## 1AC---Full Text

### 1AC---Doctrinal Stability ADV

#### Advantage 1 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 and 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 is a template for global RF, undercutting broad persecution.

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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.

#### 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 AND results in loose nukes.

Dr. Sidra Akram et al. 25, PhD, Assistant Professor, Political Science, National Business School, The University of Faisalabad; Dr. Altaf Majeed, PhD, Scholar, International Relations, Government College University Faisalabad; Hira Arshad, Visiting Lecturer, Political Science, Government College University Faisalabad; Sufyan Fiaz, MS, Scholar, Fashion Design Management, Pakistan Institute of Fashion and Design, "Religious Intolerance: A Threat to World Peace," International Journal for Social Sciences, Vol. 4, No. 3, 08/27/2025, pg. 3935-3951.

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.

#### The plan solves AND ‘CBRs’ are key. They thread the needle between conflicting interests, deter overextension of exemptions, are predictable, AND downsides are overinflated.

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.

Regarding RFRA accommodations in the labor and employment context, there is one area in which both employers and employees should be able to agree (at least in the abstract): the interests of all concerned are served when accommodations are as narrow as possible, particularly if they burden third parties. Of course, narrow accommodations minimize encroachments on employees' interests. But, perhaps counterintuitively, religious employers are also better off when RFRA accommodations are narrow. As discussed previously, the sincerity determination will be much easier – and much more likely to come out in an employer's favor – if a desired accommodation will not yield secular as well as religious benefits for the person invoking it. 262 Finally, the Constitution itself demands narrowness: Justice Kennedy has observed that "a religious accommodation demands careful scrutiny to ensure that it does not so burden non-adherents or discriminate against other religions as to become an establishment." 263 Thus, five Justices (Justice Kennedy plus the Hobby Lobby dissenters) may agree that RFRA accommodations are permissible only where they do not burden employees. However, the remainder of this Section proceeds from the assumption that courts may entertain religious exemption claims that impose some degree of burden on employees.

It is difficult to say exactly what a religious accommodation might look like without knowing the precise scope of the conflict between the NLRA and a given employer's religious beliefs. However, this Section offers some suggestions regarding the procedure for settling on an accommodation, as well as strategies for minimizing an accommodation's burden on third parties. It uses as examples two of the most likely conflicts between an employers' religious beliefs and the NLRA: first, the risk that a union will bargain for a specific term (such as insurance coverage for contraceptives or abortion) to which the employer would object on religious grounds; and second, the requirement to bargain in good faith with a duly certified labor union in general.

Accommodation claims are not unique to RFRA; they also arise in other statutes, such as the employment provisions of the Americans With Disabilities [\*158] Act. 264 In that context, they are generally handled through an interactive process – one in which a disabled employee and an employer exchange information about how a job's essential functions might be restructured to accommodate the employee's needs. 265 This process can be easily adapted to the NLRA/RFRA context; in fact, as a statute that has bargaining at its core, the NLRA is uniquely well suited to an interactive process. In such a process, the person seeking the accommodation – here, the employer – would need to come forward, identifying the precise nature of the conflict between their sincere religious beliefs and the NLRA. 266 Then, assuming that the employer was entitled to an accommodation, the employer and the union – or, where that fails, the NLRB itself – would engage in an interactive process to shape the accommodation. This process has two main advantages. First, it is familiar: it would not need to be constructed from the ground up. Second, it is well suited to the task: the interactive process would allow the Board to educate the employer about the NLRA's requirements (which the employer might not understand correctly, particularly if it is unrepresented), and the employer to educate the Board about the precise nature of its religious objection – both necessary precursors to arriving at an appropriate accommodation. 267

As described above, if accommodations are to be made available to employers with religious objections to bargaining, the accommodations should be structured to eliminate or at least minimize burdens on third parties. One straightforward way of minimizing these burdens is to require employers to substitute something else that is of the same value to the employees, yet does not implicate the employer's religious beliefs. When the employer's religious objection to labor law is the risk that a union will seek an objectionable employment term during bargaining, this substitution can easily occur within the confines of the bargaining relationship itself. That is, the employer can simply tell the union what proposed terms it opposes on religious grounds - say, contraceptive coverage for its employees - and offer a substitute - say, increased compensation. If the union concludes that the two terms are not of equal value, it can propose a different substitute. To be sure, this raises the risk that unions might hold employers hostage, knowing that the value to the employer of remaining true to its religious beliefs is very high. However, this scenario is unlikely - unions cannot unilaterally impose contract terms, and their negotiating leverage comes mainly from the threat of strikes, during [\*159] which employees stand to be permanently replaced by their employers. 268 This strategy is risky, to say the least, and therefore unlikely to create a major obstacle to employers and unions reaching an agreement.

On the other hand, some employers may seek a complete exemption from the obligation to bargain collectively with their employees. One significant burden associated with such an exemption is the employees' lost chance to win improved pay and working conditions. This is not the only burden - employees would also lose the opportunity to exercise voice and self-determination at work - but it is the most tangible and, correspondingly, the most likely to prompt unscrupulous employers to make insincere accommodation claims. However, this burden can be at least partially ameliorated. Good aggregate data exist on the effect of unionization on employees' pay and benefits across a range of variables. Therefore, employers seeking religious exemptions from collective bargaining should be willing to accept that the price of bargaining is paying their employees the wages and other perquisites (such as for-cause protections from termination) typically enjoyed by employees who have had an opportunity to join a union.

To be sure, this accommodation is imprecise; there are by definition some employees who would have achieved more during bargaining and some who would have achieved less. Yet, if employers are going to receive religious exemptions from collective bargaining, those accommodations must take into account the corresponding losses of their employees' opportunity to improve their wages and working conditions through collective bargaining.

Conclusion

This Article has advanced a new, simplified way to address the conflict between employers' sincere religious beliefs and the requirements of labor law. First, a modest yet fundamental change in the application of the constitutional avoidance canon would better preserve Congress's lawmaking function by preventing entrenchment of Court lawmaking via the constitutional avoidance canon. Applying this adjustment to constitutional avoidance should lead to the retirement of the flawed Catholic Bishop decision, which essentially amended the NLRA without congressional approval. In its place, statutory exemptions from labor law should turn only RFRA's free exercise accommodation model. Applying that model leads to the conclusion that religious exemptions from labor law are, as a general matter, inappropriate both because the NLRA is the least restrictive means of furthering a compelling state interest and because of the burdens accommodations would impose on employees. But in any event, courts can minimize both the incentive to manufacture insincere religious claims and the burden of religious accommodations on employees by carefully structuring narrow accommodations that avoid needlessly burdening employees' labor rights. Often, bargaining itself will allow employers to [\*160] structure accommodations through self-help. Where this is not the case, then at minimum, employers should compensate employees for the lost opportunity to improve their wages through collective bargaining. Applying these principles faithfully should ensure that employees' collective rights are not lost as the Board and the Courts apply Hobby Lobby in the context of labor law.

### 1AC---Hospitals ADV

#### Advantage 2 is HOSPITALS.

#### Renewed fights will result in the disorderly unwinding of CBRs at religiously affiliated (or RA) hospitals.

Rachel S. Casper 23, JD, Greenfield Fellow, Bredhoff & Kaiser, PLLC, "Hospitals, God, and the NLRB," Northeastern University Law Review, Vol. 15, pg. 507, 2023, Nexis Uni. [italics in original]

The Board approach changed dramatically after the Supreme Court decision in *Catholic Bishop*. In *Catholic Bishop*, the Supreme Court construed the NLRA to exclude certain religious employers and certain groups of employees, namely teachers at parochial schools, from coverage of the Act.124 In so doing, the Court rejected the "completely religious" test articulated in Catholic Bishop of Baltimore and held simply that "[s]chools operated by a church to teach both religious and secular subjects are not within the jurisdiction granted by the [NLRA]."125 The Court expressed concern that there was a risk of excessive entanglement of religion in (1) [\*530] the NLRB's assessment of employer motivation when evaluating unfair labor practice charges, and (2) the NLRB's determination of mandatory subjects of bargaining.126 To avoid the "serious constitutional questions" that the Board's exercise of jurisdiction would introduce, the Court asked whether the NLRA "clearly expressed" an intention to cover these employers.127 Finding "no clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act," the Court construed the Act to exclude such employees.128

Since the constitutional avoidance case of *Catholic Bishop*, the Board and the courts have approached the question of unionization at religious organizations with varying success. In the years immediately following *Catholic Bishop*, the Board and the courts addressed unionization in religious healthcare facilities several times.129 That approach is discussed in depth below. Outside the religious hospital setting, several circuit courts and the NLRB held that *Catholic Bishop* does not extend to "church operated, non-school institutions," or non-teaching employees.130 In *Hanna Boys Center*, for example, the Ninth Circuit Court of Appeals held that NLRB jurisdiction over "lay child-care workers, recreation assistants, cooks, cooks' helpers, and maintenance workers" in a religious education and residential setting did not conflict with the Religion Clauses; *Catholic Bishop* did not extend to these nonteaching employees.131

This approach, however, was not universal. In *Riverside Church*, the Board declined to exercise jurisdiction over a non-school entity, a large "traditional house of worship," whose maintenance and service [\*531] employees sought to unionize.132 The Board held that it would decline jurisdiction if the religious employer operated "in a conventional sense using conventional means" and the secular employees were necessary for the employer to "accomplish their religious mission."133 Similarly, in *Faith Center-WHCT Channel* 18, the Board declined jurisdiction over the broadcasting engineers of a church radio station, finding its "purpose and function indistinguishable from 'conventional' churches."134 In both cases, the Board "wielded a broad brush" in finding seemingly secular employees essential to a religious employer's religious mission.135 Examples of the Board's approach abound; analysis of the Board's changing approach could alone fill an article.

The NLRB's approach to teachers' unions at religious schools stands apart. While *Catholic Bishop* is directly on point and controlling over teachers' unions at religious primary schools, its extension to religious colleges and universities, as well as non-teacher unions at religious schools, has varied.136 In 2002, in *University of Great Falls*, the United States Circuit Court for the District of Columbia held that the NLRB must decline to exercise jurisdiction when a religious school (1) "holds itself out to students, faculty, and community as providing a religious educational environment"; (2) is "organized as a nonprofit"; and (3) is "affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion."137 In 2014, rejecting the original *University of Great Falls* test, the Board considered Catholic Bishop's application to a unit of nontenure-eligible contingent faculty members at a religiously affiliated university.138 The Board in *Pacific Lutheran University* held that a religious college must not only hold itself out as a religious educational environment, "ostensibly accepting the first prong of the Great Falls test."139 The college must [\*532] also hold out "the petitioned-for faculty members themselves as performing a specific role in creating or maintaining the college or university's religious educational environment, as demonstrated by its representations to current or potential students and faculty members, and the community at large."140 In other words, the *Pacific Lutheran University* Board would require the school to hold itself out as a religious school and hold the faculty member out as playing a religious role. Explaining that both requirements demand an objective holding-out standard an objective inquiry that the *University of Great Falls* court already blessed141 the Board reasoned that this was permissible under the First Amendment.142

In 2020, both the NLRB and the D.C. Circuit rejected the *Pacific Lutheran University* test and reverted to the *Great Falls University* standard.143 In *Duquesne University*, the DC Circuit explained that the inquiry into the specific religious or non-religious role of faculty members posed an impermissible risk of constitutional violation.144 The court held that this refusal to "examine the roles played by various faculty members followed directly from *Catholic Bishop*."145 What this area of law will look like under the Biden Administration remains to be seen.146 No matter which way the Board and the courts go on this issue, however, the instability of this area is unavoidably clear. Such instability can, and should, be considered when organizing at religiously affiliated hospitals.

2. Religiously Affiliated Hospitals

Nearly one in five U.S. hospitals is religiously affiliated.147 Not all religiously affiliated hospitals, however, are what they seem. Professor Elizabeth Sepper has documented the emergence of "zombie religious hospitals," healthcare facilities that, through contract, were once [\*533] "secular, affiliated with other faiths, or operated as public hospitals [and now] assume new religious obligations and privileges."148 By the contractual terms of their sales, some "formerly religious hospitals maintain a religious identity," even when secular healthcare systems come to own the hospital.149 In other words, these are hospitals that may be owned and operated by secular corporations, may appear entirely secular to patients and employees alike, but retain a legally religious character through contractual obligations. Sepper continues that in "other instances, hospitals lose their religious affiliation after sale but continue their compliance with religious rules. Zombie religious hospitals removed of the leadership or mission that might have given them special status as religious institutions carry on."150

Identifying religiously affiliated hospitals sounds easy; it sounds like a niche category. To the contrary, Sepper explains that religious affiliation has proliferated, and the category is not nearly as circumscribed as it seems.151 While this phenomenon may exist outside of Catholic hospitals, its widespread practice has been documented in the Catholic hospital sphere: "In buying and selling, Catholic healthcare systems have populated the market with secular healthcare entities subject to Catholic restrictions."152

The issue of union organizing at religiously affiliated hospitals is no small question. It affects millions of workers and millions of patients at religious hospitals across the country.153 And that number both of religiously affiliated hospitals and the workers therein is growing.154 Early labor organizing efforts in the healthcare space affected both religious and non-religious hospitals,155 but collective bargaining grew stronger and more quickly in nonprofit hospitals without a religious affiliation.156 Before the Health Care Amendments to the NLRA, "religious hospitals had the lowest proportion of collective bargaining agreements of any [\*534] major hospital category."157 By 1980, despite the rate of union growth at religiously affiliated hospitals increasing, the percentage of religiously affiliated hospitals with collective bargaining agreements remained "nine percentage points below the corresponding percentage for their nonreligious nonprofit counterparts."158 Religiously affiliated hospitals have used religious arguments to oppose unionization since at least this period.159

The Board and the courts have repeatedly held that workers at religiously affiliated hospitals are covered by the NLRA and rejected contentions that *Catholic Bishop* applies to religiously affiliated hospitals. In the 1960s, the NLRB or state equivalents exercised jurisdiction over workers' unionizing and collective bargaining efforts at religiously affiliated hospitals.160 In 1980, in *St. Elizabeth Community Hospital*, the Ninth Circuit Court of Appeals held that the NLRB properly asserted jurisdiction over hospital service and maintenance employees, and that NLRB jurisdiction over this religious hospital did not violate the Religion Clauses.161 In so ruling, the court distinguished a parochial school and a religious hospital, noting that the primary purpose of St. Elizabeth, like that of secular hospitals, was health and not religion.162 In at least two 1980 cases, the NLRB relied on the specific inclusion of healthcare institutions in the 1974 amendments to exercise jurisdiction over religious hospitals, over the employers' First Amendment objections.163

In *Tressler Lutheran Home for Children*, in 1982, the Third Circuit Court of Appeals affirmed the permissibility of NLRB jurisdiction over a religiously affiliated nursing home.164 Echoing the Ninth Circuit in *St. Elizabeth Community Hospital*, the court noted that the primary function of the nursing home was care, not religion.165 The next year [\*535] in *St. Elizabeth Hospital*, the Seventh Circuit Court of Appeals held that NLRB jurisdiction over a religious hospital was permissible, rejecting the religious employer's contention that the Religion Clauses of the First Amendment precluded NLRB jurisdiction.166 Relying on earlier cases from the Third and Eighth Circuits, the court held that when an "institution's primary activity is secular, assertion of NLRB jurisdiction does not violate the institution's first amendment rights."167 The court also explained that *Catholic Bishop* does not compel a contrary conclusion.168 There, the Court found "no evidence that Congress intended to bring religious schools within the scope" of the NLRA, whereas "Congress specifically amended the [NLRA] to include non-profit hospitals."169 As such, the court concluded that Catholic Bishop "does not control."170

More recently, in 2000, the Board again held that the exercise of jurisdiction over a religiously affiliated hospital was proper in *Ukiah Adventist Hospital*.171 After the NLRB asserted jurisdiction over the hospital operated by the Seventh Day Adventist Church, one commentator stated that the religious hospital "must follow the same labor laws as other nonreligious hospitals."172 The Board in Ukiah applied the Religious Freedom Restoration Act ("RFRA"), which considers whether there was a substantial burden on religion and whether that burden was outweighed by a compelling government interest.173 The Board held that the hospital's "freedom to operate in accordance with its religious beliefs concerning labor organizations is outweighed by a 'compelling state interest' in averting labor unrest."174 In 2003, the Board relied on *Ukiah Adventist Hospital* to again reject a religious hospital's arguments under RFRA.175 As these cases demonstrate, the Board and the courts have, repeatedly and for decades, held that workers at religiously [\*536] affiliated hospitals are protected by federal labor law.

