duty to protect.22 It could also, for instance, take the form of helping other states to develop a system of early warning and monitoring and a system of checks and balances to protect themselves from externally supported illiberal major events. This is to help them to ensure the values of democracy and human rights within their state, and to protect their self-determination and territorial integrity. It also concerns, for instance, the dangers posed to Taiwan and the Baltic states, and the duties owed to help these states maintain their independence.

These two bases are an important element of the duty to confront global authoritarianism but are contingent on the existence of threats to undermine self-determination and territorial integrity. Some states may not be subject to these threats, with, for instance, little chance that global authoritarians will invade or interfere with their domestic politics. Focusing only on these two bases therefore risks underplaying the threat posed by global authoritarianism. Focusing on only self-defence is especially problematic because it risks framing the challenges posed by global authoritarianism as matter of only defending democracy at home and/or national self-interest, and this overlooks the risks to those in other states. What these defensive framings miss, more specifically, are the broader implications that rising global authoritarianism has for the fulfilment of global responsibilities, such as climate change obligations and refugee protection. This brings us to the third basis, which is the central part of the weightiness of the duty that I consider below.

To explicate: an international order dominated by authoritarian actors could lead to far less fulfilment of global responsibilities. Authoritarian states typically fail to fulfill their global responsibilities, with fewer resources going towards humanitarian assistance and disaster relief (Huang, 2018: 310) and accepting very small numbers of refugees. For instance, in 10 years, China has accepted only 526 refugees (Norwegian Research Council, 2023) and Saudi Arabia has, according to Human Rights Watch, shot dead hundreds and perhaps thousands of migrants at its borders in a systematic pattern of large-scale killing (BBC, 2023b). Moreover, some authoritarian states commit atrocities within their own borders (e.g. Ethiopia in the Tigray). Some have consistently attempted to block progress in climate change negotiations, such as Saudi Arabia's attempts to postpone, delay, refuse to negotiate, and deny the science (Depledge et al., 2023). Under Bolsonaro, Brazil increased the deforestation of the Amazon, thereby weakening efforts to tackle climate change and harming biodiversity and, under Orbán, Hungary has adopted a xenophobic and punitive attitude towards refugees (much more so than its more liberal neighbours). In his first administration, Trump seemingly wanted to get rid of the rules of war and proposed measures that were clear violations of international humanitarian law (Ford, 2021; Galbraith, 2020).23 Democratic backsliders have reduced their aid budgets. For instance, under the tenure of Boris Johnson, who attempted several ways of undermining British democracy, the United Kingdom cut its foreign aid budget to 0.5% of GDP in light of pressure from right-wing elements of the Conservative party.24 The shift towards authoritarianism tends to reduce attentiveness to global responsibilities.25

Moreover, a post-liberal order dominated by authoritarian actors could create a far less conducive international environment for the fulfilment of global responsibilities. Recent International Relations scholarship has explored the contours of a potential post-liberal order, with three main perspectives. The first predicts a more Realist-nationalist order (e.g. Mearsheimer, 2019). In this order, there will a significant rise in nationalism and security competition between China and the United States, and increases in the instances of mass atrocities and conflicts, as well as the open violation of key international norms such as non-intervention and the failure of international institutions. The second perspective is somewhat less pessimistic, imagining a pluralist-sovereigntist order (e.g. Acharya, 2017; Hurrell, 2018). In this order, statist norms and statist interpretation of norms will become much more prevalent and regions will be more import, including those regions dominated by authoritarian states. Authoritarianism, isolationism, and nationalism will become more prevalent in several previously liberal states and, in general, cosmopolitan elements of international norms will be less influential. By contrast, the third perspective envisages the liberal international order lingering on (e.g. Deudney and Ikenberry, 2018; Ikenberry, 2020). On this view, even the influence of the United States declines, authoritarianism will be significantly constrained and liberal hegemony will still continue. Liberal democracies will still be prevalent but will also decrease in their influence and power relative to other states, and the norms concerning human rights and democracy will decrease in influence globally.

Whichever of these scenarios emerges, it seems likely that a post-liberal order with more global authoritarianism will, first, lead to more crises and issues, as the number of human rights situations, mass atrocities, and conflicts increase, due to greater polarisation and rivalry between great powers and regions. This is likely to be most severe in the Realist-nationalist scenario, as many states, in part led by the whims of their authoritarian leaders, assert aggressively their national interests, and in general, the world becomes less rule-governed and more conflictual.

Second, and related, there is less likely to be successful multilateralism. In recent times, multilateralism has become subject to ‘gridlock’, as international institutions have failed to progress over the past few decades (Hale et al., 2013; Hale and Held, 2017). In the more pessimistic scenarios, a post-liberal order dominated by global authoritarians would see the further weakening of multilateral institutions as there would be an increased polarisation and stymying within organisations, reducing their ability to resolve crises and conflict, leading to more unilateral efforts, or simply inaction. As there are more authoritarian states, regional organisations are already being more and more dominated by them, enabling them to protect each other from criticism and sanctions (Independent Commission for Aid Impact, 2023: 16). International organisations are also being significantly influenced by authoritarian actors. The UN Human Rights Council has elected states that have been major human rights violators, including Cameroon, Eritrea, Qatar, and Sudan, and China and other authoritarian states distort the Human Rights Council practice of Universal Periodic Review, reducing the scrutiny of its human rights record, ‘turning the process into a self-congratulatory exercise and propaganda platform’ (Chen, 2021: 1241). In addition, authoritarian actors often disengage and withdraw from multilateral organisations. Under the (first) Trump administration, the United States withdrew from (or ended funding for) the Paris Agreement, the United Nations Relief and Works Agency for Palestine Refugees, the Trans-Pacific Partnership, UNESCO, the Universal Postal Union, the World Health Organization, the UN Human Rights Council, and threatened to withdraw from the World Trade Organization and the North American Free Trade Agreement (NAFTA) (resulting in the latter's demise) (Talmon, 2019). (The second Trump administration is adopting a similar approach). China, despite working with some institutions (such as the World Bank), has flouted others, including the International Tribunal for the Law of the Sea ruling on the South China Sea, and generally prefers bilateralism over multilateralism, being unwilling to engage in self-binding multilateral agreements that might limit its sovereign discretion (Weiss and Wallace, 2021: 642). According to Tom Ginsberg's (2020: 230) account of ‘authoritarian international law’, authoritarian states are worried about overly constraining themselves with transparent international commitments, which might create a domestic backlash if the benefits do not emerge. This means that authoritarian states are likely to be less committed to major multilateral initiatives.

Third, in the more authoritarian-dominated international orders, liberal and cosmopolitan norms will be weaker, such as the most ambitious aspects of the R2P and international humanitarian law, as they are subject to increased contestation and even open denial (Pattison, 2021). The (first) Trump administration not only withdrew from international treaties, it also showed an attitude of unparalleled contempt or disdain, if not even open hostility’ to the international legal order, and attacked legal bodies such as the International Court of Justice and denied basic laws such as those prohibiting the illegal acquisition of territory (Talmon, 2019: 664) (and, again, the second Trump administration is adopting a similar position). The first Trump administration also proposed a ‘Commission on Unalienable Rights’, which Roth (2020), former Executive Director of Human Rights Watch, called a ‘frontal assault on international human rights law’, as it attempted to justify restrictions on reproductive freedom and the rights of LGBTQIA + people, and attempted to abandon the binding quality of human rights law.

Fourth, more broadly, in a postliberal order dominated by authoritarians, there is likely to be the further erosion of the notion of ‘truth’ as an ideal. Actors will increasingly engage in what Adler and Drieschova (2021) call ‘truth-subversion’ practices. These include ‘false speak’ (deliberate and obvious lying with the intention of subverting the facts), ‘doublespeak’ (with intentional internal contradictions to erode reason), and ‘flooding’ (the intentional presentation of several different messages in order to create confusion). The erosion of truth, Adler and Drieschova argue, has serious ramifications, exacerbating some of the problems above: free and fair elections can be more difficult if the public is misled and confused about accurate information; markets can be undermined since they depend on accurate information for functioning; and multilateralism can be weakened as it requires a reasoned consensus, as well as coordination and cooperation that depend on shared understandings.

Given these four elements, an authoritarian-dominated international order will be far less conducive to carrying out global responsibilities. The fact that there will be more crises to deal with will mean that states will have more responsibilities to fulfil as there will be additional people who are vulnerable with claims to assistance. But there are likely to be fewer states willing to commit to fulfilling global responsibilities, given the rise of authoritarianism. The remaining willing actors, as a result, will have to do a lot more – and many will be unable or unwilling to do even more. Weaker, or non-existent, global norms will exacerbate this, reducing the influence of norms encouraging states to fulfil their global responsibilities. And even when states do act, the weakening of multilateralism will mean that efforts will often have to be unilateral, which will typically jeopardise their effectiveness and increase the burden on those acting. More generally, truth-subversion practices will make it difficult to access the information needed to assess how global responsibilities should be fulfilled and threaten the ability to achieve agreement on action.

As such, this third basis of the duty to confront global authoritarianism is what Chiara Cordelli calls a ‘*prospective duty*’. A prospective duty is a duty ‘to overcome incapacities that make us unable to carry out positive duties to assist’ (2018: 386). That is, there is a prospective duty to overcome the likely incapacity that the international community will face in carrying out positive duties in the future, given the threats posed by a post-liberal order dominated by authoritarianism. It follows that the failure to confront global authoritarianism is wrongful. As Farod Akhlaghi argues, ‘an agent performing an otherwise permissible and not heavily burdensome action… that they have good reason to believe will drastically lower the chances of fulfilling a moral obligation, relative to at least one alternative action available, is pro tanto morally wrong’ (2020: 636). The third basis of the duty to confront global authoritarianism, then, concerns the threats posed to the fulfilment of global responsibilities, as a post-liberal order dominated by authoritarianism reduces the likelihood of these responsibilities being fulfilled.

The dangers for the fulfilment of global responsibilities are most serious in the Realist-national scenario, but also the pluralist-sovereigntist order, both of which would face increased authoritarianism and major negative side-effects, such as reduced ability to coordinate international responses to major crises from climate change to global pandemics. It is important to preclude in particular the Realist-national scenario, given the dangers that this scenario poses. The basis of the duty to confront global authoritarianism therefore concerns not simply rising authoritarianism in other states, which might appear to be only a relatively minor consideration in light of numerous ongoing global political challenges. The basis, rather, concerns the threats posed to self-determination of one's own state, of other states, and the fulfilment of global responsibilities. As argued above, these three elements necessitate the language of duties; the seriousness of the threats involved means that the duty will not simply be *pro tanto* but also often an all-things-considered duty. Indeed, we might think, given particularly the threat to the fulfilment of global responsibilities, that we should see this duty as very weighty – and at times weightier than duty to tackle other major challenges. Establishing this point is the task of the next section.26

Comparison to other duties

Having set out the basis of the duty to confront global authoritarianism, I now want to consider how this duty differs from other duties that focus on emerging global developments, such as the duty to tackle climate change, or reduce the threats posed by technological developments such as the misuse of AI and to minimise the risk of future pandemics. I will argue that the duty to confront global authoritarianism should be viewed as sometimes weightier than these other duties, other things being equal.

Why is this? After all, the other emerging duties concern threats of undoubtedly major magnitude. Take, for instance, the threats posed by future pandemics. Epidemiologists tell us that it is only a matter of time until there is another major pandemic, such as a major influenza strain (Kamradt-Scott, 2018: 544), with, in the worst cases, a potential fatality rate far higher than that of COVID-19 (see, further, Bloom and Cadarette, 2021; Rowe, 2021; Taubenberger et al., 2007). Central to the weightiness of the duty to confront global authoritarianism is that an international order dominated by authoritarianism threatens the political conditions that are necessary for the fulfilment of other global responsibilities, as explicated above. This includes these other emerging duties; a politically conducive international environment is necessary, for instance, to respond to pandemics effectively. The duty to confront global authoritarianism should therefore be seen as sometimes weightier since its fulfilment can be seen as required for the performance of other duties.

To explicate further, it helps to draw on the distinction between ‘direct’ and ‘indirect’ duties that Henry Shue (1988) makes in his seminal article, ‘Mediating Duties’. Whereas *direct* duties concern the attempt to fulfil the duty in question directly, *indirect* duties concern duties to cooperate and coordinate to establish institutions designed to implement the direct duties. Shue argues that mediating duties through institutions can be (1) far more efficient and (2) less onerous for individuals. Indeed, he suggests that fulfilling indirect duties takes precedent for these reasons. He argues that ‘[i]t will often be the case that resources are best employed not in direct action but in maintaining and enhancing institutions that are working to fulfill rights’ (1988: 696). For example,

where police protection of rights to physical security is inadequate, one's positive duties will not normally be to take direct action by conducting armed patrols oneself but to pay higher taxes in order to support a larger or better police force. The direct duties involved in maintaining enough law and order to protect physical security fall upon such institutions as police forces and judicial systems, but individuals generally have various indirect positive duties to support the institutions that bear the direct duties (1988: 696).27

The duty to confront global authoritarianism is, similarly, indirect, given that it is focused on political conditions. This contrasts to other emerging duties, which mostly concern more direct responses to threats, such as the threats to human health posed by pandemics and climate change.

This indirectness means that the duty to confront global authoritarianism is weighty – and at times weightier. Why is this? To start with, fulfilling the duty to confront global authoritarianism is more efficient, other things being equal. The need for a conducive environment means that defending the international order is likely to result in the fulfilment of *many more* global responsibilities over the longer term – and ultimately many more lives being saved – than acting on direct duties. A post-liberal order dominated by autocrats will make it much harder to fulfil other global duties. It will make it harder, for instance, to respond to climate change, given the need for multilateral efforts to mitigate and adapt to climate change. It will also make it harder to coordinate to deal with the threats posed by the misuse of AI – without global efforts, states may decide to downplay or ignore the risks posed by technology, fearing that their rivals will gain the upper hand. In regard to AI, there has already emerged an illiberal movement that blocks efforts to improve international governance on AI that includes liberal elements, such as on gender equality (Schopmans and Cupać, 2021). There is an ‘unholy alliance’ of antifeminist NGOs, Catholic, Islamic, and post-Soviet states, the United States under Trump, and the Vatican, which have contested women's rights in the UN in an increasingly coordinated manner, which shows a ‘willingness to throw a wrench in any initiative that, even marginally, seems to further progressive ideas on gender and women's rights’ (Schopmans and Cupać, 2021: 336). It is vital, then, to maintain and establish a conducive international environment so that these issues can be confronted effectively (or confronted at least somewhat effectively).28

Related to this, confronting global authoritarianism will mean that global responsibilities are less onerous over the long term, compared to acting on direct duties. By ensuring a system where others are more likely to fulfil their global responsibilities, one particular state will not be left having to do so much. In a more authoritarian post-liberal order, as argued above, there are likely to be many more crises and fewer willing responders. For instance, there will be fewer states willing to deal with famines and droughts, and the increased flooding and heat waves caused by climate change. Those states that are willing to act are likely to have to pick up the slack much more.29 It is crucial, then, to maintain and establish a conducive international environment so that particular states are not required to do too much and ultimately that vulnerable individuals in the future are not left to bear the brunt of major non-compliance.

#### Migration crisis is existential.

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In the interest of establishing a research agenda, we have adopted a harm threshold that remains somewhat ambiguous and hence leaves room for future refinements. In the extreme, a polycrisis could reach the severity of a ‘catastrophic risk’, an event that kills 10–25% of humanity (Cotton-Barratt et al., 2016; Kemp et al., 2022) or brings about the collapse of human civilization (GCRI, 2023). It could even become an ‘existential risk’ that extinguishes humanity entirely. But a polycrisis, by our definition, does not need to reach these levels of harm; and, in contrast to accounts of individual existential and catastrophic threats (arising from, for instance, an asteroid hitting Earth), a polycrisis necessarily involves *multiple* crisis events. It could involve massive immediate casualties, but also a widespread and sustained decline in the quality of life into the future.

Based on these considerations, we define a global polycrisis as *the causal entanglement of crises in multiple global systems in ways that significantly degrade humanity’s prospects*. The causal interactions between constituent crises are significant enough to produce emergent harms that are different from, and usually greater than, the sum of the harms they would produce separately. Consequently, these crises must be addressed as a whole; they cannot be resolved individually. While our approach to polycrisis incorporates key aspects of other definitions, it is specifically intended to aid scientific research into the nature of polycrisis by emphasizing the *causal interactions* that connect *global systems* and spread crises among them. Our definition relates to other important concepts (such as systemic risk) but adds essential novelty by highlighting the causal entanglement of multiple crises – interconnections that abound but remain sparsely understood, as explained in the sections below.

3. Are we in a global polycrisis?

We argue here that the world is currently experiencing a global polycrisis and that this situation is worsening. Constituent crises include the lingering health, social, and economic effects of the Covid-19 pandemic; stagflation (a persistent combination of inflation and low growth); volatility in global food and energy markets; geopolitical conflict, especially between assertive authoritarian regimes (including China and Russia) and the democratic West, which is leading to a partial decoupling of American and Chinese economies; political instability and civil unrest in countries both rich and poor arising from economic insecurity, ideological extremism, political polarization, and declining institutional legitimacy; and increasingly frequent and devastating weather events generated by climate heating. These crises are destroying livelihoods and lives around the globe and are undoubtedly diminishing humanity’s prospects. Moreover, they are certainly interconnected, although exactly how remains unclear.

This is not humanity’s first polycrisis. We experienced at least two additional instances in the last half century, though some may argue they were not truly global. The oil shocks of the 1970s arose from conflicts in the Middle East and generated severe international energy shortages that contributed to, and interacted with, stagflation in the world economy (Progressive International, 2023). The 2008–09 global financial crisis intersected with oil supply constraints and long-term stresses in food production to produce cascading bankruptcies, food price hikes, and political unrest worldwide (Biggs et al., 2011; Homer-Dixon et al., 2015).v

While the present polycrisis features some of the same constituent crises – including energy and food shocks, stagflation, and financial instability – it is unprecedented in crucial ways (Homer-Dixon, 2023; Lähde, 2023). First, the world is far more interconnected now than it was during the OPEC oil shocks. Between 1980 and 2020, air freight increased sixfold to 180 billion-ton-kilometers per year, the number of air passengers nearly tripled to 1.8 billion annually, and internet usage increased from virtually 0 to 60% of the world’s population. Meanwhile, the total value of world merchandise trade increased twelve-fold between 1980 and 2022 to nearly 25 trillion US dollars annually (at current prices), and container port traffic has more than tripled since 2000 to almost 800 million 20-foot-equivalent-units in 2020.vi

The ‘conduits’ of this extreme connectivity – aircraft, container carriers, fiber-optic cables, and the like – now carry immense circum-planetary flows of the ‘vectors’ of matter, energy, biota, and information (Box 1). The conduits also create and sustain multi-continental markets and globalized corporations that in turn encourage increasing standardization and homogenization among system elements, from financial instruments to germ plasm for agricultural goods to computer operating systems and social media platforms. This homogenization then enables even denser interconnection, in a powerful positive feedback.

Unfortunately, complex systems that feature *both* high connectivity and high homogeneity among system elements can be especially prone to rapid, discontinuous change (Scheffer et al., 2012), much as closely planted agricultural monocrops are susceptible to devastation by pathogens. By striving to maximize efficiency and open access to markets while stripping away social and environmental safeguards, neoliberal arrangements have exacerbated both homogenization and hyper-connectivity in the global economy, generating recurrent crises and worsening stresses both in the economy (for instance, by increasing inequality) and in other systems (for instance, by damaging the ecosphere).

Even in the absence of high homogenization, gradual shifts in exogenous conditions can erode a highly connected system’s resilience until its stabilizing feedbacks are overwhelmed, and it flips to a different equilibrium (Scheffer, 2009). And systems that may be resilient on their own can become more vulnerable to such flips when they become tightly connected to other systems (Buldyrev et al., 2010; Gao et al., 2015); unexpected vulnerabilities can arise when system elements not designed to work together are inadvertently connected (Perrow, 1999).

In sum, the interlinked architecture of our global systems is at the heart of the current polycrisis, because it worsens risks as diverse as financial turmoil, pandemics, economic inequality, and ideological extremism (Centeno et al., 2015; Helbing, 2013; Rodrik, 2011). These systemic risks are ‘endemic to globalization’; they can be managed (by reforming the neoliberal economic order, for instance) but not eliminated (Goldin & Mariathasan, 2016, p. xiii).

The present polycrisis is also unprecedented in a second respect. Human resource consumption and pollution output are pushing Earth’s physical and ecological systems far from their previous equilibria, imperiling the stability of many other global systems critical to human wellbeing, from food production to international security. For instance, our emissions of greenhouse gases have created an energy imbalance at the planet’s surface (more heat coming in from space than going out) of about 1.36 Watts per square meter (Hansen et al., 2023). This extra energy – now equivalent to nearly one million Hiroshima-sized atomic bombs exploded in the atmosphere *every day* – is producing increasingly extreme storms, floods, heat waves, and droughts, affecting billions of people and worsening population displacement, social instability, and conflict (Adelphi & PIK, 2020; Ide et al., 2020; Schleussner et al., 2016).

Together, hyper-connectivity and the destabilization of ecospheric systems are amplifying and accelerating crisis events worldwide (Figure 2). For example, since HIV first appeared four decades ago, outbreaks of zoonotic viral disease have become increasingly severe and frequent, from the SARS outbreak of 2002 to H1N1 in 2009, MERS in 2012, Ebola in 2014, Zika in 2015, Ebola again in 2018, Covid-19 in 2019, and most recently mpox and Marburg (Araf et al., 2023; CFR, 2023; Smith et al., 2014). Meanwhile, climate heating is also accelerating: between 1970 and 2010, Earth’s tropospheric temperature increased about 0.18 °C per decade; between 2010 and 2040, warming is predicted to increase to 0.27 °C per decade, a rise in rate of 50% (Hansen et al., 2023, p. 21). And because this warming makes zoonotic disease outbreaks more likely, two seemingly discrete crises – pandemics and calamitous weather – are becoming increasingly entwined (Carlson et al., 2022).

[Figure omitted]

But global crises are not just amplifying and accelerating, they also appear to be *synchronizing*. ‘We’re seeing what occurs when everything happens everywhere all at once’, says International Relations theorist Stephen Walt (2022). Complex and largely unrecognized causal links among the world’s economic, social, and ecological systems seem to be causing many risks to go critical at the same time or in quick succession (Figure 3). Indeed, ‘the failure to take into account feedbacks across systems’ is a crucial emerging risk itself (Future Earth, 2020, p. 6).

While scientific knowledge of individual systemic risks like climate change and zoonotic viral disease is often deep, our grasp of causal mechanisms linking these risks and the crises they generate remains shallow (ISC et al., 2022, p. 8). For instance, the World Economic Forum’s annual *Global Risk Report* identifies apparent links among risks but does not examine amplifying feedbacks in detail. Below, therefore, we offer an analytical framework to help advance our understanding of the causal mechanisms driving the present polycrisis.

4. The causal mechanisms of crisis entanglement

‘Synchronization’ can mean several things. In physics, synchronization occurs when interactions between oscillating objects cause them to align their rhythms so that events happen at the same time or with the same periodicity (Pikovsky et al., 2007). Synchronization often homogenizes behavior by causing system elements to act in the same way, as when glow bugs flash in unison or investors all try to sell off bad stocks at the same time (Strogatz, 2003). And the term synchronization may be used more loosely to refer to events that occur in quick succession.

The apparent synchronization of global crises (in any of the above senses) raises a crucial question: what sorts of interactions and feedbacks are aligning crises in multiple global systems? These relationships remain opaque and underexplored. We therefore propose an analytical framework to guide investigation of the causal mechanisms connecting global crises.

*4.1 The basic model: crisis in a single system*

Scholars and policymakers tend to silo their analyses of, and responses to, crises; that is, they tend to see the causes and effects of a given crisis through the lens of a single system. Such parsimony can be a useful analytical starting point. Beginning, therefore, with a single system, our basic model (Figure 4) proposes that a crisis occurs when one or more slow-moving *stresses* interact with one or more fast-moving *trigger* events to push the system out of its established equilibrium and into a state of disequilibrium or instability.vii In line with our earlier definition of crisis (Section 2), this disequilibrium manifests itself as a sudden (non-linear) event or series of events that significantly harms a large number of people.

[Figure omitted]

A complex system is not static. Constantly operating internal processes (such as negative feedbacks) keep the system’s state (represented in Figure 4b as a ball) within a certain range of values (depicted as a ‘basin of attraction’ in a ‘stability landscape’). Stresses are slow-moving processes – pressures, emerging contradictions, and deepening vulnerabilities – that accumulate in the system over time and weaken its stabilizing feedbacks, reducing their ability to hold the system’s state within its established range.viii

[Figure omitted]

Metaphorically, the basin in which the system resides becomes shallower.

Stresses often operate at the global scale, and because they are slow-moving, their change over time is usually somewhat predictable. In global systems, stresses currently include growing socioeconomic inequalities, increasing resource scarcities, economic overleveraging, climate heating, and ecological degradation, among many others. By reshaping the stability landscape, these stresses shift the probabilities of future global developments and create systemic risks – that is, potential pathways across that landscape to crisis.

A trigger event is a fast-moving process that interacts with stresses to push a system state out of equilibrium. If stresses have made the system’s basin of attraction shallower, a trigger event of a given magnitude will more easily cause such disequilibrium. Trigger events are usually stochastic, unpredictable, and local or regional in scale, but they have global-systemic consequences. They include phenomena like political uprisings, price spikes in critical goods and services, major corporate bankruptcies, and the loss of keystone species in specific ecosystems.

A system enters crisis when it leaves its established basin of attraction. A crisis thus has three defining properties: the system state is unstable (i.e. out of equilibrium), the change in system state occurs relatively suddenly, and the resulting instability causes significant human harm. Pushed from equilibrium, the system is in a turbulent state that disrupts stabilizing mechanisms and generates harmful outcomes, such as loss of income or deaths and injuries from violent conflict, malnutrition, starvation, or disease.

A crisis ends when the system returns to equilibrium – by either re-entering its original basin of attraction or moving to a new one. If the system state returns to its original basin and that basin remains shallow, a crisis will likely erupt again. If the system state settles into a new basin of attraction, it has completed a critical transition; it has flipped from one set of system behaviors to another with its own stabilizing internal processes.

Ideally, a crisis ends with the system entering a basin that reinforces normatively beneficial system behaviors and which is sufficiently deep (i.e. stable) to prevent another crisis. But the system could also enter a harmful and undesirable – but still highly stable – basin, perhaps one with widespread economic deprivation and political repression. In these circumstances, it is the system’s newfound stability in a pernicious state, rather than its crisis instability, that creates significant harm.ix For example, systems such as slavery and imperialism caused immense suffering over long historical periods – not as crises, but due to their lamentable stability and resilience.

[Figure omitted]

The global financial crisis of 2008–9 illustrates our basic model. It arose from the conjunction of several slow-process stresses, including growing worldwide trade in opaque financial instruments securitized by overvalued housing markets, and tightening balance-sheet interdependencies among major financial institutions stemming from cross-ownership of these instruments. The collapse of Lehman Brothers was the trigger event that started a cascade of defaults. The crisis ended when central banks rescued major commercial banks from default, slashed interest rates, and injected unprecedented amounts of liquidity into national economies. The global economic system settled into a new disinflationary equilibrium of weak demand, low growth, and exceptionally low interest rates that lasted until the Covid-19 pandemic.

Through this entire period and up to the present, the global economy has continued to experience additional powerful stresses – including rising economic inequality within most nations and worsening global heating – that have progressively weakened its social and ecological foundations and contributed to a long-term fall in the secular rate of global economic growth (Homer-Dixon, 2020, p. 204). These (and other – see e.g. Roubini, 2022) changes amount to a steady shallowing of global capitalism’s basin of attraction that is boosting the risk of future systemic crises.

No conceptual schema can fully capture the intricate causal, spatial, and temporal features of specific global crises. But our basic single-system model should help researchers distinguish between the three core elements of stress, trigger, and crisis and then map interactions among these elements. Figure 5 shows possible types of within-system interaction.

*4.2 Crisis interaction between multiple systems*

A global polycrisis, however, is characterized by relationships between systems. In Figure 6, we show how the elements of our basic model (stresses, triggers, and crises) can interact among multiple systems.

The possible inter-systemic interactions shown in Figure 6 draw upon – and echo – advances in ecological research. Just as other scholars and policy makers tend to address crises in single systems, ecologists have largely studied critical transitions in isolated ecosystems. But recent, leading-edge work in ecology identifies causal relationships *between* such transitions in *multiple* ecosystems (Keys et al., 2019; Klose et al., 2021; Rocha et al., 2018).

Rocha et al. (2018) compare the thirty ecosystem critical transitions mapped in the Regime Shifts Databasex and identify three broad types of causal relationships between them:xi

* *Common stresses*: A common stress may weaken the resilience of multiple systems, or the stresses affecting one system may interact with stresses in another, as depicted in Figure 6a.
* *Domino effects*: A crisis in one system may affect the stresses in another system, cause a triggering event that pushes another system into crisis, or reshape a crisis in another system, as depicted in Figures 6e and 6f. Domino effects operate in temporal sequence.
* *Inter-systemic feedbacks*: Stresses, trigger events, and other events generated by a crisis can form feedback loops that either dampen or, more commonly, escalate crises in two or more systems. Feedback effects can be depicted by combinations of the processes shown in Figure 6, as illustrated in Figure 7.

We propose additional possibilities: ‘common triggers’ by which the same event can activate crises in multiple systems (Figure 6b), as well as possible causal interactions between stresses in different system (Figure 6c) and stresses in one system that generate trigger events in another system (Figure 6d). All six forms of interaction depicted in Figure 6 can be thought of as ideal types; together they provide a ‘grammar’ of causal interactions between systems that can be used to develop hypotheses in polycrisis research. The remainder of this section provides further applications and examples.

*4.3 Common stresses and systemic synchronization*

Many global systems are currently undergoing radical change; this simultaneity of change is probably not coincidental. It suggests common stresses are causing the synchronization of underlying system behavior (Figure 6a), which may account (at least in part) for the acceleration, amplification, and apparent synchronization of today’s global crises.

* The Earth environmental system is leaving its Holocene equilibrium and entering a period of instability due to anthropogenic perturbation of the climate and other physical and ecological systems (Armstrong McKay et al., 2022; Barnosky et al., 2012; Rockström et al., 2021; Steffen et al., 2018). This instability is already causing enormous human harm, and its effects could become catastrophic in the near future (Kemp et al., 2022; Xu et al., 2020).
* The global human energy system has begun to shift away from its dependence on fossil fuels. Whether this shift will culminate in a new zero-carbon energy equilibrium is uncertain: technological bottlenecks and incumbent opposition may block its progress. The shift’s economic benefits are also uncertain: it could ultimately force humanity to decrease its energy consumption per capita (Hall, 2018; Smil, 2022).
* The international security system is changing from a world order based on American leadership (a ‘pax Americana’) toward an uncertain and likely less-stable multipolar order defined by the rise of China and the diffusion of power to a much wider range of actors (Gilpin, 2002; Ikenberry, 2014; Nye, 2011). Historically, such transitions have been accompanied more often than not by major war (Allison, 2017; Gilpin, 1988).
* The global economic system is shifting from a neoliberal economic regime – one undermining itself through worsening instability, inequality, and ecospheric externalities – to a yet indeterminate regime, but one likely involving increased dirigisme and economic integration within ideological blocs (Birdsall & Fukuyama, 2011; Monbiot, 2016; Rodrik, 2011; Rodrik, 2019).
* The information system is being revolutionized by artificial intelligence, with unclear but likely unprecedented implications for employment, decision making, and personal, national, and global security.

The simultaneity of radical change across these systems likely arises, in significant part, from their interdependence, as we argued in section 3 above. Stresses affecting one system can create (or constitute) stresses in others (Figures 6a and 6c). Stresses in the global energy system, for example, include the declining thermodynamic quality of remaining fossil fuel deposits, a trend that increases the energy cost (and therefore carbon emissions) of extraction. Fossil fuel emissions then create stresses in the Earth system, such as climate heating and ecosystem disruption. But possibilities for substituting other, zero-carbon energy sources remain limited (Hall, 2018). Most alternatives, for instance, have relatively low power density, which makes them ill-suited as primary energy sources for today’s high power-density-ofconsumption urban regions and manufacturing facilities (Smil, 2016). Fossil fuels also still provide energy for nearly all longdistance transportation and remain essential to steel, cement, plastic, and fertilizer production (Smil, 2022, pp. 76–102). Stresses in the global energy system thus create stresses in global food, transportation, and economic systems.

Additionally, stresses in one global system can stimulate or constrain reorganization in others. For example, the Earth system’s post-Holocene transformation is influencing change in the global energy system and thereby the global economic system. Hegemonic competition in the international security system could reduce governmental collaboration to reorganize the global energy system so as to reduce, in turn, that system’s impacts on the Earth system.

A framework called *adaptive cycle theory* suggests that a number of global systems may be on the cusp of catastrophic reorganization. Global energy, food, and financial systems have become increasingly complex, and their sub-components increasingly specialized and connected, as firms have competed to maximize productivity and efficiency. These changes have made these systems more rigid and less resilient in some respects. Systems exhibiting such characteristics, adaptive cycle theory argues, are susceptible to breakdown and reorganization (Gunderson & Holling, 2002; Holling, 2001). When multiple systems align at this phase of the cycle – as several global systems appear to be doing now – breakdown in one may trigger breakdowns in others.

*4.4 Domino effects between global systems*

Such a cascade of breakdowns across systems would be an example of domino effects. The domino metaphor implies a linear chain of cause and effect, in which one crisis causes another, and so on. The interactions between global crises are, of course, not so simple. Stresses and triggers can interact across systems (Figures 6c and 6d); a crisis in one system may affect the stresses and/or the trigger events that push another system into crisis (Figure 6e); and the events generated by one crisis may influence the behavior of another system in crisis (Figure 6f). These types of interactions combine across multiple systems to form multicausal networks, in contrast to simple causal chains.

[Figure omitted]

Figure 8 illustrates domino effects by mapping a causal network of stresses, triggers, and crises among several global systems – specifically, the health, environmental, economic, transportation, international security, and social order and governance systems – from the past through the present to possible (and somewhat speculative) outcomes in the future. The left-to-right temporal logic of such maps helpfully traces the course of events, but it cannot capture the recursive feedback loops that powerfully drive synchronization. Those feedbacks are illustrated instead by the causal loop diagrams in Figure 9.

*4.5 Inter-systemic feedback loops*

Domino effects are one-way causal relationships. But system behaviors can sometimes influence their own causes, creating feedback loops. Negative (i.e. dampening) feedbacks tend to stabilize systems by counteracting change, such as when markets correct for overvalued assets. Positive (i.e. self-amplifying) feedbacks involve two or more variables that intensify one another in spirals of run-away growth or decay, such as arms races or stock market crashes.

[Figure omitted]

We argue that feedbacks arise from combinations of the interactions depicted in Figure 6 and produce the crisis synchronization manifested in a polycrisis. Although one crisis may on occasion dampen another – as when, for example, a stock market crash produces a communication system outage that slows herd behavior – the real danger arises when interactions among two crises’ causes and effects create a positive feedback in which each crisis keeps worsening the other. Positive feedbacks can quickly overwhelm institutional safeguards and controls. And they can create an acute policymaking dilemma in which one crisis cannot be resolved without remediating a second one – but the second cannot be resolved without remediating the first.

Figure 9 illustrates several harmful positive feedbacks that appear to be forming today within and between the global systems identified in Figure 1. Compared to Figure 8, which shows how stresses, triggers, and crises can cascade unidirectionally over time, Figure 9 illustrates the back-and-forth (or cyclical) interactions between crises, triggers, and stresses.

In Figure 9a, economic turmoil arising, for instance, from inflation, financial crisis, and debt – or perhaps due to scarcities of key resources such as energy, food, water, and raw materials – creates mass grievances and institutional opportunities for populist leaders to capture political power and weaken the rule of law. These leaders’ actions to establish authoritarian regimes simultaneously draw on and amplify nationalist, chauvinistic, and anti-globalization ideologies, often by scapegoating foreigners, cosmopolitan elites, and internal minorities. Although their efforts to decouple the national economy from the world economy generally worsen internal economic turmoil, this turmoil, paradoxically, often exacerbates the grievances and opportunities the leaders can exploit to consolidate their power (by blaming ‘foreign elements’ or ‘internal enemies’ for the economic crisis). In the last decade, this feedback has operated in such diverse countries as Venezuela, Nicaragua, Russia, Turkey, Zimbabwe, Myanmar, and Sri Lanka.

In Figure 9b, we show that populist authoritarian regimes espousing nationalist and anti-globalization ideologies generally decrease their participation in international institutions, reduce their international cooperation, and focus their attention and resources inward. They thus diminish opportunities for mutually beneficial economic exchange and forego the benefits of globalization, which can worsen both internal and global economic turmoil.

In Figure 9c, we indicate that, in the decades ahead, less international cooperation will perhaps fatally weaken international action to slow climate change. More frequent and severe extreme weather events will then trigger flows of migrants toward richer countries (Lustgarten, 2020; Xu et al., 2020), an influx that is likely to increase support for chauvinistic and isolationist ideologies in receiving societies. The resulting exacerbation of economic turmoil could ultimately propel out-migration from these countries.

Finally, Figure 9d shows that the chauvinistic reaction to mass migration is likely to precipitate violence against those seeking refuge and those deemed too sympathetic toward outsiders. Meanwhile, extreme weather events could worsen intercommunal tensions, trigger state collapse and civil war, and increase the probability of international conflicts over scarce resources, including water and food. Civil violence and interstate war tend to deepen nationalism while generating new waves of refugees and exacerbating economic turmoil. These pernicious feedbacks are certainly not inevitable; but if they were to take hold they would escalate all of the problems depicted in Figure 9 in a catastrophic spiral.

#### In partcular, jurisprudence is key, AND the US model puts a lid on conflict escalation.

Dr. Allen D. Hertzke 19, PhD, David Ross Boyd Professor, Political Science, University of Oklahoma, "The Constitutional Roots of American Global Leadership on Religious Freedom," Starting Points Journal, 03/05/2019, https://startingpointsjournal.com/constitutional-roots-american-global-leadership-religious-freedom/. [italics in original]

Forged out of a century and a half struggle against religious persecution in the colonies, the American constitutional heritage codified an innovative break from centuries of Western practice. Both the First Amendment and state constitutional provisions bar religious establishments and protect religious free exercise from government infringement. These two provisions work in tandem. Freed from the paternalistic support of government and thus owned and operated by the people themselves, religious communities have blossomed here in bewildering diversity and fecundity. In turn, the protection of free exercise provides leverage to religious communities and institutions against government intrusions of their autonomy in civil society.

This American constitutional experiment not only shapes law and politics; it has also seeped deeply into the American DNA. As I will show, this DNA in our national character has produced a singular global impact in three ways: 1) by our example; 2) by our global leadership; and 3) by our booming scholarly and advocacy infrastructure.

The American Example and Experience

Most 18th Century European intellectuals thought the American experiment was folly, that ending state support would doom churches — or that protecting religious free exercise would produce chaos. But the American experiment demonstrates that churches thrive without state support. And that protecting religious rights produces a more harmonious, inclusive, and productive society.

This has inspired scholars and global activists from the 18th century to our own time. In the 1830s, for example, the French intellectual Alexis de Tocqueville observed how the spirit of liberty and religion moved together in America:

*In France I had almost always seen the spirit of religion and the spirit of freedom pursuing courses diametrically opposed to each other; but in America I found that they were intimately united, and that they reigned in common over the same country.*

In this sense the United States bequeathed to the world a model of the social benefits of guaranteeing religious freedom. As Robert Putnam and David Campbell show, the United States uniquely manages to combine strong religiosity with a high degree of inter-religious amity and tolerance – what they term “American Grace.” Moreover, successive waves of immigrants of diverse faiths find that they can thrive here as nowhere else, not only because the law protects their religious life but because societal norms buoy that legal promise. Even tiny religious groups, like American Sikhs, gain allies in defending their way of life.

Fatefully, the American experience and model profoundly influenced the transformation of the global Catholic Church after the Second Vatican Council (1963-1965). Before Vatican II, Church leaders resisted religious freedom and pluralism, making Catholicism a net drag on democratic governance. In America, however, Catholics thrived in a democratic society of pluralist voluntarism. This experience informed the work of the American Catholic theologian John Courtney Murray, who made the case for the compatibility of Catholic teaching with the American Constitutional heritage. Though initially silenced by the Vatican in the 1950s, Murray went on to help craft language of the Church’s 1965 declaration on religious freedom, Dignitatis Humanae.

That declaration stands as one of the pivotal moments in the global advance of freedom because it turned the Catholic Church into the engine of the last wave of democratization on earth. Before that declaration some 70% of Catholic countries were authoritarian; by the 1990s only two were not democracies. Moreover, Catholic majority nations, according to Pew Research, now enjoy the lowest levels of both government restrictions on religion and religious social hostilities in the world.

American Global leadership

When the United States emerged as a global superpower after World War II, it led the way in enshrining religious freedom as a universal right in international law and remains a global leader in upholding it today.

On the eve of the Second World War, for example, President Franklin Roosevelt invoked “Four Freedoms” in his State of the Union address in January of 1941, articulating principles that conduce to world peace and development. One of those four principles, audaciously, was the “freedom of every person to worship God in his own way—everywhere in the world.”

In the searing aftermath of the Holocaust, the United States also played a leading role in developing the Universal Declaration of Human Rights, through the leadership of Eleanor Roosevelt, who chaired the U.N. committee that drafted the declaration. Article 18 of that foundational declaration, adopted by the United Nations in 1948, provides this ringing statement of principles:

*Everyone has the right to freedom of thought, conscience, and religion. This right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship, and observance.*

Similar language is found in subsequent international covenants that virtually all nations have signed.

The denial of religious freedom also served as a pivotal subtext of relations between the United States and the Soviet Union during the Cold War, as American leaders deployed diplomatic leverage to open spaces for faith behind the Iron Curtain. The Jackson–Vanik law of 1974, for example, tied normalized trade relations to the freedom of Jews, and others, to emigrate from the Soviet Union. Similarly, the Helsinki Accords of 1975 tied territorial sovereignty of the Soviet Union to advancements in human rights, particularly religious freedom. Article 8 of the Helsinki Accords begins: “The participating States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion.” American leadership culminated in the close personal collaboration between President Ronald Reagan and Pope John Paul II to support the Polish Solidarity and other dissident movements, which brought down the Iron Curtain.