Organizing efforts at religiously affiliated hospitals have continued often successfully throughout the first two decades of the twenty-first century. While employer objection to unionization is widespread both amongst religiously affiliated hospital employers and others176 the shape of the objections has changed. Objections to NLRB jurisdiction on First Amendment grounds have abated in recent years, replaced with more commonplace anti-union rhetoric and arguments.177 Numerous examples exist of protracted and bitter fights between religiously affiliated hospital employers and unions, yet they nonetheless lack any suggestion that NLRB jurisdiction is impermissible.178 Rather, [\*537] the permissibility of NLRB jurisdiction is simply presumed.

As an example of religiously affiliated hospitals acceding to the permissibility of NLRB jurisdiction, 2009 Catholic hospital guidelines were titled "Respecting the Just Rights of Workers: Guidance and Options for Catholic Health Care and Unions."179 These guidelines culminated from a twelve-year process through which the United States Conference of Catholic Bishops worked collaboratively with representatives of Catholic healthcare systems, the AFL-CIO, Service Employees International Union ("SEIU"), and others.180 Although the guidelines are somewhat dated today, given the recent and rapid change in the federal courts around the Religion Clauses and labor law, they remain illustrative.181 The guidelines note management and labor's often differing "views on the usefulness and difficulties of the traditional [NLRB] process."182 They also set practical guidelines related to NLRB-supervised elections.183 Throughout, the guidelines assume NLRB jurisdiction, not once questioning the constitutionality of such jurisdiction.184 Even where noting management's aversion to certain practices, the permissibility of NLRB jurisdiction remains a given.185

An empirical study on the number of religiously affiliated hospitals with unionized workers today is outside the scope of this Article. Despite lacking the benefit of hard data, some qualitative and quantitative measurements can help inform the current landscape. The Catholic Labor Network tracks "Catholic hospitals and health care institutions whose employees enjoy the benefits of union [\*538] representation."186 As of the time of writing, the Network had identified more than 100 Catholic healthcare institutions in which at least some categories of workers enjoy union representation.187 These hundredplus institutions are located in at least twenty-one states and cover tens of thousands of healthcare workers.188

II. CONSTITUTIONAL LIMITATIONS: THE RELIGION CLAUSES DO NOT BAR NLRB JURISDICTION OVER EMPLOYEES OF RELIGIOUSLY AFFILIATED HOSPITALS

Courts, the National Labor Relations Board, and scholars have addressed the potential constitutional problems with NLRB jurisdiction over religious institutions, including religiously affiliated hospitals, in varying terms. Some have pointed out specific actions the NLRB can take that pose constitutional concerns, whereas others have contributed with lavish rhetoric and far-reaching threats.189 Courts and the Board (both across circuits and administrations) agree, however, that the Religion Clauses do not bar NLRB jurisdiction over employees of religiously affiliated hospitals.190 The Board and courts have repeatedly held that the constitutional avoidance case of Catholic Bishop holding that teachers at parochial schools are outside NLRB jurisdiction does not extend to workers at religiously affiliated hospitals.191

Although consensus has been strong, the shifting federal bench and Supreme Court in particular and shifting Religion Clause [\*539] jurisprudence warrants concern about the continued viability of consensus in this area.192 The institutionalization of religious freedom the expansion of the Religion Clauses to highlight religious institutions' freedom, rather than focusing on individuals' has been prominent in recent years. This institutionalization spans topics,193 but is especially prominent in the ever-expanding ministerial exception.194 Additionally, organized labor has repeatedly lost in the federal courts as the federal bench has grown increasingly anti-union.195 This combination of increasing focus on religious institutions' religious freedom and waning protection for organized labor indicates that previous consensus that the Religion Clauses do not bar NLRB jurisdiction over employees of religiously affiliated hospitals is tenuous at best.196

#### RA hospitals ensure rural access to care. Workers are key.

Robin Roenker 25, Contributor, Health Progress, "Rallying Around Rural Care: Hospitals Strive to Deliver Accessible Services," Health Progress, Fall 2025, https://www.chausa.org/news-and-publications/publications/health-progress/archives/fall-2025/rallying-around-rural-care--hospitals-strive-to-deliver-accessible-services.

Roughly 1 in 5 Americans — more than 60 million in all — live in rural areas across the country. For these residents of rural ZIP codes, locating accessible health care can feel like an uphill battle.1

The striking provider disparity between urban and rural areas in America is one key reason why. While urban areas currently average 31 providers per 10,000 people, rural areas have just 13 per 10,000 residents. And while urban areas boast 263 specialists for every 100,000 individuals, rural areas have only 30 specialists available per 100,000 people, according to the National Rural Health Association.2

Across the country, Catholic hospital systems are working diligently to bridge this divide and provide greater health care access to residents of small towns and farm communities.

When it comes to maximizing rural health care delivery, "It's really a theme of each patient getting the right care at the right place at the right time," said Kevin Post, DO, chief medical officer for Avera Health. To pursue that mission, Avera has prioritized "keeping the patient at the center of focus, while leveraging innovative tools" to support rural health care providers, Post said.

Other systems, including SSM Health and Intermountain Health, are doing the same. Drawing on innovative telehealth applications, creative staff recruitment initiatives and organizational models that optimize the reach of available staff and facilities, Catholic health systems strive to provide all patients with top-notch care, unhindered by community size.

RETHINKING RURAL CARE DELIVERY

Historically, rural residents have poorer health outcomes, on the whole, than those who live in urban areas.3 Death rates from heart disease, cancer, stroke and respiratory disease tend to be higher in rural areas,4 leading to a life expectancy for rural residents that's roughly 2.5 years lower than their urban counterparts — a gap that continues to widen.5 These outcomes are tied to a myriad of health determinants, from smoking rates and obesity rates to residents' access to nutritious food, health insurance and accessible health care, among other factors.

Hospital administrators said tackling this rural-urban disparity will require a multipronged approach, with telehealth programming serving as a powerful tool to help level the health care playing field.

Beginning with telehealth programming for critical care in 2014, Intermountain Health has grown its telehealth services footprint to include 105 programs, including telestroke, telehospitalist, teleoncology, telechaplaincy and telecrisis (behavioral health) services. The telehealth programs serve Intermountain Health's entire 33-hospital footprint, including five Catholic hospitals across Montana and Colorado, as well as 43 hospitals outside of the Intermountain Health system that receive services on a contract basis.

"Through telehealth, we can bring specialty care to the patients, instead of bringing the patient to specialty care," said John Williams, Intermountain Health's assistant vice president of telehealth services. Having access to specialists via telemedicine reduces travel time for patients, allowing them to receive expert care in smaller, local, critical access hospitals, which frequently do not have specialists, like neurologists, on staff.6

"If we have a patient who walks into the emergency room who is suspected of having a stroke, staff will call our command center to be immediately connected with our telestroke team," Williams said. "Typically, in under three minutes, [the remote specialists] are able to see that patient, and they're able to run through their assessments, using video technology, to work with the local physician or local APP [advanced practice provider], depending on how that hospital is staffed, to help develop a care plan for that patient."

Systems generally transfer patients to tertiary sites if a higher acuity of care or an ancillary service is needed to maintain quality and safety of care.

At Avera — where 37 hospitals serve a footprint of 72,000 square miles across South Dakota, North Dakota, Nebraska, Iowa and Minnesota — a similar approach uses telehealth to deliver specialty services, like cardiac or oncology care, to rural facilities without those specialists on staff. "Telehealth services allow us to leverage our care team to the top of license," said Post, noting that 90% of Avera's hospitals are critical access facilities with 25 or fewer beds.

"Our patients [in rural hospital settings] will see local, advanced practice providers, while getting remote access to specialists — perhaps back in Sioux Falls — so they really feel like they're getting cared for by a team," Post said.

Operating 23 hospitals across Illinois, Missouri, Oklahoma and Wisconsin, SSM Health, too, is "leaning heavily into telehealth to see how we can better open up care access for our patients," said Stephanie Duggan, MD, the system's chief clinical officer. She notes that SSM Health's adoption of specialty services using telehealth — including stroke services — is well integrated across their network. Their next goal: integrating primary care using telehealth just as effectively, drawing on a regional service model.

"We need to lean into [telehealth] resources in a different way," she said. "Telehealth can feel a bit impersonal, but if we can develop a regional telehealth center [where patients see the same, regionally based primary care providers] … we can help patients gain greater trust and confidence in the person on the other end of that camera."

Like many systems, SSM Health, Intermountain Health and Avera Health also use telehealth services paired with remote monitoring technology as a prevention tool. These programs provide real-time biofeedback for patients at risk of cardiovascular disease, diabetes or even prepartum7 or postpartum complications. This allows providers to identify and address possible red flags before symptoms progress to critical levels.

From a health care provider's perspective, having the support of telehealth services can, in some cases, lessen the challenges of accepting a post in a rural area, where staffing can be stretched thin. Avera is among the systems that have found success, for example, in implementing an artificial intelligence-supported virtual nursing program that lets remote, central hub teams use in-room cameras to monitor patient fall or bed sore risk, reconcile medications and do other routine tasks.8 This addition of "virtual eyes on beds" helps free on-site nurses to focus their expertise on other, high-level responsibilities, Post said.

Additionally, Intermountain Health found that hospitals using its nighttime telehospitalist services discovered it's now easier to retain staff, Williams said. "Because this service allows us to handle admit orders overnight virtually, on-site physicians no longer have to be on call 24/7. It allows the on-site teams to refresh and have some time with their families. As a result, these communities are able to recruit and retain physicians much more successfully."

BUILDING A RURAL WORKFORCE PIPELINE

Recruiting and retaining staff is a critical concern at rural hospitals and clinics, as it is everywhere in health care.

Administrators at SSM Health, Intermountain Health and Avera Health agreed that building a pipeline of rural care providers remains a key focus. Each system is developing specific outreach programming to address ongoing staffing needs.

"We have to have people see rural medicine in a different light," Duggan said, pointing to the power of offering on-site, rural shadowing opportunities for young physicians. "It's about showing [them] how vital and what an important role and a difference one can make by being a part of a smaller community," she said. "Often that is enough for them to say, 'Hey, maybe I could see myself living in a more rural community, even though I didn't grow up there.'"

For some providers, the rural setting is a real draw. SSM Health's two southern Illinois hospitals, St. Mary's Hospital in Centralia and Good Samaritan Hospital in Mount Vernon, for instance, have found notable success recruiting locally. Partnering with area community colleges, the hospitals offer a nursing extern program that allows current nursing students to gain hands-on training while still in school. To date, roughly 85% of program participants have gone on to accept full-time SSM Health nursing positions in either Centralia or Mount Vernon. The hospital system hopes to expand the program soon to include other modalities, including respiratory therapy.

#### Rural care is essential to contain pandemics.

Dr. Arush Lal 25, PhD, MSc, Advisor, Pandemics Programme, The Elders Foundation. Non-Resident Fellow, Planetary Health Equity, School of Regulation & Global Governance, Australian National University, "Fewer Clinics, Unhealthier People, Less Warning: The 'Big, Beautiful Bill' Will Make the US Less Prepared for Pandemics," Bulletin of the Atomic Scientists, 07/03/2025, https://thebulletin.org/2025/07/fewer-clinics-unhealthier-people-less-warning-the-big-beautiful-bill-will-make-the-us-less-prepared-for-pandemics/. [italics in original]

As I have argued with colleagues in *The Lancet*, access to primary health care is the cornerstone for preventing disease outbreaks and responding to health crises. Before an outbreak, primary health care providers manage chronic conditions that otherwise increase susceptibility to severe infection and provide early warning of budding threats. During a crisis, those providers help maintain continuity of care, deliver countermeasures, and support community engagement. After a crisis, they provide catch-up services and strengthens long-term recovery.

Outbreaks or pandemics involving novel pathogens, like the 2009 “swine flu” pandemic or H5N1 avian influenza, often affect rural and poor communities first—communities that disproportionately rely on social safety net programs to access care. These are precisely the communities that the bill targets for savings through reduced safety net spending. If local systems are unable to detect and contain outbreaks quickly, the consequences can escalate for public health and the economy. A poorly contained outbreak could prompt other countries to restrict travel, suspend trade, or sever supply chains—decisions that could deepen economic instability and erode the United States’ global credibility.

The United States has already seen more than 130 rural hospitals shut down since 2010, many of them in states that declined to expand Medicaid under the Affordable Care Act. Each closure can leave an entire county without ready access to care, delaying detection of everything from foodborne illness to respiratory outbreaks.

#### Future pandemics are existential.

Dr. Eoin McLaughlin & Dr. Matthias Beck 25, PhD, Professor of Economics & Head of Research, Department of Accountancy, Economics, & Finance, Edinburgh Business School; PhD, Professor of Management, Cork University Business School, University College Cork, "Managing and Mitigating Future Public Health Risks: Planetary Boundaries, Global Catastrophic Risk, and Inclusive Wealth," Risk Analysis, Vol. 1, pg. 1-25, 01/18/2025, Wiley Online Library.

One conventional GCR-type argument is that pandemics, as GCRs, can be mitigated and/or eliminated via public health interventions (e.g., Kilbourne, 2008). The view that pandemics can be easily mitigated is highly problematic on a number of counts. First, WHO research indicates that many diseases resulted in pandemics that have not been eliminated but rather are prone to ‘‘flare ups,’’ at times of pandemic proportions. Where ‘‘flare ups’’ occur, public health responses are sometimes insufficient with, for example, unequal access to vaccines; an issue that became evident during the 2009 influenza pandemic (Jorgensen et al., 2013). Second, increased presence, and or detection, of zoonotic pandemics again indicate a blurring of boundaries where climate related risk, pressures on food security, and population pressures make traditional PB and GCR boundaries increasingly difficult to define. This is exemplified by the recent avian influenza outbreak in the Russian Federation that, albeit identified as low risk, calamitously paralleled the ongoing Covid-19 pandemic (WHO, 2021b).

5 INTERACTION OF PLANETARY BOUNDARIES AND GLOBAL CATASTROPHIC RISKS

Interactions of risky and near-catastrophic events create risks at several levels (Helbing, 2013).18 There is discussion within the GCR literature on the interaction of risks, with research focusing on the impact on food security of a GCR, such as a pandemic or nuclear war (Helfand, 2013; Huff et al., 2015), but this seems less clearly discussed in the PB literature.19 Continuous interactions, at different scales, meanwhile, are seen as integral to the function of social–ecological systems (Reyes et al., 2018). Interactions are foundational to the understanding of complex systems and the aggregation of such interactions can lead to properties greater than the individual components (Cillers, 2013; Jensen, 2023), with key properties of complexity relating to interactions.20 Figure 6 is a representation of the approach taken in systematic risk, if there is only one risk within a system, then an assigning probability of risk to that element will suffice, but if there are multiple elements at risk, then the question becomes whether or not they are related and then, if they are related, what is this relationship (Hochrainer-Stigler, 2020). This relationship may imply dependence (interpreted as correlation) of risks or “tail dependence,” whereby the relationship is found in the tails of the distribution. Thus, an important consideration is whether the interaction of risks implies subadditivity, additivity, or supraadditivity (synergistic interaction) of risk; evidence suggests that the interaction of risks can amplify risks (e.g., Arrigo et al 2020). The challenge with such complex interactions is the difficulty in preparing, controlling, and managing these interactions once they do occur (Helbing, 2013). Synergistic risks would be of greatest concern in the context of PBs and GCRs as the impact would be greater than that of a risk in isolation.

[Figure omitted]

An historical example of how influential such risk interactions can be comes from the worst pandemic in the modern era:21 the 1918 influenza pandemic. Death estimates for this event are close to 3–5% of global population, but contextualization is needed.22 The 1918 pandemic coincided with the end of a global war; the First World War created the ideal conditions for the spread of influenza among a warweary population. Moreover, the war itself appears to have been given a low probability by contemporaries as judged by financial markets (Ferguson, 2006), this is despite historians documenting various international crises in years preceding the war. In contrast to the 1918 influenza pandemic, the less heralded global influenza pandemic of 1889–92 had a much lower death toll, with no other coinciding global phenomena. This demonstrates the dangers of extrapolating lessons from 1918 and applying them to modern events without contextualization- the pandemic was undeniably exacerbated by the global war—but at the same time, this illustrates the importance of the interaction of risks (Doran et al., 2024).

The interaction of risk has led to new understandings of risks that deviate from conventional risk management, such as the cardiovascular disease epidemic in the latter twentieth century, prominent among these are the study of ‘‘systemic risks’’ (Helbing, 2013; Renn et al., 2022). A now classic definition of systemic risk as a breakdown of an entire system rather than individual components of the system was originally applied in the context of financial systems (Kaufman & Scott, 2003). However, with increasing globalization and interconnectedness, the application has spread to various global risks (Lucas et al., 2018). While systemic risk has not been fully integrated in either PB or GCR framework, it is clearly applicable and some aspects of both risk paradigms (e.g., pandemics from infectious diseases, environmental risks, and risks from technology) are considered in early applications of systemic risk thinking (e.g., OECD, 2003). Although as systemic risks tend to be the interaction of individual risks, they tend not to receive the same level of attention as GCRs or PBs (Renn et al., 2022). Richardson et al. (2023) see PBs as being systemic, but this refers only to the Earth System, on which the PBs are based, and not spillovers to other risks or other systems. However, thinking of risks as interacting stresses the importance of not siloing thinking on risk. Effectively, both PBs and GCRs can be seen as extreme systemic risks as they threaten entire systems and the dynamic in which the risks are realized is either endogenously (through failures within the system) or exogenously (external attacks to the system) (Hochrainer-Stigler, 2020). Many of the PBs outlined are endogenous to human society, they are a result of the human system, while many GCRs are exogenous there are some that are endogenous. It is the endogenous risk where PBs and GCRs overlap.

#### Failures collapse otherwise stable rural communities.

Alison Coates et al. 25, MS, Assistant Professor, Rural Health, Clarkson University; Dr. Janice Probst, PhD, Associate Director, Rural & Minority Health Research Center, Arnold School of Public Health, University of South Carolina; Kanika Sarwal, MSc, School of Public Health Sciences, University of Waterloo; Dr. Suhaib Riaz, PhD, Associate Professor, Management, University of Ottawa; Dr. Agnes Grudniewicz, PhD, Assistant Professor, Management, University of Ottawa, "The Impact of Rural Hospital Closures and Mergers on Health System Ecologies: A Scoping Review," Medical Care Research & Review, Vol. 82, No. 5, pg. 359-375, 07/24/2025, SAGE.

Rural hospitals deliver health services, participate in population health initiatives, sustain healthy rural communities, and contribute to the economic health of their regions. Financial precarity among rural hospitals has increased, especially in states that did not expand Medicaid as provided for by the Affordable Care Act (ACA) of 2010 (Bai et al., 2020). Across the country, many rural hospitals have closed, leaving rural communities with diminished access to c are, or have sought merger or affiliation models to remain viable. Given that rural communities experience multiple disparities in health outcomes and social determinants of health compared to the United States population (CMS Framework for Advancing Health Care in Rural, Tribal, and Geographically Isolated Communities, n.d.), changes in availability of hospitals and health services could exacerbate rural health inequity.

Approximately half of the hospitals in the United States are located in rural areas, with 30% of these located in isolated regions, far from other population centers (Cecil G. Sheps Center for Health Services Research, 2024). Most rural hospitals are small; 90% have fewer than 100 beds and 63% have fewer than 26 beds (Cecil G. Sheps Center for Health Services Research, 2024). Unsurprisingly, rural hospitals average lower volumes than their urban counterparts (Harrington et al., 2020). In addition to traditional inpatient, emergency, obstetric, and surgical services, rural hospitals in the United States often provide outpatient primary and specialty care, diagnostic services, preventive health services, and participate actively in population health initiatives (Freeman et al., 2015).

Beyond their central role in health services delivery, rural hospitals contribute substantially to their local economies (Cordes et al., 1999; Frakt, 2019; McDermott et al., 1991; Wishner et al., 2016). These hospitals are usually among the largest employers in their region (Murphy et al., 2018; Williams, Reiter et al., 2020), providing jobs across a variety of skill and income levels. In addition to health care providers, hospitals employ clerical and technical staff to support scheduling, billing, and maintenance needs. Hospitals are thus both sources of income and employer-based health insurance for rural regions. Rural hospitals also sustain employment in other industries that support the hospital such as food, laundry, and construction (Frakt, 2019). All of these working individuals spend money in their local communities, contributing to a sustainable economy (Frakt, 2019; Holmes et al., 2006). Access to health care provided by rural hospitals impacts the broader community economy by attracting businesses and industry investments to the region and improving businesses’ ability to recruit employees (McDermott et al., 1991). While playing a central role in rural community well-being, the hospital must overcome a number of challenges (Douthit et al., 2015): populationrelated (Cosgrove, 2018; Coughlin et al., 2019; Matthews et al., 2017; Meit et al., 2014), geographic (Harrington et al., 2020; Lam et al., 2018), workforce-related (Coates et al., 2021; Cosgrove, 2018; Kaufman et al., 2016; US Department of Health and Human Services et al., 2020), and structural (Carroll et al., 2022; Probst et al., 2019). Several studies suggest that lower profitability (Cosgrove, 2018; Kaufman et al., 2016), low patient volume (Kaufman et al., 2016), and smaller market shares are antecedents of hospital closure (Kaufman et al., 2016). Financial distress is also reported to contribute to mergers or affiliations (Noles et al., 2015) as rural hospitals look to improve financial performance to survive (Williams, Reiter et al., 2020).

#### That prevents unsustainable levels of urban migration. Else, extinction from environmental destructtion.

Bishnupriya Sen 23, PGDM, Consultant, Risk & Financial Advisory, Deloitte, "Going Back to Move Forward: Incentivized Reverse Migration as a Pathway to Sustainable Development in Remote and Challenging Landscapes," International Conference on Sustainable Development, 10/25/2023, pg. 1-22.

At the same time, there has been a growing out-migration trend from these vulnerable rural areas to urban centers. Driven by the pursuit of economic opportunities and modern amenities, this urban-bound migration has led to depopulation and economic decline in remote areas. This shift has also resulted in overburdening resources and environmental degradation in urban areas due to population concentration (UNDP, 2022).

In this complex scenario, existing policy frameworks incorporating sustainability principles have insufficiently addressed the long-term existential risk to remote communities and ecosystems. A key challenge has been the drain of human resources from these areas. As such, there is an urgent need for innovative policy approaches that can balance sustainable development goals with the dynamics of human migration.

This paper proposes an alternative approach to incentivized reverse migration, where individuals and families are encouraged to return to their original rural homes. The core hypothesis of this study is that “Incentivized reverse migration can lead to sustainable development in remote and challenging landscapes and reduce environmental pressures in urban areas.”

The primary objective of this study is to explore the potential benefits and challenges of implementing policies that incentivize reverse migration, focusing on how such policies can revitalize rural communities, reduce urban overcrowding, and contribute to broader sustainability goals.

To address these aims, we will review existing literature on migration and sustainable development, analyze case studies of reverse migration, and explore stakeholder perspectives. Through this multi-faceted approach, this paper aims to provide a comprehensive understanding of incentivized reverse migration as a policy tool and offer actionable recommendations for policymakers and practitioners. In doing so, we hope to contribute to the vital discourse on achieving global sustainability in the face of mounting environmental challenges.

LITERATURE REVIEW

The topic of incentivized reverse migration to promote sustainable development in remote and challenging landscapes is a rich and complex study area, drawing on diverse strands of research in migration, urbanization, sustainability, and more. This review explores vital findings in these areas, providing an intellectual context for this study.

Rural-to-urban migration is well documented (Todaro & Smith, 2015), with economic prospects, better infrastructure, and quality of life as the primary drivers (Bilsborrow, 1992). Conversely, research on reverse migration is less extensive but growing, often focusing on the return migration of retirees or individuals seeking a lifestyle change (Stockdale, 2004). A recent surge of interest has been noted in the potential for incentivized reverse migration to solve sustainability challenges in rural and urban contexts (de Haas et al., 2020).

Another well-established research area is the vulnerability of remote and challenging landscapes to climate change and the corresponding impact on their communities. The IPCC’s (2021) special report highlights the disproportionate impact of climate change on mountains and small islands, with significant risks to biodiversity and local communities. UNESCO’s (2022) work on the linkages between Indigenous knowledge, and sustainable development underscores the value of these communities’ cultural practices in climate change adaptation.

Sustainability is a concept that has gained significant traction in policy and research circles. The Brundtland Report (World Commission on Environment and Development, 1987) defined sustainable development as development that meets the needs of the present without compromising the ability of future generations to meet their own needs. This concept has been further refined and is the cornerstone of the 2030 Agenda for Sustainable Development (United Nations, 2015).

However, the integration of sustainability principles into policy has proven challenging. A body of research examines the difficulties of sustainability policy implementation, from insufficient funding to political obstacles and economic trade-offs (Jordan & Lenschow, 2010). Research has highlighted that despite recognizing the risks of remote and challenging landscapes, policy responses have often fallen short due to lacking human resources (de Haas et al., 2020).

In summary, existing research provides essential context for this study. It highlights the pressing issues of rural-to-urban migration, the vulnerability of remote landscapes to climate change, the necessity of sustainable development, and policy implementation challenges. This study aims to contribute to the ongoing discourse on innovative approaches to sustainable development by situating incentivized reverse migration within this context.

HYPOTHESIS

The central hypothesis guiding this research is as follows:

“Incentivized reverse migration can significantly contribute to sustainable development in remote and challenging landscapes and relieve the environmental pressures caused by overpopulation in urban areas.”

This hypothesis posits a potential solution to two significant and interconnected challenges – the existential risk that remote communities and ecosystems face due to climate change and the overburdening of resources and environmental degradation in urban areas resulting from urban-bound migration.

There are several reasons to propose such a hypothesis. First, previous research has indicated that human populations in remote landscapes play a crucial role in maintaining biodiversity and that their depletion could negatively impact these fragile ecosystems (Cincotta & Engelman, 2000). Second, it is established that urban overpopulation leads to resource overexploitation and environmental degradation (UNDP, 2022).

#### The plan solves:

#### 1. LABOR RELATIONS. CBRs improve hospital effectiveness AND prevent burnout.

Rachel S. Casper 23, JD, Greenfield Fellow, Bredhoff & Kaiser, PLLC, "Hospitals, God, and the NLRB," Northeastern University Law Review, Vol. 15, pg. 507, 2023, Nexis Uni. [italics in original]

Factors specific to this historical moment make comprehensive campaigns for neutrality and private recognition procedures at religiously affiliated hospitals uniquely likely to succeed. COVID-19 and the harrowing and deadly experience of the United States in 2020, 2021, 2022, and beyond, strengthens labor's bargaining position. The COVID-19 pandemic strengthens the "hand of unions looking to organize more healthcare workers."3 47 COVID -19 has not only mobilized healthcare workers for their own solidarity but has also increased community support and advocacy for these "hero" essential workers. 348 The resolve of workers combined with this community support presents a unique opportunity for the cause of organized labor. Workers can use the sheer economic power of labor and community to better their working conditions and get the respect, dignity, and terms and conditions of employment they deserve.