Most recently, Congress invoked the American tradition of religious liberty in its landmark International Religious Freedom Act (IRFA) of 1998, which makes the promotion of religious freedom a “basic aim” of American foreign policy.

What moved Congress to act was the broad array of religious leaders backing the initiative, leaders often at odds on other issues. A number of these leaders forged relationships with their unlikely allies through the domestic campaign in the early 1990s to reinstate a heightened legal protection for religious claimants burdened by government regulations. In other words, a coalition galvanized to strengthen *domestic* religious liberty helped fuel the *international* campaign.

The law sets into motion a process by which our diplomatic personnel must document the status of religious freedom in every country on earth, for an annual report that has become the gold standard of reporting on the status of religious freedom. That documentation helped catalyze the third American global role as the hub of independent research and advocacy on religious freedom

Infrastructure of Research and Advocacy

Informed by the American experience and anchored in the United States, a booming array of think tanks and academic centers documents the empirical benefits of religious freedom, while a network of religious advocacy groups and human rights champions upholds it in international law. This infrastructure of research and advocacy is leading the way in documenting the value of, and challenges to, religious liberty in the world today.

For example, State Department documentation, along with U.N. and NGO reports, provide the foundation for systematic measurement of global restrictions on religion by the Pew Research Center. With a simple internet connection anyone can now access Pew’s transparent measures of religious repression for every country on earth.

In turn, this global documentation enables sophisticated statistical research into the connections between religious liberty and other social goods. Groundbreaking scholarship demonstrates the powerful links between protections of religious freedom and democracy, civil liberties, women’s status, economic development, regional stability, and peace.

Repression of religion, on the other hand, is one of the key drivers of the strife, violence, and instability afflicting many parts of the world today. Regimes that severely violate religious freedom experience lagging economic development, corruption, abuses of power, repression of women and minorities, and violent religious strife that spills over borders.

Yet at the very time the value of religious freedom is becoming manifest, we see a worldwide crisis of repression. According to Pew, over three-quarters of the world’s population live in countries with high or very high restrictions on religion, and alarmingly those restrictions are rising.

Behind that peril, however, lies promise. We live in an historic moment when mounting empirical evidence and events on-the-ground corroborate a key ontological insight suggested by the American experience: humans are spiritual creatures who thrive best and most harmoniously when they enjoy the freedom to express their fundamental dignity. Religious liberty may be the best means of peacefully navigating the crucible of the 21st Century: living with our differences in a shrinking world.

Troubles in the Cradle of Liberty

The American constitutional heritage provided a model to the world of how protecting broad religious exercise fosters vibrant civil society, unleashes positive contributions by religious communities, builds citizen loyalty, and cultivates mutual respect among competing faiths.

Ominously, that heritage is fraying. Evidence comes from the Pew Research Center, which reports a doubling of both government restrictions on religion and religious social hostilities in the United States from 2007 to 2016. These “troubles in the cradle of liberty” arise from diverse sources. From the secular left we see religious conscience rights treated as trivial or a cover for odious discrimination. How else to explain the former Obama Administration’s costly, unnecessary, and doomed legal strategy of trying to conscript groups like the Little Sisters of the Poor – against their sincere religious convictions – to provide contraceptive services in their health plans?

From the right we see an even more alarming trend – the rise of a “blood and soil” ethno-tribalism that challenges the proposition that American citizenship, equally by birth or adoption, is open to all on the basis of a shared creed embodied in the Declaration of Independence and the First Amendment. The 2017 “Unite the Right” rally in Charlottesville, Virginia, which gave us the specter of an angry mob with torches chanting “Jews will not replace us,” represents a stunning repudiation of George Washington’s paean to a Hebrew congregation of an enlightened American policy that “gives to bigotry no sanction, to persecution no assistance.”

Given American leadership in upholding international law on religious freedom, this amnesia about our religious heritage has global implications. It is hard to promote something abroad that is fraying at home. Charges of hypocrisy stick when we challenge infringements of religious rights in other nations. In other words, to defend religious freedom abroad we must preserve it at home.

This leads to an enticing proposition: Could responding to the global crisis of persecution lead to a renewal at home? It has happened before. Recall a pivotal episode of American jurisprudence, when the Supreme first rejected conscience claims of Jehovah’s Witnesses in 1940 and then reversed itself three years later. The issue was the requirement that Witnesses children salute the flag during the pledge of allegiance (with arms extended upward), which to them represented blatant idolatry. In Minersville School District v. Gobitis, the Court found in favor of the school district mandate, which invited a wider wave of persecution against Witnesses and their children, with thousands kicked of school, harassed, and beaten up, as Sarah Barringer Gordon recounts.

Such a spectacle was deeply embarrassing to President Roosevelt as he sought to mobilize the nation against the Nazi threat (which persecuted Jehovah’s Witnesses along with Jews). Thus his invocation of religious freedom in 1941, though phrased as a global right, was meant to buoy that tradition at home, and it did. Two Supreme Court justices changed their minds, to be joined by two others appointed by Roosevelt, to overturn the Gobitis decision in 1943, paving the way for expansive protections of religious conscience rights for many others to come.

The lesson: To ensure America’s continued global leadership for freedom of religion, we must revive and strengthen the domestic legal and cultural norms that produce vibrant religious civil society, the fertile soil of such salvific international action.

#### Declining RF also drives conflicts. Those go nuclear.

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Religious intolerance, defined as the refusal to accept or respect beliefs different fromone’s own, leadingto persecution or discrimination, is recognized as a serious threat to human dignity and peace (Singh, 2015). Throughout history and culture, when a group is specifically denied tolerance or is perceivedas aninfidel or heretic, the ground is prepared for further atrocities. What begins as prejudice andsocial exclusion can eventually turn into mass violence when the perceived “other” becomes sufficientlydehumanized (Hayat & Malik, 2022) . Modern social psychology supports this evolution: whenpeoplefeel that their group or beliefs are under threat, prejudice and intolerance increase, giving rise toadefensive worldview that demonizes outsiders. In the religious sphere, this dynamic can be particularly unstable, since beliefs are often at the Centre of identity and community. When combined with political power struggles, economic pressures, or nationalist fervor, religious intolerance becomes a destabilizing force that can fuel conflict. Religious intolerance has repeatedly led to violence and wars throughout history, undermining global peace and security (DAUDA, 2020) . This article examines key historical episodes, from the religious wars between Palestine and later Israel against Iran, to illustrate how religious animosity can fuel large-scale bloodshed. It then analyzes the role of military deterrence, particularly nuclear deterrence, in maintaining the fragile peace in religious tensions (such as betweenIndia and Pakistan or in the Middle East), highlighting a paradox: deterrence may prevent all forms of war, but it does not resolve the underlying hatred and creates even greater dangers. The use of powerful military instruments (including nuclear weapons and modern military forces) to intimidate religious minorities is a moral debate, in which arguments of strategic necessity are weighed against moral andhumanitarian grounds. Today, this issue is of global importance. Religious hate crimes and sectarian violence are reported on every continent (Hayat & Malik, 2022). Religious nationalism is on the rise in many countries, and extremist groups often use religious rhetoric to justify violence. The sad reality is that wars and conflicts serve as a backdrop for persecution and violence against religious minorities(Zalec & Pavlikova, 2019) . These conflicts not only cause immediate human suffering but also sow lasting divisions that hinder peace for generations. Indeed, international reports and human rights organisations have warned that, in societies from the Middle East to South Asia, intolerance towards other religions is perpetuating a cycle of revenge and instability (Ruepke & Veltri, 2023).

Research Objectives

This study examines the impact of religious intolerance on world peace and explores possible solutions. Firstly, it examines historical examples in which religious fanaticism and hatred have led to violence, war or social unrest. These cases reveal recurring patterns and the magnitude of the threat. It then criticallyanalyzes the concept of deterrence, especially nuclear deterrence in regions of intense religious tension. The advantages and disadvantages of using powerful defensive mechanisms (such as nuclear weapons or modern militarism) to protect vulnerable religious groups are discussed. Finally, it argues that unless the root causes of intolerance are addressed, any “negative peace” achieved through deterrence or force will remain fragile. Finally, it argues that genuine world peace requires combating the ideological rigidity, religious extremism, propaganda, and misinformation that fuel hatred, as well as the inequalities that fuel grievances. The discussion is based on real-world consequences and ethical considerations, recognizing the human costs of both action and inaction in the face of intolerance.

Research Methodology

This research work is analytical as well as descriptive in nature. The data was collected by the secondarysources such as books, articles, reports, and newspapers. This qualitative study examines the phenomenonof religious intolerance as a threat to world peace. This study aims to gain a deeper understandingof thecomplexities of religious intolerance and its impact on world peace and stability. A qualitative approachmakes it possible to explore the complexity and nuances of religious intolerance, allowing the researcher to identify patterns.

HISTORICAL IMPACT OF RELIGIOUS INTOLERANCE

History provides compelling evidence that religious intolerance, if addressed early, can lead to change and even change in the global political landscape. In many cases, religious differences have become entangled in battles for power or resources, turning ideological struggles into devastating wars. Below, the study examines some historical examples:

The European Wars of Religion (16 th -17th Centuries): The Protestant Reformation and the CatholicReformation sparked more than a dozen civil wars across Europe. In conflicts such as the FrenchRevolutionary Wars and the Thirty Years' War, opposing sides fought brutally (Fletcher, 2018). Duringthe Thirty Years' War (1618-1648), between 4.5 and 8 million people, both soldiers and civilians, diedinbattles, famine, and disease. Some regions were completely devastated. Parts of Germany lost more thanhalf of their population. These wars were not caused by theology: the political ambitions and territorial rivalries of the period exacerbated sectarian divisions. After all, religion was a rallying cry that justifiedextreme violence. The trauma of this long conflict ultimately forced European leaders to finda newprinciple for coexistence (Morrow, 2020) . The Peace of Westphalia (1648) introduced the concept of cuius regio, eius religio (each ruler would determine the religion of his state) and presented the concept of more lasting religious tolerance as a practical necessity. It was born not of a sudden enlightenment but of exhaustion after generations of bloodshed. Even absolute monarchs recognized that imposing the "true"faith was less important than ending endless wars. Thus, from this terrible intolerance emerged the earlymodern principle that religious tolerance was essential to peace (PAJIN, 2018).

Partition of India (1947): Few events symbolize the deadly clash between religion and nationalismasclearly as the partition of British India. When colonial India was divided into two independent states, aHindu-majority India and a Muslim-majority Pakistan, widespread religiously motivated violence erupted. Mobs of Hindus, Muslims, and Sikhs clashed in passionate bloodshed. Communal riots and revengekillings spread across Punjab, Bengal and other regions. It became the largest human migration in historyas people fled in opposite directions for safety with their devotees (GERVERS & POWELL, 2001). Anestimated 15 million people were displaced during the collapse, and between one and two million diedinthe genocide. Trains carrying refugees were attacked, and entire villages were destroyed because of thereligion of their inhabitants. The violence of partition left a deep scar on the collective psyche of Indiaand Pakistan, breeding mistrust and hostility that led to further conflicts (including the full-scale wars of 1947, 1965, and 1971). The legacy of 1947 shows how religious intolerance, fueled by fear and rumours, would soon escalate into genocide-like situations. It also shows that political solutions that ignoresectarian tensions or, worse, exacerbate them, can destroy peace on a subcontinental scale.

Sectarian Violence in Modern India: Religious intolerance did not end the divide. Even todayit continues to threaten India’s peace. Since the Indian invasion, there have been hundreds of religious riotsevery decade. These incidents are usually carried out by extremists targeting minorities. For example, attacks on Muslims and Christians by some Hindu nationalist groups. In recent years, vigilantes have usedreligious sentiments to punish people (mostly Muslims) for slaughtering cows or eating beef andcommitting violence (Kumar & Banerjee, 2023) . In 2017, for example, at least 10 Muslimmenwerekilled across India by “cow protection” groups motivated by Hindu nationalist sentiments. Theseincidents show how religious intolerance spreads at the local level and sometimes results in bloodshed, disruption of social cohesion and internal peace. They also highlight the challenges of upholding theruleof law and protecting minority rights in an environment where extremist ideologies are gaining political influence (Gudavarthy, 2022). The Indian experience suggests that even outside of official war, persistent religious hatred manifests itself in unprecedented violence, discrimination, and fragile peace betweencommunities.

The Bosnian War (1992-1995): The collapse of Yugoslavia led to prolonged ethnic and religious hatredin the 1990s, one of the most violent conflicts in Europe at the end of the 20th century. In BosniaandHerzegovina, a multi-ethnic republic, the war pitted Orthodox Christian Serbs, Catholic Croats andMuslim Bosnians against each other in a struggle for territory and control (Stojic, 2016) . Religiousidentity was intertwined with race, and nationalist leaders were reluctant to promote intolerance. Theresult was a campaign of ethnic cleansing that included mass deportations, torture, and genocide. About 100,000 people were killed during the Bosnian War, mostly Bosnians (Bosnian Muslims) whowerepersecuted because of their faith and ethnicity. The darkest chapter of the conflict came in July1995, when Bosnian Serb forces captured Srebrenica, a UN sanctuary, and systematically murdered some 8,000Bosnian Muslim men and boys the largest massacre on European soil since the Holocaust (Ezekoma, 2020). The Bosnian War demonstrated how quickly neighbors can turn on each other when poisonedbysectarian propaganda and fear. Communities that had lived side by side for decades descendedintobrutality as war leaders weaponized religious and ethnic intolerance. Although the war finally endedwithinternational intervention and the Dayton Peace Accords, Bosnia remains a divided society (Shahzadi &Hashmi, 2020). Even today, deep ethnoreligious divisions persist, and peace feels fragile a stark reminder that hatreds spread by war do not easily fade.

Israel-Palestine War: The Israeli-Palestinian conflict is a very complicated issue. It is also the longestrunning conflict in the Middle East. This conflict led to the terrible October 7th attacks. Amilitaryresponse followed, and both sides now face serious humanitarian problems. Israel declared war onHamasand strengthened its blockade of the Gaza Strip on October 9, 2023. As a result, in January 2024, theInternational Court of Justice ruled that Israel's actions in Gaza could be described as genocide. TheIsraeli-Palestinian conflict is a long-standing conflict that has resulted in violence and gross humanrightsviolations (Danfulani, Leawat, & Dinshak, 2024). Israel has launched a large-scale military campaigninGaza, causing significant loss of life and property. Since October 7, 2023, 63,000 Palestinians have beenkilled, and nearly one million have been internally displaced. The conflict has created a severehumanitarian crisis, with the Gaza Strip facing famine and a collapsed healthcare system(Lin, 2021). TheIsraeli blockade has impeded the supply of essential goods such as food, water, and medicine. TheUNGeneral Assembly has overwhelmingly supported the call for Israel to withdraw fromthe occupiedPalestinian territory. The International Court of Justice has also ruled that Israel’s presence in the territoryis illegal and that all states have a duty not to recognize the occupation (Swaraj, 2023). There are concernsthat Israel’s actions may amount to genocide, with UN experts and human rights organizations citinggrowing incitement to genocide and evidence of a clear intent to destroy the Palestinian people. Theexpansion of Israeli settlements in the West Bank, including the E1 plan, seeks to fragment Palestinianlands and undermine the viability of a future Palestinian state. The plan would separate East Jerusalemfrom the rest of the West Bank and confine Palestinians to more isolated areas. The conflict has resultedin significant civilian casualties, with an estimated 36,000 Palestinians killed since October 2023. Nearlyone million Palestinians in Gaza have been internally displaced. The blockade has exacerbatedthehumanitarian crisis, preventing the delivery of essential humanitarian aid. Currently, the Palestine’s Gazais facing a high risk of famine, with one in five people at risk of dying from hunger (Gherardini, 2024). The World Health Organization has reported that Gaza is “facing one of the world’s worst hunger crises, unfolding in real time.” The Israeli blockade has blocked the delivery of essential goods, includingfood, water, medicine and fuel. This has caused widespread hardship, with people having to wait hours for basic items such as water and food. Millions of Palestinians have been forced to flee their homes duetoIsraeli evacuation orders, with no safe place to go. Since the blockade began, at least 57 childrenhavedied of malnutrition in Gaza. The health system is overwhelmed, and essential medical supplies arerapidly running out. Lack of access to bread, milk, medicines, clean water and sanitation facilities hasincreased the risk of disease outbreaks (Alzou’bi, 2025) . The roots of the Israel-Palestinian conflict extend beyond Hamas’s recent actions, with the Israeli occupation of Gaza and the West Bank servingasa historical backdrop. Palestinians who support Hamas in Israel question its human rights abuses. Hamas’s condemnation of the hostage-taking is tantamount to Israel’s imprisonment of thousands of Palestinians, including women and children. The balance of power is clear: Israel bombs Gaza’s civilianpopulation, controls the fuel of the war, and restricts aid, acting as both oppressor and patron. Justifyingthe bombing of hospitals based on suspicions about Hamas, even if justified, raises ethical questionsabout targeting civilians along with Hamas members. The feud between these adversaries endures. Many UN resolutions exist and the Security Council and General Assembly passed them. Both sides ignoremost resolutions. They choose to follow what helps them most. (Frieden, 2020) . Arab backingfor Palestinians appears to have faded. The United States has become a strong supporter of Israel. The Trumpadministration broke new ground in Israel-Arab ties. This shift seemed to harm the Palestinian cause. TheWorld eagerly await an agreement to bring lasting peace. This deal should also build good ties and growth. It needs to guarantee basic freedoms, rights, and fairness. The road to peace in the region is a longandarduous. This makes finding a win-win solution that will be mutually acceptable and beneficial tobothparties must be treaded carefully to ensure freedoms, rights, fairness, peace and dignity (Gherardini, 2024).

Israel-Iran War: Iran's 1979 Islamic Revolution transformed its relationship with Israel froma strategicalliance to vehement opposition. The Iranian government views Israel as a colonial outpost promotingWestern interests, while Israel views Iran's nuclear ambitions and its support for anti-Israel militant groups as existential threats. Iran's nuclear program is a major controversy, as Israel considers a nuclear- armed Iran an unacceptable threat to its security. Iran's uranium enrichment activities have beenthesubject of international scrutiny and sanctions (Service, 2025) .The two countries wage a proxywar, supporting opposing groups in regional conflicts. Iran supports Hezbollah in Lebanon, Hamas inGaza, and Shiite militias in Iraq and Syria, while Israel counters Iranian influence through covert operations andmilitary strikes (Alzou’bi, 2025). In April 2024, Israel carried out a precision strike on an Iranian militarybase in Isfahan in response to Iranian drone and missile attacks. Israel launched “Operation RisingLine”to target Iranian military and nuclear facilities. Iran responded with ballistic missile attacks, causingsignificant damage and casualties In June 2025. The conflict has increased tensions, with bothsidesengaging in direct military cyberattacks and confrontations. The conflict between Israel and Iran escalatedwhen Hamas attacked southern Israel on October 7, 2023. Israel considers Iran's nuclear programanexistential threat and has launched a military campaign to prevent Iran from developing nuclear weapons(Strategy, 2025) . Israel has carried out airstrikes against Iranian military and nuclear facilities, killingsenior military officials and nuclear scientists. The attacks targeted the Fordow uraniumenrichment plant, the Natanz nuclear facility, and the Isfahan Nuclear Technology Centre. Iran has responded byfiringhundreds of missiles and drones at Israel, some of which penetrated the country's air defenses. Iran'sSupreme Leader, Ayatollah Ali Khamenei, has warned that any US military intervention wouldhave"irreparable consequences." The United States has supported Israel in the conflict, and President DonaldTrump ordered airstrikes against Iranian nuclear facilities in June 2025. The United States andIsrael conducted joint military exercises in March 2025, seen as a warning to Tehran. Russia warned the UnitedStates against direct military aid to Israel, claiming it would destabilize the situation in the Middle East. The United Nations condemned the violence and called for diplomacy to resolve the conflict. It hascaused countless casualties and material losses on both sides. (Strategy, 2025). The humanitarian situationis dire, with fears of possible retaliation and terrorist threats. This conflict ended with a ceasefire brokeredby US President Donald Trump after 12 days of fierce fighting. Israel and Iran agreed to a mutual ceasefire, in which Israel halted attacks on Iranian nuclear facilities and Iran halted its missile attacks onIsrael. The ceasefire was negotiated through US-led diplomatic efforts, with Qatar playing a keyroleinpersuading Iran to accept the terms. Both countries claimed victory, and Israel claimed to have achievedits objectives of curtailing Iran's nuclear program and weakening its military capability. Iran demonstratedits ability to retaliate and inflict damage on Israel, while suffering heavy losses (Alzou’bi, 2025) . Theceasefire has held, with occasional minor incidents reported but no major escalation. Diplomatic effortsare ongoing to ensure a lasting peace and potentially resume talks on Iran's nuclear program. The conflict has raised security concerns and regional instability, with potential repercussions for global oil suppliesand maritime security. The international community is turning to diplomacy to resolve the conflict. However, the situation remains volatile, with no signs of de-escalation by either side. The conflict couldescalate further, involving other countries and leading to a wider regional war (socradar, 2025).

These cases, not detailed here (such as the Crusades of the medieval period or sectarian conflict inNorthern Ireland during the late 20th century), demonstrate a consistent truth: religious intolerance is a source of conflict and an obstacle to peace. Often, it does not act alone; it is connected to political, regional, or ethnic grievances. For instance, in European wars and the Bosnian conflict, religious rhetoric provided a convenient justification for violence, which was also driven by power politics and nationalism. Similarly, the Partition of India was influenced equally by colonial politics and sectarian insecurityas bytheological differences (Service, 2025) . Yet in each situation, it was the depiction of the "other" as adangerous infidel or heretic that enabled ordinary people to commit or accept extraordinary atrocities. Consequently, history clearly shows that when religious intolerance is unchecked, it can sometimes tear the social fabric beyond repair.

NUCLEAR DETERRENCE AND PEACE IN RELIGIOUSLY TENSE REGIONS

The nuclear deterrence strategy is the most controversial. Deterrence theory states that wheneachadversary is capable of inflicting unacceptable destruction (especially through nuclear weapons), bothsides are deterred from initiating a war due to the threat of devastating retaliation. This principleof Mutually Assured Destruction (MAD) is often credited with preventing direct superpower confrontationduring the Cold War. It is a key element of strategic stability in many unstable regions (Hayat &Malik, 2022) . However, the role of deterrence in maintaining peace amid religious and ideological conflict iscomplex and contradictory, as seen in regions such as South Asia and the Middle East. Proponents of nuclear deterrence argue that it has established a high-stakes balance that maintains peace (Lillis &Suleman, 2018).

The nuclear deterrence strategy is highly contentious. The deterrence theory states that when an adversarycan cause unacceptable damage, particularly with nuclear weapons, both sides avoid initiating conflict because of the threat of retaliation. The concept of mutually assured destruction (MAD) is often citedtoprevent superpower conflicts during the Cold War. It remains a crucial element of strategic stabilityinmany volatile regions (Pajin, 2021). However, the role of deterrence in maintaining peace during religiousand ideological conflicts is complex and sometimes contradictory, as seen in South Asian and MiddleEastern contexts. Proponents of nuclear deterrence argue that it has fostered a greater balance of power that encourages peace. During the Cold War, for example, the United States and the Soviet Unionamassed vast arsenals but refrained from using them against each other. By threatening “unacceptablecosts” essentially the destruction of entire cities, nuclear weapons established a grimbalance that neither side was willing to challenge (Clarke, Powell, & Savulescu, 2021) . This logic also applies to regional rivalries with religious undertones. In South Asia, India and Pakistan have fought several wars since their independence. However, since both acquired nuclear capabilities (India in 1974, Pakistan in 1998), theyhave avoided another full-scale war. Despite frequent border skirmishes and crises, neither countryhasdared to escalate to full invasion, indicating that nuclear deterrence keeps them in check. In fact, after their 1998 nuclear tests, conflicts have largely remained localized, such as the 1999 Kargil conflict inKashmir, which was contained before escalating into a larger war (Ge, 2025). This pattern suggests that when the cost of war could mean nuclear catastrophe, rational leaders tend to step back fromthe brink. Similarly, in the Middle East, Israel, a nation born from the ashes of the Holocaust and surroundedbyhistorically hostile neighbours, is widely believed to possess around 90 nuclear warheads for deterrencepurposes. Israel’s undeclared nuclear arsenal functions as the ultimate safeguard of its survival in a regionmarked by religious and ideological conflicts. Some analysts believe this deterrent has discouragedneighbouring countries from attempting another full-scale invasion, as occurred in the major Arab-Israeli wars before Israel’s nuclearisation. In theory, then, nuclear weapons act as a formof insurance: theydefend against existential threats by making any potential aggressor think twice. Advocates also highlight an “indefinable additional diplomatic clout” associated with nuclear status, which can enhance a nation’snegotiating position and dissuade opponents from intimidation (Limon, Ghanea, & Power, 2025).

However, the reality of nuclear deterrence in religiously charged conflicts is far more problematic than the theory suggests. First, deterrence may prevent large formal wars, but it does nothing to resolve the underlying religious animosities or territorial disputes that fuel tensions. The case of India and Pakistanis illustrative: nuclear weapons did not erase the bitter feud over Kashmir or reduce communal hatred; they simply forced the rivals to seek limited, proxy, or sub-conventional ways of hurting each other without crossing the nuclear threshold. The result has been a persistent state of low-grade conflict and a series of dangerous brink~~man~~ship incidents (such as the 2001 Parliament attack crisis, the 2019 Pulwama/Balakot strikes, and a major scare in 2025) that could accidentally spiral out of control. Deterrence has thu sproduced a tense peace, but not a trusting peace (Service, 2025) . In the Middle East as well, Israel’s nuclear deterrent has not brought harmony with its neighbours; war and violence short of an existential invasion from intifadas and insurgencies to sporadic conflicts like the Lebanon and Gaza wars continueunabated. The acquisition of nuclear weapons cannot solve issues such as the statelessness of thePalestinian people or the sectarian power struggle in the region. At best, some aspects of society are paralyzed by fear (Alzou’bi, 2025).

Moreover, the policy of deterrence presents serious risks and ethical problems. By its very nature, deterrence relies on trust; leaders must fear mass destruction in a way that prevents war. This means that peace can only be maintained through violence, which is always dangerous. It is a “bad peace,” basednot on reconciliation or justice but on fear and fragile security. Such peace is impersonal and affects the mind. As one study notes, a world under nuclear siege is like a city about to collapse under the shadow of arampart. Everyone is safe until the siege collapses, at which point nothing catastrophic happens. And history has shown that there is no such thing as a failure: the risk of accident, recklessness, or irrational decision leading to nuclear war is never zero. Many experts warn that it “denies the credibilityof thenotion that nuclear weapons will never be used,” whether by mistake or by design, if it remains stagnant (Hayat & Malik, 2022). The Cuban Missile Crisis of 1962 and the many close calls that followed have shown how easy it is to avoid disaster. In areas of religious extremism or weak command and control structures, the prospect of nuclear weapons falling into the hands of interested parties or being violently disposed of is a real nightmare (Ruepke & Veltri, 2023).

#### RF curtails religious terrorism. The US is key.

Dr. Nilay Saiya 18, PhD, Assistant Professor, Public Policy and Global Affairs, Nanyang Technological University, "Weapon of Peace How Religious Liberty Combats Terrorism," in Religious Liberty and American Foreign Policy, Chapter 5, 2018, pg. 162-183, CUP.

Today, billions of people around the world are either denied their basic rights to seek transcendent truth, or they do so in the face of stiff legal penalties, societal intimidation or both. To make matters worse, the global trend in religious freedom continues to deteriorate in both depth and breadth of violations. Some might see religious restrictions as an inopportune situation for people of faith but necessary given the contemporary realities of violent religious extremism and the security threat that it poses. This position is on the surface logical: if religion poses a threat to a country’s security, then the natural response (and the default position of many governments) is to restrict its expression. This view ignores the point, however, that these restrictions themselves are often the cause of such violence to begin with. In a world where the vast majority of people holds religious beliefs, the suppression of religious freedom often leads to extremism and violence. Unfortunately, until this immensely important dimension of statecraft is internalized, a perceived tradeoff between security interests and the promotion of religious liberty will continue to guide the thinking of policymakers. Yet as this project has shown, religious liberty constitutes an important weapon in the fight against terrorism and a cornerstone of sustainable security.

How might the world look different today had extremists like Osama bin Laden or Abu Bakr al-Baghdadi been raised in climates of religious tolerance where they would have been exposed to competing interpretations of Islam, minority religious beliefs and nonreligious conceptions of a good society instead of being inculcated exclusively into the radical traditions of Ibn Taymiyyah and Muhammad ibn Abd alWahhab? Would al Qaeda and ISIS have come into existence? Would Saudi Arabia still be one of the world’s leading exporters of extremism? Would Iraq have descended into a horrific cauldron of sectarian violence? How might Pakistan look different today had President Muhammad Zia ul-Haq invited freedom of thought instead of pushing his country toward an intolerant rendering of religion and reviving a fundamentalist brand of Islam in an attempt to secure support from the religious establishment? Would it still be one of the world’s most terror-prone countries? Would Egypt have faced a prolonged Islamist insurgency in the 1990s had Islamists not been banned, imprisoned and tortured under the repressive reigns of Gamal Nasser and Anwar Sadat? Would Egyptian doctor Ayman al-Zawahiri have been drawn to radicalism and eventually become the leader of al Qaeda after the assassination of Osama bin Laden? What if after the collapse of the Soviet Union, Russia had refused to align itself with the Orthodox Church and control minority groups? Would it be facing the same militant challenge on its southern tier that it does today? How might Turkey, Tunisia, Iran and Malaysia look different today had they embraced, rather than repressed, the ideas of Muslim reformers like Fethullah Gulen, Rached Ghannouchi and Abdolkarim Soroush? And what would have happened if the United States had put greater pressure on its allies to embrace religious liberty as a way to root out extremist ideas and promote tolerance? Would 9/11 still have occurred?

“Those who cannot remember the past are doomed to repeat it,” twentiethcentury philosopher George Santayana famously quipped. Yet when it comes to the struggle against religious extremism, the lessons of history constantly repeat themselves. The argument set forth in this book is not necessarily intuitive in today’s world, but neither is it new. Similar claims were made by prominent intellectuals like John Locke, Adam Smith, James Madison, David Hume and Roger Williams hundreds of years ago. Yet, despite the long intellectual tradition supporting religious freedom, many today fear the implications of increased religious liberty, particularly in the aftermath of the Arab Spring.

As global religious repression increases, so too do extremist theologies and religious terrorism. This does not, of course, justify the violence of religious militants in any faith tradition. Nevertheless, we must attempt to understand the roots of faith-based violence if we are serious about developing policy initiatives aimed at combating its onset. If American foreign policy since the horrific terrorist attacks of September 11, 2001 has taught us anything, it is that repression leads to violence not only against the authoritarian regimes that directly repress their people but also against external powers that support those regimes in the name of preserving stability and security. This is not to suggest that the road to genuine freedom will be free of roadblocks and violent backlash, especially in the short term. But over the long haul, the evidence is clear: the denial of religious freedom increases the likelihood of violent religious forms of political engagement; paradoxically, the best way to combat religious terrorism is not by restricting religious beliefs and practices but rather by safeguarding their legitimate manifestations. The effective promotion of religious liberty by the United States will not only help protect a foundational and indispensable human right, it will also promote stability and ultimately its own national security.

The question for the United States and its allies remains how best to counter the forces of extremism regardless of where they appear. To be sure, terrorism is a complex phenomenon that requires a comprehensive approach to effectively deal with it. For years, the answer has been to employ a wide array of tools, from intelligence gathering to police work to military action. But if the fight against terrorism is to succeed, it also must include efforts to promote freedom of religion. The struggle against violent religious extremism is a war of ideas as much as a battle of brawn, and environments that promote freedom of thought and belief empower moderate ideas and voices to denounce extremist hatred and violence and delegitimate the narrative of extremists in their countries that their faith is under attack and that America is partially to blame.

#### Else, religious terrorists ensure extinction. They have capability AND motive.

Émile P. Torres 18, MA, Visiting Research, Existential Risk, University of Cambridge, "Agential Risks and Information Hazards: An Unavoidable but Dangerous Topic?" Futures, Vol. 95, pg. 86-97, January 2018, ScienceDirect. [italics in original]

Recent scholarly work within the interdisciplinary field of existential risk studies has begun to focus on the various human nonstate actors who might “couple” themselves to advanced technologies and bring about an existential catastrophe. This topic is both unavoidable and increasingly important given (T1) the growing power and (T2) the increasing accessibility of dual-use emerging technologies. Examples include digital-to-biological converters, CRISPR/Cas-9, base editing, SILEX (i.e., separation of isotopes by laser excitation), and anticipated future artifacts like nanofactories, self-replicating nanobots, and autonomous artificial intelligence systems (e.g., lethal insect-sized drones). The result of these dual trends is the rapid distribution of increasingly destructive capabilities across society, thus multiplying the total number of state and—*most importantly*—nonstate actors capable of unilaterally destroying the world. Elsewhere I have termed this the “threat of universal unilateralism” and shown how, following Sotos (2017), it has direct implications for the “doomsday hypothesis” (i.e., that a Great Filter lies ahead), as well as for the contractarian foundations of the modern state system (Torres, 2017a).

It follows that to obviate a worst-case outcome for our species, existential risk scholars ought to focus no less on the various properties of individual agents who might destroy the world than on the various properties of “weapons of total destruction” (WTDs) that could enable them to do this. The importance of this point is underlined by a simple gedankenexperiment, namely, the *two worlds thought experiment*. This asks us to imagine two worlds, A and B, where world A contains a single WTD and world B contains 10,000. The question is which world one would rather inhabit based entirely on security considerations, and the obvious answer is world A. But it would be hasty to choose this world without asking for further information about the kinds of beings who inhabit A and B. Thus, imagine further that world A is run by an alien species of bellicose warmongers whereas world B is run by an alien species of irenic peaceniks. Given this additional information about the moral and psychological characters of each population, I would argue that world B appears less likely to self-destruct, and therefore constitutes the most judicious answer. To dissect this conclusion: for an *agent-artifact coupling* to bring about a global disaster, the necessary and sufficient conditions of *means and motivation* (i.e., of being “able and willing”) must be satisfied. Thus, whereas both are satisfied in world A, only one is satisfied in world B, and this is what makes world A more existentially hazardous.

If understanding both sides of the agent-artifact coupling is indeed important, the next question to ask is: W*ho exactly would destroy the world if only the means were available?* Here we must follow Rees (2004) in distinguishing between terror agents and error agents, where each could destroy the world if they were to gain access to a WTD, but only the former would do this on purpose. Although the topic of agential error is, I believe, important and neglected, the present paper will focus exclusively on agential terror. Thus, the relevant question becomes: *Who exactly would destroy the world on purpose if only the means were available?* I would contend that the answer to this question is not as obvious as it may appear prima facie, and in fact it has received almost no serious scholarly attention in *any* field of intellectual inquiry, including the field to which it is most directly germane, existential risk studies.

Nonetheless, one finds many references to candidate answers to this question scattered throughout the literature—these candidates just haven’t been organized in any coherent way, which will be the task of Section 2. For example, scholars have used colorful descriptors like “maniacs,” “lunatics,” “misanthropes,” “sociopaths,” “nefarious dictators,” “belligerent tyrants,” “agents of doom” (Yudkowsky, 2008), “suicidal regimes or terrorists” (Bostrom, 2002), “garage fanatics and psychopaths” (Roden, 2015), “criminal groups, terrorists, and lone crazies” (Wittes & Blum, 2015). A particularly concise example of grasping for clarity on this complicated issue can be found in Sagan (1994) *Pale Blue Dot*:

Can we humans be trusted with civilization-threatening technologies? [Consider] some misanthropic sociopath like a Hitler or a Stalin eager to kill everybody, a megalomaniac lusting after “greatness” and “glory,” a victim of ethnic violence bent on revenge, someone in the grip of unusually severe testosterone poisoning, some religious fanatic hastening the Day of judgment, or just technicians incompetent or insufficiently vigilant in handling the controls and safeguards. Such people exist.

One way to impose some conceptual-ontological order on this jumble of imprecise terminology involves what we can call the *doomsday button test*. This is a simple mechanism for determining which agents, whether real or hypothetical, would intentionally cause an existential catastrophe if they could. It is, in other words, a *filter* that enables one to answer the “who” question posed above. The idea is this: imagine that a “doomsday button” were suddenly placed in front of every person alive on the planet. If pushed, this button would initiate a WTD that would immediately cause either human extinction or the permanent collapse of civilization. Having isolated all sorts of potential confounding factors, one can then consider and analyze individual cases one by one, ultimately yielding a list of token individuals who would possibly, probably, or almost certainly “pass” the test.

For example, imagine a doomsday button suddenly presented to members of the Provisional Irish Republican Army (PIRA) during the height of conflict with the British government. Would any terrorist fighting for PIRA push it? Almost certainly not, since destroying the world would interfere with PIRA’s provincial political goals of chasing the British out of Northern Ireland. This answer can be generalized to nearly all forms of political, nationalist-separatist, Marxist, anarchist, anti-government, and single-issue terrorism: individuals motivated by the corresponding ideologies are unlikely to willingly destroy the world even if the opportunity were presented. The same goes for most forms of religious terrorism, which the Global Terrorism Index now identifies as the primary manifestation of global terrorism today (see Torres, 2016a). For example, Osama bin Laden didn’t harbor fantasies of killing every human on Earth or causing the total collapse of civilization. Rather, his religio-political goals were more focused on crippling Western civilization because of its religious infidelity and jingoistic foreign policy. In particular, bin Laden’s campaign of terror that culminated in the 9/11 attacks were motivated by the US military presence in Saudi Arabia and devastating sanctions on Iraq—which resulted in immense human suffering—and his ultimate goal was to establish a global Caliphate before the Last Hour. Thus, it seems highly unlikely, in my view, that he would have pushed a doomsday button if one had been placed in front of him at any moment from, say, the late 1980s until his death in 2011. Similar claims can be made about most world leaders, even the most grandiose, megalomaniacal, militaristic autocrats. Simply put, one cannot rule the world if the world doesn’t exist, and this provides a strong incentive for rational actors at the helm of states not to bring about global-scale catastrophes.

Thinking about such examples in the context of the doomsday button test might initially lead one to concur with Eliezer Yudkowsky (2008) that “all else being equal, not many people would prefer to destroy the world.” In fact, I would argue that this statement is true, but only if the ambiguous word “many” is understood in *relative* rather than *absolute* terms.1 That is to say, the total number of people who would pass the doomsday button test is *indeed* small when compared to the human population of 7.6 billion going on 9.3 billion, yet I would also argue that the total number of malicious agents is nonetheless alarmingly large. This is perhaps the most relevant issue—the absolute number—given the trends of (T1) and (T2), because as Rees (2004) and so many other scholars have emphatically argued, it could take only a *single* lone wolf or small group in the future to bring about ruinous consequences for humanity. Since I provide a detailed examination of actual individuals who would almost certainly pass the doomsday button test elsewhere, the present paper will embrace a more theoretical approach (see Torres, 2017b). Thus, the next section will outline an abstract typology of human agents who would almost certainly destroy the world if only they could. I will illustrate these types with a few real-world examples, but the primary aim will be to establish a conceptual foundation for understanding the “agent” side of the agent-artifact coupling, which gives rise to a specific kind of risk that we can call an “agential risk,” defined as follows:

*Agential risk*: the risk posed by any agent who could initiate an existential catastrophe in the presence of sufficiently powerful dual-use technologies either on purpose or by accident.

Before proceeding to the next section, we can make one more distinction within the category of agential terror between *omnicidal* agents and *anti-civilizational* agents. This distinction not only captures a real difference among agential risks in the world (some of whom fall within the same overarching type), but it roughly tracks the canonical definition of an existential risk (alluded to above) as “one that threatens the premature extinction of Earth-originating intelligent life or the permanent and drastic destruction of its potential for desirable future development” (Bostrom, 2013). Omnicidal agents wish to actualize the former disjunct whereas anti-civilizational agents wish for the latter. This being said, there are also extremely dangerous agents who don’t clearly fall into either category, such as the Finnish eco-fascist Pentti Linkola, who (a) doesn’t want humanity to go extinct, (b) doesn’t target civilization the way, for example, anarcho-primitivists and neo-Luddites typically do, yet (c) does advocate a global-scale involuntary genocide that significantly reduces the human population. There are also some agents whose ambitions exceed omnicide: they wish to annihilate not merely all humans but the entire biosphere—or, in some cases, every instance of life in the universe.

With these nuances stated, we will now outline a four-part typology of agential risks. The penultimate section will then focus on a number of possible information hazards associated with agential risk studies, arguing that these hazards are real and significant but do not currently outweigh the benefits of exploring this topic.

2. A typology of agential risks

2.1. Types of omnicidal and anti-civilizational agents

(1) Apocalyptic terrorists: Let’s consider two models for understanding this threat. The first involves the following tripartite distinction: (i) *Doxastic apocalypticists*: Individuals of this sort hold a passive belief that the end of the world, the “eschaton,” is rapidly approaching, but they do not attempt to alter the timing or chronology of eschatological events. Extrapolating from recent history, we should expect a staggering 3.5 billion religious people to hold doxastic apocalyptic views by 2050.2 (ii) *Activist apocalypticists*: Individuals of this sort take mostly indirect actions to alter the onset or chronology of eschatological events by, for example, fomenting the conditions necessary for Armageddon to occur. An example comes from the “Armageddon lobby” in the US, a sizable demographic of dispensationalist Christians who, for partly eschatological reasons, support a Jewish state in Palestine and often interpret wars and natural disasters with “a certain grim satisfaction,” since such events are harbingers of the rapture (Haija, 2006, Walls, 2008). And (iii) *febrile apocalypticists*: Individuals of this sort take direct action to catalyze the apocalypse. They see themselves as divinely ordained participants in an eschatological narrative that is unfolding in realtime and will ultimately culminate in an epic clash between the cosmic forces of Good and Evil. Somewhat crudely speaking, there are inward-facing and outward-facing instances of this type: suicide cults can constitute the former while Aum Shinrikyo, the Islamic State, and groups influenced by Christian Identity constitute the latter. It is outward-facing febrile apocalypticists—agents who believe that “the world must be destroyed to be saved”—that concern the present paper.

Another model comes from Landes (2011). According to Landes, some eschatologies posit a *transformative* “call for a change of the heart,” whereas others anticipate *cataclysmic* violence at the end of time. Furthermore, some religious believers identify the causal agents responsible for bringing about the apocalypse to be supernatural (e.g., God or a messianic figure like the Mahdi), whereas others believe that God has delegated this all-important task to them. This task is “all-important” because nothing means anything within the religious worldview if there is no divine justice to “set things right” at the end of time; indeed, eschatology constitutes the ultimate *theodicy*, or vindication of the existence of evil given God’s supposed omnipotence and omnibenevolence. Even more, Pinker (2011) notes that the utopian aspect of most apocalyptic ideologies is especially dangerous because it sets up a “pernicious utilitarian calculus” whereby present suffering, however immense, can always be justified by the infinite moral value of paradise. Stern and Berger (2015) offer a similar observation, writing that apocalyptic groups aren’t “inhibited by the possibility of offending their political constituents because they see themselves as participating in the ultimate battle.” It follows that they are “the most likely terrorist groups to engage in acts of barbarism” (Stern & Berger, 2015).

With respect to agential risks, it is the active-cataclysmic mode of belief in the top-left triangle of Fig. 1 that constitutes the gravest danger. Simply put, if the world must be destroyed to be saved and if pressing a doomsday button would destroy the world, then active-cataclysmic extremists would press a doomsday button. Note here that many apocalyptic ideologies are *plastic* in that they can undergo significant changes over time from one quadrant of Fig. 1 to another. In fact, history is replete with apocalyptic groups that oscillated between the active and passive Gestalts as a result of endogenous (within the group) and exogenous (outside of the group) factors. In some cases, the evolution from a thoroughly passive eschatology to a violently active one has occurred quite quickly, meaning that anti-risk enforcement operations will need to keep their eyes on a wide range of apocalyptic movements in the future, not just those that currently embrace an active mode of belief.

#### It also ensures effective governance of existential risks (climate change, environment, poverty, inequality, war, and resources).

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How can we talk of “leaving no one behind”— the central promise of Agenda 2030 of the United Nations—if we neglect all those who are marginalized, discriminated against, and persecuted owing to their very beliefs? And how can we invest in holistic models of human development without taking account of the human person’s religious and spiritual needs? This report reinforces and deepens the emerging recognition by scholars and policymakers of the interdependent relationship between freedom of religion or belief—the human right enshrined in Article 18 of the Universal Declaration of Human Rights—and global development, as defined by the seventeen Sustainable Development Goals set forth in the UN’s Agenda 2030. Put negatively, there is an increasing awareness of the intertwining nature of these two global existential challenges, namely the escalation of various forms of discrimination and persecution based on religion or belief, on the one hand, and the failure of the international community to arrest the devastating forces of climate change, violent conflict, global poverty, inequality, and other threats to human security, on the other.

The report explores the dual proposition that integral human development (IHD), an idea and aspiration resonant within many of the world’s religious, philosophical, and wisdom traditions, provides fresh insight into the crisis of freedom of religion or belief; and that the concept of IHD is itself enriched and its significance further clarified when it incorporates a profound appreciation of the intrinsic relationship between religious freedom and human dignity. This dual recognition, in turn, opens a path for addressing obstacles to the full realization of freedom of religion or belief.

The report is inspired by Pope Francis’s 2015 message to government leaders in his historic address to the United Nations on the occasion of the adoption of Agenda 2030:

The simplest and best measure and indicator of the implementation of the new Agenda for development will be effective, practical and immediate access, on the part of all, to essential material and spiritual goods: housing, dignified and properly remunerated employment, adequate food and drinking water; religious freedom and, more generally, spiritual freedom and education. These pillars of integral human development have a common foundation, which is the right to life and, more generally, what we could call the right to existence of human nature itself.

By viewing the persecution and discrimination based on religion or belief through the lens of integral human development, and by considering multifaith perspectives on religious freedom and human development, this report offers a path for creating a new global platform for engaging religious and policy leaders as well as recommendations for designing innovative government-religious partnerships aimed at achieving more inclusive and peaceful societies.

Introduction

With five years to go to achieve the United Nations’ Agenda 2030, no country is on track to do so. The Sustainable Development Goals (SDGs) have become an empty acronym, obscuring the fact that we are speaking not merely of theories or “targets,” but of concrete existential challenges: poverty, war, discrimination, environmental degradation, and access to resources. Violations of religious freedom represent their own existential challenge across the world. Watchdogs report high and sustained levels of religious persecution and discrimination through state and societal violations of this human right.2 These violations occur in a context of rising levels of polarization, social hostility, and communal violence, which are often accompanied by and intertwined with new waves of religious nationalism and extremism.

The right of freedom of religion or belief (FoRB)—which includes freedom of thought, conscience, and religious freedom—encompasses not only traditional religious beliefs but all nontheistic beliefs as well as the right not to believe.3 Enshrined in article eighteen of the Universal Declaration of Human Rights (UDHR), it is often described as the foundation of all human rights and is seen as a key component of flourishing, peaceful societies, especially as these are envisioned in Agenda 2030. Indeed, this freedom not only allows everyone to choose and profess the religion or belief that is most in accordance with their conscience but also encourages the formation of alternative normative worlds in which different people experience new social relations and generate innovative models of human development. Yet the relationship between FoRB and sustainable development has been overlooked: FoRB receives little to no mention within the SDGs and has long been absent from policy conversations on international development.

### 1AC---Education ADV

#### Advantage 1 is EDUCATION.

#### Higher education prevents extinction.

Dr. Adrian Parr et al. 22, PhD, Professor of Planning, Public Policy, and Management at the University of Oregon, Senior Fellow at the Design Futures Council, “Knowledge-driven actions: Transforming higher education for global sustainability”, a report published in 2022 by the United Nations Educational, Scientific and Cultural Organization, Paris

Universities and, more broadly, higher education institutions (HEIs), need to use the knowledge they produce and their education of new professionals, to help solve some of the world´s greatest problems, as addressed by the Sustainable Development Goals (SDGs) set out by the United Nations (UN). Humanity is facing unprecedented challenges, most strikingly so in relation to climate change and loss of nature and biodiversity, as well as inequality, health, the economy, and a suite of issues related to the 2030 Agenda. Given this new reality in which the future of humans, along with other species, is at stake, it is time for HEIs and their stakeholders to systematically rethink their role in society and their key missions, and reflect on how they can serve as catalysts for a rapid, urgently needed and fair transition towards sustainability. The complexity of the issues at stake means that solutions should be part of a radical agenda that calls for new alliances and new incentives.

It is also time for HEIs to make sustainability and SDG literacy core requisites for all faculty members and students. Sustainability education should bring students into contact with real-world problems and immersive experiences. Appreciating the greater good of both people and planet, and contributing to values beyond mere monetary gain will further enthuse and inspire students and faculty mentors alike. Ultimately, the educational culture at universities and HEIs needs to encourage students to learn via experimentation and critical thinking from multiple perspectives.

This report is undoubtedly about the SDGs; however, it is important to realize that these will expire in 2030. We thus strongly recommend that HEIs, while being a part of that agenda, should also look ahead – not only to implementing the SDGs, but also to being intensively involved in crafting the next steps and goals beyond 2030. A long-term perspective needs to be adopted for both HEI activities and policies.

The call this report makes is for universities and HEIs to play an active part in an agenda that has the consensus of 193 countries and aims to resolve some of the world’s most pressing problems, as stated in the 17 SDGs.

The challenge is for HEIs to embrace the 2030 Agenda, because if they do not it will be difficult, if not impossible, to achieve the SDGs. The SDGs represent a unifying challenge for all universities and HEIs, and this must be reflected in plans and actions for research, education and outreach.

HEIs have played a crucial role as bringers of societal enlightenment and change over the centuries, maintaining their role as free and critical institutions while also – to varying degrees – aiming to perform a service within societies. It is essential to maintain and encourage these important roles and enable HEIs to combine their traditions of critical thinking with problem-solving activities, while also adjusting their role in the light of societal changes. The future of humanity and our planet is under threat, and the need for critical thinking and societal change is therefore more pressing than ever.

#### AND its erosion collapses US leadership.

Dr. Nicholas Eberstadt & Evan Abramsky 22, PhD, Henry Wendt Chair, Political Economy, American Enterprise Institute; MA, former Senior Research Associate, International Political Economy, American Enterprise Institute, "America's Education Crisis Is a National Security Threat," Foreign Affairs, 09/20/2022, https://www.foreignaffairs.com/world/america-education-crisis-national-security-threat.

Just as it transformed the global economy in the last century, the worldwide explosion in education is set to transform geopolitics in this one. Over the next two decades, more people are likely to enter the world’s highly educated labor pool than did in the previous two decades—or ever before. By 2040, there could be 250 million more working-age college graduates in the global workforce than there are today—a jump of 70 percent—and almost half a billion more people with at least some higher education.

From the standpoint of global prosperity, the postwar educational explosion has been an unmitigated boon, helping fuel a near quintupling of worldwide GDP per capita since 1950. Although those gains in income and wealth have by no means been equally shared, nearly all humanity has nevertheless benefited from them: falling poverty, growing life expectancies, and improving well-being are all partly due to educational advances.

From the standpoint of geopolitics, however, the consequences of the educational explosion are less propitious, at least for the United States. The surge of highly educated people into the global workforce has shifted the balance of economic power and, by extension, military power among countries, undercutting the United States’ primacy. For the first three postwar generations, the United States’ college-educated workforce was unmatched in terms of size, giving the country a powerful economic advantage that helped sustain it during and immediately after the Cold War. Today, it is neck and neck with China in total highly trained workers, with India closing in. By 2040, China and India will be vying for the lead in total highly trained labor, with the United States a distant third.

To be clear, there is no reason to presume that Chinese or Indian higher education will be of the same quality as that in the United States. And the United States will still be able to count on many other assets that reinforce its global advantage: among others, its prowess in research and technological development, its dynamic business sector, its sophisticated financial system, and its dominant currency. But these realities should only afford a limited measure of consolation in the face of otherwise troubling educational trends.

The erosion of the United States’ educational edge will eventually weaken the country’s global reach. With a less highly educated workforce than it could or should have, the United States will have less economic, political, and military heft with which to defend its interests and uphold the economic and security architecture that has defined the postwar order. Eventually, Pax Americana will come under pressure. It is not hard to imagine a progressively less peaceable and more economically insecure international environment in which the United States has much less influence as a result of its stagnating pool of high-skilled labor.

Fortunately, the United States still has good options for coping with loss of educational hegemony. But they all require Washington to take initiative—something it seems unaccustomed to lately. Through more active and imaginative diplomacy, the United States could seek to forge new coalitions or alliances that would add human resource ballast to the liberal order. This might entail patient cultivation of new security partnerships with some of tomorrow’s major centers of highly educated labor: India, Indonesia, Vietnam—maybe even Iran. Other intriguing possibilities include a closer integration of Canada, Mexico, and the United States, which might bring North America’s strategic potential more in line with its tremendous demographic and economic potential.

Meanwhile, the United States could attempt to reverse its ominous educational slowdown. Stagnation in educational attainment is impeding economic growth and likely robbing the United States of trillions of dollars in output each year—a price that will only rise if the United States doesn’t shift course. Part of the problem is that Americans do not want to buy a lot of what U.S. educators want to sell, and it is hard to blame them. The quality of public primary and secondary schooling is woefully uneven, and a high school diploma does not always come with marketable skills. Higher education is increasingly bureaucratized, ideological, and expensive. If Americans treated education as if their future depended on it, they would look for far-reaching overhauls, not marginal changes, and they would look beyond teachers’ unions and university administrators for better ideas. Revitalizing the country’s human resources—not just educational attainment, but health, workforce participation, and even family—will increasingly be strategic imperatives for the United States.

#### That goes nuclear.

Dr. Hal Brands 25, PhD, MPhil, MA, Distinguished Professor, Global Affairs, Johns Hopkins School of Advanced International Studies. Senior Fellow, American Enterprise Institute, "Three Ways America's World Order Could Collapse," American Enterprise Institute, 07/28/2025, https://www.aei.org/op-eds/three-ways-americas-world-order-could-collapse/.

Since 1945, that order has generated tremendous peace, prosperity and freedom. It can only be termed a smashing success. But stresses on that order — those imposed by its challengers, and those imposed by its creator — have been mounting. One way of gauging just how severe the risks have become is by considering the various ways an order might end.

The brilliant Cambridge historian Brendan Simms has suggested that international orders typically end in one of three ways: Through defeat in war or some catastrophic failure of deterrence; through economic decline or a divergence between the order’s political and economic arrangements; or through the collapse of respect for its guiding rules and norms.

The US order has proven remarkably resilient, but the possibility of a breakdown is growing as America piles up risk on each of these dimensions at once. And while recent leaders, including President Donald Trump, have made important moves to shore up the order, America’s present policies are increasingly making those dangers worse.

Orders can die of murder, exhaustion or suicide. Today, it’s difficult to rule any of those grim finales out.

How America Took the Lead

Order is about rules and rule-makers. International orders feature commonly accepted norms or principles meant to govern global behavior. Those rules are made, and sustained, by mighty actors and institutions. A long line of powers has sought to structure the globe to their liking. But since World War II, America’s order has been the biggest, most successful game in town.

The lesson US policymakers took from that conflict was that only a secure, prosperous system could ensure America’s own wellbeing. So the US built an order based on relatively free trade; a preference for human rights and democratic values; the prevention of great-power aggression and war; and institutionalized cooperation to address common problems.

Washington used its unmatched military and economic power to buoy the fortunes of like-minded nations. America, said President Harry Truman, was “assuming the responsibility which God Almighty intended” for “the welfare of the world in generations to come.”

Make no mistake: This endeavor was rooted in US interests. But because America was so powerful, and defined those interests so broadly, this project brought historic gains for much of the world.

Democracy went from endangered to dominant in the postwar decades. Trade flourished and living standards soared, first in the free world and then globally after communism fell. A world that suffered two all-consuming great-power wars in quick succession has avoided anything like that since 1945.

The US presided over a global golden age. Yet the stresses on America’s order have become impossible to ignore.

Revisionist powers — China, Russia, Iran, North Korea — are challenging a system they view as dangerous to their illiberal regimes and oppressive to their geopolitical ambitions. The Global South has become disillusioned with Western dominance. The US itself has seemed ambivalent, in recent decades, about world leadership. Threats to its economic and military supremacy have grown more severe.

Visit nearly any US ally, and you’ll notice conviction that American power remains necessary — and concern that the post-World War II order is slipping away. So how real is the danger? Let’s consider the three ways an order can come apart.

Losing a War

One path to failure runs through defeat or devastation in war. Nothing ruptures the authority of a hegemonic power like a humiliating beatdown on the battlefield. The Athenian empire collapsed after losing the Great Peloponnesian War. Britain won World War I, but never recovered from its costs.

For decades, America has been the sole superpower. As last month’s attack on Iran’s nuclear program reminded us, the Pentagon still possesses power-projection capabilities without peer. But anyone who thinks the US is militarily invincible hasn’t been paying attention.

The Pentagon faces a vexing military arithmetic problem. Several challenges — from Russia in Europe, Iran and its proxies in the Middle East, and China and North Korea in Asia — are stretching US resources. A superpower with a military designed to fight one war at a time is always at risk in a world of multiple, interlocking threats. But the danger of crushing defeat is most concentrated in the Western Pacific.

“The intelligence couldn’t be clearer,” said Secretary of the Air Force Frank Kendall in 2023. “China is preparing for a war and specifically for a war with the United States.” The Chinese threat is real, “and it could be imminent,” Secretary of Defense Pete Hegseth observed this year. Those are only two of many alarming statements from US officials.

Beijing is building the forces and rehearsing the plans needed to attack Taiwan or otherwise reorder the Western Pacific. It is racing to construct a nuclear arsenal that will match, and maybe exceed, America’s. Meanwhile, Xi Jinping’s government is hoarding food, fuel and other resources. Xi would surely prefer to eject America from the Western Pacific peacefully. But he’s getting ready for a fight.

A US-China war would cause cascading economic carnage and bring serious risks of nuclear escalation. And if America lost — which is a real possibility — the damage to the US order would be profound. America’s alliances in the Indo-Pacific might fracture. A broken US military might struggle to police other parts of the world. “The trajectory must change,” the head of US Indo-Pacific Command, Admiral Samuel Paparo, has warned: America isn’t responding with the urgency the threat demands.

#### Intellectual arrogance erodes governance. Extinction.

Trisha Dutta & Dr. Jon K. Maner 26, PhD, Instructor, Social Psychology, Florida State University; PhD, Professor, Psychology, Florida State University, "An Evolutionary-Developmental Perspective on the Relationship Between Childhood Unpredictability and Intellectual Humility," Personality & Individual Differences, Vol. 250, February 2026, ScienceDirect.

The last several decades have presented humans with numerous epistemic challenges that our ancestors could not possibly have envisioned. The advent of the internet, for example, has created a double-edged sword. On one hand, it provides an immense amount of information at our fingertips, facilitating equitable and transparent access and dissemination of knowledge. On the other hand, it creates information silos that promote polarization and misinformation, problems compounded by the meteoric rise of large-language-model-powered AIs. Moreover, some of the most serious existential challenges facing humanity, such as climate change, are abstract and operate on long temporal scales, making it difficult for individuals and communities to perceive their immediate impact. In this increasingly complex and fractured world, certain epistemic 1 tendencies are especially vital: having metacognitive awareness of the limitations of one's knowledge, being open to different points of view, and being willing to update one's knowledge in the presence of compelling evidence. These abilities are central to intellectual humility (Porter, Baldwin, et al., 2022).

Research on intellectual humility has grown considerably in the last decade. While some studies have focused on establishing intellectual humility as a distinct personality trait (Church & Barrett, 2016; Hoyle et al., 2016; Krumrei-Mancuso & Rouse, 2016; Porter, Baldwin, et al., 2022), other studies have focused on the consequences of intellectual humility, such as its implications for challenges including intergroup prejudice, misinformation, and political polarization (e.g., Hook et al., 2017; Koetke et al., 2023; Krumrei-Mancuso & Newman, 2020; Ryu et al., 2023).

#### Religious schools foster a participatory, intellectualy open, and well-educated populace.

Dr. Samuel J. Abrams & Joshua M. Tubbs 12-11, PhD, Professor, Politics & Social Science, Sarah Lawrence College. Nonresident Senior Fellow, American Enterprise Institute. Faculty Fellow, New York University's Center for Advanced Social Science Research; Contributor, Real Clear Education, "How Religious Schools Strengthen Our Republic," American Enterprise Institute, 12/11/2025, https://www.aei.org/op-eds/how-religious-schools-strengthen-our-republic/. [italics in original]

The narrowing of intellectual life on campus is no passing trend; it has become a defining feature of American higher education. Viewpoint diversity among professors and students alike is growing scarce, leaving prevailing ideas uncontested and unrefined. Yet religious colleges and universities offer an unlikely model for renewal. Though rooted in faith traditions, they often preserve the very conditions for open, rigorous inquiry that many secular institutions now struggle to sustain. That the most intellectually diverse campuses may be those grounded in a single faith seems paradoxical—but it is precisely their moral coherence that makes pluralism possible.

Consider the College of the Holy Cross, a small Jesuit school in Worcester, Massachusetts. Each fall, freshmen pledge themselves to the Jesuit principle of *Magis*—the call to strive for excellence in all learning. The ritual is more than symbolic; it establishes a shared moral vocabulary that guides the community. Holy Cross reinforces those principles not through slogans but through structure: small classes that reward dialogue, a common core curriculum that demands breadth, and even a single dining hall that draws the entire campus into conversation. The result is an intellectual culture animated by trust and curiosity. Its alumni—ranging from Justice Clarence Thomas to Dr. Anthony Fauci—reflect not uniformity but academic seriousness. In an age defined by stagnation and opposition, Holy Cross quietly demonstrates how conviction and pluralism can coexist.

That paradox holds across faith-based campuses nationwide. From Baylor to Brigham Young University, from Yeshiva University to Wheaton College, religious institutions thrive by marrying moral clarity to intellectual openness. They know what they stand for, and that clarity frees students to question rather than conform. Where secular universities increasingly police speech and sentiment, faith-rooted schools model institutional confidence. According to the Foundation for Individual Rights and Expression, roughly four in ten students nationwide regularly self-censor for fear of social or administrative reprisal. That number should alarm anyone who believes education requires freedom. Religious colleges provide a striking counterexample: when purpose is clear and belonging is secure, disagreement becomes safe again, and students are more willing to test arguments in good faith.

Sociologist Émile Durkheim would have recognized what such institutions achieve. He called it “collective consciousness”—the web of norms and meanings that makes genuine freedom possible. Religious colleges build that architecture deliberately. They integrate faith, service, and scholarship so that knowledge serves not just private ambition but civic life. As the Sutherland Institute’s *Religion and the American Experiment* report notes, religious schooling consistently correlates with higher levels of civic trust, charitable giving, and political tolerance than secular institutions. Their graduates tend to vote more, volunteer more, and participate more actively in their communities. The pattern is clear: when moral formation accompanies academic instruction, democracy benefits.

The reason is not theological indoctrination but anthropological realism. Faith-based education assumes that humans are moral creatures before they are political ones—and that character cannot be outsourced to policy. It teaches responsibility alongside rights. Students at Notre Dame, BYU, or Yeshiva are reminded that knowledge is ordered toward service, that liberty demands discipline, and that truth-seeking requires humility. In this respect, religious colleges preserve something secular institutions have lost: the link between intellect and virtue. Their pedagogy insists that *how* one learns matters as much as *what* one learns.

And that link is not confined to religion’s adherents. Many non-believing students choose faith-based schools precisely because they crave a moral community within which to think freely. They may not pray, but they respect purpose. In an age of ironic detachment and social atomization, the rituals of shared meals, chapel services, and civic engagement build habits of gratitude and empathy. Those habits are the seedbed of citizenship. When graduates leave such institutions, they are more inclined to see politics not as performance but as service.

This is also where ideological diversity enters. A Pew Research Center study finds that religious adherence correlates with higher rates of conservatism—the overwhelming minority position in today’s academy. That demographic reality matters. Religious schools draw applicants who bring ideological heterogeneity that is increasingly absent at secular universities. This does not create unanimity; it creates the conditions for real debate. When students realize they are not alone, confidence grows. Silence gives way to speech. And speech—sometimes halting, sometimes contentious—is the prerequisite for building independent thinkers capable of engaging across difference.

But demographic variety alone is insufficient. Without structure, ideological diversity easily fractures into siloed groups, mutual suspicion, or status anxiety. Religious colleges counter that risk because creed, mission, and shared purpose construct a framework strong enough to hold disagreement. Their clarity creates the container in which heterogeneity can be generative rather than corrosive.

The lesson for secular universities, then, is not that they must become religious, but that they must again become serious. Mission clarity is not indoctrination; it is honesty. Every institution embodies values, but few are transparent about them. A college that preaches neutrality while enforcing unspoken orthodoxies about identity and power is far less open than one that declares a creed and invites students to challenge, discuss, and dissent from it. Through commitment—real, articulated, lived commitment—religious schools set an example: better to admit what you believe than to hide belief behind bureaucratic platitudes.

Pluralism, properly understood, depends on institutions of conviction. A free society requires spaces where ideas can be contested without fear, but also where meaning can be pursued without cynicism. Religious colleges prove that these goals are compatible. They stand as quiet guardians of civic life, reminding us that liberty without moral order devolves into license, and community without conscience curdles into conformity.

Holy Cross embodies that balance. Its Jesuit ethos—anchored in purpose, disciplined by reason, and animated by faith—produces graduates who can disagree without disdain and serve without cynicism. In an age when universities often confuse activism for intellect, Holy Cross and schools like it remind us what higher education can still be: a place where belief strengthens inquiry and community sustains freedom. That is not merely good pedagogy. It is the foundation of a republic.

#### The plan solves:

#### 1. LABOR RELATIONS. Bargaining enables stability AND teacher buy-in.

Evelyn M. Tenenbaum 01, JD, Associate Professor, Lawyering, Albany Law School. Adjunct Professor, Law, Albany Law School, "The Application of Labor Relations and Discrimination Statutes to Lay Teachers at Religious Schools: The Establishment Clause and the Pretext Inquiry," Albany Law Review, Vol. 64, No. 2, pg. 629-674, 2001, HeinOnline. [italics in original; OCR error edited by Jordan]

Applying labor relations and discrimination statutes to lay teachers at religious schools is particularly sensitive due to the unique role of a teacher. The courts have consistently upheld the constitutionality of applying labor relations and discrimination statutes to lay employees who are not teachers and who are performing essentially secular functions at church-operated institutions.221 The courts have also held that labor relations and discrimination acts should not be applied to employees performing purely religious functions, such as ministers and priests. 222 Lay teachers are in a unique position because they perform the essentially secular function of educating children but have a profound role in shaping ideas and attitudes. 223 The courts have found that this unique role creates a special danger of violating the Establishment Clause.224

As set forth in Part IV, by limiting inquiry concerning religious issues, the important rights of lay teachers to be protected from anti-union and discriminatory animus can be safeguarded without violating the rights of religious schools. There are particularly important reasons for ensuring that lay teachers at religious schools have these protections. The labor relations acts promote a harmonious educational environment for the children at religious schools by encouraging the peaceful resolution of disputes. The anti-discrimination provisions help ensure that children are not exposed to divisive discriminatory practices in a school setting, that children are exposed to diverse views that help prevent future discrimination and that discriminatory values are not perpetuated by example. Indeed, the courts have found a compelling interest in eliminating discrimination 225 and in applying labor relations statutes to lay teachers. 226

*A. The Importance of Applying Labor Relations Statutes to Lay Teachers*

The labor relations acts did not create the rights of employees to unionize or to strike. These rights have long been recognized at common law. 227 Moreover, the First Amendment's protection of freedom of association has been held to extend to labor union activities such as the right to solicit union members and the right of union members to assemble and discuss their own affairs. 228

Neither the common law nor the First Amendment, however, imposes a legally enforceable duty on an employer to recognize and deal with a bargaining agent selected by his employees. 229 Consequently, before the enactment of labor relations statutes, employees frequently had to resort to strikes and picketing to compel their employers to negotiate. As the Supreme Court wrote, "[rlefusal to confer and negotiate has been one of the most prolific causes of strife."230

Labor relations statutes impose a duty on the employer to bargain collectively with the employee. If the lay teachers and their chosen bargaining representatives are excluded from the coverage of the labor relations acts and their employers refuse to bargain voluntarily, they will be forced to revert to strikes to resolve their labor disputes or to negotiate with their employers on an individual basis. A strike, or the failure to amicably discuss the teachers' needs, may cost the schools more than money. It may affect the goodwill, credibility and trust that must be present between teachers and administrators and among teachers to maintain a productive environment in the schools. 231 \*\*\*FOOTNOTE BEGINS\*\*\* *See* Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857 (Minn. 1992). Applying the Minnesota Labor Relations Act to lay teachers at a religious school, the court wrote: "[t]he nature of collective bargaining is unique; other alternatives pale in comparison and remain unable to effectuate the strength of collective action. Collective bargaining allows the individual 'David' to negotiate against the employer 'Goliath."' *Id*. at 867.

In an era of school reform where teacher empowerment is designed to give faculties greater voice in the daily exercise of their professional duties, a positive response from Church leaders can further serve as a powerful example of the effectiveness of shared decision making. By entering into labor contract negotiations with teachers' unions over terms and conditions of their employment, dedicated lay teachers who staff the schools can be made full partners in the enterprise of educating children.

Gregory & Russo, *supra* note 6, at 467 (footnote omitted); c/ Michael E. Hartmann, *Spitting Distance: Tents Full of Religious Schools in Choice Programs, the Camel's Nose of State Labor-Law Application To Their Relations With Lay Faculty Members, and the First Amendment's Tether*, 6 CORNELL J.L. & PUB. POL'Y 553, 560 (1997) (stating that "[t]he interest of educational researchers in the overall effect of teacher unionization on education in general is, surprisingly, relatively sparse and, perhaps not surprisingly, seemingly contradictory") (footnote omitted). \*\*\*FOOTNOTE ENDS\*\*\*

#### Only CBRs (or collective bargaining rights) preserve equitable conflict resolution AND labor outcomes. The federal government is key.

Kevin H. Govern & John I. Winn 24, LLM, Associate Dean, Academic Affairs, Ave Maria School of Law. Professor, Law, Ave Maria School of Law. Executive Board Member, Center for Ethics & the Rule of Law University of Pennsylvania; JD, LLM, Professor, Business Law, School of Business, Shenandoah University, "Academic Corporatism, NLRB v. Yeshiva, and the Rise of the University Professional Management Class," Ave Maria Law Review, Vol. 22, pg. 1-26, 2024, HeinOnline. [italics in original]

Competition for students, rising infrastructure costs, and (to a lesser extent) pressure to engage in outside grant-funded research, are all major factors in the adoption of corporate management practices.1 23 In the traditional university governance model, emphasis is placed upon cooperation and partnership between faculty and administration (of whom, most have risen from faculty ranks). Although faculty still retain primary responsibility over classroom curriculum, academic governance has evolved into a fully top-down exercise of power over vast bureaucracies of assistant vice presidents, associate provosts, assistant deans, and others. This shift in authority reveals a growing chasm between the interests of university administrators and those of the faculty. Academic corporatism is obvious when universities establish the need to hire "Chief Risk Officers" (CROs). 24 The Brown University CRO functions as "leader, partner and facilitator" regarding "institution level risk identification, analysis, evaluation, response and monitoring" within that institution's "Enterprise Risk Management (ERM) process."1 25 The University of Toledo's Associate Vice President for Risk Management and Chief Risk Officer reports to "Senior Leadership and ultimately the President," as well as to the Finance and Audit Committee of the Board of Trustees.126 Of the twelve listed "Key Responsibilities" of the Toledo CRO, none involve any direct or continuing engagement with faculty. 127

The selection of business leaders and former military officers 128 as presidents and chancellors reflects new leadership styles to "create an environment more conducive to fostering entrepreneurship and innovation. 12' Recent examples include Janet Napolitano (former Arizona governor and Secretary of Homeland Security) at the University of California, James Clark (former AT&T executive) at South Carolina, Timothy M. Wolfe (former president at Novell America) at the University of Missouri, and Clayton Rose (former vice chair at JP Morgan Chase) of Bowdoin College. Jonathan Lash at Hampshire College was a lawyer at an environmental think tank. Bruce Benson at the University of Colorado is from the oil industry. Neither hold PhDs. Recent research by Scott Beardsley at the Darden School of Business found that among 248 liberal arts presidents in 2014, 30% followed a non-traditional, non-academic path. 30 By 2017, almost half (46%) of university presidents came from corporations, the military,' 3 ' or government.132

One particularly contentious non-traditional leadership hire was the selection of Bruce Harreld (formerly of IBM and president of Boston Market Co.) as President of the University of Iowa in September 2015. Harreld assumed the Presidency with no doctorate and with a search committeei33 composed primarily of business and political interests. Following a no confidence vote by faculty, the American Association of University Professors (AAUP) sanctioned the University of Iowa. 3 4 After continuing rancor, especially by disaffected faculty,'3 5 Harreld announced he was stepping down in October 2020. Laura McKenna in the Atlantic explains that a college campus "cannot be managed like a hierarchical corporation or a governmental bureaucracy," and that "real value [] comes from having a deep understanding of the dynamics of a college campus and from having the loyalty of faculty."'36 The "collegium" of engaged, intimate scholars seeking consensus decision-making retain little or no bargaining power where they are merely a minority voice in a complex web of competing power blocs. 137 In *The Ties that Corporatize: A Social Network Analysis of University Presidents as Vectors of Higher Education Corporatization*, the authors note that, "[w]ith financial pressures to generate revenue, universities respond by conceptualizing students as consumers and the university as a business" with a concomitant "cultural shift away from the traditional core mission of the university as an altruistic public good and towards a revenue-seeking [enterprise]."138

VI. CORPORATISM DURING THE COVID PANDEMIC

During the COVID-19 pandemic of 2020 through the time of this writing, faculty have often faced a Hobson's choice of either accepting ad hoc, "force majeure"1 39 decision-making or losing their positions entirely. Keuka College in New York suspended the faculty handbook and terminated tenured faculty without simultaneously shutting down the underlying academic programs. Keuka's President in a written response to the AAUP noted that "I do not believe that when the AAUP's Statement on Government of Colleges and Universities was authored and adopted by that organization in 1966-67, its authors could have foreseen a financial environment like the one in which modern-day institutions currently operate." 4 As opposed to "financial exigency," mere "budgetary hardship" was proposed by John Carroll University in Ohio for incorporation into faculty handbooks which the AAUP acknowledges will "effectively render tenure meaningless at those institutions."141 Marian University of Wisconsin declared an "enrollment emergency," and Medaille College implemented a revised faculty handbook which mandated "annual performance reviews" for recently tenured faculty and three-year contracts for tenured faculty with greater seniority. 42 Faculty who refused to sign new employment agreements were advised they would be considered "at-will employees."1 43 Demographic enrollment challenges, aggravated by labor market volatility and financial strains during the pandemic, often resulted in unilateral decision-making by boards and administrators to discard institutional governance procedures. Restrictions on traditional university classrooms and campus education during the COVID19 pandemic resulted in reductions in tuition income. In response, many colleges and universities imposed layoffs, reorganized programs, and announced significant changes in decision-making processes without faculty input.

A May 2021 special investigative report by the AAUP on the impact of the COVID-19 pandemic on faculty governance concluded the "COVID-19 pandemic has presented the most serious challenges to academic governance in the last fifty years." 44 A 2021 AAUP report found that more than 60% of four-year programs have zero faculty input upon budgetary matters as compared to a similar poll from 2001 at only 13%.145 In May 2021, the AAUP sanctioned six campuses for violating "widely accepted standards of college and university governance" in shutting down programs and terminating tenured faculty.1 46 The next month, the AAUP added Canisius College to its list of sanctioned programs after Canisius discontinued nine academic programs and terminated twenty-two tenured and tenure-track faculty without faculty consultation.1 47 AAUP's sanctioning report notes that the ad hoc nature of the process "disregarded normative standards of academic governance" and "degraded conditions for shared governance, weakened tenure, and damaged the climate for academic freedom. "148 Although the pandemic often required swift administrative decision-making, matters relating to class sizes, teaching methods, and delivery formats were often enacted behind closed doors without faculty input. James White, interim dean of the College of Arts and Sciences at the University of Colorado at Boulder, stated: "Never waste a good pandemic" while announcing a long-term plan to replace tenured faculty members with nontenure-track faculty members.149

Corporatism has the potential to replace shared governance in both public and private universities. Facing such changes, faculty in public universities and private colleges and universities, when authorized by state laws, are entitled under the NLRA to unionize and collectively bargain. The "community of scholars" are powerless within a "scheme of academic control" in which "the captain of erudition should freely exercise the power of academic life and death over the members of [their] ~~his~~ staff." 0 While there should always be healthy tension between an administration focused upon cost (or profit) and intellectual functions governed by academic core values, as early as 1966, the American Council of Education, the Association of Governing Boards, and the AAUP underscored the critical role of the faculty governance in "such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process."151

CONCLUSION

Eliane Glaser laments "the replacement of the horizontal self-government of university departments with the vertical hierarchy of departmental heads and senior management. "152 The traditional model of transparent and participatory faculty self-governance has been effectively disenfranchised within a rabbit warren of non-teaching underlings focused upon auditing and assessing "student experience" with only modest concerns for teaching, scholarship, or academic freedom. Ironically, while corporate sectors have embraced leaner and flatter organizational models, universities embraced hierarchical controls. Traditional faculty governance models preserved consultation and debate between faculty representatives and senior university officials. In defense of expanding administrations, David Attis aptly points out the following regarding new administrative staff hires taking over some of the more bureaucratic tasks from faculty: "If you think back 50 or 100 years ago, faculty members did all of these jobs . . . now . .. faculty members feel that their time is better spent educating students and doing scholarly research."153

For some educators and staff at state institutions and the limited number of secular private institutions where faculty collective bargaining units have the right to bargain conditions and academic freedom, negotiated contractual commitments may offer greater security as well as retained stake in the operation of their institutions. Hierarchy has its place in academia, but a vast expansion of administrative officials without commensurate growth in faculty positions presages increased conflict between academics and administrative leadership. Administrators should always retain primary responsibility for finances and budgets, but private faculty encountering disparity in compensation and disenfranchisement in institutional governance may be inclined to pursue protections afforded under the NLRA, a sort of "New Deal for Higher Education [to support] labor rights and salary parity of all college [and university] teachers."1 5 4 Nevertheless, federal influence over higher education has generally been achieved by means of Congress' *spending* power;155 the NLRA, in contrast, was an assertion of Congress' *commerce* power.156 A challenge to *Yeshiva* in the realm of labor relations and education would therefore have to "'substantially affect interstate commerce."" 57

Adding to the difficulty of challenging *Yeshiva* is the doctrine of stare decisis. The central proposition of *Yeshiva* on "shared governance" was flawed, but any challenge to that proposition must demonstrate that *Yeshiva* was "not just wrong, but grievously or egregiously wrong."1 58 Moreover, the doctrine of *stare decisis* "carries enhanced force when a decision," like *Yeshiva*, "interprets a statute."1 59 That is because, "unlike in a constitutional case, ... Congress can correct any mistake it sees."1 60 Congress has had 40- plus years to respond to *Yeshiva*, yet has failed to do so. "As against this superpowered form of *stare decisis*," the Court "would need a superspecial justification to warrant reversing"' 6 ' *Yeshiva*.

Essential deliberative and consultive responsibilities of faculty can be consistent with the protection of collective bargaining agreements. Designating faculty as "managers" under the NLRA was an aberration, even in 1980, and is no more logical at the time of this writing. Appreciating that the Commerce Clause argument against *Yeshiva* is tenuous at best, are universities, in their present guise, really still "nonprofit institutions "162 as conceptualized by the Court in *Yeshiva*? The Court has sagely opined that "beneficent aims ... can never serve in lieu of constitutional power."1 63

From a practical perspective, university administrations need not function as something between a sole proprietor and a multinational corporation; willing and able faculty and staff make a collaborative and consensus building business model both plausible and desirable for all parties involved. Faculty unions will not be ideal for ensuring that every faculty meaningfully share and participate in every or any university decision-making process. For universities to remain sui generis with distinguishing characteristics of academic freedom, shared governance, and due process, full-time tenured and tenure-track faculty must engage meaningfully and collectively with management, and vice-versa. While recognizing the intrinsic complexity of modern universities requires bureaucratic oversight, true shared governance, especially in matters unique to faculty, requires a balancing of interests through good-faith negotiations, whether collective bargaining, or otherwise. Faculty and staff must work together at achieving and retaining shared governance and act in the common good especially when exigencies like the COVID-19 pandemic of 2020 call for innovative and rapidly implemented solutions to shared challenges.

#### 2. CREDIBILITY. Exemptions from CBRs wreck the perception of religious schools.

Dr. Joseph A. McCartin 18, PhD, Professor, History, Georgetown University, "Confronting the Labor Problem in Catholic Higher Education: Applying Catholic Social Teaching in an Age of Increasing Inequality," Journal of Catholic Higher Education, Vol. 37, No. 1, 2018, pg. 71-88. [italics in original]

American Catholic higher education finds itself increasingly ensnared in a contradiction. On the one hand, Catholic colleges and universities, “born from the heart of the church,” continue to play an indispensable role in the promotion of Catholic Social Teaching.1 At the same time, institutions of Catholic higher education are fighting to survive and remain relevant amid rapacious economic trends that are reorganizing all of higher education — secular and Catholic alike — in ways that contradict essential principles of Catholic Social Teaching, such as the dignity of labor and the centrality of solidarity to a just social order. Put more bluntly, Catholic colleges and universities fi nd themselves increasingly entangled in what Pope Francis has called “an economy of exclusion and inequality,” an economy that “kills.”2

Nowhere is this problem clearer than in the realm of labor relations, where Catholic institutions struggle to reconcile bedrock ideals of Catholic Social Teaching, such as a worker’s right to be paid a living wage or to organize and bargain collectively, with the business practices that increasingly characterize U.S. institutions of higher education. Facing and resolving this contradiction will not be easy. Yet the future integrity of Catholic higher education depends upon the willingness of its institutions to meet this challenge honestly and courageously.

An Increasingly Problematic Economic Context

The first step in addressing the problem must be a clear-eyed recognition of the forces that have reshaped our economy and so many of our institutions — including higher education — over the past half century. American Catholic higher education reached the height of its infl uence in the post–World War II decades in an economic context very different from the one that prevails today. There were 92,000 students enrolled in Catholic colleges and universities in 1945. That number more than doubled within the space of only three years, largely with the help of the GI Bill. By 1970, it had reached 430,000, thanks to federally guaranteed loans under the provisions of the National Defense Education Act (1958).3

This postwar expansion took place in the context of a nation where prosperity was not only growing, but also broadly shared. Economists refer to the years between 1940 and 1973 as the era of the “Great Compression,” because in these years the nation’s income structure became dramatically more equal. During this period, the rate of income growth was higher in the bottom two quartiles of the economy than in the top two. A number of factors contributed to this trend. Important among them was a strong union movement, a progressive taxation and regulation regime, and corporate practices that tended to favor strategies of investing in workers as lifelong employees.