1. Community Support

With or without a global pandemic killing millions of peoplehighlighting the essentiality of healthcare workers and putting healthcare workers lives at risk-supporting healthcare workers is relatively easy. Healthcare workers are, to put it simply, easy to like and support. Healthcare workers help us when we are vulnerable, they save lives, they are ubiquitous in our media and psyche, they are a "light in the face of uncertainty." 349

Healthcare workers are not only healthcare "heroes," but they are heroes who have been "traditionally among the lowest paid" workers in the nation's economy.350 While healthcare heroes are underpaid, hospitals, including religiously affiliated hospitals, are often multibillion-dollar corporations. 35 Healthcare workers fighting against hospital systems truly look like David fighting Goliath; and who doesn't like an underdog? Hospitals, including religiously affiliated hospitals, tend to look "much more like big businesses, paying their CEOs millions of dollars and charging patients high rates for care." 352 Illustrative is one religiously affiliated hospital that boasted of "$97 million in firstquarter profits . . . even as it [spent] millions to fend off a strike the singular stated mission of which [was] to improve patient safety." 353 To repeat: David vs. Goliath.

Not only are healthcare workers the underdog, but they are also the underdog fighting for the community. The fight of healthcare workers is a fight for patients.354 As unions and workers fight for better working conditions, they are necessarily fighting for better patient conditions.3 55 Healthcare union demands regularly include better staff-patient ratios, for example. 56 Such ratios are "a life and death issue in any medical facility," and unions "are champions of safer staffing ratios that lead to better patient outcomes." 357 Even worker demands like increased wages that seem somewhat removed from patient care conditions have been shown to benefit patient care. 358 Looking to patient care during COVID-19 in particular, some studies have shown that unionized healthcare facilities have better patient outcomes, including lower COVID-19 mortality rates, than facilities without unionized workers. 359 Because of this common-good unionization, or "bargaining for the common good," which coordinates union "demands with those of their community allies,"3 60 communities have a stake in labor's fight in general, and particularly at hospitals.

A common retort to the argument that healthcare worker unions benefit patient care is that unionization leads to strikes and strikes hurt patient care. 361 Although true that strikes in healthcare "can affect care quality, strikes and slowdowns are rare" in the healthcare industry.362 Rather than strikes and slowdowns, healthcare unions often use "nontraditional workplace tactics including work-to-rule, regulatory interventions, lobbying, and community, patient, and stakeholder mobilization. "363 In 2012, for example, the Bureau of Labor Statistics "identified only 8 health care work stoppages involving 1000 or more workers .... With over 3 million RNs in the United States, this is not a lot of nurse-related work stoppages."3 64 Moreover, "a11 8 were short; 5 lasted for 5 days and 3,just 1 day each." 365 While such actions may affect patient care, these short actions "are often symbolic rather than intended to shut down the activity of the hospital."3 66 Additionally, when there are strikes like these, they are "highly regulated, requiring advance notice and other patient safeguards." 367

Community support for healthcare workers is not hypothetical. Community support for healthcare workers, especially in the face of the COVID-19 pandemic, is already strong. For example, in a recent contract fight with a religiously affiliated hospital system in Buffalo, elected officials wrote letters to hospital management in support of the union.3 6 These officials noted that the contract proposals were "completely unacceptable to the heroes who got us through last year."3 69 A petition with thousands of community signatures called on the religious employer, Catholic Health, to "increase staffing and wages."'70 Moreover, public support of unions generally is up.371

Community support is a central factor in the success of a comprehensive campaign for voluntary union recognition, a mutually beneficial recognition procedure, and employer neutrality. When workers organize outside the confines of NLRB jurisdiction, sheer economic power is what gets employers to the bargaining table. Worker power depends on community support. Workers at religiously affiliated hospitals are in an excellent position to garner community support and bolster successful comprehensive organizing campaigns.

2. COVID Has Exacerbated a Healthcare Worker Shortage

Community support is a windfall for healthcare workers, but it is far from the only factor on labor's side. There is a dearth of healthcare workers in the United States. 372 That dearth has only gotten worse with the COVID -19 pandemic, which has "mentally and physically exhaust[ed] nurses ... as they worked long hours, scrambled to take care of patients and worried about spreading the virus to others." 373 Healthcare workers have taken "early retirement, chased higher wages as travel nurses or, emotionally drained, quit healthcare altogether."374 The healthcare labor market is facing current shortages and "unprecedented projected shortages" as the "exodus of exhausted and depleted care workers continues."3 75

Worker shortages provide leverage for workers and unions. 76 As employers grow more desperate for workers, workers' bargaining position grows stronger. And healthcare management knows that. As one Forbes Magazine article noted, "without major, systemic change, the healthcare industry is facing a dangerous chapter and healthcare leaders are sounding the alarm." 77 That article concludes by stating that "it's imperative to place an emphasis on improving the working conditions for *people* in healthcare, in addition to advancing the technology they use." 378

American healthcare is in a unique moment, a "dangerous chapter" whereby there is a growing need for healthcare workers and a burgeoning scarcity of such workers, and both labor and management know it. Healthcare workers' newfound bargaining power should be harnessed as part of a comprehensive campaign for voluntarily recognized healthcare worker unions. The healthcare worker shortage reinforces the extent of worker power today and underscores the potential for a truly successful comprehensive campaign.

3. COVID Has Mobilized Workers

The COVID-19 pandemic has garnered community support for healthcare workers and has worsened a healthcare worker shortage. It has also mobilized healthcare workers themselves. 379 \*\*\*FOOTNOTE BEGINS\*\*\* *See, e.g.*, Beverly Alfon & Michael Hughes, *Health Care Workers & Labor Unions: The COVID "Bump" & the New Administration's Efforts to Unionize More Workers*, AMUNDSEN DAVIS LLP: LAB. & EMP. L. BLOG (Apr. 29, 2021), https://www.jdsupra. com/legalnews/health-care-workers-and-labor-unions-1469557/ ("For health care workers, the issues of staffing, wages and benefits are typically what unions have focused on in their organizing campaigns. Against the backdrop of the COVID-19 pandemic, these issues are heightened with the added urgency of worker safety. The realities created by the pandemic have and will likely continue to make their impact on health care workers - even prompting some who never may have considered union representation - to reconsider their position."). *See also* Philbrick & Abelson, *supra* note 94 ("The past year has created conditions ripe for organizing to address longstanding issues like inadequate wages, benefits and staffing, a problem exacerbated by health care workers falling ill, burning out or retiring early for fear of getting sick. The unions 'have successfully been able to use the pandemic to rebrand those same conflicts as very urgent safety concerns,' said Jennifer Stewart, a senior vice president at Gist Healthcare, a consulting firm that advises hospitals.").\*\*\*FOOTNOTE ENDS\*\*\* Cass Gualvez, Organizing Director for Service Employees International Union-United Healthcare Workers West in California, stated that "[t]he urgency and desperation [she's] heard from workers is at a pitch [she hasn't] experienced before in 20 years of this work ... [She's] talked to workers who said, 'I was dead set against a union five years ago, but COVID has changed that." 380 Mary Kay Henry, President of the SEIU, also stated that in her "40 years of organizing health care workers, [she has] never experienced a time when people are more willing to take risks and join together to take collective action . . . . That's a sea change. "381

#### 2. INNOVATION. CBRs provide for the development and integration of new technology.

Dr. Leila Haghighat 23, MD, MPhil, Chief Fellow, Cardiology, UC San Francisco, "Doctor Unions Are Good for Your Health," Wired, 03/08/2023, https://www.wired.com/story/health-doctor-unions/.

Unions boost life quality for house staff, which is critical in sustaining the health of young physicians and, in turn, the patients under their care. Persistently high rates of burnout signal that the system is inadequate in responding to house staff feedback for change. Instead, Kilpatrick’s case shows how unions not only help house staff voice their ideas, but also provide the resources to actually implement them. House staff are a unique type of laborer in that they are still learners who are generally altruistic in their pursuit of providing the best possible care to patients. They are apt to do whatever it takes to finish their training and are at risk of becoming elastic labor, stretched out thin to cover gaps in the hospital. This is a vulnerability that can lead to serious mental and physical health issues that unions protect against.

Unions can also be the catalyst for strengthening a culture of advocacy that supports better patient care. A more pervasive culture of advocacy looks like a fierce championing of health equity by physicians, the development of new health technologies and drugs, and broader health insurance coverage for patients. Challenging the status quo is the basis for innovative change everywhere, and medicine, which for so long has prided itself on tradition, should not exclude itself.

Unions directly result in patient advocacy, too. Several contracts negotiated by CIR incorporate patient care funds, which promise money from hospitals to house staff, who decide how to allocate the money in ways that best advance patient care. These funds expand ways for optimizing patient care, especially when hospital departments are strapped for money. They also open a route for introducing newer health technologies into the hospital through physicians who are forward-minded and adept at using them. Last year, house staff working in the public health hospitals of New York City received $650,000 through patient care funds, and house staff in Los Angeles County received over $2 million. These grants went toward purchasing routine exam room supplies, novel portable ultrasounds, simulation equipment for training house staff to respond to cardiac arrest, and a custom-built supercomputer to analyze complex health data in the emergency room and identify risk factors for Covid-19 infection.

House staff unions are not at odds with the health system, according to Dr. Lorenzo González, the current CIR president and a family medicine physician. Rather, González says house staff unions work together with the health system toward a shared goal of improving the quality of health care. “What we’re trying to do is utilize labor to make sure that we all win—that the community wins, that our residents win, and that our health systems win.”

And if the past can offer any testimony, that is exactly what unions do.

### 1AC---Avoidance ADV

#### Advantage 3 is AVOIDANCE.

#### *Catholic Bishop*’s presumption against implied repeals with the clear statement rule fuels modern avoidance creep.

Charlotte Garden 20, JD, Co-Associate Dean, Research & Faculty Development, Seattle University. Associate Professor, Law, Seattle University, "Avoidance Creep," University of Pennsylvania Law Review, Vol. 168, No. 331, 2020, Nexis Uni. [italics in original]

Judges and scholars have convincingly argued that these justifications for avoidance are unavailing. 13The Court offers no evidence to support its account of congressional preferences, and logic often suggests Congress could have precisely the opposite set of preferences. Why, for example, would Congress prefer that a court construe a statute narrowly in order to avoid answering a question that *might or might not* result in a determination of unconstitutionality? 14Or, as Antonin Scalia and Bryan Garner put it, "[t]he [\*337] modern Congress sails close to the wind all the time. Federal statutes today often all but acknowledge their questionable constitutionality . . . ." 15Perhaps Congress would rather that the judiciary put the most likely reading of a statute to the test by actually ruling on its constitutionality. The critique, then, is that by invoking constitutional avoidance, courts purport to act deferentially to the elected branches--but in truth, they are empowering themselves to rewrite statutes, rules, or regulations in ways that Congress never wanted or anticipated. 16

These problems have been amplified in recent decades. First, the Court's methods of engaging in constitutional avoidance have changed. 17In some recent cases, the Court has applied a clear statement rule instead of more traditional tools of statutory interpretation--that is, it adopts a statutory reading that avoids a constitutional question unless Congress responds by clearly stating its intent to the contrary. When the Court does this, it usually adopts an implausible statutory interpretation, throwing the onus onto Congress to reiterate that it meant what it said the first time around. 18 And the Court has sometimes adopted statutory interpretations in order to avoid constitutional questions that seem insubstantial under existing law. In those situations, avoidance seems unnecessary because the chances that the Court would really invalidate the statute on constitutional grounds are slim, unless the Court is prepared to undertake a major shift in constitutional law. 19Moreover, while it might be desirable for the Court and Congress to be in [\*338] ongoing dialogue over the meaning of statutes, 20that dialogue is unlikely in the face of legislative gridlock. 21

A case from labor law--*NLRB v. Catholic Bishop* 22--illustrates both the Court's call for a "clear statement" from Congress about its intent to legislate in a way that the Court believes raises a constitutional question, and the Court's reliance on avoidance in the face of a constitutional question that could seemingly be resolved easily and in Congress's favor. 23 In Catholic Bishop, the Court applied a clear statement rule, holding that if Congress intended the NLRA to cover parochial high schools, it would have to say so explicitly--notwithstanding the fact that the NLRA's definition of covered employers is already very broad. 24 The Court adopted this approach to avoid a constitutional question about religious freedom that the Court never defined very clearly, and that the Court could have resolved in the NLRB's favor anyway. 25 \*\*\*FOOTNOTE BEGINS\*\*\* Garden, *supra* note 14, at 117 ("[T]he Supreme Court soon backed off the broad approach to church autonomy that *Catholic Bishop* might have previewed."). \*\*\*FOOTNOTE ENDS\*\*\* The result was a decision that diverged from the statutory interpretation that most closely tracked the statutory text in order to avoid a low or nonexistent probability that the Court would otherwise uphold the parochial school's as-applied challenge to the NLRA. Neal Katyal and Thomas Schmidt recently condemned this approach as an exercise in hypocrisy: "Avoidance decisions profess a Brandeisian reticence about the judicial power, which . . . allows the Court to renovate the Constitution with less visibility." 26

Recognizing the weakness of the Court's insistence that constitutional avoidance reflects judicial minimalism, some scholars have devised alternative accounts. For example, some argue that avoidance protects constitutional rights by forcing Congress to be explicit if it wants to approach the outer boundaries of its legislative power. 27These accounts often focus on what their proponents [\*339] see as "underenforced" constitutional norms. For example, Scalia and Garner argue that avoidance "represents judicial policy--a judgment that statutes *ought not* to tread on questionable constitutional grounds unless they do so clearly." 28Others have proposed that courts may engage in avoidance to preserve their own legitimacy while protecting litigants' rights in highly charged cases; Philip Frickey's account of the Court's approach to protecting the rights of dissidents in certain Cold War-era cases highlights this approach. 29

These scholarly accounts recast avoidance as constitutional law-lite. They shift the focus away from the Supreme Court's claimed deference to Congress in statutory interpretation and instead emphasize the importance of fidelity to the Constitution in difficult cases. This approach makes a virtue of the fact that Congress rarely overrides the Supreme Court's avoidance decisions. 30To scholarly defenders of constitutional avoidance, congressional inaction is a sign that the Court's use of avoidance has successfully served its purpose, rather than a signal that there has been a breakdown in the "conversation" between the courts and Congress. 31

Yet neither the Court's own account of constitutional avoidance nor the reasoning of its scholarly defenders adequately grapples with the many costs of constitutional avoidance. One of these overlooked costs is that avoidance [\*340] decisions distort or inhibit the development of substantive law. 32The next Part uses labor law to demonstrate how this happens.

#### The plan solves by weakening the presumption, balancing inter-branch exchanges AND preventing the destruction of judicial legitimacy.

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.

Catholic Bishop has staying power because it is a statutory case resting on constitutional avoidance; its holding has been immune to developments in First Amendment law, and, as is discussed infra, Congress is unlikely to enact an explicit overrule of a constitutional avoidance decision. This is in part an effect of the decision itself - a rational legislator would be unlikely to spend political capital on a bill that the Court has already stated to be constitutionally suspect, 118 and, even then, the Court may resist the override in a subsequent [\*130] case. 119 In other words, decisions like Catholic Bishop risk undermining Congress in at least two ways: first, when the Court adopts an implausible statutory construction over a plausible one; and second, when the Court makes it more difficult for Congress to override the Court.