Catholic higher education today inhabits a very different economic world from the one that prevailed in 1970. Then, the federal government taxed income in the top earnings bracket at 71.75 percent and collected a top capital gains tax of 32.3 percent. By 2017, however, these numbers had fallen to 39.6 and 25 percent, respectively. Then, the minimum wage was $10.09 (in infl ation-adjusted dollars), compared with $7.25 in 2017. Nearly 28 percent of workers were unionized in 1970, whereas the number has fallen below 12 percent (only 6 percent in the private sector) at this writing. The nation’s largest private sector employer in 1970 was General Motors, which bargained collectively with its employees, offered paid vacations and company-funded health and retirement benefi ts, and generally employed its workers for the duration of their working lives. Today, the largest employer is Walmart, which refuses to deal with unions and welcomes employee “churn” as a way of keeping wage costs down.5

While many commentators invoke globalization to explain the recent growth of inequality, the rise of a neoliberal faith in the infallibility of markets, the fi nancialization of the economy, and corporate restructuring have had an even more far-reaching impact on the conditions of labor. The 1970s marked a seedtime for each of these trends. The decade began with Richard Nixon declaring, “We are all Keynesians now,” as he sought wage and price controls and new environmental and workplace safety regulations. After “stagfl ation” undermined the Keynesian consensus, the decade ended with Jimmy Carter cutting back government and embracing deregulation. As faith in markets displaced faith in government during the Reagan era, a sea change took place on Wall Street. Investors pushed corporations to focus above all on “maximizing shareholder value.”6

By the 1980s, leveraged buyouts and hostile takeovers proliferated. New market forces such as hedge funds and private equity fi rms pushed corporations away from the conglomerate model that had arisen in the postwar era and toward a “lean and mean” restructuring accomplished by downsizing and outsourcing. The rise of private equity enterprises was perhaps the most infl uential fi nancial engineering development of this new era of capitalism. As scholars Eileen Appelbaum and Rosemary Batt have demonstrated, breaking union contracts, defaulting on pension obligations, and laying off workers have been key tools of that business model.7

As these trends progressed, American business was increasingly “managed by the markets,” as Gerald F. Davis puts it.8 In the endless effort to maximize shareholder value and avoid falling prey to hostile takeovers, corporate leaders sought ever higher stock prices in part by shedding responsibility for workers through subcontracting, the creation of international supply chains, franchising, and the hiring of temporary labor. Such practices helped bring on what David Weil calls “the fi ssured workplace,” where subcontracting has become a dominant model.9 Whereas large offi ce buildings typically employed their own janitors in the 1970s, today they contract the work to cleaning companies that might further subcontract it, making it diffi cult to know who is ultimately accountable for the conditions of those who work in the “fi ssured jobs” at the bottom of our economy. This contributed to the emergence of a new class of workers for whom the aspiration to attain a stable, family-sustaining job with a single employer has been a mirage. The infl ux of immigrants from Latin America, among elsewhere, who accompanied this transformation meant that workers of color were increasingly trapped in the most exploitative jobs.10

As this great transformation unfolded, enormous wealth accumulated in the hands of those who steered the new economy. The ratio of chief executive offi cer pay to worker pay was 20:1 in 1965. By 2014 it was 300:1.11 The top 1 percent of income earners took home 85 percent of all income gains between 2009 and 2013.12

Catholic Higher Education’s Entanglement in the ‘Economy of Exclusion’

All of these economic trends have affected Catholic higher education. Not only have they shaped the *environment* inhabited by the 200-plus institutions of Catholic higher education in the United States that now serve roughly 950,000 students, but they also may have begun to influence the *internal dynamics* of those institutions.13

To begin with, some observers have questioned whether these larger trends have affected the leadership of Catholic colleges and universities. In 1996, Notre Dame political scientist Peter Walshe lamented that his university’s board was “weighted with extravagantly paid corporate CEOs and their lawyers.” “Where are the doctors serving in our inner cities, the devoted social workers, trade unionists and leaders of serviceoriented NGOs?” he asked.14 Walshe’s question has taken on greater signifi cance twenty years later as we face an economy of increasing inequality. Although we await a fuller study sampling of institutions by size and other relevant factors, what evidence we have indicates that lay members of the boards of trustees hail increasingly from among the ranks of those who have benefi ted most from recent economic trends and include a disproportionate share of representatives from the world of fi nance in particular. One study has found that the percentage of board seats held by fi nance industry professionals has nearly doubled in America’s colleges and universities overall in the past 25 years.15 In examining whether leading Catholic colleges and universities are in step with this trend, consider that in 2017, twenty-two of Boston College’s forty-three lay members hailed from the fi nance and real estate sectors alone.16 The outsized infl uence of the fi nance industry on BC’s leadership corresponds with trends among large universities in general: In 2015, 56 percent of board leadership positions at research universities came from the fi nancial sector.17

Yet it is not only the wealthier Catholic institutions that have courted board members who have benefi ted from the economic transformation of recent decades. Consider the board of the Catholic University of America (CUA), the only university under the direct control of the U.S. Conference of Catholic Bishops. CUA’s board is currently chaired by a defense contractor, while fi fteen of its nineteen lay members are businesspeople (including bankers, private equity executives, and other corporate leaders). While none of these lay board members has any apparent connection with the tradition of Catholic teaching on labor that was once so ably represented at CUA by fi gures like Monsignors John A. Ryan and George G. Higgins, one board member, Leonard Leo, serves as vice president of the Federalist Society, an organization whose members have championed “right-to-work” laws and sought to reverse the very labor policies that Ryan and Higgins once championed.18

Moreover, it is not only larger institutions that have seen growing infl uence of business leaders on their boards.19 Consider St. Michael’s College of Vermont. Twenty of its thirty trustees are laypeople. Sixteen of these are from the world of business, including three CEOs, three insurance executives, four management consultants, a private equity investor, a hedge fund president, a bank president, a law partner, and a realtor.20

It is understandable that Catholic institutions have relied increasingly on trustees who can help raise funds for their institutions. Catholic institutions are overwhelmingly tuition-driven and are notably underrepresented among institutions with the largest endowments: Only four (the University of Notre Dame, Boston College, Georgetown University, and the College of the Holy Cross) rank among the 120 institutions with the largest endowments. To be clear, there is every reason to assume that these trustees care about Catholic higher education. But, as Bernard Prusak’s article in this issue suggests, lay board members’ formation in the substance and mission of Catholic Social Teaching is uneven. Thus, as Catholic institutions are increasingly overseen by trustees who have led and profi ted from the economic transformation of the past four decades, who are often uneducated on the long tradition of Catholic labor teachings, and who may have little personal experience with the struggles of workers in the present economy, it should not be surprising that the tendencies that have reshaped labor practices in that larger economy also may begin to reshape practices on Catholic campuses. Several changes are especially notable: a sharp rise of income inequality; increasing reliance on poorly paid contingent labor; the contracting out of services to profi t-making corporations; an increased opposition by the campuses themselves to unionization; and their growing participation in or reliance on supply chains in which labor exploitation is endemic.

Consider first how salary structures are changing on Catholic campuses. A preliminary analysis of data from Form 990 (which non-profi t organizations fi le annually with the Internal Revenue Service) indicates that the pay of the top fi ve non-offi cer salary earners at twentyfi ve Jesuit colleges and universities rose by 29 percent above infl ation between 2001 and 2011.21 We do not have comparably detailed data for all employees on Catholic campuses, but U.S. Department of Education data indicate that average faculty salaries nationally rose by less than 4 percent above infl ation during this period, while the minimum wage rose by 7 percent above infl ation.22 To the extent that Catholic institutions will have to compete with better endowed private institutions to retain top faculty, the distorting pressures that favor those at the top of the income ladder are likely only to worsen in the years ahead.

Income patterns that favor the top brackets have been accompanied by the spread of contingent labor on Catholic campuses, especially in the rising proportion of adjunct instructors relative to tenured or tenure-track professors. As the American Association of University Professors (AAUP) has documented, the proportion of instructors in institutions of higher education overall who hold full-time tenured positions declined by 26 percent between 1975 and 2015.23 Over the same period, there was a 62 percent increase in non-tenure-track faculty positions and a 70 percent increase in part-time non-tenure-track positions (that is, adjuncts).24 Some Catholic institutions appear to have replicated these trends. According to data gleaned from the U.S. Department of Education’s Integrated Postsecondary Education Data System (IPEDS), by 2013 more than half (53 percent) of instructional faculty at Jesuit colleges and universities were non-tenured and not on a tenure track line, and 43 percent were part time.25 Reliable income data for adjunct faculty at Catholic institutions are unavailable, but AAUP has found that the median pay per part-time faculty member teaching on a persection basis was $4,773 in 2016-17.26 Poorly paid adjuncts have become a cornerstone of college and university budgets, and it is easy to see why. The union-sponsored advocacy group Faculty Forward offers data indicating that Jesuit colleges saved an average of $42,109 from each class taught by an adjunct professor in 2013.27

An increasing reliance on subcontracting has also changed labor dynamics on all campuses, Catholic institutions included. In the 1970s, it was customary for institutions to directly employ their food service, security, janitorial, bookstore, and maintenance workers. As long as these workers were directly employed, it was easy enough to hold the institution accountable should working conditions fail to meet the standards set by Catholic Social Teaching. Since the 1970s, however, most of these services have been contracted out on most Catholic campuses, as at non-Catholic institutions. For example, three multinational companies, Aramark, Sodexo, and Compass, have come to dominate the college food service industry, and they have a checkered record on labor issues. Even though enforcement of labor laws has become spotty as a result of budget cuts, Aramark (which has contracts at Georgetown and Loyola University of Chicago, among many others) has been found in violation of labor, workplace safety, wage and hour, and employment discrimination laws thirty-nine times since 2010, accruing fi nes totaling over $1.1 million.28 Even as they rely on low-wage employees, campus food service providers continue to raise meal prices out of proportion to their labor costs. The price of college meal plans has risen by 47 percent in the last decade, according to federal data, while food prices rose by only 26 percent and the average pay of food preparation workers rose by 21 percent over that period.29 The executives and stockholders who run these corporations have been the primary benefi ciaries of these rising costs: The pay of Aramark’s CEO rose by 70 percent over this period.30

Because the same forces that are skewing the larger economy toward greater inequality are operative on Catholic campuses, it should not be surprising that campus workers are increasingly seeking to organize unions. Given that the U.S. bishops’ 1986 pastoral letter on the economy stated that “all church institutions must also fully recognize the rights of employees to organize and bargain collectively with those institutions through whatever association or organization they freely choose,” one might expect that unionization efforts would not meet strong opposition on Catholic campuses.31 In fact, however, unionization efforts on some Catholic campuses in recent years have met opposition.

To be sure, courts have long recognized limits to the reach of labor law in private and religiously affiliated colleges and universities. Two Supreme Court decisions helped establish those limits. The Court’s 1979 decision in *NLRB v. Catholic Bishop of Chicago* found that the National Labor Relations Board (NLRB) did not have jurisdiction over teachers in church-operated schools; the 5-4 majority was anxious to avoid government interference with these schools’ religious mission.32 In 1980, the Court ruled in *NLRB v. Yeshiva* that tenured faculty at private institutions were excluded from the protections of the National Labor Relations Act (NLRA) because they held too much managerial authority to be categorized as workers under the law. But these limiting factors did not obstruct the formation of unions on Catholic campuses over the past half-century. Many institutions willingly bargained with unions of groundskeepers, security guards, maintenance workers, food service workers, and other non-educators. Moreover, some Catholic institutions recognized and bargained with faculty unions even though the law did not require them to do so, as happened at the University of Scranton.

It is natural that adjuncts would consider unionizing. The vast majority are unaffected by the *Yeshiva* and *Catholic Bishop* decisions. Unlike tenured and tenure-track faculty, they play little or no governance role in the affairs of their campuses, and the vast majority are not involved in religious inculcation. Their precarious work is generally poorly paid and lacking in health insurance or other benefi ts. The gains they might achieve through unionization are clear: According to a survey undertaken by the Coalition on the Academic Workforce, unionized adjuncts earn on average 25 percent more per course than their non-union peers.33

Yet unionization efforts at some Catholic institutions have been complicated by the institutions’ concerns that the NLRB is overstepping its jurisdiction.34 Manhattan College and Seattle University, among others, argued that the NLRB had no jurisdiction when it comes to protecting adjuncts’ labor rights on their campuses.35 In an *amicus curiae* brief filed before the NLRB, leading organizations of Catholic higher education — namely, the Association of Catholic Colleges and Universities joined by the Association of Jesuit Colleges and Universities and the Association of Franciscan Colleges and Universities — endorsed that stand. The NLRB rejected this position in a 2014 decision called *Pacific Lutheran*, which upheld the right of most adjuncts on religiously affiliated campuses to form unions for the purpose of collective bargaining.36

But the Pacific Lutheran decision scarcely settled the issue. The argument for continued resistance to NLRB jurisdiction was eloquently summarized in a widely read article in Inside Higher Ed in January 2016 by Dennis H. Holtschneider, CM, who was then serving as president of DePaul University. Holtschneider is no reflexive anti-unionist. As a faculty member at St. John’s University, he joined a faculty union; at Niagara University, he led negotiations with a faculty union on behalf of the administration. Yet, as president of DePaul, he felt it was his “unenviable” duty “to oppose organizing efforts of part-time faculty” in order to protect his institution from the encroachments of an NLRB that was attempting to decide for itself which instructors carried out the institution’s religious mission and which did not. According to Rev. Holtschneider, “The freedom to determine what is or what is not religious activity inside our church is at stake.”37

To be sure, Catholic institutions have a duty to protect the integrity of their religious mission from government interference. But resistance to NLRB jurisdiction does not necessitate resistance to unionization. The NLRB had no jurisdiction over the faculty at St. John’s University when Rev. Holtschneider joined the union there; tenure-line faculty members at private institutions have had no union rights under the NLRB since the *Yeshiva* case. Indeed, as Holtschneider’s own experience at St. John’s and Niagara showed, Catholic institutions need not recognize NLRB jurisdiction over their faculty in order to bargain collectively with their instructors; institutions are free to recognize and bargain with unions outside of the NLRB process. In recent months, some secular institutions, such as Cornell University, have opted for a union election and certifi cation process for their graduate assistants that has been overseen by the non-governmental American Arbitration Association (AAA) rather than the NLRB.38 Catholic institutions could take the same approach. Indeed, on April 2, 2018, Georgetown concluded an agreement with the American Federation of Teachers to hold an AAA-monitored union election for its graduate assistants.39 Whether other Catholic institutions are willing to explore union certifi - cations of this kind outside of the NLRB will reveal much about their guiding principles.

As they wrestle with the issue of union certifi cation on their campuses, Catholic institutions also find themselves confronting the exploitative labor trends of the broader economy through their business dealings with outside entities. This is happening in at least two ways. First, Catholic campuses, like their secular counterparts, regularly license their logos to and accept corporate sponsorships from sports and apparel manufacturers that have dubious records of protecting the rights of workers in their supply-chain factories overseas. Nike, the manufacturer with the largest presence on campuses (including such universities as Georgetown, Gonzaga, and Villanova), was found in 2015 to have relied on a factory in Hansae, Vietnam, in which workers, including pregnant women, were subjected to inhumane conditions including high temperatures that caused mass fainting.40 Nike was scarcely an outlier in this regard. Second, campuses frequently rely on domestic suppliers that likewise have a record of exploiting labor. This is especially true for the suppliers of food on college campuses, and the poultry industry is a particularly conspicuous offender. As a cheap and versatile source of protein, poultry is more popular in the diets of college students than in those of Americans at large. The poultry processing industry, however, is among the most dangerous in the nation: A recent study showed that twenty-seven poultry workers each day suffer amputation or hospitalization.41 While some public school districts have begun setting minimum labor standards that poultry producers must meet before their products can be fed to students, no Catholic colleges or universities appear to have adopted similar standards.42 It could be argued that, to the extent that campuses serve food produced by exploited workers or accept licensing or sponsorship agreements with corporations that operate sweatshops abroad, they are helping perpetuate systems of oppression.

Reviving and Applying Catholic Social Teaching to Today’s Labor Problems

As the foregoing suggests, Catholic campuses are increasingly entangled in a larger economy that promotes yawning inequalities. Replicating those inequalities within their institutions exposes a contradiction between Catholic Social Teaching on workers’ rights and the dignity of labor and the practices of Catholic institutions. Left unaddressed, this growing contradiction threatens to undermine the integrity of the Church’s social teaching and compromise its voice as a defender of the oppressed. Disentangling Catholic campuses from the “economy that kills” will require principled and prophetic action.

Thankfully, some prophetic actions have been taken in recent years that help point the way forward. For instance, students on Catholic campuses have shown leadership through the anti-sweatshop activism that emerged in the late 1990s. In 1999, students at Georgetown University were among the fi rst in the country to hold a sit-in in their president’s offi ce demanding that the university cancel licensing agreements with athletic and apparel fi rms that produced goods bearing the university’s logo in sweatshop conditions. After similar agitation spread across many campuses, a new student organization called United Students Against Sweatshops (USAS) emerged. USAS, which includes chapters on many Catholic campuses, kept up enough pressure on sweatshop factories to induce universities to launch their own independent monitoring organization, the Worker Rights Consortium (WRC), in 2001.

Universities created the WRC to ensure that goods bearing their logos would not be made under sweatshop conditions. Georgetown was a founding member of the WRC, which now includes 190 colleges and universities, twenty-three of which are Catholic institutions.43

The WRC system is not without limitations. The organization is unable to inspect every factory engaged in university-related production and only conducts investigations when it receives complaints from workers. Further, as in the case of the Hansae factory in 2015, the WRC has had to fi ght to get independent access to the workplaces it is investigating. Months passed and many protests were lodged before Nike fi - nally facilitated a visit by WRC investigators to Hansae in 2016. But agitation on Catholic campuses has helped bring about recent improvements in the WRC system. A path-breaking agreement between Nike and Georgetown concluded in August 2017 both ensures that henceforth the WRC will have access to Nike’s supplier factories and bolsters remediation procedures when a violation is identifi ed.44 That agreement will no doubt set the template for anti-sweatshop activism at other Catholic institutions. Given that only one-tenth of all Catholic colleges and universities have affi liated with the WRC to date, there remains considerable opportunity to cut the links between Catholic institutions and sweatshop labor.

The anti-sweatshop fi ght in turn helped ignite living wage agitation on a number of campuses. Again, Georgetown was the locus of early action on this issue when students learned that janitors employed by a subcontracted company not only earned substantially less than those employed directly by the university, but also earned much less than a living wage. In response to student agitation, Georgetown created a Living Wage Subcommittee to study the problem. After student protests escalated to a hunger strike, the committee came forward in March 2005 with a sweeping new policy that Georgetown made a centerpiece of its campus mission, the Just Employment Policy.45

Georgetown’s Just Employment Policy (JEP) was a model document grounded in the university’s identity as a Catholic and Jesuit institution. This policy mandated that all campus workers, whether directly employed or subcontracted, must be paid a living wage. It also made clear that both the university and its subcontractors would respect the right of workers to organize and bargain collectively.46 In the years since the policy’s promulgation, it has helped lift wages, correct abuses, and allow workers to fi nd a collective voice. When workers at a campus cafeteria run by an outside contractor complained that they were not being paid in accordance with the policy’s provisions (as of January 2017, minimum compensation under the policy is $16.63/hour), the university conducted an audit of the contractor’s books and made sure that the pay practices were corrected. The JEP was also instrumental in helping the employees of Georgetown’s food service contractor, Aramark, form a union in 2011. When Aramark’s Georgetown managers expressed opposition to an organizing drive, workers brought their concerns to the university. The university in turn reached out to the CEO of Aramark, reminding the company that Georgetown expected it to abide by the JEP. “As you know, Georgetown University’s mission as a Catholic and Jesuit institution includes principles and values that support human dignity in work, and respect for workers’ rights,” wrote associate vice president LaMarr Billups. “We expect the leadership of the companies we engage to provide services on our campuses to inform their managers, supervisors and employees of the JEP provisions in a timely manner…. We appreciate the partnership we have enjoyed with Aramark, and urge you to remain open to respectful dialogue with your employees.”47 After receiving this letter, Aramark dropped its resistance to the unionization effort at Georgetown, recognized the union, and bargained a contract with the food service workers.

The JEP also guided Georgetown’s approach to adjunct unionization. When Georgetown’s adjuncts began organizing a union during the 2012–13 school year, the university’s top-level leadership met to review the situation. That meeting produced a clear consensus. “This seems like a straightforward issue for us to deal with,” argued one of the administrators in that meeting. “This is not a complicated decision, because we’ve thought through the principles on this already.” University leaders decided to abide by the principles of the JEP and simply apply that policy in this case as they had in other cases.48

Georgetown elaborated its position in a campus-wide e-mail sent on September 28, 2012, by Provost Robert M. Groves. Groves affi rmed the adjuncts’ right to unionize if they chose to do so. “The university has a long history of working productively with… unions,” Groves wrote. “As stated in Georgetown’s Just Employment Policy, our University respects employees’ rights to freely associate and organize, which includes voting for or against union representation without intimidation, unjust pressure, undue delay or hindrance in accordance with applicable law.” Groves went on to say that union representatives would be allowed on campus and in buildings that were open to the public, like members of the community, as long as they did not disturb classes. While some university administrators at other institutions were asserting that the NLRB had no business regulating labor relations on their campuses, Groves encouraged adjuncts to consult the NLRB’s website to learn more about their rights, and he provided the phone number of its regional offi ce for those who had further questions. In the months after Groves sent this letter, Georgetown remained neutral and left its adjuncts to decide whether they needed a union. When the adjuncts chose unionization, the university amicably concluded a collective bargaining agreement with them that raised wages and created a professional development fund to help the adjuncts pursue their scholarly projects.49

Although its principles are derived from Catholic Social Teaching, to date Georgetown’s Just Employment Policy remains a unique document in the community of Catholic institutions of higher education. Yet some individual institutions are beginning to move in this direction. In June 2017, a special Just Employment Task Force at Loyola University Chicago (LUC) drafted a policy that includes a living wage provision and a statement that the university “supports employees’ right to represent themselves or to be represented by unions of their choice.” That report is under consideration by the university’s administrators at this writing.50

Change is also evident on the issue of adjunct organization. Although Georgetown’s benign approach to unionization initially made it an outlier, its approach has gained ground among other Catholic institutions since 2015. Saint Louis University and St. Mary’s College recognized adjunct unions in 2016 without bitter fi ghts, after both universities issued statements expressing support for their employees to make their own informed choice about unionization.51 After initially opposing adjunct unionization and contesting the applicability of federal labor laws on its campus, LUC also began negotiating with a union of its adjuncts. In May 2017, Fordham University dropped its opposition to adjunct unionization. In a letter to the Fordham community, President Joseph M. McShane, SJ, whose own scholarship has explored the roots of Catholic Social Teaching in the United States, explained that he had become “*convinced of the rightness of this course of action” after refl ection with fellow Jesuits. “After all, organized labor has deep roots in Catholic social justice teachings*,” McShane explained. 52

It is too soon to tell whether these hopeful trends will continue. At this writing, many Catholic campuses have begun grappling with the issue of graduate assistant unionization, which was permitted by a 2016 decision of the NLRB.53 The graduate assistant union movement is bound to further test the commitment of Catholic campuses to workers’ rights to unionize, which the Church has long upheld.

Yet one thing is becoming increasingly clear amid swirling labor controversies. As Catholic colleges and universities grapple with today’s labor problems, they have an opportunity not only to disentangle themselves from the “economy of exclusion,” but to show leadership in the construction of a more just and sustainable alternative. This task will not be easy. Catholic institutions must navigate a world in which the costs of higher education are exploding.54 Yet their inheritance — the rich tradition of Catholic Social Teaching on labor — confers a special responsibility upon these institutions: They are uniquely positioned to lead. Moreover, as tuition-driven institutions that generally lack huge endowments, they cannot afford to indulge the illusion that labor problems on Catholic campuses can be fixed without addressing the public policies and larger economic trends that are exacerbating those problems. Broad action on a host of policy issues, including student debt, will be necessary if we are to prevent U.S. higher education from becoming an agent of increasing inequality rather than incubator of a more just society.

#### Independently, CBRs increase vaccination for students, teachers, AND communities at large.

Dr. Todd E. Vachon 24, PhD, Assistant Professor, Labor Studies & Employment Relations, Rutgers University. Director, Labor Education Action Research Network, "Unions Are Good Medicine," AFT Healthcare, Spring 2024, https://www.aft.org/hc/spring2024/vachon.

From the onset of COVID-19 in the United States, the value of unions became increasingly apparent to many workers—particularly those in healthcare and education, but also those in more precarious work arrangements. Essential workers like those in nursing homes, food production, and distribution were some of the most vulnerable, typically working side by side with inadequate safety protections. In the face of federal government inaction and an inadequate response by many employers, these workers and their unions used their collective voice to demand better COVID-19 safety and health protections.1

Nurses, warehouse workers, shop clerks, and workers in other essential roles fought for and in many cases won personal protective equipment (PPE), cleaner workplaces, hazard pay, and, where possible, the ability to telecommute.2 Unions joined with worker centers and other allies to support better conditions for nonunion workers, including immigrant workers in precarious work arrangements.3 They fought for furlough plans to keep fellow workers in their jobs rather than getting laid off.4 To win these protections, they signed letters, organized sickouts, filed grievances, engaged in bargaining, and, in some cases, engaged in work stoppages.5

But what about vaccines? They’re recognized by epidemiologists and health experts as the most effective weapon in the fight against the pandemic6—so what role did organized labor play in efforts to increase vaccination?

If we turn to major media outlets, the coverage focused largely on the reluctance, or even opposition, to employer-based vaccine mandates by some unions.7 Some of the coverage equated this opposition to mandates with an opposition to vaccination all together. However, the reality was more complex. Many unions had simultaneously promoted vaccination among their members, including educating them about the safety and effectiveness of vaccines and even hosting vaccine clinics for their members and communities, while also opposing unilateral mandates by employers.8 For many, the primary issue was the infringement upon the collective bargaining process that compels employers in unionized workplaces to negotiate over changes to wages, hours, and working conditions.9 Other unions were dealing with mixed views among their membership and seeking ways to balance the need for protection against COVID-19 with the intricacies of politically diverse workplaces.10

Considering the seemingly contradictory stances on vaccine mandates by various unions, I partnered with Michael Wallace of the University of Connecticut and Angran Li of NYU Shanghai to conduct an empirical study exploring the relationship between unionization rates and vaccination rates.

Our research, which was published in the journal Social Science Research, found that net of other factors, the percentage of workers covered by a union contract in a county was positively related with the county’s COVID-19 vaccination rate.11 To explore whether the effect was limited only to politically liberal areas, we also examined the relationship between unions and vaccination rates based upon voter preferences in the 2020 presidential election. Unsurprisingly, counties with high levels of support for former President Trump had some of the lowest vaccination rates, exposing the political polarization around vaccinations. However, we also found that union coverage increased vaccination at a faster rate in the Trump-supporting counties than in the Biden-supporting counties. That is, the dampening effect of Trump support on vaccination rates was partially mitigated where there was a strong union presence. How?

Our findings suggest that when workers have a collective voice in their workplace and beyond, then collective action problems are more easily addressed and the pursuit of common good solutions such as vaccination become more likely. Through social media campaigns, member-to-member organizing conversations, and local vaccine clinics, many unions helped to educate members, their families, and the general public about the safety and effectiveness of vaccination as a tool for stopping the spread of the virus. This sort of formation of a collective identity through workplace solidarity is strong medicine and can lead residents of even the most politically divided counties to embrace the need for vaccines to stop the spread of deadly viruses such as COVID-19.

#### Religious schools are critical to herd immunity.

Dr. Joshua T. B. Williams et al. 21, MD, Assistant Professor, Pediatrics, University of Colorado School of Medicine; Adrian Miller, JD, Executive Director, Colorado Council of Churches; Dr. Abraham M. Nussbaum, MD, Associate Professor, Psychiatry, University of Colorado School of Medicine. Assistant Dean of Graduate Medical Education. Chief Education Officer, Denver Health, "Combating Contagion and Injustice: The Shared Work for Public Health and Faith Communities During COVID-19," Journal of Religion and Health, Vol. 60, pg. 1436–1445, 03/27/2021, Springer.

Historically, requiring children to receive selected vaccines prior to public school or daycare entry has been an effective method for preventing such disease outbreaks (Orenstein & Hinman, 1999). All states currently have laws requiring vaccines for school or daycare entry (“States with Religious and Philosophical Exemptions from School Immunization Requirements,” 2020). However, 45 states and the District of Columbia offer exemptions to school-mandated vaccines on religious grounds, even though major religions support vaccination (Grabenstein, 2013), and over a dozen states allow exemptions for philosophical reasons (“States with Religious and Philosophical Exemptions from School Immunization Requirements,” 2020). Millions of American children attend parochial and other private religious schools (“Private School Enrollment,” 2020), and studies suggest private schools have higher rates of exemptions to school immunization requirements than public schools, with over twice the rate of religious exemptions specifically (Shaw et al., 2014). Additionally, rates of religious exemptions appear to be increasing; among kindergartners, religious exemptions increased significantly from 2011 to 2018, despite a simultaneous decrease in American religiosity (Williams, et al., 2019a). Many suspect these trends indicate misuse of religious vaccine exemptions for children by parents without religious objections to vaccines or even a genuine religious affiliation.

This rise in religious exemptions, and their high rates within private schools, compound existing COVID-19-induced immunization problems, pose a problem to COVID-19 vaccine distribution, and threaten child and community health. Multiple studies have linked exemption availability and high exemption rates to outbreaks of infectious diseases, including measles and pertussis (Feikin et al., 2000; Phadke et al., 2016). As a result, in recent years, policymakers have tried to eliminate religious or philosophical vaccine exemptions at the state level to increase vaccination coverage rates (“Update on top 10 resolutions adopted at Annual Leadership Forum,” 2019). Yet, the process is difficult, and anti-vaccination groups have stalled or doomed efforts on several occasions (Tully et al., 2020).

In lieu of attempting to change policy at the state level, religious schools and daycares could avert thousands of illnesses and save lives simply by refusing to accept religious exemptions at the level of their own institution. Many have already done so. In 2014, the Catholic Bishop of Orlando, FL—in charge of 79 parishes, 11 missions, two Basilicas, 43 schools, and hundreds of ministries—stopped recognizing religious vaccine exemptions in parochial schools (Noonan, 2014). In 2019, the Archdiocese of Seattle—representing 73 Catholic schools, 144 parishes, and nearly 1 million members—followed suit, referencing official teaching by the Pontifical Academy for Life and the moral obligation in Catholicism to guarantee the safety of others through vaccination (“School Immunization Policy Updated to Reflect Catholic Teaching,” 2019).

These decisions impacted hundreds of thousands of children and their communities, and they were accomplished quickly, independent of state policies permitting exemptions that may have been more difficult to change. They are examples of how powerful the partnership between public health and faith communities can be. They are also an excellent example of religious leaders engaging their communities and leaning more deeply into their sacred texts and teachings to develop and implement policies consistent with their beliefs.

Furthermore, as we disseminate COVID-19 vaccines, religious leaders could replicate this behavior by organizing gatherings for their community members to reflect more deeply upon their sacred texts and teachings and the ways they interact with the topic of vaccines (COVID-19 or otherwise). Leaders could use materials published in the academic literature, such as John Grabenstein’s 2013 review of “What the World’s Religions Teach, Applied to Vaccines and Immunoglobulins” (Grabenstein, 2013), as well as other materials—e.g., letters, blog posts, or pamphlets—from individual leaders (Noonan, 2014) or other authoritative bodies within their own tradition, (“School Immunization Policy Updated to Reflect Catholic Teaching,” 2019). This work, especially if it addresses school-attendance requirements, routine childhood vaccinations (e.g., measles, influenza, and pertussis), and COVID-19, will be essential when COVID-19 vaccines are available for schoolchildren. Strengthening religious school and daycare vaccination policies will not only protect children and families attending those schools but extend the benefits of herd immunity to disadvantaged community members who lack healthcare access or face obstacles to making appointments.

Herd immunity, or community immunity, exists when sufficient people in a community are protected against an infectious disease that it becomes hard for the causative bacteria or virus to find susceptible individuals. Importantly, herd immunity can have collateral benefits. For example, when a vaccine against a bacteria that causes ear infections in children was introduced in the US, the number of older adults hospitalized for bacterial pneumonia declined (“Vaccines Protect Your Community,” 2020). For decades, poor and minority children have lagged behind wealthier and white counterparts in vaccination coverage (Bobo et al., 1993; Miller et al., 1994). Multi-level barriers, such as limited transportation, appointment times that conflict with work schedules, and chaotic home environments for single parents contribute to vaccination disparities (Lannon et al., 1995). Strengthening school or daycare vaccination policies will not directly address these determinants, but it will improve herd immunity. In turn, herd immunity will protect disadvantaged community members who face numerous obstacles to vaccination and give them additional time and opportunities to receive recommended vaccines.

#### Else, natural and artificial pandemics are existential. Defense doesn’t assume innovation.

Tess F. Johnson 24, DPhil, Senior Researcher, Ethics of Pandemic Preparedness, Surveillance, and Response, University of Oxford, "For the Good of the Globe: Moral Reasons for States to Mitigate Global Catastrophic Biological Risks," Journal of Bioethical Inquiry, Vol. 21, pg. 559-570, 02/08/2024, Springer.

Harms during the COVID-19 pandemic resulted not only from the disease itself, but from poorly internationally coordinated responses. Mortality, economic losses, and ongoing mental and physical health burdens continue around the world. The pandemic highlighted human vulnerability to biological threats, and policymakers’ often-ineffectual attempts to take collective action against them. In 2020–2021, worldwide excess mortality associated with COVID-19 was around fifteen million lives (World Health Organization 2022). Yet, even COVID-19 has not had a very significant impact on the world, when compared to the biological catastrophes that might be still to come. “Global catastrophic biological risks” (GCBRs) can be defined as events leading to “sudden, extraordinary, widespread disaster beyond the collective capability of national and international governments and the private sector to control” (Schoch-Spana, et al. 2017, 323). Examples may include naturally occurring pandemics, pandemics resulting from artificial/engineered pathogens, use of bioweapons programmes, the development of extreme drug resistance across multiple pathogens, or bio-hacking and harmful outcomes of human genome editing (Nouri and Chyba 2011). Their possible effects (whether the actions were deliberate or accidental) range from societal collapse to the institution of totalitarian regimes, to extreme morbidity and mortality across the human population. Indeed, they might occur on a scale that could cause human extinction and would then be re-termed existential risks. Whilst the risk of extinction from natural causes remains relatively constant (and we are not extinct yet, despite having spent a while now on this planet), anthropogenic existential and catastrophic risks are increasing. Despite this, bioethical work to date mostly focuses on natural pandemics and biological risks (Dawson 2007; Emanuel, et al. 2020; Giubilini 2019), with some exceptions (Adalja, et al. 2019; Chyba and Greninger 2004). Building on emerging public goods accounts in bioethics, I propose applying this framing to GCBRs to illuminate the issue of GCBR mitigation in a way that may help the future development and international coordination of interventions.

Experts on GCBRs have estimated a chance of up to 1 in 1000 that humanity will become extinct from an artificial pandemic within the next century (Lewis 2020; Millett and Snyder-Beattie 2017). This is an example of only one potential GCBR, and we might therefore expect the risk of extinction from GCBRs as a whole to be greater. The data is based on extrapolations from historical data on experiments with creating or modifying pathogens. The situation for this GCBR and others that involve the use of biotechnologies, including biohacking and misuses of human genome editing may deteriorate in the future, as two changes occur (Lewis 2020). The first change is increasing technological availability: the tools needed to edit genomes, whether pathogen or human, are becoming more available and affordable, with benchtop DNA synthesizers available to buy online, and mail-order DNA sequences available for USD 100-300 for a small gene, even back in 2017. The second change is knowledge availability: knowledge concerning how to simultaneously increase the lethality, transmissibility, incubation time and drug-resistance of pathogens whilst reducing their detectability is set to improve as synthetic biology research and, in particular, gain-of-function research continues and is performed and published in freely or pay-for-access academic journals. (For instance, in 2012, the U.S. National Science Advisory Board for Biosecurity allowed the publication of studies that described the modification of H5N1 viruses to allow airborne transmission between ferrets (Burki 2018).) The same goes for knowledge surrounding the influence of particular human genes on our traits and how these might be used for personal gain (Ma, et al. 2017).

Existing measures to mitigate GCBRs seem inadequate (Chyba and Greninger 2004; Kilbourne 2011). The main international agreement that might mitigate these risks is the biological weapons convention (BWC). The BWC aims to ban the development, storage, or use of biological and chemical weapons. In theory, this should prevent states party to the convention from causing a number of different types of GCBRs, and should require them to ensure their citizens are prevented from doing so. The BWC was introduced in 1972 and there are currently 185 states party to the convention (United Nations Office for Disarmament Affairs 1972). However, current levels of financial and structural support leave the BWC with a staff of only four people, and insufficient resources to verify state compliance or penalize non-complying states (Chyba and Greninger 2004). Whilst there are a number of other groups whose work supports the BWC, such as the United Nations Office for Disarmament Affairs, these do not play a direct role in monitoring and enforcement of the BWC. And whilst there may be other work being done that is not made public, if this exists, it does not appear too successful: there have been multiple violations of the convention (discovered or suspected) since its introduction (Lentzos 2019). What’s more, domestic structures for enforcement within nations appear scarce—for instance, scientists judge there to be too little regulation of the publication and performance of gain-of-function research in the United States and Europe (Fears and ter Meulen 2015; Kozlov 2022).

It may seem odd that states are not highly motivated to mitigate these risks, even without an international agreement. Mitigation would benefit both states’ own citizens, and everyone else—in fact, that may be part of the problem. When the benefits of a state investing in protection against a global threat befall everyone, there may be very little prudential or economic reason for purely self-interested states (that is, states that care only about their own citizens’ interests) to contribute to protection, rather than relying on others’ contributions to protect their own citizens (Aschenbrenner 2020; Millett and Snyder-Beattie 2017). Economic solutions and effective coercive mechanisms at the international level—which, as already noted, may be difficult to maintain (Martin 1999)—are unlikely to be successful, then. That said, there may be some possible solutions to mitigating GCBRs as a collective action problem (Weimann, et al. 2019), based on not merely economic but moral reasons.

My aim in this paper is to search for moral reasons to ground state decisions to undertake GCBR mitigation efforts. This work contributes another, perhaps more appropriate or effective motivating reason for GCBR mitigation than economic or political reasons. That motivation might impact policymakers directly or via a public who might (in a democratic state) vote for a party more willing to mitigate GCBRs (and there is evidence that moral arguments can change prospective voting behaviours, and thus, policymaking (Burstein 2003)). I begin by presenting an argument for framing GCBR mitigation as the production of a global public good (GPG) (section 1), which has not yet been thoroughly explored as a framing approach. By treating efforts to mitigate GCBRs as contributions to a GPG, I highlight three possible categories of moral reasons for contribution (section 2). The categories of moral reasons are: 1) moral nationalism—i.e., that regardless of whether contributing to GCBR mitigation constitutes production of a GPG that benefits everyone, more to the point it protects the citizens of a state, 2) moral cosmopolitanism—i.e., that concerning the production of GPGs like GCBR mitigation, states have obligations toward people outside their own jurisdictions, and 3) interstate obligations—i.e., that there are moral reasons for specific individual states to produce the GPG of GCBR mitigation based on obligations they hold toward other states, such as, moral leadership, fairness, and reciprocity. I conclude that states have moral reason to mitigate GCBRs, based foremost on their specific interstate obligations and an overarching reason of moral cosmopolitanism.

GCBR Mitigation as a Global Public Good

The basis of my argument going forward is that GCBR mitigation constitutes a “global public good” (GPG). This is important both for explaining the weaknesses in an economic argument for states to contribute to mitigating GCBRs, and for grounding the categories of moral reasons for contributing to GCBR mitigation that I explore in the next section. I defend my claim that GCBR mitigation constitutes a GPG here by reference both to the definition of GPGs and how GCBR mitigation fits this, and by reference to similar examples of GPGs in the literature. In what follows in this section, I follow the status quo in the literature of treating states as individual, rational, self-interested economic actors coordinating to solve a public goods problem.

The standard definition of GPGs in economics differentiates them from other goods as a special category that raises particular problems and motivates particular behavioural strategies by states. Any good constitutes a GPG insofar as it has four characteristics that jointly render it 1) public and 2) global. Consider publicness, first. The benefits of a good are public if they are non-excludable and non-rivalrous (Hardin 1968; Samuelson 1954). That is, people cannot be prevented from accessing the benefits, and there is no less of the benefit left for others as a result of their accessing it. Another feature sometimes attributed to public goods is “the problem of jointness”—that is, the necessity of a large number of contributors for the production of the good (Waldron 1987). This raises problems of coordination that may not be seen with smaller groups, where more accountability is possible for (non-)contribution to the production of the good.

Consider globalness next. A GPG’s globalness is characterized by its aggregator technology and its spillover range (Kindleberger 1986). Aggregator technology refers to the marginal benefit produced by an additional contribution toward producing the GPG, and can be characterized as summative, weighted-sum, weakest-link, best-shot, or threshold, among others (as explored further below). A GPG may have one or a number of aggregator technologies associated with it. The spillover range refers to how far the benefits extend, and for a GPG, must include multiple global regions. Controversially, some definitions hold that a GPG’s spillover range should be not only geographically extensive but temporally extensive, too, such that future generations experience the benefit of GPGs produced today (Kaul, Grunberg, and Stern 1999).

GPGs face production problems—that is, where we consider states as individual, rational, self-interested economic actors, they will not coordinate to produce GPGs, at least in many scenarios. This is because of the non-excludability of their benefits. Whilst sometimes it is in an individual’s interest for a good to be secured even if others benefit from it, such as in economies of scale cases (Heath 2006), this is often not the case where the costs of contribution are moderate to high. Particularly in the case of global public goods, the logic of an n-prisoner’s dilemma features in a multiple-contributor public goods scenario, such that it is almost always in an individual state’s interest not to contribute to a public good and rather to free-ride, regardless of whether others are contributing (Hardin 1971). An n-prisoner’s dilemma occurs where multiple actors contribute resources to benefit from a shared good. Because there are many actors, they can each get away with free-riding on others’ contributions—that is, relying on others for the production of the public good without contributing. In the case where there are other altruistic states contributing, a state is incentivized to not contribute to GPG production. In this case, an individual state can increase its net benefit by eliminating the cost of contribution. This threatens the continued production of the GPG if many states stop contributing on the assumption they can free-ride. Second, even in the absence of altruistic others, states will be incentivized to not contribute to GPG production. Where other states will not contribute up to a threshold level for the good to be produced (at least in the case of GPGs with threshold aggregator technologies), an individual state’s own contribution may be futile, and thus a waste of resources. It is only in cases where there is significant marginal benefit from every contribution or where just one more state contribution is required to reach a threshold for GPG production where it will ever be in a state’s economic interest to contribute. Because of the n-prisoner’s dilemma set-up of public goods provision, economic arguments for contributions are weak motivators.

In framing GCBR mitigation as a GPG but setting aside economic arguments for coordination to produce this GPG, I hold that we might better consider moral reasons states have to contribute to GPGs and solve collective action problems. In social contract theory, mechanisms have been explored to solve such collective action problems, including economies of scale, gains from trade, risk-pooling, self-binding, and information transmission (Heath 2006). The extent to which these mechanisms constitute moral reasons varies, and their applicability to particular cases has not been thoroughly explored. Yet, in the bioethics literature, there has been a promising strategy of framing issues as public goods production problems and considering such mechanisms alongside other moral reasons for cooperation, particularly in the cases of population health (Anomaly 2011), herd immunity more specifically (Dawson 2007), procreation (Anomaly 2014), and protection of the antimicrobial commons (Giubilini 2019). It may be a promising framing strategy for highlighting obligations to contribute.

#### Defense is wrong. Contemporary dynamics inflate the risk AND triggers cascading, alternative existential risks.

Dr. Noah B. Taylor 23, PhD, MA, Lecturer, Peace & Conflict Studies, University of Innsbruck, "Existential Risks in Peace and Conflict Studies," in Peace, Pandemics, and Conflict, Chapter 5, 2023, pg. 85-108, Springer. [italics in original]

Though humanity has lived with diseases since its earliest history, the contemporary possibility of such a risk has increased. The global population recently climbed to over 8 billion, and the overall population density continues to increase (Roser et al. 2013). With more individuals, there are more possible origins of new pandemic diseases. As of 2018, 55% of the world’s population lived in urban areas (UN DESA 2018), and an estimated 65% by 2050 (UN DESA 2019). People living closer to one another will likely increase the transmission rates.

Many facets of modern life further increase a pandemic’s possible severity, scope, and scale (Jones et al. 2008; Morse 1995). Deforestation, industrial farming, and meat production practices combined with climate change increase the likelihood of zoonotic transmission of pathogens from animals to humans. The melting permafrost, increased ultraviolet immunosuppression, changing weather patterns, and arctic thawing that comes with global warming may unleash pathogens frozen long ago (Hofmeister et  al. 2021). Alternatively, trigger pathogenic mutations in previously non-pathogenic organisms. The ease of global transportation also dramatically increases the risk of future pandemics (Ord 2020). In addition to these variables, war is a significant factor that results in the spread of pandemic disease, both unintentionally as troops move into foreign lands and intentionally and potentially when used as a weapon (A. T. PriceSmith 2009).

Another often singled but under-recognized future pandemic risk is so-called super bugs, antimicrobial resistant bacteria. Superbugs fall into three categories defined by their susceptibility to antimicrobial agents. Multidrug-resistant pathogens are not susceptible to at least one agent in three or more categories, extensively drug-resistant are not susceptible to at least one agent in all but two or fewer categories, and the most concerning the pandrug-resistant which have no known susceptibility to any antimicrobial agents (Magiorakos et al. 2012).

The potential risk from superbugs is grave. The general director of the WHO described it as being a “fundamental threat to human health, development and security” (Fox 2016). In the USA alone, in 2019 the rate of superbug infections was 2.8 million each year with more than 35,000 deaths (CDC 2019). This rate has likely risen by 15% between 2019 and 2020 (Mishra 2022). Globally the situation is worse. In 2019 an estimated 1.27 million deaths were directly tied to these superbugs, with another 4.95 million associated with such infections. The global burden of these infections is likely higher than HIV or Malaria. Like many other pandemicrelated topics, the global burden of these diseases unequally spread with much higher concentrations in Sub-Saharan Africa and South Asia (Antimicrobial Resistance Collaborators 2022).

Biomedical researcher Dr. Brian K. Coombes described the severity of the situation, “antibiotics are the foundation on which all modern medicine rests. Cancer chemotherapy, organ transplants, surgeries, and childbirth all rely on antibiotics to prevent infections. If you can’t treat those, then we lose the medical advances we have made in the last 50 years” (Miller 2015).

Even if bio risks, such as pandemics, are not technically defined as a genuine existential threat and are instead understood as a global catastrophic risk, there is a consensus that they should be an issue of global priority (Connell 2017; Palmer et al. 2017). These evaluations of the destructive potential of pandemics focus on it being the direct cause of an existential or global catastrophic threat. The possibility of pandemics following similar pathways as discussed regarding Great Power Conflicts makes a pandemic’s indirect or compounding risk a topic of concern. Global cooperation is needed to address another existential risk a pandemic could hinder. A pandemic could occur alongside another existential threat, such as a Great Power Conflict or runaway global warming overtaxing the systems that might otherwise make us resilient to such a risk.

Peace, Pandemics, and Conflict

Two relationships are essential when considering a PCS perspective on pandemics: (1) What effects do violent conflict have on pandemic diseases? (2) How do pandemics affect violent conflict? The former is currently better understood than the latter. This second relationship reflects an essential priority for the field of Peace Research that will remain so for the foreseeable future. Generally, the relationship between the overall health of a population and peace is well understood. Societies with a higher level of positive peace also tend to be healthier overall. Violent conflicts are also usually correlated with most measures of ill-health (IEP 2022).

Armed conflict between warring states and groups within states has been a significant cause of ill-health and mortality for most of human history. Estimates vary, but it is likely that armed conflict has directly killed somewhere between 100 million and 1 billion lives throughout human history (Roser et al. 2016; Eckhardt 1991). Most estimates do not account for deaths due indirectly to war, so the death toll could be much higher. At the most direct level, large-scale violence results in deaths, with an estimated 90% of causalities being civilians (UNSC 2022). On the topic of disease and conflict, Kaniewski and Marriner (2020) write that “historically, wars disrupted the human-microbe balance, resulting in devastating outbreaks of microbial diseases and high rates of mortality and morbidity all over the world” (2). In addition to the deaths directly due to conflicts, there are also health consequences due to the conflict, what Sartin (1993) refers to as the “third army,” owing to how diseases, directly and indirectly, related to violent conflict often kill as many or more people than die directly on the battlefield. Deaths from these diseases are tied to the movements of troops, the displacement of populations, the breakdown of health and social services, the destruction of safe waste treatment capacity, reductions in food security, and access to clean drinking water (Murray et al. 2002). In low-income countries with a reduced public health capacity, armed conflict exacerbates the effects of diseases, making respiratory infections, diarrheal illnesses, tuberculosis, malaria, and HIV rise into the top ten causes of death. It seems clear that even though more is to be understood, the link between infectious disease and violent conflict is indisputable (Goniewicz et al. 2021; McMichael 2015). Violent conflict has the effect of spreading infectious diseases (Bousquet and Fernandez-Taranco n.d.). Recently an analysis conducted by Mohamed Daw (2021) demonstrated that in Libya, Syria, and Yemen that armed conflict increased the spread of COVID-19 and that this synergistic interaction between the pandemic and violence is likely to be ongoing.

The relationships between violence and disease spread are complex and reciprocal in the Democratic Republic of Congo, with many small-scale attacks against government and health workers in 2019 (Paquette and Sun 2019). These episodes can be understood as a violent backlash resulting from heavy-handed top-down approaches used in communities where there was already long-standing mistrust between local communities during the August–November outbreak of 2014 (Cohn and Kutalek 2016). During the Ebola outbreak from August 2018 to June 2020, there were eruptions of violence and the aura of suspicion and distrust were further exacerbated by rumors that international organizations and the local government were conspiring to intentionally spread the outbreak to sell the dead’s organs (Hayden 2019).

It is also clear that conflicts, particularly large-scale direct violence and prolonged cultural and structural violence, make populations more susceptible to disease and disease transmission. This linkage is due to the destruction of physical infrastructures (food supply lines, access to medicine, sanitation) and political structures (the inability of certain groups to access these physical infrastructures) (Ghobarah et al. 2004). Troops, refugees, and prisoners of war are often “housed” in close quarters with makeshift sanitation promoting rapid spread of contagions. Further violent conflicts contribute to the emergence and proliferation of pathogens in the following ways: increasing population density as individuals flee from conflict areas and into displacement or refugee camps, compromising immune systems through famine, increasing poverty, reducing the effectiveness of public health surveillance systems, and generally creating situations of prolonged physical and psychological stress (A. T. PriceSmith 2009).

The effects of pandemic diseases on the emergence or exacerbation of violent conflicts are less straightforward. New and emerging infectious diseases have already been considered a threat to national security in addition to a threat to global health (National Intelligence Council 2000). Their threat is through directly challenging the state’s power, compromising economic resources, undermining the legitimacy and effectiveness of the state, paralyzing institutions, and stoking intrastate violence (A. T. Price-Smith 2009). Beyond understanding pandemics as security threats to the state, PCS needs to develop a more complex and nuanced perspective on how pandemics can drive conflict and peace.

COVID-19 has highlighted the importance of understanding the relationships between peace, conflict, and pandemics. The COVID-19 outbreak was declared a public health emergency of international concern on January 30th and a pandemic on March 11th, 2020, by the World Health Organization (WHO 2020a, 2020b). Less than a month later, the pandemic became a concern for the United Nations. The UN Security General Antonio Guterres delivered remarks to the Security Council regarding the consequences the COVID-19 pandemic could have on global peace and security. Amongst his concerns, Guterres highlighted that the pandemic had already eroded trust in public institutions in many countries. It had resulted in the postponement of elections resulting in political tensions and undermining the legitimacy of governments. He worried that the economic fallout in fragile societies could threaten their stability and resilience. Further, the uncertainty created in the pandemic’s wake could incentivize malicious actors to sow division or provide windows of opportunity for terrorism (Guterres 2020).

Already at this point in the pandemic, it has been clear that COVID-19 revealed the global lack of pandemic preparedness. For many, this came as a shock, given outbreaks of Ebola, H1N1, Zika Avian Flu (H5N1), SARS, and MERS in recent memory. There were earlier warnings from the scientific community about the reservoir of SARS-COVID-type viruses in China (Cheng et al. 2007). The threat of emerging diseases was even a topic of many popular nonfiction best sellers such as Robin Marantz Heing’s (1994) *Dancing Matrix*, Richard Preston’s (1999) *The Hot Zone*, and Laurie Garrett’s books *The Coming Plague* (1995) and *Betrayal of Trust* (2003). Even Wolfgang Petersen’s film *Outbreak* (1995) begins with Nobel laureate Joshua Lederberg’s now haunting line, “The single biggest threat to man's continued dominance on the planet is the virus.” Lederberg wrote that though humanity has, through its technology, dominated the plant and animal kingdoms, it is the “microbes that remain our competitors of last resort” (1988, 684). Like the twist ending in H.G. Wells’ *War of the Worlds* (1898), when predatory megafauna has been subdued, humanity’s smallest enemies could be their undoing.

In his book *The Causes of War* (Blainey 1988), Geoffrey Blainey writes that wars often start when the belligerents are optimistic. When elites who make decisions are confident and, therefore, willing to take risks, they tend to be less likely to negotiate. Following his logic, peace may best be served by pessimism. Building on this point, Posen (2020) argues that, at least in the short-term, the pessimism and overall contraction resulting from a pandemic may function as a *Pax Epidemica*. According to him, contagious diseases are not conducive to war. Funding is often directed away from the military, and national economies are a primary source of military power. Diseases do not take sides, and soldiers and sailors may be more vulnerable to infection (Posen 2020).

This type of thinking, alongside the general atmosphere of uncertainty, may have led to a temporary downturn in the global level of violent conflicts and military spending shortly after the United Nations Secretary General’s call for a global ceasefire in March 2020. A similar call for the ending of all wars to pool efforts to fight the pandemic was made by the Pope (Bordoni 2020). At this moment in history, there was a fleeting hope for a kind of *Pax Epidemica*, that the common enemy of a global pandemic may be a driving force for peace. There have been past precedents for a large-scale disaster having a positive effect on peacebuilding, such as the influence of the 2004 tsunami in catalyzing the peace agreement in Ache, Indonesia (Berghof Foundation 2020). The UNSG’s call received the backing of more than 180 UN member states, several armed movements, and many civil society organizations (Yazgi et al. 2020).

There were promising signs. Israel and Hamas began negotiating a prisoner swap in April 2020 (Harel 2020). In Yemen, the Coalition to Restore Legitimacy in Yemen announced a two-week pause in fighting to allow discussions to take steps to a permanent ceasefire (WAM 2020; Chmaytelli 2020). The *Ejército de Liberación Nacional* (ELN) in Colombia called for a 90-day ceasefire to create an environment to restart the peace dialogue (Télam 2020). The Philippines saw dual unilateral ceasefires declared by the New People’s Army and the Government of the Philippines (CPP 2020; Santos 2020). In some cases, armed groups such as the United Wa State Army in Myanmar or drug cartels in Mexico were working to deliver pandemic assistance (Burke 2020; Felbab-Brown 2020). As of July 2022, there were 40 unilateral and 16 bi-/multilateral ceasefires during the COVID-19 pandemic (University of Edinburgh n.d.).

Many hoped the pandemic would serve as a common enemy that would bring forth a common future leading to global cooperation and a more peaceful world. As of 2022, this has not been the case. The opportunity for peace out of the disaster of the pandemic may have been squandered (Brattberg 2020).

Before focusing more on effects directly attributable to the pandemic, an overall picture of the changes during the Global Peace Index (GPI) for 2022 provides an overall picture of the state of peace in 2022. The GPI is calculated by the Institute for Economics and Peace (IEP) and measures 23 qualitative and quantitative indicators from three main domains: (1) ongoing conflicts, (2) safety and security, and (3) militarization. From 2021 to 2022 the IEP found that global peacefulness deteriorated by 0.3%, the 11th year of deterioration over the last 14 years. This timeframe saw a deterioration of 9.3% in the domain of ongoing conflicts and a 3.6% deterioration in safety and security. There was some improvement with decreasing levels of militarization. While it is impossible to delineate which of these effects were causally related to the COVID-19 pandemic, a general inference can be drawn. During this time of the global pandemic, there has been a general increase in the number and intensity of internal and external conflicts fought and the total number of refugees and Internally Displaced Persons (IDPs). One of the most significant changes observed was the number of violent demonstrations, which saw a 50% deterioration, with 77 out of 126 nations recorded as having increased in the total number. Additionally, the economic impact of violence increased by 12.4% from the previous year to $16.5 trillion in purchasing power parity (IEP 2022).

At the outset of the pandemic, it was feared that it would negatively impact peacebuilding efforts. This has primarily turned out to be true. The Carnegie Endowment for International Peace conducted a study early in the pandemic into its effects on 12 conflict-affected areas: Afghanistan, Eastern Ukraine, Iran, Iraq, Israel-Palestine, Kashmir-India-Pakistan, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen. Their preliminary findings were that “the pandemic and efforts to contain it are much more likely to aggravate and multiply conflicts than reducing or end them” (Blanc and Brown 2020). They observed that nation-states and nonstate actors often instrumentalized the pandemic for their own gain. These same observations were found by Sara Polo in a study at the beginning of the pandemic using data from the Armed Conflict Location and Data Project (ACELD) (Polo 2020). The pandemic also tested the legitimacy of all actors claiming authority. It tended to compound existing economic, health, and conflict problems. The pandemic also caused a widespread reorganization of peace processes (Blanc and Brown 2020).

The pandemic has also contributed to conflict by exacerbating many of the underlying root causes (Polo 2020). It has accelerated deep-seated socioeconomic inequality, thus increasing the risk of conflict worldwide (Blattman and Miguel 2010; Cederman et al. 2011). The impact pandemics have on social and economic inequality is essential to consider when understanding the relationships between pandemics and conflict. Poverty and inequality are principal variables in the spread of pathogens (Farmer 2003). Further, both are also factors that can exacerbate violent conflict. In his book *The Great Leveller* (2017), Walter Scheidel argued that events such as wars and pandemics generally have a leveling effect on economic inequality. In his observations, social-economic systems generally unequally distribute wealth. Because it is often advantageous to those in power to keep the status quo, the system reaches a kind of homeostasis. It is a function of complex systems in balance to be resistant to change. A large-scale and sustained shock to the system allows systems to be reorganized. He argued that this had been the historical trend; economic inequality is reduced following a pandemic.

Two years into the COVID-19 pandemic, this historic observation does not seem to hold. The pandemic has made evident and further exacerbated the levels and scope of socioeconomic inequality. Though measuring inequality within and between countries at the global level is complex, the pandemic is still far from over, and the data is not fully available. However, it does seem that generally speaking, social, political, and economic inequality has increased during the COVID-19 pandemic (IMF 2021; Stiglitz 2020; UNDP 2020; Goldin and Muggah 2020).

The negative impacts are more acutely felt by those at lower socioeconomic levels and less by those who are more affluent. Generally, the death rates are greater among minorities and the poor compared to those who can afford health care and whose living and working circumstances make them less likely to contract COVID-19. Similarly, the effects of unemployment resulting from the pandemic have been spread unevenly across societies, significantly affecting the poor, working class, and marginalized (Stiglitz 2022).

At the outset of the pandemic, there were well-founded fears that uncertainty and economic contractions in OECD (Organisation for Economic Co-operation and Development) countries would have a knock-down effect of decreasing global investment in overseas aid and international peacekeeping efforts (IEP 2020). Luckily, this was not the case, with OECD spending rising to record levels in 2020 and 2021 (OECD 2022).

In their first update to their textbook *Peace and Conflict Studies* (2022) since the COVID-19 pandemic began, David Barash and Charles Webel wrote,

This pandemic made it clear that we are not all in the same boat: The rich and powerful continue, for the most part, to sail through these heavy seas on their yachts (sometimes literally) while the rest of humanity had to paddle their rowboats through a superstorm. (926)

The economist Joseph Stiglitz confirms this observation. He writes that the pandemic’s most significant impact “will be a worsening of inequality, both within the U.S. and between developed and developing countries” (Stiglitz 2022). The world’s billionaires got about $1.9 trillion richer in 2020 and $1.6 trillion richer in 2021 (Peterson-Withorn 2020). The trend seems likely to continue. At the same time, it is estimated that 75–95 million more people than pre-pandemic projections are likely to be living in extreme poverty by the end of 2022 (Mahler et al. 2022). This increase in extreme poverty has a corresponding effect on acute food insecurity, putting millions of children at risk of famine, and placing additional pressure on social and health systems already at their limits (UNICEF 2020).

The COVID-19 pandemic has brought many long-standing shadow problems into the light. On the material level, food security has been a long-standing concern in many countries and regions worldwide (FAO 2019). The pandemic has already had dramatic effects on food insecurity (McDermott and Swinnen 2022), which is being further exacerbated by the 2022 war in Ukraine (WFP 2022). Tensions and long-standing sanctions on countries like Iran and Cuba have hindered the pandemic response (IEP 2020). The neoliberal structures in the geopolitical system compounded by the pandemic have resulted in many countries with poor credit being unable to borrow or repay debt, likely leading to increases in poverty, political instability, and violence. All of which can be further compounding factors for conflict and contributors to existential risks.

The pandemic has also exposed structural and cultural violence systems, bringing many long-standing sociopolitical issues to the surface, revealing fault lines, prejudices, and discrimination that have been made worse through the pandemic and made visible. The scapegoating of minorities and pandemics have gone hand in hand throughout history (Nelkin and Gilman 1988). Studies of past and present epidemics have shown that this mixture makes social conflicts more likely (Jedwab et al. 2021). Already at the beginning of the COVID-19 pandemic, these relationships were evident. In the USA, the news was full of stories of people of Asian descent being intimidated, attacked, and scapegoated for having “caused” the pandemic (Tavernise and Oppel Jr 2020; Abdulllah and Hughes 2021; NPR 2021). Anti-Chinese sentiments and discrimination against Asian peoples grew across Africa (DW 2020; Solomon 2020). At the same time, in China, people of African origin were forcibly tested, evicted, and quarantined (Vincent 2020; Al Jazeera 2020). In the Gulf countries, there was an increase in xenophobia against people from Asia living and working in countries like Kuwait and Bahrain (Migrant Rights 2020).

What is perhaps unique about pandemics as a global catastrophic risk are their effects on humanity’s ability to work together. As Yuval Noah Harari argues, people’s ability to collaborate is one of the fundamental reasons we have survived and thrived as a species (2015, 2018). Social distancing, quarantines, and lockdown brought forth the challenge of working together and developing a sense of community when the very act of being physically together could be a hazard. This, it seems, will prove to be an essential lesson for the future. Coordination and collaboration are critical elements in responding to a pandemic and are essential for addressing most, if not all, existential risks. This ability becomes a concern when considering the nexus of infectious disease, existential risks, and conflict. Similar to the dynamics discussed in the chapter on Great Powers Conflicts, international trust and cooperation tend to fall as tensions rise and are further diminished through conflicts. From the experiences of the COVID-19 pandemic, it is possible to imagine how responses to pandemics can be hindered through the collapse of trust. In situations of high uncertainty and fear, mistrust of government officials can be extended to health and aid workers. At the same time, governments can become reluctant to provide aid to populations affected by ongoing conflicts. These dynamics can make it difficult for vulnerable populations to receive assistance during a pandemic. Authoritarian governments can also use the opportunities presented by a pandemic to use the closure of borders, the adaptation of high-tech surveillance systems, and new legal frames to restrict collaboration they see as threatening to their power (Burke 2020).

## Hallow Hope DA

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#### Dammit, it’s a government mindset change.

yellow

Dewey 23 – Labor Correspondent at Stateline.

Caitlin Dewey, “States and cities eye stronger protections for gig economy workers,” Stateline, 09-19-2023, https://stateline.org/2023/09/19/states-and-cities-eye-stronger-protections-for-gig-economy-workers/

Joshua Wood remembers days during the COVID-19 lockdown when New York City’s streets were practically empty, save for workers like him.

That experience convinced the 25-year-old Brooklynite — who makes deliveries for both Uber Eats and a package delivery service — that the gig economy needed some urgent changes.

Roughly 1 in 6 American adults have engaged in gig work for platforms such as Uber, Lyft and DoorDash, according to a 2021 report by the Pew Research Center. But while those jobs promise flexibility and a low barrier to entry, they often pay less on an hourly basis than the prevailing minimum wage and lack basic protections such as overtime, sick pay and unemployment insurance.

“There was a sense among workers, coming off the pandemic, that something really needed to be done,” said Wood, a member of the labor group Los Deliveristas Unidos, which fights for gig worker benefits in New York City. “So much of the city is dependent on the work that we do — but if we want to make the conditions better for us, we have to be the ones to do it.”

New York City has since passed a package of legislation guaranteeing a minimum wage and other benefits for app-based food deliverers, and communities across the country are following suit. In the past five years, lawmakers in at least 10 jurisdictions — including cities such as Chicago and Seattle, and states such as Colorado, Connecticut and Minnesota — have proposed new protections for ride-share drivers and food delivery workers.

At least 10 states have also considered programs that would make it easier for gig workers to access traditional workplace benefits, such as retirement or paid family leave. Meanwhile, regulatory agencies and courts in states including Massachusetts, New Jersey and Pennsylvania have sought to force Uber, GoPuff and other tech platforms to grant their drivers the same benefits as regular employees.

The push comes amid a resurgent workers’ rights movement in the United States and a global reconsideration of labor rights in the age of the gig economy. Since the start of the summer, both Australia and the European Union moved to strengthen workplace protections for gig workers, while the U.S. Department of Labor is expected to finalize a new rule that may reclassify some gig workers as employees as soon as October.

#### Leakage and race to the bottom.

Alexander T. MacDonald 25, Shareholder & Co-Chair of the Workplace Policy Institute, Littler Mendelson P.C., 2 June 2025, “Be Careful What You Wish For: The Risks of Competitive Labor Federalism for Pro-Union States,” *Federalist Society*, https://fedsoc.org/commentary/fedsoc-blog/be-careful-what-you-wish-for-the-risks-of-competitive-labor-federalism-for-pro-union-states.

The reason is competitive federalism. Competitive federalism means that when states have leeway to set their own policies, they can compete with one another for business. A state can experiment with taxes, regulations, and subsidies to attract new residents and investments. The state that finds the best policy mix becomes a magnet for people and companies. The state with the worst mix becomes a desert.

Today, competitive federalism is often tempered by federal law, which sets minimum standards in some policy arenas. States can’t fully compete in those arenas because the most important rules are set at the national level. One such arena used to be labor policy. But if California is right that states can adopt their own labor rules, then the doors to competition are now open. And they are open not only for pro-labor blue states, but also for more conservative states

with dimmer views of organized labor.

It’s not difficult to predict how the resulting competition would play out. We already have decades of evidence under “right to work” laws. Whether to adopt right-to-work laws is one of the few choices left to states under the NLRA. The NLRA explicitly allows states to decide whether to let unions to bargain for “agency” fees. Agency fees are the fees that non-member employees pay to a union for the union’s bargaining services. Those fees are controversial, and today, more than half the states have banned them.

The results of those bans are unmistakable. Multiple studies have shown that right-to-work laws not only boost overall employment, but also increase real wages. By one count, employment growth in right-to-work states has been more than twice as fast as in their non-right-to-work counterparts. Real wages have been higher too—as much as $2,900 per person in 2023. And the share of manufacturing employment has been significantly higher—by some estimates, nearly 30%.

More broadly, heavily unionized states have performed poorly in the national competition for people. In 2024, the states with the highest union densities were Hawaii (26.5%), New York (20.6%), Alaska (19.5%), and California (16.3%). But the same year, those states lost more residents than any others. Among the biggest gainers of residents were the states with the lowest union densities—North Carolina (2.4%) and South Carolina (2.7%). In fact, the five states with the biggest population increases from domestic migration all had below-average unionization rates. And all but Delaware had a right-to-work law.

Those numbers are daunting for the supporters of independent state labor policies. These supporters tend to be pro-labor advocates who want to strengthen union rights. But the numbers say that pro-union laws chase jobs into other jurisdictions. That leakage is already happening; businesses have been fleeing New York and California for years. And those states are unlikely to stem the tide by making their laws even less friendly to businesses.

Indeed, other states will no doubt seize the same opportunity to make their own laws even less union friendly. If businesses were already eager to decamp for Texas, one can only imagine their excitement when Texas bans card checks and dues checkoffs. The lesson for pro-union states is clear: be careful what you wish for.

#### No spillover link. Religion is siloed.

Dr. John Moore 16, PhD, Northcentral University, MBA, Indiana Institute of Technology, "The First Amendment Case for Corporate Religious Rights," Nevada Law Journal, Vol. 16, 01/15/2016, SSRN

Dr. John Moore 16, PhD, Northcentral University, MBA, Indiana Institute of Technology, "The First Amendment Case for Corporate Religious Rights," Nevada Law Journal, Vol. 16, 01/15/2016.

E. Not Every Corporation Does or Will Practice Religion

Just because corporations can exercise religion, it does not mean that all will. Indeed, it is unquestioned that all individuals can exercise religion, but there are still many who do not.303 Given the realities of corporate ownership and the pressures of the marketplace, it is likely that most corporations will opt not to exercis

e religion:

In the real world, of course, reliance on such mechanisms may be relatively rare. Shareholders of publicly held firms are likely quite diverse in their religious views (or lack thereof), and market pressure may deter large firms with diverse consumers and employees from adopting a particular religious stance. Still, while rare, one cannot assume that all we do not believe that such assertions are impossible. 304

In light of these considerations corporations will exercise religion even if such a right is recognized. But it would be a non sequitur to jump from there to the conclusion that no corporation can or will exercise religion. Even if the majority of American citizens did not exercise religion, the First Amendment would still protect the rights of the minority who did practice religion. So too, the lack of religiosity in most corporations cannot be validly deemed to undermine constitutional protections for those corporations that do practice religion.

Rather, the lack of universal religiosity points to the need for a means to determine whether a corporation actually exercises its religion or whether the corporation is purely secular. Just as the First Amendment does not protect the religious exercise of individuals who do not exercise religion, it will not protect corporations without religious beliefs. As explained more fully above, focusing on the sincerity of a corporation’s beliefs, as manifest in its practices, provides just such a mechanism.305

## Distinguish CP

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#### It evicerates religious freedom (or RF) by undermining pluralism, inviting backlash, AND diluting otherwise legitimate protections. RFRA (or Religious Freedom Restoration Act) balancing is key.

Angela C. Carmella 15, JD, Professor, Law, Seton Hall Law School, "After Hobby Lobby: The Religious For-Profit and the Limits of the Autonomy Doctrine," Missouri Law Review, Vol. 80, No. 2, pg. 381-450, Spring 2015, HeinOnline. [italics in original; OCR error edited by Jordan]

It is critical that *Hobby Lobby* not be read broadly as a grant of autonomy protection to for-profit corporations. Surely it is a path-breaking decision, but it need not be a dam-breaking one. To constrain *Hobby Lobby*, it should be quite enough that the case was argued and decided under RFRA – a statute that embodies the balancing approach.7 6 Going forward, the case should be interpreted to mean that for-profit free exercise claims should be adjudicated (if they are adjudicated at all) within a balancing framework, with full attention to impacts on identifiable individuals and groups. 77 In fact, the Court's recent decision in *Holt v. Hobbs* unanimously reinforced the notion that RFRA requires a balancing and an impacts inquiry.78 In that case, which interpreted a RFRA-like "sister statute, ' 79 the Court pointed to both *O Centro* and *Hobby Lobby* to demonstrate its consistent understanding that statutory balancing requires it to "scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants .... ,,80 To depart from this highly structured approach and adopt "autonomy" in its place would introduce a disastrous expansion of a doctrine that is meant to be limited in scope and application.

II. THE APPLICABILITY OF THE AUTONOMY DOCTRINE TO CHURCHES AND RELIGIOUS NONPROFITS

One of the most significant functions of the Religion Clauses of the First Amendment is to ensure the autonomy of religious institutions - that is, the ability of churches to "manag[e] their own institutions free of government interference." 81 Autonomy under the Free Exercise Clause protects decisions regarding the religious identity and mission of those institutions we would consider to be jurisgenerative. 82 Freedom for such institutions to define and constitute themselves in order to generate and reinforce norms, in turn, furthers the religious exercise of individuals because it protects their voluntary decisions to affiliate with (or exit) religious communities. Obviously this autonomy is not without limits, but it is capacious enough to provide churches with the freedom to "select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions." 83 The Establishment Clause, which first and foremost expresses a fundamental jurisdictional independence of church and state, also bolsters this notion of autonomy: the state is not competent to "set up a church' 84 - to be involved in clergy selection, doctrinal determinations and ecclesiastical decisions. As a consequence, churches are free to function as significant non-state mediating institutions in civil society. The recognition of church autonomy thus furthers individual and collective free exercise, a healthy institutional independence of church and state, and a more diverse and vibrant civil society.

The importance of autonomy reveals itself wherever the core religious identity of a church might be vulnerable to state interference. Its origins can be traced to a Supreme Court decision made shortly after the Civil War that recognized that civil courts were incompetent to adjudicate religious questions, and so must defer to religious tribunals on matters of religious law; church members had impliedly consented to such internal church processes.85 Indeed, in a case in which a state court set aside a church's decision to defrock a bishop and ordered the church to reinstate him, the Supreme Court found this "an impermissible rejection of the decisions of the highest ecclesiastical tribunal of this hierarchical church," even though the church's conduct had been appallingly arbitrary. 86 While a complex body of "church autono my" jurisprudence has evolved over time to address church schisms and property disputes, the broader autonomy concept allows churches the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." 87 The doctrine ensures that state and federal governments steer clear of church beliefs; decisions regarding structure, governance, and mission; issues of church membership and leadership; many aspects of the church employer-employee relationship; and church decisions regarding sponsorship or affiliations with other institutions, charitable and educational, formal and informal. 88 Even the constitutionality of tax exemptions for churches is grounded in the notion that an exemption preserves the jurisdictional independence of church and state, as taxation of churches poses a far greater risk of excessive state entanglement in the life of churches than does the exemption.8 9

In the context of these protections for churches, and often for religious nonprofits as well, we find exemptions that have real, and often negative, impacts on identifiable individuals - employees, religious leaders, and members - whose participation in the life of the church may be conditioned upon "conforming to certain religious tenets., 90 In connection with this freedom in the employment context, Justice Brennan provided reasons for why this must be acceptable:

The [church's] authority to engage in this process of self-definition inevitably involves what we normally regard as infringement on [an individual's] free exercise rights, since a religious organization is able to condition employment in certain activities on subscription to particular religious tenets. We are willing to countenance the imposition of such a condition because we deem it vital that, if certain activities constitute part of a religious community's practice, then a religious organization should be able to require that only members of its community perform those activities. 91

In certain circumstances, the autonomy concept has also allowed religious institutions to tailor the provision of social, educational and health services to the public in ways that comport with their beliefs. While the application of autonomy considerations tends to be more nuanced and less consistent - and more contested - in this context (given the greater engagement with those outside the faith community), autonomy continues to ground many such accommodations. Whatever the context, autonomy-based exemptions will result in impacts on identifiable person and groups who will be without recourse to complain and who may suffer harms that are without legal redress.92

*A. Clergy and Other Employees*

The Supreme Court unanimously and enthusiastically reaffirmed the autonomy doctrine as applied to the selection of ministers, broadly defined, in the recent case of *Hosanna-Tabor Evangelical Lutheran Church* and *School v. Equal Employment Opportunity Commission*, where the Court recognized a robust "ministerial exception" to anti-discrimination laws.93 That doctrine prohibits government interference in the selection of its ministers, which is "an internal church decision that affects the faith and mission of the church itself",94 Cheryl Perich, a teacher at a church-sponsored elementary school, had been fired from a position that required a "call" from the church.95 Perich sued the church for reinstatement and damages on the grounds that the church had fired her in retaliation for threatening to bring suit under the Americans with Disabilities Act.9 6 The government urged the Court to reject the concept of the ministerial exception, which, up until this case, had been developed in the federal courts of appeals.97 In its place, the government argued that the generalized concept of "freedom of association" would sufficiently protect churches from government intervention in religious affairs.98

The Court found that Perich's duties - as they were regarded and functioned in the life of the church - made her a "minister" within the meaning of the exception. 99 The Court also rejected the government's argument, declaring that it "cannot accept the remarkable view that the Religion Clauses have nothing to say about the religious organization's freedom to select its own ministers."' 00 The Court explained that Perich's action "intrudes upon more than a mere employment decision":

Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions. 101

In short, allowing the teacher to seek legal recourse would constitute government interference in "faith and mission." 10 2 Thus, the *Hosanna-Tabor* Court concluded that "[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers."' 0 3

For clergy and any employees who are considered "ministers," 10 4 there is a startling lack of legal protection from virtually any kind of employment discrimination. 1 0 5 A church could engage in actual discrimination, having nothing to do with its exercise of religion, but the employee who is harmed would have no recourse. Indeed, ministerial exception cases usually involve allegations of discrimination based on race, 1 0 6 sex, 1 0 7 pregnancy, 1 0 8 age, 1 0 sexual orientation' 10 and disability.I"' We also see this story repeated outside the church context, as courts have applied the ministerial exception to religiously affiliated nonprofits like universities, I 1 2 hospitals"' and nursing homes114 on the theory that "an entity can provide secular services and still have substantial religious character."115 Yet dismissing these claims without further examination is required by both Religion Clauses." l6 For over forty years, courts have reaffirmed that the harmful effects of unredressed discrimination are simply outweighed by the necessary institutional freedom for a church or nonprofit to define its identity, faith and mission. 117 If we are to have vibrant religious communities and robust individual free exercise, religious institutions must have the ability to define and constitute, to perpetuate and reform, themselves. And so it is with many other exemptions that are either explicitly or implicitly driven by autonomy protections: their negative impacts on identifiable persons and groups are ignored.

Even employees who are not considered "ministers" can find themselves without legal recourse in cases of *religious* discrimination. Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination, and the Americans with Disabilities Act ("ADA"), which prohibits disability discrimination in a variety of contexts, including employment, both contain autonomy-based exemptions for religious entities." 8 Title VII's exemption allows "religious organizations" to discriminate on the basis of religion in favor of their own members or in favor of a particular faith, regardless of the religious or secular nature of the employment. 119 The exemption protects eligible religious organizations from all employment-related challenges, whether the claims involve hiring, discharge, harassment or retaliation. 20 In addition to churches, many religious nonprofits qualify for the exemption; 12' they do not have to be sponsored by or affiliated with a particular church.122 Moreover, the qualifying "religious organization," even if church-sponsored, does not have to require church membership in order to make employment decisions on religious grounds.123 Indeed, some courts have defined the exemption broadly so that it applies to cases in which employees have failed to comport their personal behavior to the religious employer's rules of conduct and moral standards.12 4

The main decision regarding Title VII's exemption is *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*. 125 In that case, employees working at church-affiliated facilities - including a janitor and a seamstress - were fired because they were no longer members in good standing of the Mormon Church.126 They challenged the Title VII religious exemption as a violation of the Establishment Clause on the grounds that their jobs were secular and that churches should be subject to anti-discrimination laws with respect to such secular positions. 27 The Court rejected the argument. 28 Justice White justified the broad exemption on autonomy grounds: it "alleviate[d] significant governmental interference with the ability of religious organizations to define and carry out their religious missions. ' 29 Justice Brennan's concurrence noted that government decisions regarding the religious-secular distinction would involve case-by-case inquires resulting in "excessive government entanglement ... and [would] create the danger of chilling religious activity."' 130 He went on to justify the exemption in terms of religious autonomy:

For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. *Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself*. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.13 '

Employees of church-affiliated entities may also find themselves without labor law protection, in particular without the protection of collective bargaining and the ability to unionize. In *National Labor Relations Board v. Catholic Bishop of Chicago*, the Court read the National Labor Relations Act to not authorize board jurisdiction over lay faculty at church schools in order to avoid the constitutional issues.' 32 The Seventh Circuit had concluded on the merits that National Labor Relations Board ("NLRB") jurisdiction "would impinge upon the freedom of church authorities to shape and direct teaching in accord with the requirements of their religion" and to control the "religious mission of the schools" in violation of the Free Exercise and Establishment Clauses.' 33 In contrast, the Supreme Court avoided reaching the merits, noting that "[i]t is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions."', 34 The decision was driven in particular by autonomy concerns over government entanglement in the relationship between the church and teachers in its schools.' 35

Further, in the context of higher education, courts have denied NLRB's jurisdiction, making it impossible for faculty to unionize at religiously-affiliated colleges and universities.136 \*\*\*FOOTNOTE BEGINS\*\*\* *See, e.g.*, Univ. of Great Falls v. NLRB, 278 F.3d 1335 (D.C. Cir. 2002). NLRB currently asks whether a religiously affiliated university has a "substantial religious character" in order to determine if it has jurisdiction for purposes of collective bargaining. *See id* at 1337. Because of concerns that such an inquiry could lead to entanglement and possible denominational preferences, the court has mandated a blanket exemption for all religiously-affiliated universities, without further inquiry, so long as they are nonprofit and hold themselves out to be religious institutions. *See id.* at 1341, 1347 (reasoning that in trying to determine whether a university had a "substantial religious character," the NLRB "engaged in the sort of intrusive inquiry that *Catholic Bishop* sought to avoid"); *see also* Pac. Lutheran Univ. & Serv. Emps. Int'l Union, 361 N.L.R.B. No. 157 (2014), 2014 WL 7330993 (Member Johnson, dissenting) (detailing cases). \*\*\*FOOTNOTE ENDS\*\*\*

*B. Members and Dissenters*

In addition to choices regarding clergy and employees, decisions regarding membership are central to a church as it defines and constitutes itself. It should therefore come as no surprise that autonomy considerations justify impacts on persons in the context of church membership. Of course churches usually "open their doors to all."' 137 Regardless of a church's openness or exclusivity, however, no court will tell a church that it must accept or reinstate a particular person as a member, or tell a church that it must reconsider a decision to exclude or change the status of a member. And yet the harm suffered by those without recourse is unmistakable. A particularly heart-rending case is *Anderson v. Watchtower Bible and Tract Society of New York*, in which a married couple who had been active in the Jehovah's Witness community for decades was expelled, or "disfellowshipped," because the wife was found guilty of causing unrest and division within the church when she publicly criticized the way the church was handling sex abuse claims."' As a result of the expulsion, the couple was "shunned" by other church members (including family). Their suit for $20 million in damages on multiple tort claims - including defamation, false light invasion of privacy, interference with business, breach of fiduciary duty, fraud, intentional infliction of emotion distress, and wrongful disfellowshipping - was dismissed in its entirety on church autonomy grounds. 139 As members, the plaintiffs had implicitly consented to the church's rules and governance structure. 140 "[T]he freedom of religious bodies to determine their own membership is such a fundamentally ecclesiastical matter that courts are prohibited from adjudicating disputes over membership or expulsion.' 4 1 Courts cannot review the correctness or fairness of such decisions; and the impacts from shunning, including real economic impacts resulting from loss of business from customers known through church membership, are not cognizable because the practice of shunning is "integrally tied to the decision to expel a member. ,,42 These claims simply could not be "adjudicated without inquiry into the religious doctrine and practice of the Jehovah's Witnesses and without resolution of underlying religious controversies."' 143

In addition to expulsion claims, numerous tort claims brought by members against churches have been similarly dismissed on autonomy grounds. 14 4 These are, in the author's view, unjustified under autonomy considerations, yet the hands-off approach persists.145 Attempts to create a standard of care for clergy counseling and mental health services, for instance, have been met with resistance: no state recognizes "clergy malpractice."1 46 Indeed, for a very long time, autonomy considerations obstructed negligence claims against churches in the clergy sex abuse litigation. 147 Although this has eroded in the context of massive scandals involved in moving pedophile priests from church to church, some tort claims continue to be dismissed despite egregious conduct by church defendants. 148

Some of the most emotionally-charged situations involve members challenging theological or financial decisions made by the church, which are gen erally not justiciable. 149 As noted above, there exists a long line of cases involving church schisms, where dissenting factions claim to be the "true" church and claim rightful ownership of church property. Dissenters in these cases will be turned away because even if they could "prove" that they were right on theological grounds, civil courts are not competent to adjudicate such questions.150 Beyond these classic dissenters from church doctrine, church members or parents of children who attend a religiously affiliated school sometimes challenge the legality of a church's decision to close its sanctuary or school. While the impassioned criticism and bad publicity occasionally pressure a church into changing its decision, there is little that can be done through litigation.152

Likewise, new rights to marry recognized in the civil sphere do not authorize courts to order a church to perform a religious ceremony for a samesex couple.' 53 Under both Religion Clauses, government is powerless to compel a church or clergy person to perform a religious ceremony or confer a religious privilege.' 54 This would strike at the heart of a church's autonomy. State statutes that recognize marriage equality typically include a section providing that no church or clergy person could ever be required to celebrate, solemnize or recognize such a marriage. 155 These provisions are politically necessary and have the value of clarity,156 but in reality they are redundant. While the couple might be able to sue a wedding photographer who refuses their business, 157 they cannot sue a church that refuses to marry them, regardless of the dignitary harm.