This Section argues that the Court should view its adoption of an implausible statutory interpretation as an overture that invites congressional response. That is to say, once a court has applied a clear statement rule as in Catholic Bishop, courts should be on the lookout for, and then broadly construe, a response from Congress. If one comes, then courts should reverse the earlier improbable statutory interpretation and start again.

Applying that principle would lead to the conclusion that Congress legislatively overruled Catholic Bishop when it enacted RFRA because RFRA constitutes a clear statement regarding the treatment of religious exemption claims under the NLRA. Neither the fact that Congress did not expressly state within RFRA itself that Catholic Bishop was overruled nor the fact that Catholic Bishop and RFRA can co-exist should impede this conclusion. Rather, the premises justifying the canon of constitutional avoidance themselves call for a fluid interchange between the Court and Congress, in which Congress can overcome the Court's statutory constructions with relative ease.

I begin this Section by briefly discussing the various justifications advanced by the Court and commentators for constitutional avoidance. I then turn to a question that has been surprisingly neglected in the literature so far: If constitutional avoidance is supposed to be part of a conversation between the Court and Congress, how loudly or clearly should Congress have to reply? This discussion forms the basis for my conclusion that the NLRB and the courts should view RFRA as having effectively rejected and replaced Catholic Bishop.

1. Why Constitutional Avoidance?

Proponents of the canon of constitutional avoidance have traditionally proceeded from two premises: first, that judicial minimalism requires the Court to avoid striking down statutes wherever possible; and second, that Congress should be presumed to abide by the Constitution in its legislative drafting. 120 This conception of constitutional avoidance directed early courts to choose a [\*131] plausible, constitutional interpretation of a statute instead of striking a statute down as unconstitutional; the choice was preservation or destruction. 121

However, the Court soon undertook a subtle shift: rather than deciding the constitutional question conclusively and then approaching the statutory interpretation question accordingly, the Court began to adopt limiting interpretations in order to avoid answering difficult constitutional questions. 122 Justice Brandeis famously articulated this approach in his concurrence in Ashwander v. Tennessee Valley Authority:

The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of… . "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." 123

Under this formulation, the choice is between two plausible readings of a statute: one that presents difficult constitutional questions and one that does not. The advantage of this formulation is that it does not require courts to determine that one reading of a statute is unconstitutional, only to turn that conclusion into dicta by adopting another reading of the statute. 124 Now, however, the Court is making a different choice: rather than choosing certain preservation or certain destruction, it is choosing between certain preservation and uncertain destruction.

Catholic Bishop is emblematic of a further shift in the constitutional avoidance canon: in that case, the Court avoided the constitutional question based on the absence of a clear statement of Congress's intent to cover religious employers. 125 That brings two variables into play in cases where constitutional avoidance is a possibility. The first is the difficulty of the [\*132] constitutional question (and attendant possibility that it will be resolved against the government); the second is the plausibility of the statutory interpretation that avoids that question. "Modern" constitutional avoidance moves the needle on both questions, with Catholic Bishop at the outer perimeter. 126

Catholic Bishop reflects a modern constitutional avoidance that is unmoored from the values of judicial minimalism and fidelity to congressional intent that initially prompted the development of the doctrine. 127 Instead, other scholars have observed that modern constitutional avoidance reflects judicial activism more than judicial minimalism; it is not at all clear that Congress would prefer to have its handiwork narrowed through judicial construction, rather than run the relatively small risk that a statute will be struck down. 128 As Judge Friendly put it, "it does not seem in any way obvious, as a matter of interpretation, that the legislature would prefer a narrow construction which does not raise constitutional doubts to a broader one which does raise them." 129 In the same vein, Philip Frickey explained that constitutional avoidance "involves judicial lawmaking, not judicial restraint; the outcomes it produces are at least sometimes inconsistent with probable current congressional preferences; and it will not always foster a deliberative congressional response." 130 And, to Justice Scalia, the aggressive form of constitutional avoidance is little more than a way [\*133] for judges to rewrite statutes in order to achieve their preferred results. 131 The price of this approach is not limited to accuracy in statutory interpretation (though that is certainly a significant cost); in a slightly different context, Frickey and William Eskridge persuasively argued that avoidance of "immediate constitutional conflict" comes at the "price of a candid ventilation of constitutional concerns … ." 132 Worse, constitutional avoidance decisions often lack "the corresponding care that ordinarily goes into constitutional decisionmaking in cases where the court forthrightly acknowledges that such decisionmaking is taking place." 133

The traditional justification for constitutional avoidance is particularly inapt in the context of as-applied challenges, like Catholic Bishop. When the Court narrows a statute in the course of a facial challenge, it is at least possible that Congress would prefer something to nothing: a narrowed statute to the risk of one that is struck down in its entirety. For example, in challenges that raise the issue of congressional authority to enact a challenged law, the adoption of a narrowing construction through constitutional avoidance may save the remainder of the statute so that it can be applied to others. 134 But when the Court avoids a constitutional question in an as-applied challenge, as in Catholic Bishop, the on-the-ground outcome is the same whether the Court actually sustains a constitutional challenge to the statute's application to the plaintiff or avoids that question. It is utterly implausible that legislators would prefer that the Court read a statute in an unnatural way when the only possible effect is to increase the chance that the as-applied challenge will succeed.

[\*134] This evaluation of modern constitutional avoidance is damning, at least in light of the judicial minimalism values that the doctrine was originally intended to serve. However, scholars have backstopped Catholic Bishop-style constitutional avoidance by arguing that it accomplishes other important goals. Most prominently, several scholars have proposed that avoidance creates a penumbra that protects under-enforced constitutional rights by imposing hurdles on legislative attempts to come right up to the edge of what is constitutionally permissible. 135 Ernest Young puts this function in terms of "resistance norms," which protect constitutional values. 136 In his view, the importance of constitutional avoidance lies in its capacity to "function much like super-majority requirements by making it harder - but not impossible - to achieve certain legislative goals that are in tension with the canon's underlying value." 137 The canon's "underlying value" essentially incorporates the Constitution by reference; thus, for example, when the Court narrowly construes a jurisdiction-stripping statute in order to avoid a constitutional question, it is resisting congressional encroachment on Article III. 138 Similarly, constitutional avoidance might protect the underlying constitutional value of non-delegation, because avoidance decisions often limit the interpretive range available to administrative agencies. 139

Offering additional justification for aggressive constitutional avoidance, Frickey argues that it provides "an intermediate alternative between statutory invalidation and validation," 140 which preserves a role for legislative override and allows the Court to move incrementally. 141 In effect, avoidance decisions lower the temperature on hot-button decisions that might otherwise call the [\*135] Court's legitimacy into question in the eyes of the public. 142 Eskridge advances a related argument that constitutional avoidance allows the Court to protect and express public values by "updating statutes by construing them to reflect society's evolving values as they relate to the Constitution." 143 \*\*\*FOOTNOTE BEGINS\*\*\* William N. Eskridge, Jr., Public Values in Statutory Interpretation, 137 U. Pa. L. Rev. 1007, 1021 (1989). However, Eskridge criticized the outcome in Catholic Bishop, characterizing it as a decision in which the "result "rewrites' the statute and negates clearly expressed legislative expectations that have not been undone by substantially changed circumstances." Id. at 1066. \*\*\*FOOTNOTE ENDS\*\*\*

These appealing benefits of modern constitutional avoidance suggest that the canon is valuable, even if it cannot be defended on the grounds of judicial minimalism and fidelity to congressional intent. However, each of these benefits is premised on the ability of Congress to override the Court's statutory reading, and potentially force the constitutional question. 144 \*\*\*FOOTNOTE BEGINS\*\*\* See Hasen, supra note 126, at 215 (discussing, but rejecting, the descriptive possibility that "the Court will use constitutional avoidance only when doing so would further a dialogue with Congress that has a realistic chance of actually avoiding constitutional problems through redrafting"). \*\*\*FOOTNOTE ENDS\*\*\* Thus, Young's "resistance norms" are explicitly premised on the idea that congressional override is "not impossible." 145 Similarly, Sunstein's concern with non-delegation makes sense only when an agency makes a decision without clear guidance; there is no reason to make it difficult for Congress to give that guidance. Quite the opposite in fact; "so long as government is permitted to act when Congress has spoken clearly, no judicial barrier is in place." 146 And for constitutional avoidance decisions to preserve Court legitimacy, they should genuinely lob the issue back to Congress, rather than simply pretending; if the inter-branch "conversation" is a sham, then it should do little to insulate the Court from criticism. 147 \*\*\*FOOTNOTE BEGINS\*\*\* See Calabresi, supra note 36, at 12 ("The inevitable errors … cannot help but raise the specter of judicial, nondemocratic domination and cast doubt on judicial review … ."); Krotoszynski, supra note 36, at 4-9, 46-52 ("Strict observance of the passive virtues is as likely to provoke interbranch strife as to prevent it."). \*\*\*FOOTNOTE ENDS\*\*\*

2. Overriding Constitutional Avoidance

Rejecting a Court's avoidance-based narrowing of a statute will be difficult at the best of times; this is why a constitutional avoidance decision can serve a resistance purpose. The numerous "vetogates" that a proposed law must pass through create "an imposing obstacle to the adoption of national legislation." 148 And amending a statute to address a single point will probably require a new [\*136] set of legislative compromises; when the underlying legislation is controversial, proponents could reasonably fear that reopening the issue to override a court decision will risk losing more than could be gained. Then there is the effect of the constitutional avoidance decision itself to consider. Some legislators might be genuinely reluctant to pass a law that the Court has already declared constitutionally suspect. Others could certainly use the decision to score political points for their preferred position. 149

There is a final difficulty: the presumption against implied repeal. That presumption "embodies a policy of hostility to the notion of statutory updating unless the legislature makes that updating explicit. In its strongest form, the presumption amounts to a sort of clear-statement rule - allowing for repeal only by express provision - that negates the very notion of an implied repeal." 150 In other words, implied repeal "requires that before one statute is held to repeal another … the two statutes must be logically and physically impossible to apply at the same time." 151 This means that in overruling a court's statutory interpretation, Congress must usually do more than speak clearly about the underlying substantive issue; it must also speak clearly about its desire to overrule the Court's previous decision. Otherwise, Congress runs the risk that courts will seek to reconcile the two, rather than replacing the court's interpretation with the subsequent legislation. 152

Applying these two canons together can create an insurmountable barrier for Congress, particularly as Congress is de facto required to refer to constitutional avoidance decisions by name in order to overturn them. Catholic Bishop is a perfect example. First, it narrowed the NLRA in a way not anticipated by Congress. Even assuming that this narrowing serves a public value by protecting a penumbra around the religion clauses of the First Amendment from congressional interference, Catholic Bishop should have kicked the [\*137] question of how to handle labor organizing at religiously affiliated employers back to Congress, leaving Congress to contemplate the difficult, but not impossible, task of overriding the case. 153 Yet, it was a foregone conclusion that Congress would not tackle Catholic Bishop. First, there is the fact that while Catholic Bishop created uncertainty for certain religiously affiliated employers and their employees, it left most employers untouched; from the perspective of a legislator, the issue probably seemed unimportant. Then there is the subject matter to consider: "legislating against "religious liberty' would scare politicians in the best of times and seems laughably inconceivable given Congress's present dysfunction." 154 But the law of religious liberty has been positively dynamic when one compares it to federal labor law, which has not been meaningfully updated by Congress for more than fifty years. 155

If the only issue was that Congress was generally unwilling to legislate in the area of labor law and religious liberty then perhaps we could simply view Catholic Bishop as an instance where a resistance norm worked as advertised, though we might question whether the First Amendment was really an area in which a resistance norm was required. But Congress has spoken to the question of religious employers and labor law by enacting RFRA, which amends the NLRA along with every other federal law. Moreover, as I discuss in Part II, RFRA provides a superior rubric for handling the objections of religious employers within a Free Exercise-style accommodation framework that focuses on specific conflicts between labor law and religious commitments. 156 \*\*\*FOOTNOTE BEGINS\*\*\* Cf. Susan J. Stabile, Blame it on Catholic Bishop: The Question of NLRB Jurisdiction Over Religious Colleges and Universities, 39 Pepp. L. Rev. 1317, 1344 (2013) ("A better approach would be for the NLRB to determine whether to exercise jurisdiction over Catholic colleges and universities based on an analysis of factors counseling in favor of or against its doing so."). \*\*\*FOOTNOTE ENDS\*\*\* Yet, because RFRA did not mention Catholic Bishop by name, and because it is possible for the Board and the courts to apply both [\*138] RFRA and Catholic Bishop, the presumption against implied repeals comes into play and the holding persists.

This means it is doubly unlikely that Catholic Bishop will be retired absent further intervention by the Court, because there are two clear statement rule roadblocks in place: one requiring a clear statement regarding the NLRA's application to religious employers and another requiring a clear override of Catholic Bishop. The effect is to turn a resistance norm into something closer to a brick wall, undermining the justifications for Catholic Bishop-style constitutional avoidance in the process.

A better approach to statutory interpretation in the wake of constitutional avoidance decisions would be to weaken or eliminate the presumption against implied repeals where it would serve to protect a court's handiwork rather than Congress's. 157 This would allow Congress to respond to constitutional avoidance decisions by speaking clearly about the underlying substantive policy choice but not necessarily about the court decision itself. In effect, instead of the presumption against implied repeals functioning similarly to conflict or express preemption - in which a federal statute displaces a state statute only if Congress clearly states its intent to do so or the two cannot possibly be reconciled 158 - it would function more like field preemption when reconciling constitutional avoidance decisions and subsequent legislation. 159 That is to say, Congress's subsequent choice to occupy a substantive area would displace the earlier constitutional avoidance decision.

This proposed approach would not be appropriate in every instance. For example, it would be inappropriate in cases involving old-style constitutional avoidance in which the Court actually decides the constitutional question and then adopts a contrary reading of a statute. Instead, this approach is most likely to be appropriate when the constitutional avoidance decision involves a high degree of speculation in the constitutional question and low degree of plausibility in the subsequent statutory interpretation. Courts and administrative agencies can apply these considerations on a case-by-case basis to reconcile earlier cases with later legislative enactments, much as they do when reconciling other types of legislative amendments that affect the ongoing validity of earlier court decisions.

However, using this approach to reconcile Catholic Bishop with RFRA is straightforward. Catholic Bishop should yield in light of Congress's later [\*139] statement about how employers' religious objections under the NLRA should be handled. This outcome is consistent with Congress's likely preferences in that it jettisons the approach to religious employers' exemptions from labor law that Congress never approved and almost certainly did not want, and replaces it with the only approach to this question that Congress did enact into law. Of course, it also leaves in place the possibility than an employer could bring a free-standing constitutional challenge.