*C. Patients of Religious Health Care Facilities*

Religiously affiliated hospitals, like secular nonprofit and for-profit hospitals, hire professionals, serve the public, receive government monies, and are heavily regulated to ensure safety. It is not surprising, then, that as "commercial" nonprofits competing in the same market with nonreligious hospitals and treating patients without regard to religious affiliation, religious hospitals enjoy only very narrow autonomy protection: they may refuse to perform abortions and sterilizations in accordance with their institutional faith and mission. 158 These provisions are part of a larger set of conscience laws enacted to protect anyone - individual or institution - from being coerced into participating in these procedures or being penalized for refusing to do so. 159 Federal law, passed in 1973 in response to *Roe v. Wade*, and numerous state-level conscience clauses, give hospitals the right to refuse to perform abortions and sterilizations; 16 more recent legislation in some states has extended these protections to those refusing to provide contraceptive drugs and devices. 161 Laws regulating physician-assisted suicide, where in place, also exempt individual and institutional objectors from participation.162

These conscience laws protect the autonomy of churches, like the Catholic Church, that have defined and constituted themselves over the centuries not only as a worshipping community but also as multiple outreach ministries - including health care services - that give concrete expression to faith and mission.' 63 With one-sixth of all hospital patients cared for at Catholic hospitals, the Church's commitment to health care is substantial.' 64 Obviously a woman cannot obtain an abortion, sterilization or contraception in Catholic hospitals.' 65 Other facilities might provide these services, although in some communities there may be few or no alternatives. 166

*D. Contested Application of the Autonomy Doctrine*

The previous sections have described the autonomy doctrine and its broad categorical exemptions for religious employment and membership decisions, as well as its limited conscience protection for health care providers. These sections describe the potential and real consequences to employees, members, and patients. Yet the obvious must be stated: autonomy is at its strongest in the context of churches and their close affiliates, where consent to those consequences by members and employees can be more easily implied. Once we move to religious nonprofits, whether or not church-related, the appropriateness of the autonomy doctrine becomes more vigorously contested and less evenly applied. The consent of employees and others is more attenuated (or downright absent) in some of the nonprofit employment and service contexts. Indeed, many religious nonprofits whose mission involves pursuits that are not exclusively or primarily religious - like health care, education, and social services - may not be viewed as warranting the same level of identity and missional protection that churches and their close affiliates need. Especially in situations where employees are hired without regard to faith, where the public is served, where public monies finance at least some part of the operations, and where economic power is comparable to secular nonprofit or for-profit actors, religious nonprofits find themselves vulnerable to being treated like their nonreligious counterparts.' 67

Autonomy is a contested matter even in the Title VII and NLRB contexts. 168 Although it is true that the religious exemption to Title VII is applied broadly to eligible institutions, it is significant to note that the definition of an eligible religious organization is not settled. 169 Federal courts of appeals have developed at least five different tests for determining whether a religious organization is eligible for the exemption. 17 The Ninth Circuit, for instance, refuses to apply the exemption to nonprofits that charge more than a nominal fee for services, thereby rendering religious hospitals, day care cen ters, camps, and religious publishers ineligible.'7 1 The Fourth Circuit analyzes whether the mission of a religiously affiliated nonprofit has become secular over time. 172 Furthermore, even though some courts have read the exemption broadly to allow religious organizations to make employment decisions that involve sex discrimination because of the connection to church teachings, 173 other courts have held to the contrary. 74

Similar variations exist in the context of NLRB jurisdiction over religious colleges and universities. Despite the D.C. Circuit's *Great Falls* decision, which generally exempted religiously-affiliated nonprofit educational institutions, 175 the NLRB continues to use the "substantially religious character test" to distinguish between those religious institutions exempt from its collective bargaining requirements and those that fail the test and come within its jurisdiction. Indeed, it recently asserted jurisdiction over adjunct faculty members at religious institutions who are not held out as performing a "religious function." 76

The contested application of autonomy to religious nonprofits can also be seen in two specific contexts: the provision of employee benefits and the provision of social services to the public.

1. Employee Benefits

Until recently, churches and religious nonprofits were free to tailor their health insurance benefits to their religious teachings. 1 7 This allowed Catholic institutions, for instance, to provide insurance coverage for prescription drugs but not birth control. 178 Within the last two decades or so, more than half the states began to require that employers provide employees with insurance coverage for contraceptives as part of gender equity legislation.17 9 While most of these states had some kind of accommodation or opt-out for churches and religious nonprofit employers opposed to the coverage, 180 some state legislatures, like those of California and New York, provided an autonomy-based exemption only to churches and their close affiliates. 181 This narrow religious employer exemption was based on the assumption that employees in those settings would likely share the faith and consent to the withholding of coverage; in contrast, the assumption did not apply to employees of those religious nonprofits that hired without regard to faith.182 This meant that most religious nonprofits were not eligible for the exemption and were required, notwithstanding a moral opposition, to include contraception in their insurance packages.

In two high profile cases, the highest courts of California and New York held that religious nonprofits that did not qualify for the exemption had no constitutional right to be included within it, primarily because they had a religiously diverse workforce.1 83 Both courts refused to extend the autonomy principle because employees had not consented to be governed by their employer's faith. 184 Like the California and New York statutes, the ACA's contraception mandate provides the same type of narrow, autonomy-based exemption for church employers and affiliates. 185 Of course what differs is that although the broader class of religious nonprofits does not get the benefit of this exemption, it does enjoy the HHS Accommodation.' 86

A similar narrowing is underway in the context of the church plan exemption to the federal Employment Retirement Income Security Act ("ERISA"). 187 Church pension plans are exempt from many of ERISA's requirements, including prohibitions on benefit reductions, certain funding and vesting requirements, and insurance protection for pensions.' As a result, church employees with pensions do not enjoy the same level of retirement security enjoyed by employees with pensions subject to ERISA's requirements. Although it had been common for courts to allow the church plan exemption to apply to nonprofits associated with churches, recent judicial opinions have begun to reject this position and to narrow the church plan exemption to pension plans of churches. 1 89

2. Beneficiaries of Social Services

One might assume that autonomy is grounded in implied consent to be bound by the faith and internal organization and rules of a church. This is certainly a common theme that can be identified in many cases involving the ministerial exception, membership, and employment. 190 The jurisdictional nature of autonomy protection - placing the church and other religious nonprofit entities within a sphere of independent activity - seems to depend heavily on a notion of shared faith and mission among the members of a community. 191 And the jurisgenerative nature of autonomy also seems to depend upon this voluntarism: generating and reinforcing norms within a community and facilitating common belief and mission for an individual and group involves the choice to affiliate with a community.92

But as we have seen, autonomy protections are also extended to contexts outside a church community of "consenting" believers, to religious nonprofits that hire outside the faith and serve the public.1 93 Critics focus on the unfairness of exemptions that disadvantage employees and third parties - patients, clients, and students - who do not share the faith of the employer. 194 In the absence of consent, critics contend that autonomy should be limited to a narrow purpose: to protect the identity and mission of a particular church and to allow it the right to define and constitute itself. Indeed, Justice Ginsburg's dissent in *Hobby Lobby* proceeded on the assumption that the autonomy doctrine should apply only to hiring and serving within one's own community.1 95 Such a narrow conception of religious autonomy is unprecedented in both law and practice.

Defenders of autonomy-based exemptions (at least with respect to targeted issues) for religious nonprofits that hire and serve outside the faith offer several justifications. For these types of entities, the purpose of autonomy is to foster institutional free exercise broadly and to facilitate the participation of morally diverse non-state actors in civil society, as well as to promote the Establishment Clause's command of neutrality among different religions., 96 When the state is the only source of norms and requires all non-state actors to conform, then the jurisgenerative function of religious communities is subverted and the jurisdictional line obliterated. 97 In order to foster participa tion of diverse religious groups in the civil society and support truly voluntary choices, there must be some acceptance of moral diversity, at least on specific issues. 198 The argument goes like this: for groups that serve the public but tailor that service to their religious beliefs, the absence of specific consent is mitigated when there are other nonprofits offering the same services. In the overall scheme of non-state providers, then, more diversity supports the voluntary decisions of individuals to make choices.' 99 This conception is reflected in the faith-based initiatives of the Bush and Obama administrations, where beneficiaries of social services are supposed to have options among religious and secular providers. 200

The idea of diversity among service providers has been at the core of the exemption claims by Catholic adoption agencies that are morally opposed to placing children in same-sex households. 2 0 1 They have argued that same-sex couples have plenty of options for adopting, and that an exemption for agencies with objections would not impair anyone's ability to adopt.2 °2 This argument failed in Massachusetts and Illinois, where exemptions were denied on the grounds that government has an interest in eradicating the independent harm of discrimination, despite the availability of other adoption agencies to assist same-sex couples. 2 0 3 In response, several Catholic Charities agencies decided to terminate their involvement in adoption services altogether. 20 4 Harvard Law School Dean Martha Minow bemoaned the state's failure to negotiate some workable solution to retain these adoption services, because when Catholic Charities ceased to offer adoptive services the state lost an organization that had over a century of expertise in the field.2 °5

In contrast, however, Virginia and North Dakota recently enacted autonomy-based exemptions, which protect religious nonprofit adoption providers that object to placing children with same-sex couples. 2 0 6 Under these laws, objecting providers retain their licenses as well as government funds and contracts. 20 7

From the foregoing, it should be clear that churches as well as many religious nonprofits enjoy broad latitude in decision-making while ministers, members, employees, patrons, clients and patients might have very compelling stories of exclusion or harm which, in a different context, could give rise to various claims of discrimination, tort, or breach of contract. Autonomy considerations remain closely tied to the religious freedom of religious institutions and individuals: in a system of voluntary religious exercise, with individual rights to enter and exit churches, it is essential to preserve the freedom of churches to organize and perpetuate themselves. 20 8 On occasion, this autonomy is further extended to facilitate the larger project of ensuring diversity of non-state actors within a civil society. Where autonomy governs, courts and legislatures have decided that the consequences to identifiable persons and groups are overshadowed by paramount considerations of individual and institutional freedom. Obviously, the precise outer boundaries of the autonomy doctrine are highly contested, but the battles over line-drawing are being fought in the *nonprofit* context. To extend autonomy to businesses would fuel doctrinal confusion and invite an unprecedented lack of accountability.

III. WHY BALANCING, AND NOT AUTONOMY, IS APPROPRIATE IN THE FOR-PROFIT CONTEXT

*Hobby Lobby* should be read narrowly as a balancing case, rather than as an autonomy case for several reasons. First, the Court's decision is rooted in the assumption that employees will not be affected at all by the RFRA exemption. 2 0 9 In clear contrast, autonomy-based exemptions ignore the disadvantages that befall persons and groups left without legal protections. Second, *Hobby Lobby* makes no suggestion that employees have consented, even impliedly, to be governed by the faith of the corporate owners. In clear contrast, autonomy principles apply in very specific contexts of church membership and mission and in the delivery of many types of services through nonprofit organizations. 2 1° Autonomy is, at its heart, a consent-based concept; even where consent is attenuated or lacking - as in the case of nonprofit delivery of some kinds of services - the support for numerous diverse non-state actors in civil society is ultimately intended to promote consent by fostering multiple alternatives. 2 11

The jurisprudence of for-profit religion over the last fifty years, though admittedly sparse, suggests a clear demarcation between churches and religious nonprofits, on the one hand, and for-profit activities on the other.2 12 Balancing has always been the prevailing approach in the for-profit context. 213 Courts have resisted making connections between for-profit claimants and their religious communities, even where it would have been plausible to do so. 214 Courts have been unwilling to pull commercial enterprises into the religious sphere or to link them to the jurisgenerative function of religious communities and have denied recognizing any jurisgenerative function of their own. 215 Put bluntly, businesses are not churches.

Now that the Court has explicitly held that for-profit entities are capable of exercising religion, free exercise claims from closely-held, secular businesses owned and operated by people with religious convictions will likely surface. As for this class of claimants, an explicit autonomy argument is difficult to make; courts may more easily stay within the *Hobby Lobby* balancing framework. But *religious for-profits* - a potentially large class of entities - could make a plausible claim for the categorical protections offered by the autonomy doctrine. Religious for-profits, which provide religious goods and services or provide educational, health care and social services traditionally within the domain of nonprofits, are free-standing religious institutions rather than simply extensions of family businesses. In some instances, they function 216 in the same markets alongside religious nonprofits. These entities are made all the more possible by new corporate forms that facilitate combinations of charitable and religious mission alongside profit-making. 2 17 But despite the changes in corporate law that blur the traditional divide between nonprofits and for-profits, the religious for-profit is not capable of meeting the jurisdictional and jurisgenerative prerequisites for autonomy protection. Further, the harms to persons and groups that accompany autonomy exemptions would multiply in number and intensity if an entire class of market actors, wielding economic power over access to goods, services and jobs, were permitted to act without regard to those they employ and serve. And, finally, once the doctrine is expanded, protection will likely become diluted across the board. Churches and those religious nonprofits that warrant autonomy protection will see the doctrine eroded even in its core application. Courts must recognize that for all these reasons, the autonomy doctrine should not be extended to for-profits.

*A. The Blurring of Lines Between Nonprofit and For-Profit Entities*

The autonomy jurisprudence has developed in the context of nonprofit institutions. For centuries, churches and religiously affiliated educational, healthcare and charitable institutions have been the backbone of what is now called the nonprofit sector. 2 1 Because of society's heavy dependence on these institutions, their independence and protection came to be concretized in law.219 Indeed, traditionally there has been a comfortable fit between the nonprofit corporate form as an indicator of religiosity, and the for-profit form as an indicator of secularity. As Justice Brennan noted in *Amos*:

The fact that an operation is not organized as a profit-making commercial enterprise makes colorable a claim that it is not purely secular in orientation .... [U]nlike for-profit corporations, nonprofits historically have been organized specifically to provide certain community services, not simply engage in commerce. Churches often regard the provision of such [nonprofit] services as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster. 220

Both Justice Brennan and Justice O'Connor, in *Amos* concurrences, gave nonprofit organizations and activities a presumptive connection to religious mission. Justice Brennan noted that autonomy-based exemptions allowing religious-based employment discrimination for nonprofits "is particularly appropriate for such entities, because *claims that they possess a reli gious dimension will be especially colorable*.'' 221 And Justice O'Connor, expressing the traditional skepticism toward coupling profit motive with religiosity, noted, "It is not clear . . . that activities conducted by religious organizations solely as profit-making enterprises will be as likely to be directly involved in the religious mission of the organization." 222 Although Justice Brennan was willing to speculate that a religious nonprofit could be eligible for autonomy-based exemptions for some type of for-profit activity that had a "religious character," 223 no case law had developed that concept. In fact, a few years after Amos, when the Court of Appeals for the Second Circuit evaluated a claim by a church that wanted to demolish one of its historic buildings to construct a forty-seven-story commercial office tower, the court denied an exemption from historic preservation regulations - even though the revenues earned from this venture would have been used for ministry.224

Developments in corporate law, however, have resulted in a blurring of lines between nonprofits and for-profits. Many religious nonprofits are "commercial" nonprofits. 225 For instance, religiously affiliated hospitals and universities provide services to the public in exchange for money; they operate within markets in which they compete with secular nonprofits and for226 profits. In fact, many nonprofits do earn profits; rather than distribute them to shareholders, they are required to reinvest them in the corporation or spend 227 them to advance the corporation's purpose.

Even more significant are changes within the for-profit sector. The movement for corporate social responsibility (initiated largely by religious activists in the 1970s) has succeeded in getting many entities to embrace communitarian values in addition to, and even at the expense of, profitmaking.228 Many corporations have become leaders in advocating for a diverse workforce, paying just wages and benefits beyond legal minimums, and supporting social and charitable causes. 229 And while charitable works are still usually pursued through the nonprofit corporate form, a for-profit corporation is free to have a mission traditionally associated with non-profits. Google's establishment of the first "for-profit charity" provides a clear illustration of how for-profit and nonprofit categories have become increasingly interconnected.23 °

The Court mentioned these trends in *Hobby Lobby*. Responding to the statements of some federal courts that said for-profit corporations could not exercise religion because they were solely concerned with making money, Justice Alito wrote:

[M]odern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so. For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives.... In fact, recognizing the inherent compatibility between establishing a forprofit corporation and pursuing nonprofit goals, States have increasingly adopted laws formally recognizing hybrid corporate forms. Over half of the States, for instance, now recognize the "benefit corporation," a dual-purpose entity that seeks to achieve both a benefit for the public and a profit for its owners. 2 3 1

From this, Justice Alito extrapolated a principle: if for-profits can pursue nonprofit goals, "there is no apparent reason why they may not further religious objectives as well.''232 And indeed, long before the concept of the benefit corporation was introduced, some for-profit corporations have embraced an explicitly religious message. 233 Hobby Lobby's corporate documents commit it to operate in accordance with "Biblical Principles," which means that all 500 of its arts and crafts stores are closed on Sundays, at great financial cost to its owners; it does not engage in transactions that promote alcohol; it proselytizes through newspaper ads; and it contributes generously to Christian ministries. 234 As Professor Lyman Johnson noted, "[F]aith and spiritual values have influenced" even large companies, with a "leavening effect that a focus on non-economic values can have in a corporate culture.' ' 23 5 And like nonprofits, for-profits with goals beyond profit can function as mediating institutions between the individual and the state in civil society. 2 3 6

*B. The Use of Balancing in For-Profit Religion Jurisprudence*

Given the blurring of lines between the nonprofit and for-profit sectors, partnered with the Court's explicit holding that religious exercise is possible in the for-profit corporate context, the question turns to whether the autonomy approach available to religious nonprofits might also be available to forprofits. The relevant case law has remained and should remain squarely within the balancing paradigm.

Over the last fifty years, religious freedom claims made in connection with for-profit activities have fallen into two categories. The first involved individuals or entities claiming an exemption from a regulation that made it more expensive to practice their religion. 237 Because exemptions to remedy economic burdens often result in a competitive advantage for religious claimants over secular businesses in the same market,23 8 these claims were general y unsuccessful. The second category involved individuals or entities with conscience claims, as in Hobby Lobby, objecting to a law that forces participation in an activity the individual or entity considers sinful or immoral.

Those conscience claims came in a variety of areas, and the results have been mixed. In the 1990s, some landlords refused to rent apartments to cohabiting couples (which they were required to do under state anti239 discrimination laws). More recently, several pharmacists have refused to stock and sell emergency contraception; 240 several businesses have refused to 241 provide goods or services for same-sex weddings; 2 1 and some taxi drivers have refused to transport passengers carrying alcohol.242 And, perhaps most notably, the owners of the corporations in *Hobby Lobby* refused to direct their companies to pay for contraceptive coverage within the employee insurance 243 package. Such claims for exemptions do not give rise to the same "competitive advantage" noted above in the economic burden claims; indeed, refusals to provide a product or serve a customer tend to generate negative publicity against the objecting business. This became especially evident recently in Arizona and Indiana where business leaders vociferously opposed state legislation intended to protect the conscience claims of small businesses. 244

Some of these courts assessing conscience claims, as part of the balancing approach, considered not only an exemption's discriminatory impacts in the provision of commercial goods and services, but also possible mitigation of those impacts. The impacts on customers deprived of emergency contraception were mitigated by the practice of referring the customer to another pharmacy (as is commonly done when a drug is not in stock).24 ' And of course the *Hobby Lobby* Court assumed a total mitigation of impacts by an expanded HHS Accommodation. 246

*C. The Divide Between For-Profit Activity and Church*

Both the jurisdictional and jurisgenerative prerequisites for institutional autonomy claims have been missing in the for-profit religion jurisprudence. The Supreme Court has repeatedly resisted re-making businesses into churches or church-affiliated entities, even where it might have been plausible to do so, and has neither recognized the links between businesses and churches nor protected church-like internal operations of businesses. 247 The Court has been careful not to align businesses with churches in the autonomy discourse and has been careful not to suggest that a business is central to creating or reinforcing norms for a community of believers. 248 *Hobby Lobby* continues this restraint. In *Hobby Lobby*, the corporations were secular, commercial entities owned and operated by families with religious scruples, and the analysis centered on protecting the *owners'* religious exercise. True, the Court protected the corporate exercise of religion by finding an identity with the owners' faith; 249 but there was no discussion of a symbiotic relationship between the corporation and a church, nor was there talk of a church community created within the corporation.

*Hobby Lobby* is thus consistent with the Court's historic treatment of for-profit free exercise claims. In the 1961 case *Braunfeld v. Brown*, Orthodox Jewish business owners in Philadelphia sought an exemption from Sunday closing laws because their businesses were closed on Saturdays. 250 Closing on both weekend days meant serious financial loss and economic disadvantage. The Court held that "the Sunday [closing] law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive. ' 252 This "imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself .... ,,253 The Court noted a further justification: an exemption allowing these business owners to open on Sundays would give them an "economic advantage over their competitors" - those businesses that are required to close on Sundays.2 54 Thus, in an implicit balancing, the Court considered the exemption's harm to third parties - those businesses that were required to close on Sundays.

While *Braunfeld* is usually considered a simple case of economic burden, there is more to it. The holding suggests the irrelevance of any autonomy considerations. 255 No regard was shown for the local Orthodox Jewish community the businesses likely served - those customers who are now deprived of the ability to shop on Sundays. Had there been an Orthodox nonprofit whose activities were similarly curtailed on Sundays, it would have been easier to argue that its schedule should comport to the community it serves. But the Court never mentioned this. It was concerned only that Jewish businesses open on Sundays could take business away from merchants whose stores were closed. 256 In the for-profit context, the business is not understood to function like a worshipping community or like a religious nonprofit. Instead, the rules of commerce govern. 257

Two decades later, the Court considered several for-profit cases in which the employer and employees shared the same faith. A common faith could have justified an autonomy-based exemption on the grounds that it would have promoted the freedom of a religious community's identity and mission. But the Court used a balancing analysis instead, and declined to carve out exemptions, in part because of the strong desire to protect employees from the potential harmful impacts of such an exemption: employer coercion of faith and economic exploitation. The commercial context, with its commitment to a diverse workforce, prevented the Court from viewing the workplace in communal religious terms.

In the first decision, *United'States v. Lee*, an Amish farmer/carpenter employer sued for a refund of taxes, arguing that paying social security taxes violated his rights under the Free Exercise Clause as well as those of his em258 ployees, all of whom were Amish. The Amish refuse government assistance in caring for the elderly in their communities and therefore oppose paying into the social security fund.259 The Court found that while coerced participation in the social security system created a burden on Amish beliefs, that burden was justified because "mandatory and continuous participation in and contribution to the social security system" is "essential to accomplish[ing] an overriding governmental interest. 2 60 The Court analogized social security payments to more general taxation, noting that "religious belief in conflict with the payment of taxes affords no basis for resisting the tax. ' 26 1 Congress had already granted a narrow exemption to self-employed Amish, but to extend the exemption to everyone employed by an Amish employer could undermine the larger tax system. 26 Thus, the Court implied that the narrow exemption fulfilled the requirement that the government advance its interest in the least restrictive manner.

[E]very person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees. 263

This concern about an employer imposing his or her faith on the employees was unusual because all of the employees in this case were Amish.264 Since Edwin Lee had brought the case not only for himself but also on behalf of his employees, it appeared that this was not an element of the case before the Court. Indeed, it is clear that the identification of the burden implicated the Amish community generally. It was not only a burden on the employer's faith, but also a burden on "the Amish faith," Mr. Lee's faith, and the faith of 265 his employees. Although the Court refused to grant the exemption under the weight of the government's interest, it was acutely aware of communal meaning of the religious claim - that an exemption would protect the identity and faith of the religious community.266 In earlier case law the Court had been emphatic that the Amish faith pervaded every aspect of their lives,267 so, in this case, it would have been easy for the Court to acknowledge that a law regulating the workplace could threaten the religious community. But it did not, choosing instead to describe the employer and employee in adversarial terms. 268

Potential autonomy considerations also present themselves in *Tony and Susan Alamo Foundation v. Secretary of Labor*.269 The Alamo Foundation was a Christian nonprofit that served as a rescue mission and religious community to the poor and sick.270 The Foundation operated nearly forty commercial businesses to train its "associates" - converted criminals and addicts who did not consider themselves "employees. ' " 27 1 The Foundation did not pay the associates wages, but it did provide food, clothing and shelter. 272 The Labor Department characterized the relationship differently, arguing that these businesses were subject to wage and other terms of the Fair Labor Standards Act ("FLSA") and that the associates were employees entitled to the statute's protections. 273 The Foundation sued, challenging the applicability of the FLSA as a violation of the associates' free exercise and its own right to be free from government entanglement. 274 The Court found that the FLSA did apply and that Labor Department regulations explicitly provided that commercial activities of religious nonprofits were subject to its terms in order to avoid any competitive advantage. 275 The Court found that applying the FLSA to the Foundation caused no excessive entanglement in church affairs; it further found that free exercise rights of the associates were not burdened.276 The associates claimed quite vehemently that they did not want 277 to be paid wages. Their claim, on its face, was about their connection to the religious community and the religious freedom of the community.78 But the Court found that because the associates were already receiving in-kind benefits, and because the wage requirement could be met by in-kind pay ments, no actual burden resulted from inclusion in the FLSA statutory program. 279

Like the Amish employer and employees in *Lee*, the Alamo Foundation and its associates, though tied in a commercial relationship, were fundamentally connected to each other as a religious community. Both cases involved religious identity and mission. But the Court in both cases was concerned about harm to identifiable persons. In Lee, even though the employer and employees shared the same faith, the Court was concerned that an exemption would have the effect of allowing an employer to impose its faith on the employees. 280 And in *Alamo*, even though the associates claimed that they were volunteers doing work as part of their ministry, with no expectation of compensation, the Court was concerned that exemptions opened the door to exploitation or coercion by employers - in fact, there was some suggestion in the record that associates had suffered injustices in hours worked and punishments for poor work. 28 1 The Court in both cases refused to treat the workplace as a church, even in the face of what looked like shared faith among employees. 282

This resistance to analogizing a business to a church is reflected in lower federal court decisions as well. A year after the 1987 Amos decision, a forprofit corporation argued that it should enjoy the benefit of the Title VII exemption. In *Townley v. EEOC*, a manufacturing company defended a religious discrimination claim brought by a former employee by arguing that it was a "religious corporation" capable of making religion-based employment decisions. 283 The Townleys, owners of this closely held corporation, were religious and held weekly devotional services that employees were required 284 to attend. The Ninth Circuit rejected the argument that the business was a religious corporation, noting that the company was for-profit and not church affiliated, produced a secular product, and had no religious purpose in its 285 corporate documents. The fact that the Townleys were religious (and engaged in many religious acts through the company) was not enough to make the corporation "religious" within the meaning of the statute (or under the Constitution for that matter).2 86 While the Townleys were not required to abandon the devotional services, they were required by law to accommodate employees who did not want to attend.287 Protecting the rights of the owners would have negative impacts on identifiable persons: their employees.

The Townleys had tried to create a religious community at their workplace. They thought of the exemption claim for their corporation in autonomy terms: just like a church can control its membership, they wanted to control the company's pool of employees using religious criteria. 288 Each employee had to sign a statement agreeing to attend the devotional services and recognizing that they could be fired for failing to do so.289 The Townleys argued that with these signatures, employees waived their rights to seek accommodations for their own religious needs; further, the Townleys argued that the corporation was "founded to 'share with all of its employees the spiritual aspects of the company. ' 9° But the court held that the Townleys had to protect the religious rights of employees who objected to participation. 29 1 In rejecting the statutory and constitutional claims, the court made clear that in 292 the for-profit context, employers could not create a church. In essence, the court said - like the Supreme Court implied in *Lee* and *Alamo* - that the defendants, running a secular business, did not deserve the kind of autonomy enjoyed by a church.

Neither the Court nor the plaintiffs in *Hobby Lobby* suggested that the corporate plaintiffs or their owners were trying to create a church in the workplace. The owners incorporated to establish a business that would balance profit seeking and religious mission according to their own beliefs. 293 Their conscientious objection to providing contraceptive coverage to employees was not framed as a shared belief among employees. 294 The Court was quite clear that the thousands of employees of the objecting companies that are eligible for the coverage should and will receive it.295 In keeping with *Braunfeld*, *Lee* and *Alamo* (and consistent with *Townley*), the Court resisted any notion that the owners are doing anything other than demanding their own religious freedom in seeking to run their corporations in accordance with their faith.296

IV. THE TEMPTATION TO EXTEND AUTONOMY TO THE "RELIGIOUS FOR-PROFIT" AND WHY COURTS SHOULD NOT GIVE IN

Nearly all the businesses challenging the contraception mandate were closely-held corporations operated in accordance with religious beliefs but engaged in *nonreligious* endeavors like manufacturing and retail. 297 These "secular" for-profits stand in contrast to the category of "religious" forprofits, which are defined in this Article as corporations that provide explicitly religious goods and services or that engage in work traditionally undertaken by nonprofits. Indeed, two of the businesses challenging the mandate - a religious publishing house and a religious bookseller - are religious forprofits under this definition.298

It is impossible to know how *Hobby Lobby* will be applied to the free exercise claims of secular for-profits - whether narrowly, under a balancing paradigm, or broadly, under an autonomy paradigm. Obviously from the remarks thus far, this Article would argue that free exercise claims of secular for-profits should be constrained within a balancing framework. But the ultimate contention of this Article is that *balancing should apply even to those free exercise claims of for-profit entities that appear to make a plausible claim for autonomy: the religious for-profit*. Religious for-profits differ substantially from secular businesses like arts and crafts stores or cabinet manufacturers owned and directed by religious people. Religious for-profits need not be conceptualized as an extension of their owners' faith but can be viewed independently as entities possessing faith and mission, as entities with a religious character. 299 A religious for-profit might even have an unmistakable connection to a church or identifiable religious community or tradition.3 00 But even if it does not, it can still function to support or enliven a distinct religious community or tradition. Indeed, these entities would not exist *but for* a religious community or tradition. And because they are entities that endure past the lifespans of any individual, they can be established and organized in a way that ensures continuity of their religious identity, purpose and function. 301

Because of these characteristics, a court might be tempted to consider religious for-profits to be institutions that warrant autonomy protection. But the decision to do so would be dangerous. Autonomy gives religious entities protections that are categorical in nature, as a matter of constitutional design, and the negative consequences on identifiable individuals and groups are not taken into account. For-profits wield too much economic power and too many people would be made vulnerable to the harmful impacts of exemptions. It would be a mistake to add an entirely new class of entities to the class of religious institutions that currently enjoy autonomy protection. It is especially unwise to expand the circle of autonomy protection to include forprofits at a time (like now) when courts and legislatures are struggling to determine whether and when to grant autonomy protections to religious *nonprofits* that hire and serve beyond their faith communities and/or that wield economic power in ways similar to for-profit entities. 3 0 2 Are we really ready for business entities to claim protection under the ministerial exception for decisions regarding "positions of substantial religious importance, 30 3 or under the Title VII exemption, NLRB exemption, or other autonomy-based exemptions?

At first glance, the obstacles to viewing the claimants in *Braunfeld*, *Lee*, *Alamo* and *Hobby Lobby* as connected to and generating norms for a religious community do not seem to exist when we look at religious for-profits. Religious for-profits, unlike secular for-profits, are by their own definition connected to larger religious communities and traditions. Surely they create - or at least reinforce - norms and "are organized around a religious mission with a guiding doctrine and goal to facilitate individual and collective religious belief.'' 30 4 Does this render them jurisgenerative institutions that fall within the "church" jurisdiction on the church-state divide? In other words, are they similar enough to churches and religious nonprofits that they should receive protection under an autonomy approach? In this Article's view, the answer is no. Countervailing considerations, which will be described below, like the distribution of profits to owners, the role of for-profits in the economy, and the potential widespread impacts resulting from categorical protections, argue against the extension.

The discussion below focuses on the kinds of businesses that might press autonomy claims. As a preliminary matter, this Article entertains and rejects the possibility of a "for-profit church." After that, it considers two categories of entities most eligible for a "religious for-profit" designation. The first is comprised of for-profits engaged in traditional commerce: exclusively providing religious goods and services. The second category is comprised of for-profits with traditional missions: education, social services, and health care. Even with autonomy protections for nonprofits in certain circumstances, and even in the face of obvious analogies in the case of missiondriven for-profits, countervailing considerations must constrain the extension of autonomy.

*A. For-Profit Churches?*

It is well established that churches - core faith communities that gather for worship and that pass beliefs on from generation to generation - enjoy immunity from lawsuits under the ministerial exception and other autonomybased protections of their employment and membership decisions. Could a church, as we know it, be organized as a for-profit entity? One could imagine a person or group deciding to forego the benefits of federal tax exempt status (which is dependent upon a nonprofit form of organization) and organize a "church" as some form of business entity in which they would own shares, act as (or hire) ministers and open its doors to members. The for-profit entity would pay taxes and be free to participate in politics unencumbered by the Internal Revenue Code's restrictions. 30 5 But would the autonomy precedents protect it? Could the owners hire and fire ministers with impunity? Could it exclude anyone from membership? Could it discriminate in hiring nonministers on the basis of their faith? In short, could such an entity function primarily as a community of faith, analogous to a "church" as it is commonly understood? 30 6

Such an entity would likely be viewed as a business engaged in political speech.30 7 Perhaps if it made and distributed very little profit, for instance, and functioned in every way like a church organized as a nonprofit, it might be considered a "church." But if it was not intended to make a profit, why would it choose to organize as a for-profit in the first place? It need not organize as a for-profit in order to reject tax exempt status; it can take on a nonprofit corporate form under state law, pay federal taxes and speak freely. Taking on a for-profit form suggests that profit-motive is involved. If the entity functioned primarily as a profit-making entity whose owners were religiously motivated, then it would likely be viewed more like the corporations in *Hobby Lobby* - and would enjoy religious freedom under a balancing approach, if available, but not autonomy. If it were so committed to making money, in fact, the sincerity of the faith claim would be called into question, and it would likely be viewed as a secular business with no religious claim at all. 308

In any event, organizing a church as a for-profit is not a realistic option for practical reasons. First, the tax-exempt status of churches, itself justified on autonomy grounds,30 9 is deeply interconnected with many other federal and state religious exemptions. 31 The whole web of protections, intended to further the independence of church and state, is built on the nonprofit nature of the religious community. 311 This pervasive nonprofit identity and the expectations built upon that identity create substantial precedent. Of course, one could challenge the government's use of "nonprofit" as a traditional indicator of religiosity in the new environment of blurred lines between nonprofits and for-profits and argue for unbundling the tax-exempt status, nonprofit form, and availability of other exemptions. But prevailing on such a claim would be difficult, given the predilection of courts to resist any recognition of authentic faith community in the context of commercial enterprise. 312

Even beyond the practical legal obstacles a for-profit church may face, the for-profit nature of the entity creates insurmountable obstacles to any "church" trying to function as a worshipping community. The notion that a church would be "owned" by someone, and that a product or service would be sold and the profits distributed to those owners is antithetical to our basic notions of a faith community. 313 Professor Usha Rodrigues elaborates:

The benefits of religion include spiritual experience, social support, a sense of identity and belonging, and a framework for dealing with existential questions. These attributes are simply inconsistent with a profit motive. It is unlikely that a congregant would derive a satisfactory spiritual experience or a sense of deep belonging from a church that sought primarily to make money or to advance the earthly interests of its owners. And it is difficult to imagine that a congregant would feel socially supported by a church that charged market rates for spiritual counseling or participation in group activities. The concept of a for-profit church is incoherent because what churches purport to offer is incompatible with maximizing profits. 314

In my view, while religion and profits may co-exist in some contexts, they do not when it comes to the core faith community.

*B. For-Profit Entities That Provide Goods and Services Exclusively to Churches or Distinct Religious Populations*

While it may not be practical or even possible to operate a church for profit, there are many businesses that serve the particular religious needs of churches and other distinct religious communities or populations; some of these businesses might even be church-owned or sponsored. Although they would not seek autonomy protections regarding members, they might seek categorical freedoms on questions regarding employment. They might seek 315 immunity under the ministerial exception or under Title VII's exemption. A federal district court recently held the ministerial exception inapplicable to a business; but the analysis from other courts faced with similar claims in the future is, of course, unknown.316 The Ninth Circuit has ruled out Title VII protection for any entity that charges beyond nominal fees, leaving both forprofits and many religious nonprofits outside the exemption; but the Third Circuit simply considers the for-profit/nonprofit nature of the corporation one of many factors in deciding if an entity is an eligible religious corporation. 317

When a for-profit entity exists for a religious purpose, it differs from the typical for-profit that is created for any legal purpose with a goal of earning profits. Consider a kosher or halal grocery. This business has a religious identity and purpose (the provision of religious goods); it performs an important function in the life of a religious tradition by serving an identifiable religious community and enabling members of that community to exercise their religion. It cannot abandon its commitment because of demographic or market changes, assuming its corporate documents ensure its continued religious commitments. These "religious for-profit" businesses seem to be jurisgenerative insofar as they reinforce religious norms and facilitate individual and collective religious belief.

Several courts have already recognized the independent religious character of such entities, and have afforded autonomy protection under the Establishment Clause, by striking laws regulating fraud in the kosher food industry.318 Although almost half the states have regulations protecting consumers from kosher fraud and mislabeling, 319 the courts that have invalidated such regulations found them to excessively entangle the government with religion, *inter alia*. The courts cited church autonomy cases as well as entanglement cases, which - like autonomy cases - are all about maintaining jurisdictional lines: church and state must not intervene in each other's affairs so that "each is left free from the other within its respective sphere. 32 ° Like autonomy cases, entanglement cases are categorical. Because entanglement is an Establishment Clause doctrine, it does not take into account impacts on identifiable persons or groups. So it is not surprising that in response to these decisions, many Orthodox Jews were concerned that they were deprived of basic consumer protection for the food they must purchase. 321

Consider another example of a provider of religious goods: a religious book publisher. When Tyndale Publishers challenged the contraception mandate, it described a business that is quite restricted to religious identity and purpose: it publishes and distributes Christian literature. 32 The publisher stood in sharp contrast to most all of the other businesses that challenged the mandate, which provided secular goods and services like arts and crafts supplies or wood cabinets. 323 As is clear from the amicus brief submitted by Christian, Mormon and Orthodox Jewish publishers in the *Hobby Lobby* litigation, religious book publishers and book sellers perform a critical function in the life of a religious community. 324

*Amici* provide ready examples of for-profit corporations intended to serve religious communities: Deseret Book is both a for-profit corporation intended to generate a return for the LDS Church and an instrument of the Church itself Religious publishers and booksellers such as Feldheim, Tyndale House, and [Christian Booksellers Association]'s members are for-profit businesses, but they also must select which books and other items are consistent with their religious persuasions, and a retailer typically needs to hire sales staff with compatible religious views. Other for-profit corporations exist precisely to serve religious communities with specific religious needs - such as kosher butchering, Islamic finance, or pagan supply stores. For these corporations, following religious practices dictated by religious law is essential. 325

While the brief argued only for recognition of for-profit religious exercise under RFRA's balancing test, the quoted language suggests an expectation of autonomy protection for this industry, at least with respect to employment.326 Would these businesses defend an employment decision using the ministerial exception? Would they invoke Title VII's exemption to hire only co-religionists? Indeed, Deseret Book might argue that Justice Brennan had precisely this type of church-affiliated publishing in mind when he noted in the *Amos* concurrence that it was "conceivable that some for-profit activities could have a religious character, so that religious discrimination [in employment] with respect to these activities would be justified in some cases.”11327

Keep in mind, however, that not all church-owned or church-sponsored for-profits are necessarily "religious for-profits," as the term is being used here, especially those that primarily earn money through secular, commercial 328 pursuits. The LDS Church owns multiple businesses, all organized as forprofits, with annual earnings in the billions.329 These include very lucrative real estate holdings and developments, agricultural enterprises like ranches and timber, media of all sorts - print, radio, television, digital - and an insurance business.33 ° With the exception of Deseret Book (and other media businesses, assuming they are devoted to the Mormon faith), the "religious forprofit" designation would not be appropriate.

Businesses that are religious for-profits act as significant, and in some cases necessary, adjuncts to the life of a religious community. Jews could not keep kosher without businesses that provided kosher food; likewise for Muslims and their halal diet. Numerous religious traditions rely on publishers that offer texts - both old and new - of a faith tradition. The faithful rely on religious television and radio stations for edifying programming. But do such businesses warrant autonomy in their employment decisions? Let's assume one of these businesses wanted to use the ministerial exception to defend a suit brought by a terminated employee whose duties involved core religious faith. For example, consider a supervisor of a kosher kitchen in a for-profit facility who claims he was terminated solely on the basis of age discrimination. Should the business be able to invoke the ministerial exception to defend the suit?331 Should these types of businesses be able to invoke the autonomy-based Title VII exemption to allow faith-based hiring when age discrimination is at issue?

Unless there are independent Establishment Clause or classic "church autonomy" reasons for providing such protection (as in striking kosher regulations because they involve the state in religious decisions), autonomy principles should not be available by constitutional mandate to these religious forprofits, even with the important role the businesses play in the life of a religious community. There are several reasons for this conclusion.

First, the distribution of profit to owners compromises the jurisgenerative nature of the entity. To qualify for autonomy, the institution must be "organized around a religious mission with a guiding doctrine and goal to facilitate individual and collective religious belief. 33 2 The fact that the enterprise is owned means it cannot be completely directed towards those goals; profit is a substantial goal.

Second, for-profits wield power in the economy, and impacts of categorical protections can be harsh on people who need to participate in that economy. There may be many commercial establishments with religious exercise claims, all the way from a small kosher butcher serving a local population to a national book publisher supplying numerous retail outlets. (Indeed, the book publisher's brief noted that even retail religious bookstores have to hire employees compatible with their message.) All told, these businesses, as market actors, have power within the economy. Excluding workers in entire sectors from certain types of legal protection (like some or all antidiscrimination laws) will have negative impacts on specific persons and groups, perhaps in numerous markets.

Denying autonomy protection to these businesses does not mean they enjoy no protection whatsoever. They are still businesses involved in religious exercise. Rather than the ministerial exception or the autonomy-based Title VII exemption, they might be able to rely on a balancing approach under statutory or constitutional provisions, if available, to protect a given employment decision. More specifically, these businesses might be able to rely on Title VII's bona fide occupational qualification protection. Under Section 703(e)(1) of Title VII, employers have the right to discriminate on the basis of "religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. 333 A kosher or halal business, or a Christian or Mormon book publisher or media company, may have compelling reasons for making a particular employment decision based upon religious qualifications - knowledge, experience, training, expertise. Between general balancing approaches and more targeted protections (including legislative solutions), there may be sufficient accommodation in the law without placing businesses within the autonomy framework. Indeed, one of the three corporate entities in *Hobby Lobby* itself, Mardel, is a chain of Christian bookstores. This is a religious for-profit, yet the Supreme Court treated it just like the other secular businesses in the litigation: within RFRA's balancing framework.

*C. For-Profit Entities That Provide Educational, Health and Social Services to the Public*

Universities, hospitals, social services and other charitable institutions are typically organized as nonprofits; while the outer boundaries of autonomy coverage are contested, these entities do enjoy autonomy protection on specific matters.334 It seems inevitable that for-profit corporations will soon be undertaking these institutional roles alongside nonprofits: the for-profit educational institution has taken its place in society (even if viewed with skepticism); for-profit hospitals are now common; and for-profit charities are bursting on the scene - the result of growing hybrid, "quasi-profit" corporations like the public benefit corporation mentioned earlier and Dan Pallotta's TED Talks. 335 Given these larger trends, it should not be difficult to imagine a for-profit with a religious identity and a religious mission traditionally associated with the non-profit corporate form. Indeed, we already have examples of churches or religious groups with for-profits in education, social services and health care. The question is whether the types of autonomy protection available to religious nonprofits in these areas should extend to religious forprofits.

In the area of education, older precedent exists, albeit created inadvertently. Bob Jones University in Greenville, South Carolina, gained notoriety in the 1970s and 80s with its racially discriminatory admission policies and rules of conduct. When it lost its tax-exempt status in 1983, this religiouslyaffiliated university - which had been considered a religious nonprofit, exercising a traditional nonprofit role as an educational institution - reorganized as a for-profit. Unlike the newer educational for-profits that tend to be technical training schools, this was a university with all the characteristics of a religiously-affiliated university. 336 This was unquestionably a religious forprofit: it had a clear religious identity and purpose, it served the function of educating students within a religious tradition, and its corporate governance ensured continuity with its religious and educational mission.337 Assuming it remains organized as a for-profit entity, should Bob Jones University get the benefit of the ministerial exception for certain positions? The Title VII exemption for religious educational institutions or the NLRB exemption for religious universities? 338 Or does its for-profit corporate form fundamentally change the entity such that it should not be understood to be within the jurisdiction of "church"?

Similar questions are raised in other contexts where intentional efforts to mix business and social responsibility are underway, thereby allowing the development of businesses with religious missions to serve social needs. 339 The "economy of communion" businesses, numbering about a thousand worldwide (with most outside the United States), are based on a model of business development that includes the sharing of resources and profits, improving business to expand job opportunities, and spreading the values of common humanity and gratuity.340 Professors Luigino Bruni and Amelia J. Uelman undertook a case study of over seven hundred of these businesses and concluded that "business endeavors may express religious commitments" through their service to the urban poor. 34 1 Whether these would be called "religious for-profits" would depend, I think, upon the degree of connection between the business and religious mission. For these groups, the profit motive is clearly tempered by communitarian and redistributive commitments; but while social norms are shared, a strong particularist religious identity may be lacking.

For-profits with religious commitments could blossom under the new "benefit corporation" model. Benefit corporations came on the corporate law scene in 2010, and almost forty states have either enacted or are considering enacting legislation that recognizes this corporate form. 342 A "benefit corporation" is a for-profit corporation that is authorized to consider the general or a specified public benefit in addition to profit maximization; indeed, their directors and officers are expected to implement the public mission and to take into account other stakeholders' interests. 343 The benefit corporation is thus free to pursue a social goal without being concerned that a shareholder will sue for failure to maximize profits; instead, shareholder suits are available to "compel the corporation to engage in the social benefit goals it was founded to achieve (even if such activities are at the expense of profits)." 344

Benefit corporations can be "formed in furtherance of religious purposes, much like a religious non-profit." 345 The popularity of the public benefit corporation is increasing, 346 so there is no telling what types of religious forprofits the future may bring. One can foresee any number of religious ministries organized under this corporate form. Marc Greendorfer argues that a benefit corporation "with a religious purpose in its statement of purpose should be seen as identical to a non-profit under the [autonomy] doctrine." 347 That obviously adds an entire class of corporations to the "church" jurisdiction, which would be unprecedented. Further, we have no way of knowing how they will operate in the market, what kind of power they will wield, and how extensive their autonomy impacts might be. Moreover, at a time when the inclusion of some nonprofits within the autonomy circles is contested, the doctrinal instability does not argue in favor of expansion.

Perhaps the most important question is whether public benefit corporations are capable of being jurisgenerative. Professor Usha Rodrigues makes a compelling case in the larger sociological context that these entities, in contrast to nonprofits, will fail to create "social identity." 348 Like any for-profit corporation, they may involve tiered investment, so that some investors expect very little return because of the socially beneficial purposes of the corporation, whereas other investors expect a market rate of return. Because an entity structured like this "could be different things to different investors," it may be "too much of a hybrid to claim to provide any identity benefits." 349 (And even without different classes of stock, investors still expect some return.) This suggests that religious benefit corporations may not be able to generate and reinforce norms of shared identity and facilitate individual and collective beliefs with the focus and intensity of a church or religious nonprofit. 350

Religiously-affiliated health care ministry poses a unique set of circumstances for this Article's inquiry. This ministry is often carried out by multiple entities - both nonprofit and for-profit - that are in various legal and financial relationships to each other, all as part of a larger religious nonprofit health care system. In Catholic health care, for instance, for-profit joint ventures with physicians and for-profit subsidiaries (wholly owned by the nonprofit religious systems) are common. Where they exist, such for-profit entities are part of a larger Catholic nonprofit hospital system and are under its control, share in its charitable mission and adhere to its ethical standards.3 5'

This use of for-profit entities may be wholly unrelated to profit motive; indeed, it may be driven by licensure requirements or the need for capital. For example, a Catholic nonprofit hospital system might set up a for-profit joint venture with physicians or a for-profit subsidiary physician practice because the state's law prohibits physicians from being employed or owned by nonphysicians.352 Or the choice to create a for-profit subsidiary for a managed care plan might result from the very practical difficulties of having one entity comply with both hospital and insurance licensing laws.

Such for-profit entities already come within the protection of health care conscience laws at the federal level and in nearly all states, which apply to individuals and institutions regardless of their nonprofit/for-profit status.353 The implementation of ethical standards for religiously-affiliated health care relies on the existence of conscience protection; and after four decades, forprofit health care entities, and the nonprofit religious health care systems of which they are a part, have come to expect uniform conscience protection. It is reasonable to assume that laws that protect corporate conscience on matters like abortion and physician-assisted suicide will continue to apply regardless of corporate form.

The harder question of course is whether, in areas beyond conscience (like employment), autonomy should be limited to nonprofit corporate forms when profit motive is not the primary driver of for-profit form. Indeed, a wholly-owned subsidiary of a religious nonprofit hospital - though for-profit in form - lacks profit motive. Why not consider such a for-profit entity to have jurisgenerative potential? Or take the following example, presented at a recent symposium on for-profit religious health care, 354 of a for-profit structured in a way that attempts to neutralize the impacts of profit-motive. 355 Despite a rather complex corporate organization, its identity as a Catholic institution is clear and meant to endure. First, the proponents of the model argued that "a for-profit organization can have a charitable mission. The point is, 'for-profit' describes our tax status; it *doesn't* describe our purpose. Our purpose is continuing the healing ministry of Jesus - *that* is our purpose." 356 In this joint venture, 80% is owned by a private equity firm whose investors expect a return and 20% is owned by a religious nonprofit. 357

[That nonprofit owner] has sole authority in perpetuity over compliance with interpretation and application of the Ethical and Religious Directives (subject to the local Ordinary), as well as all other elements of Catholic identity - for example, charity care and community benefit. So if any private-equity partner were to put pressure on you to abandon the mission, to walk away from the poor, walk away from the vulnerable, the answer is [the nonprofit owner] has sole control within the partnership over every element of Catholic identity ... in perpetuity. And so no ownership change in the company going forward can change that ....

An entity known in canon law as a public juridic person (approved by the Vatican) is the sponsor of the 20% nonprofit owner. 359 The hospital is intended to function in the life of the church like any Catholic nonprofit because it will be operated in the same manner as the nonprofits in the same 360 health care system. Thus, the corporate structure ensures that the Catholic mission is consistently maintained - a minority owner with full authority to preserve the religious identity and purpose.

Should such religious for-profits enjoy autonomy protection in the employment context, under the ministerial exception and Title VII exemption? Several federal courts of appeals have applied the ministerial exception to religious nonprofits, 361 outside the context of the church-minister relationship, "whenever that entity's mission is marked by clear or obvious religious characteristics." 362 Two of those cases involved hospital employees with specifically religious roles - a pastoral care associate and a chaplain. A federal district court has applied the Title VII exemption to a nonprofit hospital to allow it to terminate an employee engaging in practices at odds with the entity's religious identity. 363 Should these nonprofit applications of the au tonomy doctrine be available to the religious health care for-profits described above?

Even where profit motive may be lacking or restrained, this Article continues to resist the expansion of the autonomy doctrine. Ensuring the integrity of religious hospital systems that include for-profit entities is an on-going and vital task churches must perform; it is not simply something that is established once and for all time in corporate documents. 364 There is widespread agreement that the mission might be diluted rather than promoted by the inclusion of for-profit corporate forms, which makes it critically important that prudential judgments be made continually.365 Indeed, courts have voiced concern that partnerships or other ventures between financially weak religious nonprofits and strong for-profits might result in the loss of the charitable mission. 366 Given the relative recency of these nonprofit and for-profit collaborations, this Article continues to urge caution: to use a balancing approach on employment matters. When an employer impacts someone's livelihood, it should be required to articulate the religious issues at stake. Indeed, a for-profit entity that is tied to a religious mission might still receive free exercise protection in court or through a legislative or regulatory exemption. But the categorical protections of the autonomy doctrine should be avoided in this context.

## States CP

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#### Preemption is certain. AND, it can’t solve doctrinal stability.

Charlotte Garden 18, JD, Associate Professor, Law, Seattle University School of Law, "Religious Accommodation at Work: Lessons from Labor Law," Connecticut Law Review, Vol. 50, No. 4, pg. 855-876, December 2018, HeinOnline. [italics in original]

Cases about religious accommodations for employers could be recharacterized as cases about the scope of employer control.47 When employers successfully press religious liberty claims, the effect is deregulatory 48 ---certain employers are freed to exert control over or impose conditions on their employees in ways that would otherwise be unlawful. 49 Looking at these cases through this lens, readers can group religious freedom cases involving employers with cases arising in other areas of law (including labor law) that reflect explicit or implicit assumptions about enterprises' managerial prerogatives. ° Indeed, others have convincingly pointed out that many aspects of labor law reflect courts' assumptions about the scope of legitimate employer control; 51 religious accommodation cases seem to reflect the same judicial impulse, at least in part.

For example, as described in the previous section, deference to employer control is reflected in the way the *Catholic Bishop* Court articulated its reasoning, including in its observation that collective bargaining would "encroach[] upon the former autonomous position of management."52 That same impulse is also reflected in the handful of later Supreme Court cases in which religious employers have successfully claimed statutory or constitutional exemptions from certain minimum labor standards based on their religious beliefs. (The primary exception, in which an employer seeking a religious accommodation lost at the Supreme Court, involved a religious employer seeking an exemption from the minimum wage. 53) In contrast, the Court's cases involving religious accommodations for employees have had far more mixed results.

Post-*Catholic Bishop* cases in which employers won their religious exemption claims include *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 54 and *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,55 in addition to *Hobby Lobby*. The issue in *Amos* was whether Title VlI's exemption for religious organizations violated the Establishment Clause, particularly as applied to employment decisions involving employees who had secular duties-in *Amos*, a building engineer employed at a gymnasium that was open to the public.56 The Court held that Congress could reasonably have decided to draw the exemption broadly in order to remove from religious organizations the "significant burden" of "predict[ing] which of its activities a secular court will consider religious."57 In other words, the Court upheld Congress's decision to extend Title VII's statutory exemption to cover secular employees of religious organizations because a narrower exemption might result in litigation and therefore chill religious employers in their choice of co-religionists for some jobs.

In *Hosanna-Tabor*, the Court held that the "ministerial exception" was an affirmative defense to a ministerial employee's discrimination lawsuit, because churches had the right under both religion clauses to choose whom to employ as their ministers.58 In that decision, the Court equated managerial rights with the core of religious freedom, contrasting "outward physical acts" such as religiously motivated peyote use, with employment decisions that would "affect[] the faith and mission of the church itself."59 Thus, while the Court recognized that both peyote use and hiring or firing a ministerial employee could be motivated by religion, only the latter gives rise to an exemption from generally applicable law, a distinction that has been criticized by some commentators. 60 Additionally, the *Hosanna-Tabor* Court suggested the decision may not extend to employment eligibility cases-as Christopher Lund puts it, cases implicating the relationship between the employer and the government. 61 Thus, whereas it is easy to imagine a church arguing that its ability to hire a minister without work authorization in the United States was an employment decision that implicated its "faith and mission," the ministerial exemption likely does not apply.62 In other words, employment law is different: whereas many sorts of generally applicable laws may apply equally to churches as to other institutions, employment law does not.

The exemptions in *Catholic Bishop* and *Hosanna-Tabor* have at least two important similarities. First, neither the *Catholic Bishop* nor the *Hosanna-Tabor* standard demands that employers attempting to qualify for protection under either case actually state that an accommodation was necessary because of a conflict between their religious beliefs and secular law.6 3 Thus, a parochial school can avoid NLRB jurisdiction even if its leadership does not believe there is a conflict between collective bargaining and their religious commitments, and it can fire a ministerial employee for no reason other than a desire not to pay the costs involved in providing a reasonable accommodation that would otherwise be required under the Americans with Disabilities Act. Second, in neither case did the Court consider whether there was a way to compensate employees in part for their lost statutory rights and protections-instead, the only choices for employees who have lost statutory protections under either of these cases are to grin and bear it or to quit.64

For another indication that ideas about the importance of employer prerogative play at least an implicit role in religious accommodation disputes, we might look to cases involving the religious exercise rights of employees. That is, if norms about employer control influence congressional or court decisions about the scope of religious accommodations, then we would expect religious accommodations for employees to be narrower than accommodations for employers. And indeed, this is the case. Title VII of the federal Civil Rights Act contains protections for religious employees, including those who need an accommodation because their religious practices are inconsistent with employer work rules.65 However, Title VII's religious accommodation provision applies only if the desired accommodation does not cause "undue hardship on the conduct of the employer's business," 66 and the Supreme Court has held that an undue hardship includes anything that qualifies as "more than a de minimis cost."6' 7 As others have observed, this is a major limitation that sharply diminishes the usefulness of Title VII for religious employees, in contrast to its broadly protective approach to religious employers, as seen in *Amos*.

Moreover, the Supreme Court has held that there are limits to states' abilities to compel employers to accommodate religious employees. In *Estate of Thornton v. Caldor*, the Court struck down on Establishment Clause grounds a Connecticut statute that gave every employee an absolute right to refuse to work on his or her Sabbath.6 8 The Court's reasoning focused mainly on the burdens imposed on employers when employees exercised their rights under the statute. For example, the Court wrote that:

There is no exception under the statute for special circumstances, such as the Friday Sabbath observer employed in an occupation with a Monday through Friday schedule-a school teacher, for example; the statute provides for no special consideration if a high percentage of an employer's work force asserts rights to the same Sabbath. Moreover, there is no exception when honoring the dictates of Sabbath observers would cause the employer substantial economic burdens or when the employer's compliance would require the imposition of significant burdens on other employees required to work in place of the Sabbath observers. Finally, the statute allows for no consideration as to whether the employer has made reasonable accommodation proposals. 69

In that passage (and elsewhere in the opinion), the Court mentions both employers and nonadherent employees, seemingly expressing concern about the statute's effect on both groups. But closer inspection reveals that the Court's primary concern was the statute's infringement on employers' managerial prerogatives. First, there is the purpose of the statute itself, which was concerned with limiting employers' authority to fire workers at will for a single reason: refusing to work on the Sabbath. It did not, however, require employers to respond to that limitation by forcing existing employees to cover for their Sabbath-observing coworkers; instead, employers could have adjusted their opening hours or hired more employees who were willing to work weekends. Second, each of the burdens in the paragraph above is phrased in terms of restrictions or inconveniences that befall employers, not employees; even where employees are mentioned, it is in terms of the employer having to "impose" significant burdens on them-a construction that brings to mind an autocratic employer that adjusts to life under the statute by forcing unwilling (but nonreligious) employees to work on their coworkers' Sabbaths instead of taking any of the other available paths.

Taking these cases together, a picture emerges: where employers' rights are concerned, Congress and the Supreme Court have been willing to grant exemptions even at the cost of fundamental statutory protections for employees. Conversely, where employees' religious liberty rights are at stake, the Court has interpreted narrowly or even struck down the relevant statutes-again preserving employer control.70

#### It evicerates religious freedom (or RF) by undermining pluralism, inviting backlash, AND diluting otherwise legitimate protections. RFRA (or Religious Freedom Restoration Act) balancing is key.

Angela C. Carmella 15, JD, Professor, Law, Seton Hall Law School, "After Hobby Lobby: The Religious For-Profit and the Limits of the Autonomy Doctrine," Missouri Law Review, Vol. 80, No. 2, pg. 381-450, Spring 2015, HeinOnline. [italics in original; OCR error edited by Jordan]

It is critical that *Hobby Lobby* not be read broadly as a grant of autonomy protection to for-profit corporations. Surely it is a path-breaking decision, but it need not be a dam-breaking one. To constrain *Hobby Lobby*, it should be quite enough that the case was argued and decided under RFRA – a statute that embodies the balancing approach.7 6 Going forward, the case should be interpreted to mean that for-profit free exercise claims should be adjudicated (if they are adjudicated at all) within a balancing framework, with full attention to impacts on identifiable individuals and groups. 77 In fact, the Court's recent decision in *Holt v. Hobbs* unanimously reinforced the notion that RFRA requires a balancing and an impacts inquiry.78 In that case, which interpreted a RFRA-like "sister statute, ' 79 the Court pointed to both *O Centro* and *Hobby Lobby* to demonstrate its consistent understanding that statutory balancing requires it to "scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants .... ,,80 To depart from this highly structured approach and adopt "autonomy" in its place would introduce a disastrous expansion of a doctrine that is meant to be limited in scope and application.

II. THE APPLICABILITY OF THE AUTONOMY DOCTRINE TO CHURCHES AND RELIGIOUS NONPROFITS

One of the most significant functions of the Religion Clauses of the First Amendment is to ensure the autonomy of religious institutions - that is, the ability of churches to "manag[e] their own institutions free of government interference." 81 Autonomy under the Free Exercise Clause protects decisions regarding the religious identity and mission of those institutions we would consider to be jurisgenerative. 82 Freedom for such institutions to define and constitute themselves in order to generate and reinforce norms, in turn, furthers the religious exercise of individuals because it protects their voluntary decisions to affiliate with (or exit) religious communities. Obviously this autonomy is not without limits, but it is capacious enough to provide churches with the freedom to "select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions." 83 The Establishment Clause, which first and foremost expresses a fundamental jurisdictional independence of church and state, also bolsters this notion of autonomy: the state is not competent to "set up a church' 84 - to be involved in clergy selection, doctrinal determinations and ecclesiastical decisions. As a consequence, churches are free to function as significant non-state mediating institutions in civil society. The recognition of church autonomy thus furthers individual and collective free exercise, a healthy institutional independence of church and state, and a more diverse and vibrant civil society.

The importance of autonomy reveals itself wherever the core religious identity of a church might be vulnerable to state interference. Its origins can be traced to a Supreme Court decision made shortly after the Civil War that recognized that civil courts were incompetent to adjudicate religious questions, and so must defer to religious tribunals on matters of religious law; church members had impliedly consented to such internal church processes.85 Indeed, in a case in which a state court set aside a church's decision to defrock a bishop and ordered the church to reinstate him, the Supreme Court found this "an impermissible rejection of the decisions of the highest ecclesiastical tribunal of this hierarchical church," even though the church's conduct had been appallingly arbitrary. 86 While a complex body of "church autono my" jurisprudence has evolved over time to address church schisms and property disputes, the broader autonomy concept allows churches the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." 87 The doctrine ensures that state and federal governments steer clear of church beliefs; decisions regarding structure, governance, and mission; issues of church membership and leadership; many aspects of the church employer-employee relationship; and church decisions regarding sponsorship or affiliations with other institutions, charitable and educational, formal and informal. 88 Even the constitutionality of tax exemptions for churches is grounded in the notion that an exemption preserves the jurisdictional independence of church and state, as taxation of churches poses a far greater risk of excessive state entanglement in the life of churches than does the exemption.8 9

In the context of these protections for churches, and often for religious nonprofits as well, we find exemptions that have real, and often negative, impacts on identifiable individuals - employees, religious leaders, and members - whose participation in the life of the church may be conditioned upon "conforming to certain religious tenets., 90 In connection with this freedom in the employment context, Justice Brennan provided reasons for why this must be acceptable:

The [church's] authority to engage in this process of self-definition inevitably involves what we normally regard as infringement on [an individual's] free exercise rights, since a religious organization is able to condition employment in certain activities on subscription to particular religious tenets. We are willing to countenance the imposition of such a condition because we deem it vital that, if certain activities constitute part of a religious community's practice, then a religious organization should be able to require that only members of its community perform those activities. 91

In certain circumstances, the autonomy concept has also allowed religious institutions to tailor the provision of social, educational and health services to the public in ways that comport with their beliefs. While the application of autonomy considerations tends to be more nuanced and less consistent - and more contested - in this context (given the greater engagement with those outside the faith community), autonomy continues to ground many such accommodations. Whatever the context, autonomy-based exemptions will result in impacts on identifiable person and groups who will be without recourse to complain and who may suffer harms that are without legal redress.92

*A. Clergy and Other Employees*

The Supreme Court unanimously and enthusiastically reaffirmed the autonomy doctrine as applied to the selection of ministers, broadly defined, in the recent case of *Hosanna-Tabor Evangelical Lutheran Church* and *School v. Equal Employment Opportunity Commission*, where the Court recognized a robust "ministerial exception" to anti-discrimination laws.93 That doctrine prohibits government interference in the selection of its ministers, which is "an internal church decision that affects the faith and mission of the church itself",94 Cheryl Perich, a teacher at a church-sponsored elementary school, had been fired from a position that required a "call" from the church.95 Perich sued the church for reinstatement and damages on the grounds that the church had fired her in retaliation for threatening to bring suit under the Americans with Disabilities Act.9 6 The government urged the Court to reject the concept of the ministerial exception, which, up until this case, had been developed in the federal courts of appeals.97 In its place, the government argued that the generalized concept of "freedom of association" would sufficiently protect churches from government intervention in religious affairs.98

The Court found that Perich's duties - as they were regarded and functioned in the life of the church - made her a "minister" within the meaning of the exception. 99 The Court also rejected the government's argument, declaring that it "cannot accept the remarkable view that the Religion Clauses have nothing to say about the religious organization's freedom to select its own ministers."' 00 The Court explained that Perich's action "intrudes upon more than a mere employment decision":

Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions. 101

In short, allowing the teacher to seek legal recourse would constitute government interference in "faith and mission." 10 2 Thus, the *Hosanna-Tabor* Court concluded that "[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers."' 0 3

For clergy and any employees who are considered "ministers," 10 4 there is a startling lack of legal protection from virtually any kind of employment discrimination. 1 0 5 A church could engage in actual discrimination, having nothing to do with its exercise of religion, but the employee who is harmed would have no recourse. Indeed, ministerial exception cases usually involve allegations of discrimination based on race, 1 0 6 sex, 1 0 7 pregnancy, 1 0 8 age, 1 0 sexual orientation' 10 and disability.I"' We also see this story repeated outside the church context, as courts have applied the ministerial exception to religiously affiliated nonprofits like universities, I 1 2 hospitals"' and nursing homes114 on the theory that "an entity can provide secular services and still have substantial religious character."115 Yet dismissing these claims without further examination is required by both Religion Clauses." l6 For over forty years, courts have reaffirmed that the harmful effects of unredressed discrimination are simply outweighed by the necessary institutional freedom for a church or nonprofit to define its identity, faith and mission. 117 If we are to have vibrant religious communities and robust individual free exercise, religious institutions must have the ability to define and constitute, to perpetuate and reform, themselves. And so it is with many other exemptions that are either explicitly or implicitly driven by autonomy protections: their negative impacts on identifiable persons and groups are ignored.

Even employees who are not considered "ministers" can find themselves without legal recourse in cases of *religious* discrimination. Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination, and the Americans with Disabilities Act ("ADA"), which prohibits disability discrimination in a variety of contexts, including employment, both contain autonomy-based exemptions for religious entities." 8 Title VII's exemption allows "religious organizations" to discriminate on the basis of religion in favor of their own members or in favor of a particular faith, regardless of the religious or secular nature of the employment. 119 The exemption protects eligible religious organizations from all employment-related challenges, whether the claims involve hiring, discharge, harassment or retaliation. 20 In addition to churches, many religious nonprofits qualify for the exemption; 12' they do not have to be sponsored by or affiliated with a particular church.122 Moreover, the qualifying "religious organization," even if church-sponsored, does not have to require church membership in order to make employment decisions on religious grounds.123 Indeed, some courts have defined the exemption broadly so that it applies to cases in which employees have failed to comport their personal behavior to the religious employer's rules of conduct and moral standards.12 4

The main decision regarding Title VII's exemption is *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*. 125 In that case, employees working at church-affiliated facilities - including a janitor and a seamstress - were fired because they were no longer members in good standing of the Mormon Church.126 They challenged the Title VII religious exemption as a violation of the Establishment Clause on the grounds that their jobs were secular and that churches should be subject to anti-discrimination laws with respect to such secular positions. 27 The Court rejected the argument. 28 Justice White justified the broad exemption on autonomy grounds: it "alleviate[d] significant governmental interference with the ability of religious organizations to define and carry out their religious missions. ' 29 Justice Brennan's concurrence noted that government decisions regarding the religious-secular distinction would involve case-by-case inquires resulting in "excessive government entanglement ... and [would] create the danger of chilling religious activity."' 130 He went on to justify the exemption in terms of religious autonomy:

For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. *Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself*. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.13 '

Employees of church-affiliated entities may also find themselves without labor law protection, in particular without the protection of collective bargaining and the ability to unionize. In *National Labor Relations Board v. Catholic Bishop of Chicago*, the Court read the National Labor Relations Act to not authorize board jurisdiction over lay faculty at church schools in order to avoid the constitutional issues.' 32 The Seventh Circuit had concluded on the merits that National Labor Relations Board ("NLRB") jurisdiction "would impinge upon the freedom of church authorities to shape and direct teaching in accord with the requirements of their religion" and to control the "religious mission of the schools" in violation of the Free Exercise and Establishment Clauses.' 33 In contrast, the Supreme Court avoided reaching the merits, noting that "[i]t is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions."', 34 The decision was driven in particular by autonomy concerns over government entanglement in the relationship between the church and teachers in its schools.' 35

Further, in the context of higher education, courts have denied NLRB's jurisdiction, making it impossible for faculty to unionize at religiously-affiliated colleges and universities.136 \*\*\*FOOTNOTE BEGINS\*\*\* *See, e.g.*, Univ. of Great Falls v. NLRB, 278 F.3d 1335 (D.C. Cir. 2002). NLRB currently asks whether a religiously affiliated university has a "substantial religious character" in order to determine if it has jurisdiction for purposes of collective bargaining. *See id* at 1337. Because of concerns that such an inquiry could lead to entanglement and possible denominational preferences, the court has mandated a blanket exemption for all religiously-affiliated universities, without further inquiry, so long as they are nonprofit and hold themselves out to be religious institutions. *See id.* at 1341, 1347 (reasoning that in trying to determine whether a university had a "substantial religious character," the NLRB "engaged in the sort of intrusive inquiry that *Catholic Bishop* sought to avoid"); *see also* Pac. Lutheran Univ. & Serv. Emps. Int'l Union, 361 N.L.R.B. No. 157 (2014), 2014 WL 7330993 (Member Johnson, dissenting) (detailing cases). \*\*\*FOOTNOTE ENDS\*\*\*

*B. Members and Dissenters*

In addition to choices regarding clergy and employees, decisions regarding membership are central to a church as it defines and constitutes itself. It should therefore come as no surprise that autonomy considerations justify impacts on persons in the context of church membership. Of course churches usually "open their doors to all."' 137 Regardless of a church's openness or exclusivity, however, no court will tell a church that it must accept or reinstate a particular person as a member, or tell a church that it must reconsider a decision to exclude or change the status of a member. And yet the harm suffered by those without recourse is unmistakable. A particularly heart-rending case is *Anderson v. Watchtower Bible and Tract Society of New York*, in which a married couple who had been active in the Jehovah's Witness community for decades was expelled, or "disfellowshipped," because the wife was found guilty of causing unrest and division within the church when she publicly criticized the way the church was handling sex abuse claims."' As a result of the expulsion, the couple was "shunned" by other church members (including family). Their suit for $20 million in damages on multiple tort claims - including defamation, false light invasion of privacy, interference with business, breach of fiduciary duty, fraud, intentional infliction of emotion distress, and wrongful disfellowshipping - was dismissed in its entirety on church autonomy grounds. 139 As members, the plaintiffs had implicitly consented to the church's rules and governance structure. 140 "[T]he freedom of religious bodies to determine their own membership is such a fundamentally ecclesiastical matter that courts are prohibited from adjudicating disputes over membership or expulsion.' 4 1 Courts cannot review the correctness or fairness of such decisions; and the impacts from shunning, including real economic impacts resulting from loss of business from customers known through church membership, are not cognizable because the practice of shunning is "integrally tied to the decision to expel a member. ,,42 These claims simply could not be "adjudicated without inquiry into the religious doctrine and practice of the Jehovah's Witnesses and without resolution of underlying religious controversies."' 143

In addition to expulsion claims, numerous tort claims brought by members against churches have been similarly dismissed on autonomy grounds. 14 4 These are, in the author's view, unjustified under autonomy considerations, yet the hands-off approach persists.145 Attempts to create a standard of care for clergy counseling and mental health services, for instance, have been met with resistance: no state recognizes "clergy malpractice."1 46 Indeed, for a very long time, autonomy considerations obstructed negligence claims against churches in the clergy sex abuse litigation. 147 Although this has eroded in the context of massive scandals involved in moving pedophile priests from church to church, some tort claims continue to be dismissed despite egregious conduct by church defendants. 148

Some of the most emotionally-charged situations involve members challenging theological or financial decisions made by the church, which are gen erally not justiciable. 149 As noted above, there exists a long line of cases involving church schisms, where dissenting factions claim to be the "true" church and claim rightful ownership of church property. Dissenters in these cases will be turned away because even if they could "prove" that they were right on theological grounds, civil courts are not competent to adjudicate such questions.150 Beyond these classic dissenters from church doctrine, church members or parents of children who attend a religiously affiliated school sometimes challenge the legality of a church's decision to close its sanctuary or school. While the impassioned criticism and bad publicity occasionally pressure a church into changing its decision, there is little that can be done through litigation.152

Likewise, new rights to marry recognized in the civil sphere do not authorize courts to order a church to perform a religious ceremony for a samesex couple.' 53 Under both Religion Clauses, government is powerless to compel a church or clergy person to perform a religious ceremony or confer a religious privilege.' 54 This would strike at the heart of a church's autonomy. State statutes that recognize marriage equality typically include a section providing that no church or clergy person could ever be required to celebrate, solemnize or recognize such a marriage. 155 These provisions are politically necessary and have the value of clarity,156 but in reality they are redundant. While the couple might be able to sue a wedding photographer who refuses their business, 157 they cannot sue a church that refuses to marry them, regardless of the dignitary harm.

*C. Patients of Religious Health Care Facilities*

Religiously affiliated hospitals, like secular nonprofit and for-profit hospitals, hire professionals, serve the public, receive government monies, and are heavily regulated to ensure safety. It is not surprising, then, that as "commercial" nonprofits competing in the same market with nonreligious hospitals and treating patients without regard to religious affiliation, religious hospitals enjoy only very narrow autonomy protection: they may refuse to perform abortions and sterilizations in accordance with their institutional faith and mission. 158 These provisions are part of a larger set of conscience laws enacted to protect anyone - individual or institution - from being coerced into participating in these procedures or being penalized for refusing to do so. 159 Federal law, passed in 1973 in response to *Roe v. Wade*, and numerous state-level conscience clauses, give hospitals the right to refuse to perform abortions and sterilizations; 16 more recent legislation in some states has extended these protections to those refusing to provide contraceptive drugs and devices. 161 Laws regulating physician-assisted suicide, where in place, also exempt individual and institutional objectors from participation.162

These conscience laws protect the autonomy of churches, like the Catholic Church, that have defined and constituted themselves over the centuries not only as a worshipping community but also as multiple outreach ministries - including health care services - that give concrete expression to faith and mission.' 63 With one-sixth of all hospital patients cared for at Catholic hospitals, the Church's commitment to health care is substantial.' 64 Obviously a woman cannot obtain an abortion, sterilization or contraception in Catholic hospitals.' 65 Other facilities might provide these services, although in some communities there may be few or no alternatives. 166

*D. Contested Application of the Autonomy Doctrine*

The previous sections have described the autonomy doctrine and its broad categorical exemptions for religious employment and membership decisions, as well as its limited conscience protection for health care providers. These sections describe the potential and real consequences to employees, members, and patients. Yet the obvious must be stated: autonomy is at its strongest in the context of churches and their close affiliates, where consent to those consequences by members and employees can be more easily implied. Once we move to religious nonprofits, whether or not church-related, the appropriateness of the autonomy doctrine becomes more vigorously contested and less evenly applied. The consent of employees and others is more attenuated (or downright absent) in some of the nonprofit employment and service contexts. Indeed, many religious nonprofits whose mission involves pursuits that are not exclusively or primarily religious - like health care, education, and social services - may not be viewed as warranting the same level of identity and missional protection that churches and their close affiliates need. Especially in situations where employees are hired without regard to faith, where the public is served, where public monies finance at least some part of the operations, and where economic power is comparable to secular nonprofit or for-profit actors, religious nonprofits find themselves vulnerable to being treated like their nonreligious counterparts.' 67

Autonomy is a contested matter even in the Title VII and NLRB contexts. 168 Although it is true that the religious exemption to Title VII is applied broadly to eligible institutions, it is significant to note that the definition of an eligible religious organization is not settled. 169 Federal courts of appeals have developed at least five different tests for determining whether a religious organization is eligible for the exemption. 17 The Ninth Circuit, for instance, refuses to apply the exemption to nonprofits that charge more than a nominal fee for services, thereby rendering religious hospitals, day care cen ters, camps, and religious publishers ineligible.'7 1 The Fourth Circuit analyzes whether the mission of a religiously affiliated nonprofit has become secular over time. 172 Furthermore, even though some courts have read the exemption broadly to allow religious organizations to make employment decisions that involve sex discrimination because of the connection to church teachings, 173 other courts have held to the contrary. 74

Similar variations exist in the context of NLRB jurisdiction over religious colleges and universities. Despite the D.C. Circuit's *Great Falls* decision, which generally exempted religiously-affiliated nonprofit educational institutions, 175 the NLRB continues to use the "substantially religious character test" to distinguish between those religious institutions exempt from its collective bargaining requirements and those that fail the test and come within its jurisdiction. Indeed, it recently asserted jurisdiction over adjunct faculty members at religious institutions who are not held out as performing a "religious function." 76

The contested application of autonomy to religious nonprofits can also be seen in two specific contexts: the provision of employee benefits and the provision of social services to the public.

1. Employee Benefits

Until recently, churches and religious nonprofits were free to tailor their health insurance benefits to their religious teachings. 1 7 This allowed Catholic institutions, for instance, to provide insurance coverage for prescription drugs but not birth control. 178 Within the last two decades or so, more than half the states began to require that employers provide employees with insurance coverage for contraceptives as part of gender equity legislation.17 9 While most of these states had some kind of accommodation or opt-out for churches and religious nonprofit employers opposed to the coverage, 180 some state legislatures, like those of California and New York, provided an autonomy-based exemption only to churches and their close affiliates. 181 This narrow religious employer exemption was based on the assumption that employees in those settings would likely share the faith and consent to the withholding of coverage; in contrast, the assumption did not apply to employees of those religious nonprofits that hired without regard to faith.182 This meant that most religious nonprofits were not eligible for the exemption and were required, notwithstanding a moral opposition, to include contraception in their insurance packages.

In two high profile cases, the highest courts of California and New York held that religious nonprofits that did not qualify for the exemption had no constitutional right to be included within it, primarily because they had a religiously diverse workforce.1 83 Both courts refused to extend the autonomy principle because employees had not consented to be governed by their employer's faith. 184 Like the California and New York statutes, the ACA's contraception mandate provides the same type of narrow, autonomy-based exemption for church employers and affiliates. 185 Of course what differs is that although the broader class of religious nonprofits does not get the benefit of this exemption, it does enjoy the HHS Accommodation.' 86

A similar narrowing is underway in the context of the church plan exemption to the federal Employment Retirement Income Security Act ("ERISA"). 187 Church pension plans are exempt from many of ERISA's requirements, including prohibitions on benefit reductions, certain funding and vesting requirements, and insurance protection for pensions.' As a result, church employees with pensions do not enjoy the same level of retirement security enjoyed by employees with pensions subject to ERISA's requirements. Although it had been common for courts to allow the church plan exemption to apply to nonprofits associated with churches, recent judicial opinions have begun to reject this position and to narrow the church plan exemption to pension plans of churches. 1 89

2. Beneficiaries of Social Services

One might assume that autonomy is grounded in implied consent to be bound by the faith and internal organization and rules of a church. This is certainly a common theme that can be identified in many cases involving the ministerial exception, membership, and employment. 190 The jurisdictional nature of autonomy protection - placing the church and other religious nonprofit entities within a sphere of independent activity - seems to depend heavily on a notion of shared faith and mission among the members of a community. 191 And the jurisgenerative nature of autonomy also seems to depend upon this voluntarism: generating and reinforcing norms within a community and facilitating common belief and mission for an individual and group involves the choice to affiliate with a community.92

But as we have seen, autonomy protections are also extended to contexts outside a church community of "consenting" believers, to religious nonprofits that hire outside the faith and serve the public.1 93 Critics focus on the unfairness of exemptions that disadvantage employees and third parties - patients, clients, and students - who do not share the faith of the employer. 194 In the absence of consent, critics contend that autonomy should be limited to a narrow purpose: to protect the identity and mission of a particular church and to allow it the right to define and constitute itself. Indeed, Justice Ginsburg's dissent in *Hobby Lobby* proceeded on the assumption that the autonomy doctrine should apply only to hiring and serving within one's own community.1 95 Such a narrow conception of religious autonomy is unprecedented in both law and practice.

Defenders of autonomy-based exemptions (at least with respect to targeted issues) for religious nonprofits that hire and serve outside the faith offer several justifications. For these types of entities, the purpose of autonomy is to foster institutional free exercise broadly and to facilitate the participation of morally diverse non-state actors in civil society, as well as to promote the Establishment Clause's command of neutrality among different religions., 96 When the state is the only source of norms and requires all non-state actors to conform, then the jurisgenerative function of religious communities is subverted and the jurisdictional line obliterated. 97 In order to foster participa tion of diverse religious groups in the civil society and support truly voluntary choices, there must be some acceptance of moral diversity, at least on specific issues. 198 The argument goes like this: for groups that serve the public but tailor that service to their religious beliefs, the absence of specific consent is mitigated when there are other nonprofits offering the same services. In the overall scheme of non-state providers, then, more diversity supports the voluntary decisions of individuals to make choices.' 99 This conception is reflected in the faith-based initiatives of the Bush and Obama administrations, where beneficiaries of social services are supposed to have options among religious and secular providers. 200

The idea of diversity among service providers has been at the core of the exemption claims by Catholic adoption agencies that are morally opposed to placing children in same-sex households. 2 0 1 They have argued that same-sex couples have plenty of options for adopting, and that an exemption for agencies with objections would not impair anyone's ability to adopt.2 °2 This argument failed in Massachusetts and Illinois, where exemptions were denied on the grounds that government has an interest in eradicating the independent harm of discrimination, despite the availability of other adoption agencies to assist same-sex couples. 2 0 3 In response, several Catholic Charities agencies decided to terminate their involvement in adoption services altogether. 20 4 Harvard Law School Dean Martha Minow bemoaned the state's failure to negotiate some workable solution to retain these adoption services, because when Catholic Charities ceased to offer adoptive services the state lost an organization that had over a century of expertise in the field.2 °5

In contrast, however, Virginia and North Dakota recently enacted autonomy-based exemptions, which protect religious nonprofit adoption providers that object to placing children with same-sex couples. 2 0 6 Under these laws, objecting providers retain their licenses as well as government funds and contracts. 20 7

From the foregoing, it should be clear that churches as well as many religious nonprofits enjoy broad latitude in decision-making while ministers, members, employees, patrons, clients and patients might have very compelling stories of exclusion or harm which, in a different context, could give rise to various claims of discrimination, tort, or breach of contract. Autonomy considerations remain closely tied to the religious freedom of religious institutions and individuals: in a system of voluntary religious exercise, with individual rights to enter and exit churches, it is essential to preserve the freedom of churches to organize and perpetuate themselves. 20 8 On occasion, this autonomy is further extended to facilitate the larger project of ensuring diversity of non-state actors within a civil society. Where autonomy governs, courts and legislatures have decided that the consequences to identifiable persons and groups are overshadowed by paramount considerations of individual and institutional freedom. Obviously, the precise outer boundaries of the autonomy doctrine are highly contested, but the battles over line-drawing are being fought in the *nonprofit* context. To extend autonomy to businesses would fuel doctrinal confusion and invite an unprecedented lack of accountability.