#### Judicial legitimacy prevents extinction.

John D. Bessler 21, Professor of Law at the University of Baltimore School of Law, Adjunct Professor at the Georgetown University Law Center, 2021, “The Rule of Law: A Necessary Pillar of Free and Democratic Societies for Protecting Human Rights,” Santa Clara Law Review, 61 Santa Clara L. Rev. 467

Like Adams, George Washington - the first President of the United States - embraced the notion of a government of laws. In September 1789, not long after the U.S. Constitution's ratification, 147Washington wrote a telling letter to Pennsylvania's legislature. 148"It should be the highest ambition of every American," he wrote, "to extend his views beyond himself, and to bear in mind that his conduct will not only affect himself, his country, and his immediate posterity; but that its influence may be co-extensive with the world, and stamp political happiness or misery on ages yet unborn." To obtain that end, "to establish the government of laws," he observed, "the union of these States is absolutely necessary." As Washington's letter emphasized:

In every proceeding, this great, this important object should ever be kept in view; and so long as our measures tend to this; and are marked with the wisdom of a well informed and enlightened people, we may reasonably hope, under the smiles of Heaven, to convince the world that the happiness of nations can be accomplished by pacific revolutions in their political systems, without the destructive intervention of the sword. 149

Also referring to the government of laws concept in another letter written shortly thereafter to Catharine Sawbridge Macaulay Graham, a prominent English historian known for her eight-volume The History of England from the Accession of James I to the Revolution, 150George Washington - on the Fourth of July in 1793, having just taken the presidential oath of office for a second time a few months earlier - likewise wrote to the residents of Alexandria, Virginia:

To complete the American character, it remains for the citizens of the United States to shew to the world, that the reproach heretofore cast on republican Governments for their want of stability, is without foundation, when that government is the deliberate choice of an enlightened people. And I am fully persuaded, that every well-wisher to the happiness and prosperity of this country will evince by his conduct that we live under a government of laws ... . 151

Washington - like other founders - thus had an abiding commitment to the Rule of Law as he understood it, 152though he, too, failed to live up to its promise as he, among other things, kept people enslaved at his Mount Vernon plantation throughout his life. 153In his will, George Washington (1732-1799) - the military leader turned President and statesman - only agreed to emancipate those he held in human bondage upon the death of his wife, Martha Washington (1731-1802). 154

The government-of-laws idea was repeated by other early Americans, 155including Thomas Jefferson, 156John Quincy Adams, 157Alexander Hamilton, 158and the members of the U.S. Supreme Court in Marbury v. Madison. 159John Adams, the idea's most famous proponent in America, himself incorporated the concept into the Massachusetts Constitution of 1780, 160the written instrument 161that is one of the world's oldest, continuously existing constitutions. 162And he, like so many others, 163would continue to speak of a "government of laws" in the years and decades to come. 164The concept would show up in everything from newspaper articles 165to grand jury instructions delivered by U.S. Supreme Court Chief Justice John Jay, 166the second governor of New York, a former U.S. Secretary of Foreign Affairs, and the author of some of The Federalist Papers. 167

The Massachusetts Constitution of 1780 contains a detailed declaration of rights and lays out the framework for the separation of powers between the legislative, executive and judicial branches. Among other things, its declaration of rights recites that "all men are born free and equal, have certain natural, essential, and unalienable rights"; "the people of this commonwealth have the sole and exclusive right of governing themselves as a free, sovereign, and independent State"; "Government is instituted for the common good, for the protection, safety, prosperity, and happiness of the people, and not for the profit, honor, or private interest of any one man, family, or class men"; "all elections ought to be free"; "every individual ... has a right to be protected ... in the enjoyment of his life, liberty, and property, according to standing laws"; "every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character"; "he ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay, conformably to the laws"; and "laws made to punish for actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust, oppressive, and inconsistent with the fundamental principles of a free government." 168Article XXIX of the Massachusetts Constitution of 1780 further declared:

It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit. 169

V. From the Enlightenment to Modern Conceptions of the Rule of Law

The Enlightenment - and prominent writers of that era, from Montesquieu and Rousseau to Beccaria and Voltaire to Olympe de Gouges and Mary Wollstonecraft - ushered in a new way of thinking about the Rule of Law and human rights. 170The seventeenth-century's Glorious Revolution of 1688-89, 171in which King James II was forced to abdicate the throne, led to the English Bill of Rights (1689), 172which, in turn, served as a model for the Virginia Declaration of Rights (1776), 173other early American declarations of rights and state constitutions, 174and the U.S. Bill of Rights (1791). 175The revolutionary state constitutions guaranteed a host of individual rights, including in the arenas of public affairs and the criminal law, 176with the U.S. Constitution's Bill of Rights doing the same after its ratification. 177"The American Revolution was creative and significant," Pulitzer Prize-winning historian Gordon Wood has written, "because of the revolutionary state constitutions that preceded the Constitution by more than a decade." 178"Not only did the formation of the new state constitutions in 1776," he observed in 1993, "establish the basic structures of our political institution, their creation also brought forth the primacy conceptions of America's political and constitutional culture that have persisted to the present." 179

Because they lived more than 200 years ago, Enlightenment-era figures were not necessarily enlightened by modern standards, with a number of America's own founders actually buying and selling and enslaving human beings throughout their lives, 180a total affront to the modern-day conception of the Rule of Law. 181But Enlightenment thinkers did wrestle, in their own time and in their own ways, with critically important subjects such as how to frame and organize a government to prevent abuses of power - and how to protect individual rights (at least in ways that they, then, thought of human rights and the social compact). The Enlightenment - also known as the Age of Reason - has been variously defined as the eighteenth-century philosophy 182"emphasizing reason and individualism over tradition" 183and "rational scientific inquiry, humanitarian tolerance, and the idea of universal human rights"; 184as "the search for "freedom' and "progress' achieved by a critical use of reason to change man's relationship with himself and society"; 185and as "a period during which superstition and ignorance receded in the face of an evolving body of scientific knowledge that gave order and harmony to a universe that could now be explained in the light of reason and rules." 186America's "Framers and Founders," it has been noted, "were the products of that period, and for many of them science and scientific ways of thinking were defining characteristics." 187

The figures of the Enlightenment were oftentimes deeply flawed, even resorting to extreme violence and brutality against enslaved persons. 188Their ideas on topics such as the division of powers and the importance of an independent judiciary, though, continue to shape the modern world. 189James Madison, the Virginia slave owner who played a major role in the drafting of the U.S. Constitution and its Bill of Rights, 190called Montesquieu - the French jurist who protested against torture 191but who nonetheless approved torturous punishments as part of his work within France's civil law system 192- "the oracle who is always consulted and cited" on separation of powers. 193Jean-Jacques Rousseau, the Genevan philosopher, gained much celebrity for writing about the social contract, 194although his conception of equality did not include equal rights for women. 195Beccaria - an aristocrat from Milan who, in his mid-20s, wrote about the dividing line between liberty and tyranny 196and explored the contours and subject of the criminal law - advocated for proportionate punishments, a scale of crimes and punishments, and the abolition of both torture and the death penalty 197even though his publicly offered alternative to executions - "perpetual slavery" 198- is one rightfully shunned by modern-day lawmakers. 199Voltaire, Jefferson, Madison and others championed freedom of expression, religious toleration, and a separation of church and state, 200 but sadly, slavery, overt gender discrimination, other forms of extreme prejudice, and virulent anti-Semitism stubbornly persisted. 201

At a time when women were systematically denied the right to vote and to participate in public life (e.g., as lawyers, judges or jurors), 202Mary Wollstonecraft - a talented English writer whose second daughter, the novelist Mary Shelley, famously wrote Frankenstein (1818) - called for the education of women and gender equality in A Vindication of the Rights of Woman (1792). 203Her French counterpart, Olympe de Gouges - a playwright executed by guillotine in 1793 during the French Revolution's Reign of Terror 204- published her own Declaration of the Rights of Woman and the Female Citizen (1791) shortly after France's National Constituent Assembly issued its Declaration of the Rights of Man and the Citizen (1789). 205"By moving from the masculine language of the "rights of men' to a specifically feminine pronoun," historian Eileen Hunt Botting writes, "Wollstonecraft underscored the special and urgent need for civic recognition of women's human rights, especially to education." "Using a similar rhetorical technique," Botting observes, "de Gouges's 1791 Parisian pamphlet "Declaration of the Rights of Woman and Citizen' uncovered the patriarchal bias of the 1789 Declaration, by rewriting the list of French republican rights with the female sex included." 206

Words, with all their nuance of meaning, played a critical role in eighteenth-century debates and political discourse. 207During the Enlightenment, the law's language, as expressed in bills of rights, constitutions and legal codes, came to be seen as an indispensable tool for protecting people's natural and human rights. 208Clarity in drafting constitutions and laws came to be highly valued, 209with lawmakers insisting - in what has come to be known as the principle of legality 210- that citizens be given advance notice of the laws. 211In Dei delitti e delle pene (1764), translated into French by economist and philosophe Andre Morellet and then into English as An Essay on Crimes and Punishments (1767), 212Beccaria specifically took up the topics of lawmaking and interpretation of the laws. 213"Where the laws are clear and precise," Beccaria observed, "the judge's task is merely to discover the facts." 214 Judges, he wrote, "should reason syllogistically" from a law's text, 215warning about the adverse implications of the "common axiom" that " the spirit of the laws is to be considered." 216In an era still peppered with capital and corporal punishments and sentences of exile, slavery or "penal servitude" for life, 217Beccaria emphasized: "it is the greatest of evils if the laws be written in a language which is not understood by the people and which makes them dependent upon a few individuals because they cannot judge for themselves what will become of their freedom or their life and limbs." 218

In his own time, Beccaria was celebrated as the first Enlightenment writer to make a comprehensive case against capital punishment, 219and his book was read and cited by an array of European and American lawmakers. 220"The more people understand the sacred code of the laws and get used to handling it, the fewer will be the crimes," Beccaria observed. 221With the fourth chapter of Beccaria's On Crimes and Punishments devoted to the interpretation of the laws, one modern translator of the book observes that the whole chapter was "a reaction against the unbridled judicial discretion characteristic of Beccaria's day." 222The English physician and philosopher John Locke had, in his own time, warned against "arbitrary power" and "absolute arbitrary power, of governing without settled standing laws," contending that "the liberty of man, in society, is to be under no other legislative power, but that established, by consent, in the common-wealth." 223" Wherever law ends, tyranny begins," Locke wrote. 224Beccaria, like Locke and others, opposed tyrannical practices, and America's founders similarly railed against arbitrary government, 225embracing the use of written constitutions to protect delineated rights. 226In addition to On Crimes and Punishments, Beccaria also published Ricerche intorno alla natura dello stile ( Research on the Nature of Style, 1770), which itself focused on the use and nuance of language. 227

Beccaria's writings - on tyranny, the need for penal reform, and interpretation of the laws - had a major influence throughout Europe and the Americas. 228For example, Thomas Jefferson expressed the view, in line with Beccaria's, that punishments should be "proportionate" and "mild" and that judges, in doing their work, should closely adhere to the text of laws as written by legislators. 229As Jefferson once said: "Let mercy be the character of the law-giver, but let the judge be a mere machine." 230Jefferson copied multiple passages from Beccaria's On Crimes and Punishments into his commonplace book in the original Italian, 231taking note of Beccaria's cautionary warning about judicial discretion: " si apre la porta all'incertezza," the door is opened to uncertainty. 232As Beccaria, wanting more certainty and less severity and discretion in the law's application, himself wrote:

Each man has his point of view, each man in different times has a different one. The spirit of the law would thus be the result of good, or wicked logic of a judge of an easy, or indisposed digestion; it would depend on the violence of his passions, of the infirmity of which he suffers. 233

In a passage of Beccaria's book that John Adams would copy by hand from the original Italian text, Beccaria had observed of the impulse that led to so many abuses of power: " Ogni uomo si fa centro di tutte le combinazioni del globo." The translation: "Every man makes himself the center of his whole world." 234

In accord with the notion that people must be given notice of a penal law before its application, the U.S. Constitution expressly abolished ex post facto laws - laws passed after the commission of an act that retrospectively changed its legal consequences. 235The Constitution also explicitly outlawed bills of attainder, legislative acts whereby one or more persons were declared to be attainted, to have their property confiscated, and to be sentenced to death without a judicial trial. 236In The Federalist No. 44, signed "Publius," James Madison wrote:

Bills of attainder, ex post facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. 237

In The Federalist No. 78, Alexander Hamilton - also writing as "Publius" - had this to say about those legal protections: "The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like." 238As Hamilton stressed:

Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing. 239

VI. The Universal Declaration of Human Rights and Equal Protection of the Laws

Today, the Rule of Law - as a concept - is as important as it was after World War II, when war, genocide, and countless Nazi atrocities led to the creation of the United Nations in 1945 240and the promulgation of the Universal Declaration of Human Rights (1948). 241The Universal Declaration, the work product of John Peters Humphrey, Rene Cassin, Eleanor Roosevelt, 242and many others from delegations around the world, 243explicitly tied the Rule of Law to the protection of universal human rights, 244declaring in its preamble that "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law." 245The concept of the Rule of Law - as one source notes - thus played a "central role" in the Universal Declaration's genesis, with Sir Hersch Lauterpacht - a prominent British lawyer who served on the International Court of Justice 246- writing in 1950 that "the most effective way of giving reality to it is through the normal activity of national courts and other organs applying the law of the land." 247In short, the stronger a society's Rule of Law tradition and ethic, the better human rights will be protected.