III. WHY BALANCING, AND NOT AUTONOMY, IS APPROPRIATE IN THE FOR-PROFIT CONTEXT

*Hobby Lobby* should be read narrowly as a balancing case, rather than as an autonomy case for several reasons. First, the Court's decision is rooted in the assumption that employees will not be affected at all by the RFRA exemption. 2 0 9 In clear contrast, autonomy-based exemptions ignore the disadvantages that befall persons and groups left without legal protections. Second, *Hobby Lobby* makes no suggestion that employees have consented, even impliedly, to be governed by the faith of the corporate owners. In clear contrast, autonomy principles apply in very specific contexts of church membership and mission and in the delivery of many types of services through nonprofit organizations. 2 1° Autonomy is, at its heart, a consent-based concept; even where consent is attenuated or lacking - as in the case of nonprofit delivery of some kinds of services - the support for numerous diverse non-state actors in civil society is ultimately intended to promote consent by fostering multiple alternatives. 2 11

The jurisprudence of for-profit religion over the last fifty years, though admittedly sparse, suggests a clear demarcation between churches and religious nonprofits, on the one hand, and for-profit activities on the other.2 12 Balancing has always been the prevailing approach in the for-profit context. 213 Courts have resisted making connections between for-profit claimants and their religious communities, even where it would have been plausible to do so. 214 Courts have been unwilling to pull commercial enterprises into the religious sphere or to link them to the jurisgenerative function of religious communities and have denied recognizing any jurisgenerative function of their own. 215 Put bluntly, businesses are not churches.

Now that the Court has explicitly held that for-profit entities are capable of exercising religion, free exercise claims from closely-held, secular businesses owned and operated by people with religious convictions will likely surface. As for this class of claimants, an explicit autonomy argument is difficult to make; courts may more easily stay within the *Hobby Lobby* balancing framework. But *religious for-profits* - a potentially large class of entities - could make a plausible claim for the categorical protections offered by the autonomy doctrine. Religious for-profits, which provide religious goods and services or provide educational, health care and social services traditionally within the domain of nonprofits, are free-standing religious institutions rather than simply extensions of family businesses. In some instances, they function 216 in the same markets alongside religious nonprofits. These entities are made all the more possible by new corporate forms that facilitate combinations of charitable and religious mission alongside profit-making. 2 17 But despite the changes in corporate law that blur the traditional divide between nonprofits and for-profits, the religious for-profit is not capable of meeting the jurisdictional and jurisgenerative prerequisites for autonomy protection. Further, the harms to persons and groups that accompany autonomy exemptions would multiply in number and intensity if an entire class of market actors, wielding economic power over access to goods, services and jobs, were permitted to act without regard to those they employ and serve. And, finally, once the doctrine is expanded, protection will likely become diluted across the board. Churches and those religious nonprofits that warrant autonomy protection will see the doctrine eroded even in its core application. Courts must recognize that for all these reasons, the autonomy doctrine should not be extended to for-profits.

*A. The Blurring of Lines Between Nonprofit and For-Profit Entities*

The autonomy jurisprudence has developed in the context of nonprofit institutions. For centuries, churches and religiously affiliated educational, healthcare and charitable institutions have been the backbone of what is now called the nonprofit sector. 2 1 Because of society's heavy dependence on these institutions, their independence and protection came to be concretized in law.219 Indeed, traditionally there has been a comfortable fit between the nonprofit corporate form as an indicator of religiosity, and the for-profit form as an indicator of secularity. As Justice Brennan noted in *Amos*:

The fact that an operation is not organized as a profit-making commercial enterprise makes colorable a claim that it is not purely secular in orientation .... [U]nlike for-profit corporations, nonprofits historically have been organized specifically to provide certain community services, not simply engage in commerce. Churches often regard the provision of such [nonprofit] services as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster. 220

Both Justice Brennan and Justice O'Connor, in *Amos* concurrences, gave nonprofit organizations and activities a presumptive connection to religious mission. Justice Brennan noted that autonomy-based exemptions allowing religious-based employment discrimination for nonprofits "is particularly appropriate for such entities, because *claims that they possess a reli gious dimension will be especially colorable*.'' 221 And Justice O'Connor, expressing the traditional skepticism toward coupling profit motive with religiosity, noted, "It is not clear . . . that activities conducted by religious organizations solely as profit-making enterprises will be as likely to be directly involved in the religious mission of the organization." 222 Although Justice Brennan was willing to speculate that a religious nonprofit could be eligible for autonomy-based exemptions for some type of for-profit activity that had a "religious character," 223 no case law had developed that concept. In fact, a few years after Amos, when the Court of Appeals for the Second Circuit evaluated a claim by a church that wanted to demolish one of its historic buildings to construct a forty-seven-story commercial office tower, the court denied an exemption from historic preservation regulations - even though the revenues earned from this venture would have been used for ministry.224

Developments in corporate law, however, have resulted in a blurring of lines between nonprofits and for-profits. Many religious nonprofits are "commercial" nonprofits. 225 For instance, religiously affiliated hospitals and universities provide services to the public in exchange for money; they operate within markets in which they compete with secular nonprofits and for226 profits. In fact, many nonprofits do earn profits; rather than distribute them to shareholders, they are required to reinvest them in the corporation or spend 227 them to advance the corporation's purpose.

Even more significant are changes within the for-profit sector. The movement for corporate social responsibility (initiated largely by religious activists in the 1970s) has succeeded in getting many entities to embrace communitarian values in addition to, and even at the expense of, profitmaking.228 Many corporations have become leaders in advocating for a diverse workforce, paying just wages and benefits beyond legal minimums, and supporting social and charitable causes. 229 And while charitable works are still usually pursued through the nonprofit corporate form, a for-profit corporation is free to have a mission traditionally associated with non-profits. Google's establishment of the first "for-profit charity" provides a clear illustration of how for-profit and nonprofit categories have become increasingly interconnected.23 °

The Court mentioned these trends in *Hobby Lobby*. Responding to the statements of some federal courts that said for-profit corporations could not exercise religion because they were solely concerned with making money, Justice Alito wrote:

[M]odern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so. For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives.... In fact, recognizing the inherent compatibility between establishing a forprofit corporation and pursuing nonprofit goals, States have increasingly adopted laws formally recognizing hybrid corporate forms. Over half of the States, for instance, now recognize the "benefit corporation," a dual-purpose entity that seeks to achieve both a benefit for the public and a profit for its owners. 2 3 1

From this, Justice Alito extrapolated a principle: if for-profits can pursue nonprofit goals, "there is no apparent reason why they may not further religious objectives as well.''232 And indeed, long before the concept of the benefit corporation was introduced, some for-profit corporations have embraced an explicitly religious message. 233 Hobby Lobby's corporate documents commit it to operate in accordance with "Biblical Principles," which means that all 500 of its arts and crafts stores are closed on Sundays, at great financial cost to its owners; it does not engage in transactions that promote alcohol; it proselytizes through newspaper ads; and it contributes generously to Christian ministries. 234 As Professor Lyman Johnson noted, "[F]aith and spiritual values have influenced" even large companies, with a "leavening effect that a focus on non-economic values can have in a corporate culture.' ' 23 5 And like nonprofits, for-profits with goals beyond profit can function as mediating institutions between the individual and the state in civil society. 2 3 6

*B. The Use of Balancing in For-Profit Religion Jurisprudence*

Given the blurring of lines between the nonprofit and for-profit sectors, partnered with the Court's explicit holding that religious exercise is possible in the for-profit corporate context, the question turns to whether the autonomy approach available to religious nonprofits might also be available to forprofits. The relevant case law has remained and should remain squarely within the balancing paradigm.

Over the last fifty years, religious freedom claims made in connection with for-profit activities have fallen into two categories. The first involved individuals or entities claiming an exemption from a regulation that made it more expensive to practice their religion. 237 Because exemptions to remedy economic burdens often result in a competitive advantage for religious claimants over secular businesses in the same market,23 8 these claims were general y unsuccessful. The second category involved individuals or entities with conscience claims, as in Hobby Lobby, objecting to a law that forces participation in an activity the individual or entity considers sinful or immoral.

Those conscience claims came in a variety of areas, and the results have been mixed. In the 1990s, some landlords refused to rent apartments to cohabiting couples (which they were required to do under state anti239 discrimination laws). More recently, several pharmacists have refused to stock and sell emergency contraception; 240 several businesses have refused to 241 provide goods or services for same-sex weddings; 2 1 and some taxi drivers have refused to transport passengers carrying alcohol.242 And, perhaps most notably, the owners of the corporations in *Hobby Lobby* refused to direct their companies to pay for contraceptive coverage within the employee insurance 243 package. Such claims for exemptions do not give rise to the same "competitive advantage" noted above in the economic burden claims; indeed, refusals to provide a product or serve a customer tend to generate negative publicity against the objecting business. This became especially evident recently in Arizona and Indiana where business leaders vociferously opposed state legislation intended to protect the conscience claims of small businesses. 244

Some of these courts assessing conscience claims, as part of the balancing approach, considered not only an exemption's discriminatory impacts in the provision of commercial goods and services, but also possible mitigation of those impacts. The impacts on customers deprived of emergency contraception were mitigated by the practice of referring the customer to another pharmacy (as is commonly done when a drug is not in stock).24 ' And of course the *Hobby Lobby* Court assumed a total mitigation of impacts by an expanded HHS Accommodation. 246

*C. The Divide Between For-Profit Activity and Church*

Both the jurisdictional and jurisgenerative prerequisites for institutional autonomy claims have been missing in the for-profit religion jurisprudence. The Supreme Court has repeatedly resisted re-making businesses into churches or church-affiliated entities, even where it might have been plausible to do so, and has neither recognized the links between businesses and churches nor protected church-like internal operations of businesses. 247 The Court has been careful not to align businesses with churches in the autonomy discourse and has been careful not to suggest that a business is central to creating or reinforcing norms for a community of believers. 248 *Hobby Lobby* continues this restraint. In *Hobby Lobby*, the corporations were secular, commercial entities owned and operated by families with religious scruples, and the analysis centered on protecting the *owners'* religious exercise. True, the Court protected the corporate exercise of religion by finding an identity with the owners' faith; 249 but there was no discussion of a symbiotic relationship between the corporation and a church, nor was there talk of a church community created within the corporation.

*Hobby Lobby* is thus consistent with the Court's historic treatment of for-profit free exercise claims. In the 1961 case *Braunfeld v. Brown*, Orthodox Jewish business owners in Philadelphia sought an exemption from Sunday closing laws because their businesses were closed on Saturdays. 250 Closing on both weekend days meant serious financial loss and economic disadvantage. The Court held that "the Sunday [closing] law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive. ' 252 This "imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself .... ,,253 The Court noted a further justification: an exemption allowing these business owners to open on Sundays would give them an "economic advantage over their competitors" - those businesses that are required to close on Sundays.2 54 Thus, in an implicit balancing, the Court considered the exemption's harm to third parties - those businesses that were required to close on Sundays.

While *Braunfeld* is usually considered a simple case of economic burden, there is more to it. The holding suggests the irrelevance of any autonomy considerations. 255 No regard was shown for the local Orthodox Jewish community the businesses likely served - those customers who are now deprived of the ability to shop on Sundays. Had there been an Orthodox nonprofit whose activities were similarly curtailed on Sundays, it would have been easier to argue that its schedule should comport to the community it serves. But the Court never mentioned this. It was concerned only that Jewish businesses open on Sundays could take business away from merchants whose stores were closed. 256 In the for-profit context, the business is not understood to function like a worshipping community or like a religious nonprofit. Instead, the rules of commerce govern. 257

Two decades later, the Court considered several for-profit cases in which the employer and employees shared the same faith. A common faith could have justified an autonomy-based exemption on the grounds that it would have promoted the freedom of a religious community's identity and mission. But the Court used a balancing analysis instead, and declined to carve out exemptions, in part because of the strong desire to protect employees from the potential harmful impacts of such an exemption: employer coercion of faith and economic exploitation. The commercial context, with its commitment to a diverse workforce, prevented the Court from viewing the workplace in communal religious terms.

In the first decision, *United'States v. Lee*, an Amish farmer/carpenter employer sued for a refund of taxes, arguing that paying social security taxes violated his rights under the Free Exercise Clause as well as those of his em258 ployees, all of whom were Amish. The Amish refuse government assistance in caring for the elderly in their communities and therefore oppose paying into the social security fund.259 The Court found that while coerced participation in the social security system created a burden on Amish beliefs, that burden was justified because "mandatory and continuous participation in and contribution to the social security system" is "essential to accomplish[ing] an overriding governmental interest. 2 60 The Court analogized social security payments to more general taxation, noting that "religious belief in conflict with the payment of taxes affords no basis for resisting the tax. ' 26 1 Congress had already granted a narrow exemption to self-employed Amish, but to extend the exemption to everyone employed by an Amish employer could undermine the larger tax system. 26 Thus, the Court implied that the narrow exemption fulfilled the requirement that the government advance its interest in the least restrictive manner.

[E]very person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees. 263

This concern about an employer imposing his or her faith on the employees was unusual because all of the employees in this case were Amish.264 Since Edwin Lee had brought the case not only for himself but also on behalf of his employees, it appeared that this was not an element of the case before the Court. Indeed, it is clear that the identification of the burden implicated the Amish community generally. It was not only a burden on the employer's faith, but also a burden on "the Amish faith," Mr. Lee's faith, and the faith of 265 his employees. Although the Court refused to grant the exemption under the weight of the government's interest, it was acutely aware of communal meaning of the religious claim - that an exemption would protect the identity and faith of the religious community.266 In earlier case law the Court had been emphatic that the Amish faith pervaded every aspect of their lives,267 so, in this case, it would have been easy for the Court to acknowledge that a law regulating the workplace could threaten the religious community. But it did not, choosing instead to describe the employer and employee in adversarial terms. 268

Potential autonomy considerations also present themselves in *Tony and Susan Alamo Foundation v. Secretary of Labor*.269 The Alamo Foundation was a Christian nonprofit that served as a rescue mission and religious community to the poor and sick.270 The Foundation operated nearly forty commercial businesses to train its "associates" - converted criminals and addicts who did not consider themselves "employees. ' " 27 1 The Foundation did not pay the associates wages, but it did provide food, clothing and shelter. 272 The Labor Department characterized the relationship differently, arguing that these businesses were subject to wage and other terms of the Fair Labor Standards Act ("FLSA") and that the associates were employees entitled to the statute's protections. 273 The Foundation sued, challenging the applicability of the FLSA as a violation of the associates' free exercise and its own right to be free from government entanglement. 274 The Court found that the FLSA did apply and that Labor Department regulations explicitly provided that commercial activities of religious nonprofits were subject to its terms in order to avoid any competitive advantage. 275 The Court found that applying the FLSA to the Foundation caused no excessive entanglement in church affairs; it further found that free exercise rights of the associates were not burdened.276 The associates claimed quite vehemently that they did not want 277 to be paid wages. Their claim, on its face, was about their connection to the religious community and the religious freedom of the community.78 But the Court found that because the associates were already receiving in-kind benefits, and because the wage requirement could be met by in-kind pay ments, no actual burden resulted from inclusion in the FLSA statutory program. 279

Like the Amish employer and employees in *Lee*, the Alamo Foundation and its associates, though tied in a commercial relationship, were fundamentally connected to each other as a religious community. Both cases involved religious identity and mission. But the Court in both cases was concerned about harm to identifiable persons. In Lee, even though the employer and employees shared the same faith, the Court was concerned that an exemption would have the effect of allowing an employer to impose its faith on the employees. 280 And in *Alamo*, even though the associates claimed that they were volunteers doing work as part of their ministry, with no expectation of compensation, the Court was concerned that exemptions opened the door to exploitation or coercion by employers - in fact, there was some suggestion in the record that associates had suffered injustices in hours worked and punishments for poor work. 28 1 The Court in both cases refused to treat the workplace as a church, even in the face of what looked like shared faith among employees. 282

This resistance to analogizing a business to a church is reflected in lower federal court decisions as well. A year after the 1987 Amos decision, a forprofit corporation argued that it should enjoy the benefit of the Title VII exemption. In *Townley v. EEOC*, a manufacturing company defended a religious discrimination claim brought by a former employee by arguing that it was a "religious corporation" capable of making religion-based employment decisions. 283 The Townleys, owners of this closely held corporation, were religious and held weekly devotional services that employees were required 284 to attend. The Ninth Circuit rejected the argument that the business was a religious corporation, noting that the company was for-profit and not church affiliated, produced a secular product, and had no religious purpose in its 285 corporate documents. The fact that the Townleys were religious (and engaged in many religious acts through the company) was not enough to make the corporation "religious" within the meaning of the statute (or under the Constitution for that matter).2 86 While the Townleys were not required to abandon the devotional services, they were required by law to accommodate employees who did not want to attend.287 Protecting the rights of the owners would have negative impacts on identifiable persons: their employees.

The Townleys had tried to create a religious community at their workplace. They thought of the exemption claim for their corporation in autonomy terms: just like a church can control its membership, they wanted to control the company's pool of employees using religious criteria. 288 Each employee had to sign a statement agreeing to attend the devotional services and recognizing that they could be fired for failing to do so.289 The Townleys argued that with these signatures, employees waived their rights to seek accommodations for their own religious needs; further, the Townleys argued that the corporation was "founded to 'share with all of its employees the spiritual aspects of the company. ' 9° But the court held that the Townleys had to protect the religious rights of employees who objected to participation. 29 1 In rejecting the statutory and constitutional claims, the court made clear that in 292 the for-profit context, employers could not create a church. In essence, the court said - like the Supreme Court implied in *Lee* and *Alamo* - that the defendants, running a secular business, did not deserve the kind of autonomy enjoyed by a church.

Neither the Court nor the plaintiffs in *Hobby Lobby* suggested that the corporate plaintiffs or their owners were trying to create a church in the workplace. The owners incorporated to establish a business that would balance profit seeking and religious mission according to their own beliefs. 293 Their conscientious objection to providing contraceptive coverage to employees was not framed as a shared belief among employees. 294 The Court was quite clear that the thousands of employees of the objecting companies that are eligible for the coverage should and will receive it.295 In keeping with *Braunfeld*, *Lee* and *Alamo* (and consistent with *Townley*), the Court resisted any notion that the owners are doing anything other than demanding their own religious freedom in seeking to run their corporations in accordance with their faith.296

IV. THE TEMPTATION TO EXTEND AUTONOMY TO THE "RELIGIOUS FOR-PROFIT" AND WHY COURTS SHOULD NOT GIVE IN

Nearly all the businesses challenging the contraception mandate were closely-held corporations operated in accordance with religious beliefs but engaged in *nonreligious* endeavors like manufacturing and retail. 297 These "secular" for-profits stand in contrast to the category of "religious" forprofits, which are defined in this Article as corporations that provide explicitly religious goods and services or that engage in work traditionally undertaken by nonprofits. Indeed, two of the businesses challenging the mandate - a religious publishing house and a religious bookseller - are religious forprofits under this definition.298

It is impossible to know how *Hobby Lobby* will be applied to the free exercise claims of secular for-profits - whether narrowly, under a balancing paradigm, or broadly, under an autonomy paradigm. Obviously from the remarks thus far, this Article would argue that free exercise claims of secular for-profits should be constrained within a balancing framework. But the ultimate contention of this Article is that *balancing should apply even to those free exercise claims of for-profit entities that appear to make a plausible claim for autonomy: the religious for-profit*. Religious for-profits differ substantially from secular businesses like arts and crafts stores or cabinet manufacturers owned and directed by religious people. Religious for-profits need not be conceptualized as an extension of their owners' faith but can be viewed independently as entities possessing faith and mission, as entities with a religious character. 299 A religious for-profit might even have an unmistakable connection to a church or identifiable religious community or tradition.3 00 But even if it does not, it can still function to support or enliven a distinct religious community or tradition. Indeed, these entities would not exist *but for* a religious community or tradition. And because they are entities that endure past the lifespans of any individual, they can be established and organized in a way that ensures continuity of their religious identity, purpose and function. 301

Because of these characteristics, a court might be tempted to consider religious for-profits to be institutions that warrant autonomy protection. But the decision to do so would be dangerous. Autonomy gives religious entities protections that are categorical in nature, as a matter of constitutional design, and the negative consequences on identifiable individuals and groups are not taken into account. For-profits wield too much economic power and too many people would be made vulnerable to the harmful impacts of exemptions. It would be a mistake to add an entirely new class of entities to the class of religious institutions that currently enjoy autonomy protection. It is especially unwise to expand the circle of autonomy protection to include forprofits at a time (like now) when courts and legislatures are struggling to determine whether and when to grant autonomy protections to religious *nonprofits* that hire and serve beyond their faith communities and/or that wield economic power in ways similar to for-profit entities. 3 0 2 Are we really ready for business entities to claim protection under the ministerial exception for decisions regarding "positions of substantial religious importance, 30 3 or under the Title VII exemption, NLRB exemption, or other autonomy-based exemptions?

At first glance, the obstacles to viewing the claimants in *Braunfeld*, *Lee*, *Alamo* and *Hobby Lobby* as connected to and generating norms for a religious community do not seem to exist when we look at religious for-profits. Religious for-profits, unlike secular for-profits, are by their own definition connected to larger religious communities and traditions. Surely they create - or at least reinforce - norms and "are organized around a religious mission with a guiding doctrine and goal to facilitate individual and collective religious belief.'' 30 4 Does this render them jurisgenerative institutions that fall within the "church" jurisdiction on the church-state divide? In other words, are they similar enough to churches and religious nonprofits that they should receive protection under an autonomy approach? In this Article's view, the answer is no. Countervailing considerations, which will be described below, like the distribution of profits to owners, the role of for-profits in the economy, and the potential widespread impacts resulting from categorical protections, argue against the extension.

The discussion below focuses on the kinds of businesses that might press autonomy claims. As a preliminary matter, this Article entertains and rejects the possibility of a "for-profit church." After that, it considers two categories of entities most eligible for a "religious for-profit" designation. The first is comprised of for-profits engaged in traditional commerce: exclusively providing religious goods and services. The second category is comprised of for-profits with traditional missions: education, social services, and health care. Even with autonomy protections for nonprofits in certain circumstances, and even in the face of obvious analogies in the case of missiondriven for-profits, countervailing considerations must constrain the extension of autonomy.

*A. For-Profit Churches?*

It is well established that churches - core faith communities that gather for worship and that pass beliefs on from generation to generation - enjoy immunity from lawsuits under the ministerial exception and other autonomybased protections of their employment and membership decisions. Could a church, as we know it, be organized as a for-profit entity? One could imagine a person or group deciding to forego the benefits of federal tax exempt status (which is dependent upon a nonprofit form of organization) and organize a "church" as some form of business entity in which they would own shares, act as (or hire) ministers and open its doors to members. The for-profit entity would pay taxes and be free to participate in politics unencumbered by the Internal Revenue Code's restrictions. 30 5 But would the autonomy precedents protect it? Could the owners hire and fire ministers with impunity? Could it exclude anyone from membership? Could it discriminate in hiring nonministers on the basis of their faith? In short, could such an entity function primarily as a community of faith, analogous to a "church" as it is commonly understood? 30 6

Such an entity would likely be viewed as a business engaged in political speech.30 7 Perhaps if it made and distributed very little profit, for instance, and functioned in every way like a church organized as a nonprofit, it might be considered a "church." But if it was not intended to make a profit, why would it choose to organize as a for-profit in the first place? It need not organize as a for-profit in order to reject tax exempt status; it can take on a nonprofit corporate form under state law, pay federal taxes and speak freely. Taking on a for-profit form suggests that profit-motive is involved. If the entity functioned primarily as a profit-making entity whose owners were religiously motivated, then it would likely be viewed more like the corporations in *Hobby Lobby* - and would enjoy religious freedom under a balancing approach, if available, but not autonomy. If it were so committed to making money, in fact, the sincerity of the faith claim would be called into question, and it would likely be viewed as a secular business with no religious claim at all. 308

In any event, organizing a church as a for-profit is not a realistic option for practical reasons. First, the tax-exempt status of churches, itself justified on autonomy grounds,30 9 is deeply interconnected with many other federal and state religious exemptions. 31 The whole web of protections, intended to further the independence of church and state, is built on the nonprofit nature of the religious community. 311 This pervasive nonprofit identity and the expectations built upon that identity create substantial precedent. Of course, one could challenge the government's use of "nonprofit" as a traditional indicator of religiosity in the new environment of blurred lines between nonprofits and for-profits and argue for unbundling the tax-exempt status, nonprofit form, and availability of other exemptions. But prevailing on such a claim would be difficult, given the predilection of courts to resist any recognition of authentic faith community in the context of commercial enterprise. 312

Even beyond the practical legal obstacles a for-profit church may face, the for-profit nature of the entity creates insurmountable obstacles to any "church" trying to function as a worshipping community. The notion that a church would be "owned" by someone, and that a product or service would be sold and the profits distributed to those owners is antithetical to our basic notions of a faith community. 313 Professor Usha Rodrigues elaborates:

The benefits of religion include spiritual experience, social support, a sense of identity and belonging, and a framework for dealing with existential questions. These attributes are simply inconsistent with a profit motive. It is unlikely that a congregant would derive a satisfactory spiritual experience or a sense of deep belonging from a church that sought primarily to make money or to advance the earthly interests of its owners. And it is difficult to imagine that a congregant would feel socially supported by a church that charged market rates for spiritual counseling or participation in group activities. The concept of a for-profit church is incoherent because what churches purport to offer is incompatible with maximizing profits. 314

In my view, while religion and profits may co-exist in some contexts, they do not when it comes to the core faith community.

*B. For-Profit Entities That Provide Goods and Services Exclusively to Churches or Distinct Religious Populations*

While it may not be practical or even possible to operate a church for profit, there are many businesses that serve the particular religious needs of churches and other distinct religious communities or populations; some of these businesses might even be church-owned or sponsored. Although they would not seek autonomy protections regarding members, they might seek categorical freedoms on questions regarding employment. They might seek 315 immunity under the ministerial exception or under Title VII's exemption. A federal district court recently held the ministerial exception inapplicable to a business; but the analysis from other courts faced with similar claims in the future is, of course, unknown.316 The Ninth Circuit has ruled out Title VII protection for any entity that charges beyond nominal fees, leaving both forprofits and many religious nonprofits outside the exemption; but the Third Circuit simply considers the for-profit/nonprofit nature of the corporation one of many factors in deciding if an entity is an eligible religious corporation. 317

When a for-profit entity exists for a religious purpose, it differs from the typical for-profit that is created for any legal purpose with a goal of earning profits. Consider a kosher or halal grocery. This business has a religious identity and purpose (the provision of religious goods); it performs an important function in the life of a religious tradition by serving an identifiable religious community and enabling members of that community to exercise their religion. It cannot abandon its commitment because of demographic or market changes, assuming its corporate documents ensure its continued religious commitments. These "religious for-profit" businesses seem to be jurisgenerative insofar as they reinforce religious norms and facilitate individual and collective religious belief.

Several courts have already recognized the independent religious character of such entities, and have afforded autonomy protection under the Establishment Clause, by striking laws regulating fraud in the kosher food industry.318 Although almost half the states have regulations protecting consumers from kosher fraud and mislabeling, 319 the courts that have invalidated such regulations found them to excessively entangle the government with religion, *inter alia*. The courts cited church autonomy cases as well as entanglement cases, which - like autonomy cases - are all about maintaining jurisdictional lines: church and state must not intervene in each other's affairs so that "each is left free from the other within its respective sphere. 32 ° Like autonomy cases, entanglement cases are categorical. Because entanglement is an Establishment Clause doctrine, it does not take into account impacts on identifiable persons or groups. So it is not surprising that in response to these decisions, many Orthodox Jews were concerned that they were deprived of basic consumer protection for the food they must purchase. 321

Consider another example of a provider of religious goods: a religious book publisher. When Tyndale Publishers challenged the contraception mandate, it described a business that is quite restricted to religious identity and purpose: it publishes and distributes Christian literature. 32 The publisher stood in sharp contrast to most all of the other businesses that challenged the mandate, which provided secular goods and services like arts and crafts supplies or wood cabinets. 323 As is clear from the amicus brief submitted by Christian, Mormon and Orthodox Jewish publishers in the *Hobby Lobby* litigation, religious book publishers and book sellers perform a critical function in the life of a religious community. 324

*Amici* provide ready examples of for-profit corporations intended to serve religious communities: Deseret Book is both a for-profit corporation intended to generate a return for the LDS Church and an instrument of the Church itself Religious publishers and booksellers such as Feldheim, Tyndale House, and [Christian Booksellers Association]'s members are for-profit businesses, but they also must select which books and other items are consistent with their religious persuasions, and a retailer typically needs to hire sales staff with compatible religious views. Other for-profit corporations exist precisely to serve religious communities with specific religious needs - such as kosher butchering, Islamic finance, or pagan supply stores. For these corporations, following religious practices dictated by religious law is essential. 325

While the brief argued only for recognition of for-profit religious exercise under RFRA's balancing test, the quoted language suggests an expectation of autonomy protection for this industry, at least with respect to employment.326 Would these businesses defend an employment decision using the ministerial exception? Would they invoke Title VII's exemption to hire only co-religionists? Indeed, Deseret Book might argue that Justice Brennan had precisely this type of church-affiliated publishing in mind when he noted in the *Amos* concurrence that it was "conceivable that some for-profit activities could have a religious character, so that religious discrimination [in employment] with respect to these activities would be justified in some cases.”11327

Keep in mind, however, that not all church-owned or church-sponsored for-profits are necessarily "religious for-profits," as the term is being used here, especially those that primarily earn money through secular, commercial 328 pursuits. The LDS Church owns multiple businesses, all organized as forprofits, with annual earnings in the billions.329 These include very lucrative real estate holdings and developments, agricultural enterprises like ranches and timber, media of all sorts - print, radio, television, digital - and an insurance business.33 ° With the exception of Deseret Book (and other media businesses, assuming they are devoted to the Mormon faith), the "religious forprofit" designation would not be appropriate.

Businesses that are religious for-profits act as significant, and in some cases necessary, adjuncts to the life of a religious community. Jews could not keep kosher without businesses that provided kosher food; likewise for Muslims and their halal diet. Numerous religious traditions rely on publishers that offer texts - both old and new - of a faith tradition. The faithful rely on religious television and radio stations for edifying programming. But do such businesses warrant autonomy in their employment decisions? Let's assume one of these businesses wanted to use the ministerial exception to defend a suit brought by a terminated employee whose duties involved core religious faith. For example, consider a supervisor of a kosher kitchen in a for-profit facility who claims he was terminated solely on the basis of age discrimination. Should the business be able to invoke the ministerial exception to defend the suit?331 Should these types of businesses be able to invoke the autonomy-based Title VII exemption to allow faith-based hiring when age discrimination is at issue?

Unless there are independent Establishment Clause or classic "church autonomy" reasons for providing such protection (as in striking kosher regulations because they involve the state in religious decisions), autonomy principles should not be available by constitutional mandate to these religious forprofits, even with the important role the businesses play in the life of a religious community. There are several reasons for this conclusion.

First, the distribution of profit to owners compromises the jurisgenerative nature of the entity. To qualify for autonomy, the institution must be "organized around a religious mission with a guiding doctrine and goal to facilitate individual and collective religious belief. 33 2 The fact that the enterprise is owned means it cannot be completely directed towards those goals; profit is a substantial goal.

Second, for-profits wield power in the economy, and impacts of categorical protections can be harsh on people who need to participate in that economy. There may be many commercial establishments with religious exercise claims, all the way from a small kosher butcher serving a local population to a national book publisher supplying numerous retail outlets. (Indeed, the book publisher's brief noted that even retail religious bookstores have to hire employees compatible with their message.) All told, these businesses, as market actors, have power within the economy. Excluding workers in entire sectors from certain types of legal protection (like some or all antidiscrimination laws) will have negative impacts on specific persons and groups, perhaps in numerous markets.

Denying autonomy protection to these businesses does not mean they enjoy no protection whatsoever. They are still businesses involved in religious exercise. Rather than the ministerial exception or the autonomy-based Title VII exemption, they might be able to rely on a balancing approach under statutory or constitutional provisions, if available, to protect a given employment decision. More specifically, these businesses might be able to rely on Title VII's bona fide occupational qualification protection. Under Section 703(e)(1) of Title VII, employers have the right to discriminate on the basis of "religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. 333 A kosher or halal business, or a Christian or Mormon book publisher or media company, may have compelling reasons for making a particular employment decision based upon religious qualifications - knowledge, experience, training, expertise. Between general balancing approaches and more targeted protections (including legislative solutions), there may be sufficient accommodation in the law without placing businesses within the autonomy framework. Indeed, one of the three corporate entities in *Hobby Lobby* itself, Mardel, is a chain of Christian bookstores. This is a religious for-profit, yet the Supreme Court treated it just like the other secular businesses in the litigation: within RFRA's balancing framework.

*C. For-Profit Entities That Provide Educational, Health and Social Services to the Public*

Universities, hospitals, social services and other charitable institutions are typically organized as nonprofits; while the outer boundaries of autonomy coverage are contested, these entities do enjoy autonomy protection on specific matters.334 It seems inevitable that for-profit corporations will soon be undertaking these institutional roles alongside nonprofits: the for-profit educational institution has taken its place in society (even if viewed with skepticism); for-profit hospitals are now common; and for-profit charities are bursting on the scene - the result of growing hybrid, "quasi-profit" corporations like the public benefit corporation mentioned earlier and Dan Pallotta's TED Talks. 335 Given these larger trends, it should not be difficult to imagine a for-profit with a religious identity and a religious mission traditionally associated with the non-profit corporate form. Indeed, we already have examples of churches or religious groups with for-profits in education, social services and health care. The question is whether the types of autonomy protection available to religious nonprofits in these areas should extend to religious forprofits.

In the area of education, older precedent exists, albeit created inadvertently. Bob Jones University in Greenville, South Carolina, gained notoriety in the 1970s and 80s with its racially discriminatory admission policies and rules of conduct. When it lost its tax-exempt status in 1983, this religiouslyaffiliated university - which had been considered a religious nonprofit, exercising a traditional nonprofit role as an educational institution - reorganized as a for-profit. Unlike the newer educational for-profits that tend to be technical training schools, this was a university with all the characteristics of a religiously-affiliated university. 336 This was unquestionably a religious forprofit: it had a clear religious identity and purpose, it served the function of educating students within a religious tradition, and its corporate governance ensured continuity with its religious and educational mission.337 Assuming it remains organized as a for-profit entity, should Bob Jones University get the benefit of the ministerial exception for certain positions? The Title VII exemption for religious educational institutions or the NLRB exemption for religious universities? 338 Or does its for-profit corporate form fundamentally change the entity such that it should not be understood to be within the jurisdiction of "church"?

Similar questions are raised in other contexts where intentional efforts to mix business and social responsibility are underway, thereby allowing the development of businesses with religious missions to serve social needs. 339 The "economy of communion" businesses, numbering about a thousand worldwide (with most outside the United States), are based on a model of business development that includes the sharing of resources and profits, improving business to expand job opportunities, and spreading the values of common humanity and gratuity.340 Professors Luigino Bruni and Amelia J. Uelman undertook a case study of over seven hundred of these businesses and concluded that "business endeavors may express religious commitments" through their service to the urban poor. 34 1 Whether these would be called "religious for-profits" would depend, I think, upon the degree of connection between the business and religious mission. For these groups, the profit motive is clearly tempered by communitarian and redistributive commitments; but while social norms are shared, a strong particularist religious identity may be lacking.

For-profits with religious commitments could blossom under the new "benefit corporation" model. Benefit corporations came on the corporate law scene in 2010, and almost forty states have either enacted or are considering enacting legislation that recognizes this corporate form. 342 A "benefit corporation" is a for-profit corporation that is authorized to consider the general or a specified public benefit in addition to profit maximization; indeed, their directors and officers are expected to implement the public mission and to take into account other stakeholders' interests. 343 The benefit corporation is thus free to pursue a social goal without being concerned that a shareholder will sue for failure to maximize profits; instead, shareholder suits are available to "compel the corporation to engage in the social benefit goals it was founded to achieve (even if such activities are at the expense of profits)." 344

Benefit corporations can be "formed in furtherance of religious purposes, much like a religious non-profit." 345 The popularity of the public benefit corporation is increasing, 346 so there is no telling what types of religious forprofits the future may bring. One can foresee any number of religious ministries organized under this corporate form. Marc Greendorfer argues that a benefit corporation "with a religious purpose in its statement of purpose should be seen as identical to a non-profit under the [autonomy] doctrine." 347 That obviously adds an entire class of corporations to the "church" jurisdiction, which would be unprecedented. Further, we have no way of knowing how they will operate in the market, what kind of power they will wield, and how extensive their autonomy impacts might be. Moreover, at a time when the inclusion of some nonprofits within the autonomy circles is contested, the doctrinal instability does not argue in favor of expansion.

Perhaps the most important question is whether public benefit corporations are capable of being jurisgenerative. Professor Usha Rodrigues makes a compelling case in the larger sociological context that these entities, in contrast to nonprofits, will fail to create "social identity." 348 Like any for-profit corporation, they may involve tiered investment, so that some investors expect very little return because of the socially beneficial purposes of the corporation, whereas other investors expect a market rate of return. Because an entity structured like this "could be different things to different investors," it may be "too much of a hybrid to claim to provide any identity benefits." 349 (And even without different classes of stock, investors still expect some return.) This suggests that religious benefit corporations may not be able to generate and reinforce norms of shared identity and facilitate individual and collective beliefs with the focus and intensity of a church or religious nonprofit. 350

Religiously-affiliated health care ministry poses a unique set of circumstances for this Article's inquiry. This ministry is often carried out by multiple entities - both nonprofit and for-profit - that are in various legal and financial relationships to each other, all as part of a larger religious nonprofit health care system. In Catholic health care, for instance, for-profit joint ventures with physicians and for-profit subsidiaries (wholly owned by the nonprofit religious systems) are common. Where they exist, such for-profit entities are part of a larger Catholic nonprofit hospital system and are under its control, share in its charitable mission and adhere to its ethical standards.3 5'

This use of for-profit entities may be wholly unrelated to profit motive; indeed, it may be driven by licensure requirements or the need for capital. For example, a Catholic nonprofit hospital system might set up a for-profit joint venture with physicians or a for-profit subsidiary physician practice because the state's law prohibits physicians from being employed or owned by nonphysicians.352 Or the choice to create a for-profit subsidiary for a managed care plan might result from the very practical difficulties of having one entity comply with both hospital and insurance licensing laws.

Such for-profit entities already come within the protection of health care conscience laws at the federal level and in nearly all states, which apply to individuals and institutions regardless of their nonprofit/for-profit status.353 The implementation of ethical standards for religiously-affiliated health care relies on the existence of conscience protection; and after four decades, forprofit health care entities, and the nonprofit religious health care systems of which they are a part, have come to expect uniform conscience protection. It is reasonable to assume that laws that protect corporate conscience on matters like abortion and physician-assisted suicide will continue to apply regardless of corporate form.

The harder question of course is whether, in areas beyond conscience (like employment), autonomy should be limited to nonprofit corporate forms when profit motive is not the primary driver of for-profit form. Indeed, a wholly-owned subsidiary of a religious nonprofit hospital - though for-profit in form - lacks profit motive. Why not consider such a for-profit entity to have jurisgenerative potential? Or take the following example, presented at a recent symposium on for-profit religious health care, 354 of a for-profit structured in a way that attempts to neutralize the impacts of profit-motive. 355 Despite a rather complex corporate organization, its identity as a Catholic institution is clear and meant to endure. First, the proponents of the model argued that "a for-profit organization can have a charitable mission. The point is, 'for-profit' describes our tax status; it *doesn't* describe our purpose. Our purpose is continuing the healing ministry of Jesus - *that* is our purpose." 356 In this joint venture, 80% is owned by a private equity firm whose investors expect a return and 20% is owned by a religious nonprofit. 357

[That nonprofit owner] has sole authority in perpetuity over compliance with interpretation and application of the Ethical and Religious Directives (subject to the local Ordinary), as well as all other elements of Catholic identity - for example, charity care and community benefit. So if any private-equity partner were to put pressure on you to abandon the mission, to walk away from the poor, walk away from the vulnerable, the answer is [the nonprofit owner] has sole control within the partnership over every element of Catholic identity ... in perpetuity. And so no ownership change in the company going forward can change that ....

An entity known in canon law as a public juridic person (approved by the Vatican) is the sponsor of the 20% nonprofit owner. 359 The hospital is intended to function in the life of the church like any Catholic nonprofit because it will be operated in the same manner as the nonprofits in the same 360 health care system. Thus, the corporate structure ensures that the Catholic mission is consistently maintained - a minority owner with full authority to preserve the religious identity and purpose.

Should such religious for-profits enjoy autonomy protection in the employment context, under the ministerial exception and Title VII exemption? Several federal courts of appeals have applied the ministerial exception to religious nonprofits, 361 outside the context of the church-minister relationship, "whenever that entity's mission is marked by clear or obvious religious characteristics." 362 Two of those cases involved hospital employees with specifically religious roles - a pastoral care associate and a chaplain. A federal district court has applied the Title VII exemption to a nonprofit hospital to allow it to terminate an employee engaging in practices at odds with the entity's religious identity. 363 Should these nonprofit applications of the au tonomy doctrine be available to the religious health care for-profits described above?

Even where profit motive may be lacking or restrained, this Article continues to resist the expansion of the autonomy doctrine. Ensuring the integrity of religious hospital systems that include for-profit entities is an on-going and vital task churches must perform; it is not simply something that is established once and for all time in corporate documents. 364 There is widespread agreement that the mission might be diluted rather than promoted by the inclusion of for-profit corporate forms, which makes it critically important that prudential judgments be made continually.365 Indeed, courts have voiced concern that partnerships or other ventures between financially weak religious nonprofits and strong for-profits might result in the loss of the charitable mission. 366 Given the relative recency of these nonprofit and for-profit collaborations, this Article continues to urge caution: to use a balancing approach on employment matters. When an employer impacts someone's livelihood, it should be required to articulate the religious issues at stake. Indeed, a for-profit entity that is tied to a religious mission might still receive free exercise protection in court or through a legislative or regulatory exemption. But the categorical protections of the autonomy doctrine should be avoided in this context.