The Universal Declaration was a major advance in legal thought because lawmakers in the eighteenth and nineteenth centuries - and, it must be said, for so many who came thereafter - abjectly failed to address the scourges of slavery and racism, misogyny and sexism, and homophobia and xenophobia. 248That failure, which denied equality to all, has necessitated the human rights advocacy of scores of pioneering leaders to rectify and remedy the prejudices and errors of the past. Change may be inevitable, but only through determination, grit, and collective action does lasting, positive change come. As anthropologist Margaret Mead is widely reported to have once expressed her belief in the potential for human beings to bring about constructive change: "Never doubt that a small group of thoughtful people can change the world; indeed, it's the only thing that ever has." 249

Over the centuries, many such civic and political leaders have tirelessly fought for different causes. William Wilberforce, 250Frederick Douglass, 251Sojourner Truth, 252and Harriet Tubman 253fought against slavery. Charles Hamilton Houston, 254Thurgood Marshall, 255Martin Luther King Jr., 256Claudette Colvin, 257Rosa Parks, 258John Lewis, 259and many others fought for civil rights and racial equality. 260Elizabeth Cady Stanton, 261Susan B. Anthony, 262Jane Addams, 263Ida B. Wells, 264Maud Malone 265and countless other suffragists fought for the right to vote. 266And other women's rights activists, from Margaret Sanger 267and Mary McLeod Bethune 268to Sandra Day O'Connor 269and Ruth Bader Ginsburg 270also pioneered women's rights and the law and the legal profession. 271

There have likewise been LGBTQ+ pioneers such as Karl Heinrich Ulrichs 272and Barbara Gittings; 273those, like Cesar Chavez, 274who fought for the rights of immigrants and migrant workers; 275and advocates for people with disabilities such as Edward Miner Gallaudet, 276Patrisha Wright, 277and Paula Goldberg. 278And in the anti-death penalty arena, which has occupied so much of my own scholarly agenda, 279there were early anti-gallows campaigners such as Benjamin Rush, 280Edward Livingston, 281Robert Rantoul Jr., 282and Marvin Bovee, 283and - in modern times - prominent figures like Anthony Amsterdam, 284Bryan Stevenson, 285Stephen Bright, 286Robert Badinter, 287Diann Rust-Tierney, 288and Sister Helen Prejean. 289Of course, through the centuries scores of other activists, civic leaders, and human rights defenders have participated in social movements and civil rights and environmental justice campaigns to address gross violations of human rights. 290

Ironically, in the political context, the American revolutionaries who fought for liberty and independence from England's monarchy themselves denied liberty - en masse, to borrow a French term 291- to minorities and women. Early American presidents - George Washington, Thomas Jefferson, James Madison, James Monroe and Andrew Jackson, among them - kept scores of people in human bondage, including while they served as head of state. 292Jefferson wrote the Declaration of Independence (1776), declaring "that all Men are created equal," 293but - in the hypocrisy of hypocrisies - during his lifetime he kept more than six hundred human beings enslaved at Monticello, his Virginia plantation, and in his fields or mills or at his nailery. 294The U.S. Constitution, drafted in Philadelphia and ratified in 1788, 295itself prohibited the slave trade's abolition until 1808, 296with Jefferson and Monroe exchanging letters - in the wake of Gabriel's Rebellion (1800), in which enslaved people in Virginia sought their freedom 297- about how to punish those who participated in it. The principal subject of their exchange: about the use of capital punishment and whether or not "to stay the hand of the executioner." 298Slavery itself was not abolished in the U.S. until December 6, 1865, 299after the Civil War had claimed hundreds of thousands of lives 300and John Wilkes Booth, a white supremacist, assassinated President Abraham Lincoln at Ford's Theatre. 301

In early America, women and Native Americans were likewise systematically subjugated and oppressed. In a 1776 letter, Abigail Adams - the wife of the prominent Massachusetts lawyer who would later become America's second president - had implored her husband, John Adams, to "Remember the Ladies." 302But America's founders utterly failed to do so, 303even though some from that era (and others prior to their time) 304had advocated for the recognition of women's rights. 305Women were not guaranteed the right to vote until much later - in the case of federal elections, not until the Nineteenth Amendment was ratified in 1920. 306Also, a large number of Native Americans were killed ( e.g., in Mankato, Minnesota, on December 26, 1862, a mass hanging took the lives of thirty-eight Dakota Indians), 307and they were driven off and exiled from their ancestral lands, 308with treaties - the foundation of dealings between sovereign peoples 309- frequently broken. 310President Andrew Jackson signed the so-called Indian Removal Act into law in 1830, 311with modern-day scholars documenting what has been called the unprecedented "state-administered mass expulsion of indigenous people." 312

In 1868, the ratification of the U.S. Constitution's Fourteenth Amendment enshrined the concept of "equal protection of the laws" into the nation's fabric of life. 313That constitutional amendment was, unfortunately, not immediately read to protect the rights of those it was intended to protect. 314But gradually, through the application of the U.S. Supreme Court's "selective incorporation" doctrine, constitutional protections in the U.S. Bill of Rights have been interpreted by the courts and applied to the states in a transformative way. 315In addition, the Fourteenth Amendment's equal protection guarantee has been applied to protect people's rights ( e.g., in the U.S. Supreme Court's decisions in United States v. Virginia 316and Obergefell v. Hodges, 317protecting women's rights and guaranteeing marriage equality, respectively). There are, of course, international covenants and multiple U.N. conventions that outlaw discrimination and that recognize the importance of equality and equal treatment under the law. 318

VII. Tyrannical Rule and Abuses of Power vs. the Rule of Law

It is clear that those in power have - and frequently do - abuse their power. That was certainly true of ancient Rome and Roman emperors, with condemned criminals crucified, clubbed to death, burned alive, fed to wild animals, thrown from the Tarpeian Cliff, or bound in leather sacks with live animals and tossed into bodies of water. 319"In the Colosseum," one historian notes of ancient Rome's famous amphitheater, "a whole series of elaborate executions were staged" in "the guise of certain Greek dramas, whose subject matter entailed the deaths of the actors." 320The "actors" were, in actuality, condemned criminals "dressed up as characters from Greek mythology" who "were forced to perform and, at the performance's climax, were put to death" using "collapsible scaffolds placed above cages of wild beasts." 321Rome's Colosseum could hold tens of thousands of spectators, 322and it was the sight of innumerable public executions - ones carried out in a gruesome fashion through a variety of means, 323including burning alive and damnatio ad bestias, "condemnation to the beasts." 324Humiliation and mocking of the offender were a regular part of such horrific Roman public spectacles. 325

Other political leaders, from Robespierre 326and Napoleon in France, 327to those involved in the Armenian genocide, 328to Joseph Stalin of Soviet Union 329and Adolf Hitler in Nazi Germany, 330to Pol Pot and the Khmer Rouge in Cambodia 331and Saddam Hussain's regime in Iraq, 332have engaged in the most grotesque atrocities and abuses of power. Torture has been employed for centuries, 333with techniques including waterboarding, 334the rack, 335and the thumbscrew. 336Dr. Josef Mengele, the infamous Nazi doctor, performed horrific medical experiments on Jews and Gypsies at Auschwitz, 337and innumerable state-sanctioned and summary executions have been carried out over the centuries. 338There have been more than 15,000 executions on American soil, 339and the Equal Justice Initiative has meticulously documented more than 4,000 extra-judicial, racial terror lynchings. 340Many of those lynchings were never properly investigated by governmental officials, with perpetrators thereby evading justice and leading to reports that the acts had been committed "at the hands of persons unknown." 341In addition, civil rights leaders have been surveilled, 342jailed, 343and beaten up 344- even killed 345- for their efforts to fight inequality and social and racial injustices. 346

In the twenty-first century, abuses of power continue. North Korean dictator Kim Jong Un has ordered public executions by firing squad, 347even reportedly using anti-aircraft guns to put people to death. 348Russian President Vladimir Putin, the Kremlin, and its allies have repeatedly resorted to disinformation campaigns, 349poisoning, 350and extrajudicial killing of political opponents and those in exile, 351while officials of the Kingdom of Saudi Arabia, where amputations, beheadings, eye gougings, floggings, and stonings still take place, 352 notoriously ordered and carried out the killing and dismemberment of dissident and Washington Post columnist Jamal Khashoggi. 353Syria's regime, led by a brutal tyrant, Bashar al-Assad, the son of another tyrannical ruler, Hafez al-Assad, 354resorted - like his father before him - to the use of chemical weapons, 355also ordering the bombing and killing of civilians, including scores of children, throughout the country's ongoing, ten-year-long civil war. 356Dictators and authoritarian regimes across the globe, in fact, have systematically violated people's rights ( e.g., North Korea's use of torture and forced labor camps, 357the Chinese crackdown on dissenters in Hong Kong, and the Russian Federation's complicity in shooting down a Malaysia Airlines passenger plane over Ukraine killing 298 passengers and crew). 358

Abuses of power and failures to promote and respect human rights take many forms. Former President Donald Trump, for example, repeatedly thumbed his nose at the Rule of Law, 359continually glorified violence, 360embraced authoritarian and totalitarian leaders, 361regularly attacked and tried to intimidate journalists and federal judges, 362routinely spoke of accurate reporting as "fake news," 363and grossly abused human rights throughout his presidency. 364His repeated lies and misrepresentations are well documented, 365prompting one journalist, S.V. Date, to pointedly ask President Trump at a White House press briefing in August of 2020: "Mr. President, after three and a half years, do you regret at all, all the lying you've done to the American people?" 366"As long as the president embraces autocrats and dictators, expressing envy of their ability to silence or compromise the democratically essential checks and balances on their authority," Kenneth Roth, the Human Rights Watch executive director, testified about Donald Trump on January 10, 2020 before the U.S. State Department's Commission on Unalienable Rights, "the US government will have little credibility on human rights." 367

Donald Trump's repeated abuses of power included soliciting foreign interference in a U.S. presidential election, 368separating children from their parents at the U.S.-Mexico border, 369keeping immigrant kids in cages, 370using the executive clemency power to pardon friends, political cronies and even war crimes, 371inciting and exalting violence, 372and misleading the American people about the true nature and danger of the COVID-19 pandemic, 373thus exponentially increasing sickness and death. 374In recounting a conversation with Chinese President Xi Jinping, Trump told Washington Post journalist Bob Woodward on February 7, 2020, that the coronavirus is "more deadly than your, you know, your - even your strenuous flus." "This is deadly stuff," Trump said at the time. 375Yet, Trump deliberately chose to downplay the seriousness of the virus. 376As Trump told Woodward on March 19, 2020: "I wanted to always play it down. I still like playing it down." 377

Indeed, Trump inexplicably chose as a coronavirus advisor Dr. Scott Atlas, who - unlike renowned expert Dr. Anthony Fauci, the long-time director of the National Institute of Allergy and Infectious Diseases 378- had no background in epidemiology or infectious diseases. 379A group of Stanford University faculty members specifically rebuked Dr. Atlas because, through his statements, he "undermined and threatened public health even as countless lives have been lost." 380Trump himself put his own Secret Service agents and staff at risk, including by taking a "joyride" outside of Walter Reed, after contracting the coronavirus and while still infectious. 381By December 2020, COVID-19 had killed more than 300,000 people in the United States, 382with hospital intensive care units around the country reaching or at their capacities. 383And in the wake of the rioting at the U.S. Capitol by Trump supporters, the U.S. recorded more than 4,000 dead in a single day on January 7, 2021, bringing the total COVID-19 death toll in the U.S. to more than 365,000 people as of that date. 384Tragically, COVID-19 deaths crossed the 500,000 mark in February 2021, and they continue to climb. 385

In addition, Donald Trump and his administration funneled taxpayer dollars to Trump-related businesses or entities, 386made a plethora of other unethical decisions, 387ordered the resumption of federal executions 388in the midst of a national and global trend to abandon capital punishment, 389and even resorted to attacking and undermining the mission of the U.S. Postal Service, intentionally slowing down the transport of the U.S. mail (thus causing delays in the delivery of ballots and life-saving medications) in the lead up to the presidential election. 390The Trump Administration went so far as to remove postboxes shortly before the November 2020 election, 391all in a blatant attempt to curtail voting by mail. 392

After losing the election, Donald Trump then blatantly lied about the election results as the Trump legal team made fatally flawed and frivolous arguments in court. 393With Trump's lawyers outrageously targeting counties with large minority populations 394and even promoting groundless, evidence-free conspiracy theories, Trump and his allies attempted to disenfranchise millions of American voters in an effort to overturn the election results. 395"Voters, not lawyers, choose the President," the U.S. Court of Appeals for the Third Circuit ruled in one case rejecting a Trump campaign lawsuit. 396Trump's efforts to hold onto power at all costs were aimed at undermining democratic norms and institutions, with Donald Trump's legal challenges to the election continuing long after his loss. 397One editorial in The Irish Times took stock of the "fragility" of American democracy after the mob had stormed the U.S. Capitol, but also, in the wake of the election of two Democratic U.S. senators in the run-off elections in the State of Georgia, saw "a more positive lesson: when democracy is fully mobilized, its enemies cannot win." 398

Donald Trump's frequently conspiratorial, false, dehumanizing and demeaning Tweets and rhetoric, whether directed at women, minorities, immigrants, journalists, people with disabilities, or political adversaries were offensive and disgraceful, taking political behavior - including online activity - to new lows, 399even prompting the social media companies to suspend Donald Trump's accounts. 400Not only did then- President Trump fail to attempt to quell or immediately condemn the rioting and violence at the U.S. Capitol on January 6, 2021 that he himself had plainly inspired with his baseless invective and rhetoric and his refusal to concede an election he lost, 401but the Trump Administration's rush to execute so many death row inmates, including during the COVID-19 pandemic and the lame-duck period after the November 2020 election, illustrates what has been aptly called an almost "insatiable appetite for cruelty." 402

Abuses of power, of course, are nothing new. 403Throughout human history, the rich have exploited the poor, 404and the powerful have preyed upon the vulnerable. 405The grotesque ideology of white supremacy, in fact, has centuries' old origins, 406and it has raised its ugly head throughout world history, 407including in Nazi Germany 408and South Africa's apartheid era, 409with neo-Nazis and hate groups continuing to spew hatred and trying to sew division and social discord. 410In the U.S., after deadly violence broke out in Charlottesville, Virginia, at a "Unite the Right" rally with white supremacists carrying torches, President Trump infamously declared that "there is blame on both sides." 411

Those in power sometimes try to desperately cling to that power, with now former President Trump, who reportedly heard arguments in the Oval Office about the possibility of invoking martial law to stay in office, 412being Exhibit A. Power-thirsty individuals who do not respect democratic norms will employ any means, however manipulative or nefarious in nature, to try to get what they want, including disinformation, violence and intimidation, and disenfranchising voters. 413Using Dark Money, 414gerrymandering, 415and voter suppression 416targeted at racial minorities, 417they try to pick their voters, rather than allowing all eligible voters with easy access to ballot boxes to pick their elected leaders. 418"I felt a growing sadness as I listened to a recording of Donald Trump begging, bullying, cajoling, and threatening Georgia Secretary of State Brad Raffensperger in an attempt to make him do something he can't - overturn Trump's loss in the presidential race," Solomon Jones wrote in an op-ed for The Philadelphia Inquirer. 419

VIII. The Rule of Law's Importance to Safeguarding Civil Liberties and Human Rights

As history shows, shockingly horrific - even genocidal - consequences can flow from a societal breakdown of the Rule of Law. 420 Just consider Nazi Germany and The Holocaust, 421 the Rwandan genocide, 422 "ethnic cleansing" in Bosnia-Herzegovina, 423 and all of the atrocities committed by the regimes in Turkey, Syrian and Iran. 424 In sharp contrast, the ideal of the Rule of Law, one articulated long ago, is that everyone will be treated fairly and equally by the law. 425 A Rule of Law system puts people front and center in their own governance, divides power to prevent its abuse, 426 insists on equal application of the laws, and requires an independent judiciary and skilled lawyers 427 to vigilantly safeguard individual rights. 428Before the onset of the Revolutionary War (1775-1783), the Continental Congress, in 1774, drew particular inspiration from Beccaria's On Crimes and Punishments - a book that opposed tyrannical practices - in articulating a core principle of the Enlightenment and of the American Revolution. 429As the Continental Congress wrote that year in a letter to the inhabitants of Quebec:

"In every human Society,' says the celebrated Marquis Beccaria, following the steps of the immortal Montesquieu in impressing sentiments of Humanity, "there is an Effort continually tending to confer on one Part the height of Power and Happiness, and to reduce the other to the extreme of Weakness & Misery. The intent of good Laws, is to oppose this Effort, and to diffuse their Influence, universally, & equally.' 430

When corrupt politicians such as Donald Trump repeatedly lie, ignore or brazenly violate laws and norms, refuse to comply with subpoenas, excoriate journalists and judges to deflect their own wrongdoing, use hate speech and racially charged rhetoric, employ division and disinformation to manipulate, and seek to enrich themselves at the taxpayers' expense, the Rule of Law is eroded and undermined, 431especially if there are no immediate consequences - or plainly insufficient pushback - for such behavior and misconduct. And that is the case even though the long-standing principle that "no one is above the law" might be occasionally invoked, whether rhetorically or by the courts, 432when it appears to the general public that nothing concrete is, in actuality, ever done to check the misconduct, illegality, or abuses of power. As Joyce Vance, a law professor at the University of Alabama and a former U.S. Attorney for the Northern District of Alabama, put it nicely: "Accountability is essential to our system of government. The Founding Fathers created checks and balances to keep any one branch from growing too powerful." 433

In today's world, there are many pressing problems that need to be addressed, including global warming and the climate crisis, 434 poverty and hunger, 435 a lack of affordable health care, 436 discrimination 437 and unemployment, 438 pollution 439 and habitat destruction, 440 [FOOTNOTE] 440 Mikaila Mariel Lemonik Arthur, Law and Justice around the World: A Comparative Approach 307 (2020) ("Overfishing, habitat destruction, and other human activities are leading to the mass extinction of species."). [END FOOTNOTE] the plight of tens of millions of refugees and forcibly displaced persons, 441 hate crimes and the use of excessive force, 442 and matters of peace and international security. 443 Consequently, respect for the Rule of Law must be restored post-haste in the post-Trump presidency, and there must be a much-needed renewal - indeed, an amplification - of the commitment to further it. The global future of the Rule of Law, in fact, must concentrate on better protecting human rights, 444combatting corruption, 445eliminating poverty and hunger, 446reducing disease and other forms of human suffering, 447funding and fostering legal aid services 448and an independent judiciary, 449 [FOOTNOTE] 449 Sellers, An Introduction to the Rule of Law in Comparative Perspective, supra note 80, at 5 ("The first necessary and inescapable desideratum of the rule of law is an independent judiciary. Judges must be secure and well-paid, so that they can apply the law without fear or favor."); id. at 8-9 (""Rule of law' states finally come into being with the emergence of constitutional government, provided that the constitution seeks justice and the common good through the checks and balances of divided governmental power, under the ultimate review of independent judges."). [END FOOTNOTE] and bringing more equality and human dignity to the world's diverse societies. 450

#### AND domestic legitimacy is modelled, spurring global development.

Norman L. Greene 08, JD, Member, Law, Schoeman Updike & Kaufman, LLP, "Perspectives from the Rule of Law and International Economic Development: Are There Lessons for the Reform of Judicial Selection in the United States," Denver University Law Review, Vol. 86, No. 1, pg. 53-114, 2008, HeinOnline. [italics in original]

I have learned through multiple conversations and extensive study that American writers on domestic judiciaries and American writers on foreign judiciaries seem to be on separate paths. They often publish in different places, and if they read each other's work, it is not obvious from some or perhaps much of what I have read. Not too long ago, I was on one of those separate paths myself (the domestic one) until I was told, in substance, by a friend who was on the other one (the international and rule of law one) that "the issues on both paths are really the same, don't you know?" This simple but perceptive thought gave me an entirely new perspective. The objectives of this article include joining the two paths, applying to the domestic sphere perspectives from the field of rule of law and international economic development, inspiring further scholarship, and starting on the road toward positive change.

This article will consider whether a relationship exists between good business and a fair and impartial judiciary; if so, whether a compelling domestic economic rationale for American judicial reform may be identified; and if so, how it may be achieved. It will begin by focusing on the international principles of rule of law originating in work sponsored by international financial institutions and other governmental and non-governmental organizations, which have disbursed billions of dollars to improve judicial systems in developing countries. These principles include key components of the rule of law, such as judicial impartiality, independence,3 competence, and accountability; 4 and they are applicable to the United States as well as to other countries.5 This article will also consider the basis for linking the rule of law and economic development, various causation controversies affecting the linkage, and the likely economic consequences of rule of law violations. It will then assess state court judicial elections in the United States in light of the rule of law, whether the American practice of judicial elections is consistent with the rule of law, and the potential economic implications.

The article concludes that a sufficient connection between the rule of law and sustainable economic progress (whether called development or growth) has been demonstrated to warrant the concern of governmental and nongovernmental policymakers, both at home and abroad; that the principles of the rule of law and economic development apply domestically as well as internationally; that state court judicial elections create or appear to create rule of law violations in the United States; and that Americans most concerned about the welfare of our economy should work for the elimination of state court elections in the United States.

I. THE RULE OF LAW AND INTERNATIONAL ECONOMIC DEVELOPMENT

*A. The Enormous International Commitment to Promoting Rule of Law*

The notion that the rule of law promotes economic development is built on various factors, including common sense, practical assumptions, logic, and to some extent, empirical studies.6 Based on this level of knowledge, policymakers have made decisions and taken action, including disbursing extraordinary sums of money to promote the rule of law as a key component of international assistance to developing countries.7 Policymakers are on a timetable: they need to make decisions now on the basis of the knowledge that they have to try to improve or not improve foreign legal systems. If they decide to take action, they must decide what kind of action to take and where.

At the same time, an academic debate proceeds over what we know about the subject, including: what is the rule of law; what is economic development; do improvements to the rule of law promote economic development; what is the measure of each; does economic development in turn bring about a demand for the rule of law; does it do so everywhere; are there exceptions; what caused the exceptions; do they matter; and how do we know and prove the connection between the rule of law and economic development. Is the connection just an association, perhaps a correlation, or is there demonstrated causation? Is there empirical evidence of this; if so, how much; and how much is necessary? If not, what evidence should we obtain and how should we obtain it? The academic discourse is divided, sometimes tentative, other times assertive, and often calls for further research, but it forms a vast literature.

The effort in the "field of law and economic development ... has been lead [sic] by the international financial institutions (TFIs)-the World Bank, the International Monetary Fund (IMF), the Asian Development Bank, etc.-by the aid and development arms of the U.S. government and the European Union, and to a lesser extent by NGOs.... In this context, the Rule of Law is understood as being related to economic development and the workings of a market economy, rather than as a set of normative political commitments." 8 These and other organizations, such as and including the Inter-American Development Bank, the United States Agency for International Development (USAID), and the American Bar Association (ABA) through its Rule of Law Initiative (ABA ROLl) 9 and its diverse activities, have disbursed or overseen the disbursement of billions of dollars.10 The many activities of ABA ROLl appear on its website and are too extensive to catalog, but cover numerous countries and projects in the area of legal reform, including gender equality projects. 1

For example, according to a 2002 report:

The World Bank, the Interamerican [sic] Development Bank, and the Asian Development Bank have extended over $800 million in loans for judicial reform .... [T]he United Nations Development Program, the European Union and its member states, and the American, Australian, Canadian, and Japanese governments have provided significant grant aid to help developing nations improve the operation of the judicial branch of government. 12

The World Bank reports having lent $273.2 million in 2002, $530.9 million in 2003, $503.4 million in 2004, $303.8 million in 2005, $757.6 million in 2006, and $424.5 million in 2007 on rule of law initiatives.1 3 As one commentator noted, there has been a "massive surge in development assistance for law reform projects in developing and transition economies involving investments of many billions of dollars. The World Bank alone reports that it has supported 330 'rule of law' projects and spent $2.9 billion on this sector since 1990.,14

The Millennium Challenge Corporation (MCC) is a United States government corporation that provides aid to countries meeting certain levels of satisfactory standards of good governance. 15 Founded in 2004, the "MCC is based on the principle that aid is most effective when it reinforces good governance, economic freedom and investments in people." 16 Eligibility for grants depends, among other things, on whether the country meets certain thresholds in particular categories. These categories include: "Ruling Justly" indicators, consisting of "Political Rights" and "Civil Liberties" (measured by Freedom House indexes); "Control of Corruption;" "Government Effectiveness;" "Rule of Law;" and "Voice and Accountability" (measured by World Bank Institute indexes). 17 Using these indicators, the MCC evaluates countries on, among other things, "public confidence in the ... judicial system; ... strength and impartiality of the legal system; . . . independence, effectiveness, predictability, and integrity of the judiciary; . . . [and the training of judges] in order to carry out justice in a fair and unbiased manner.',18 Eligibility does not require minimum scores in all indicators. 19 The purpose of the indicators is "to identify countries with policy environments that will allow Millennium Challenge Account funding to be effective in reducing poverty and promoting economic growth. 20

Rule of law reform includes both judicial reform and overall legal reform.2 ' What falls into the category of judicial reform or legal reform "blurs at the margin," but the "core of a judicial reform program typically consists of measures to improve the operation of the judicial branch of government and related [or supporting] entities such as bar associations and law schools. 22 This includes "changes in the ways in which judges are selected, evaluated, and disciplined to ensure that decisions are insulated from improper influences. 23 Overall legal reform may include drafting and revising legislation as well. 24 Increasing compensation and respect for the judiciary are also concerns.25

Reforms need not involve transplanting "complicated legal systems that work well in rich countries" to poorer countries "without significant modification., 26 The subject of legal transplantation-what is successful or unsuccessful and why-is one of some complexity; however, merely transplanting an institution from one place to another does not insure that the institution will be functional or effective when it arrives at its destination.27 The "'hasty transplant syndrome' is a critical problem in legal reform assistance, which 'involves using foreign laws as a model for a new country, without sufficient translation and adaptation of the laws into the local legal culture.' ' 28

*B. The Linkage Between the Rule of Law and Economic Development at Home and Abroad*

1. Definition of the Rule of Law

The concept of the rule of law has been traced to "political theorists like Aristotle, Montesquieu and Locke, who were concerned with devising limits to the power of the government., 29 In the case of Aristotle, the concept appears in the sense of "judging the case rather than the parties" and showing impartiality. 30 The phrase "rule of law" itself has been attributed to British jurist Albert Venn Dicey in 1885.31 The phrase is susceptible to varying definitions from the limited to the substantial.

For example, definitions of the rule of law have been described as broad and variable; it has been called a "notoriously plastic phrase., 32 The phrase "rule of law" is not a "legal term of art.",33 Commentators have varying views of its utility. One extreme view is that the phrase has no meaning: "The 'rule of law' means whatever one wants it to mean. It's an empty vessel that everyone can fill up with their own vision., 34 If rule of law just means the "rule of good law," the term is useless, since "'we have no need to be converted to the rule of law just in order to discover that to believe in it is to believe that good should triumph."'' 35 "Everyone uses the phrase because everyone can get behind it and it might make it easier to get funding., 36 "The rule of law... stands in the peculiar state of being *the* preeminent legitimating political ideal in the world today, without agreement upon precisely what it means. 37

One commentator observed that "[w]hen an American writes or speaks on [the rule of law] he usually begins with a confident assumption that everybody knows what the rule of law is and then devotes the rest of his time to a bold and eloquent statement in favor of it."'38 Another commentator noted the following:

Our tradition has produced no agreed definition of the Rule of Law, and there is no important tradition of academic analysis and explication of the term .... Few American law students study jurisprudence (legal philosophy), and it is safe to say that the overwhelming majority of American law students never address the Rule of Law concept in any systematic way.39

The rule of law should not be the rule of any law, regardless of its content, however. Although that may enhance predictability, such a rule of law would be "compatible with a regime of laws with inequitable or evil content"; and it "may actually strengthen the grip of an authoritarian regime by enhancing its efficiency and by according it a patina of legitimacy. 40

The World Justice Project has identified four "universal" principles comprising its "working definition" of the rule of law, embodying, among other things, fairness, accountability, independence, and competence:

1. The government and its officials and agents are accountable under the law;

2. The laws are clear, publicized, stable and fair, and protect fundamental rights, including the security of persons and property;

3. The process by which the laws are enacted, administered and enforced is accessible, fair and efficient;

4. The laws are upheld, and access to justice is provided, by competent, independent, and ethical law enforcement officials, attorneys or representatives, and judges, who are of sufficient number, have adequate resources, and reflect the makeup of the communities they 41 serve.

Another view likewise ascribes to the rule of law three elements, which generally require that the courts should be accessible, independent, impartial and accountable:

The rule of law is a tradition of decision, a tradition embodying at least three indispensable elements: *first*, that every person whose interests will be affected by a judicial or administrative decision has the right to a meaningful "day in court"; *second*, that deciding officers shall be independent in the full sense, free from external direction by political and administrative superiors in the disposition of individual cases and inwardly free from the influence of personal gain and partisan or popular bias; and *third*, that day-to-day decisions shall be reasoned, rationally justified, in terms that take due account both of the demands of general principle and the demands of the particular situation.42

In turn, judicial impartiality and independence are captured by the notions that decisions "are reached on the factual and legal merits of the issues before the court, uninfluenced by considerations that are extraneous to those merits, such as personal relations between the judge and one of the parties, corruption, cronyism, political interference or coercion in particular decisions, especially those affecting the government of the day or its officials." 43 Judicial accountability, among other things, includes such matters as the quality of the decision-making process, compliance with judicial codes of conduct, and the efficiency of judicial administration.44

Different concepts of the rule of law are peculiarly referred to as "thick" or "thin," depending on the number and kinds of requirements they contain, and have been shown in a sliding scale. 45 The thickest versions contain individual rights, including some social welfare concepts.46 For example, the World Justice Project's concept of the rule of law is not merely one of formalistic legality, but expressly includes concepts of fairness, competence, and the protection of "fundamental rights." Its definition appears to fall within the "thicker" part of the scale.

The notion of the "rule of law, not of men" has sometimes been considered an alternative view of the rule of law.47 This is subject to the caveat that human participation cannot be divorced from the operation of law since laws do not apply or interpret themselves.48 It is a valuable reminder that judges should "apply a relevant body of rules to a situation," rather than "do as they please ...without regard to rules. 4 9

Without specifying what the rules should be, the concept calls for government to "sublimate their views to the applicable laws."5°

Finally, the World Justice Project recently developed a Rule of Law index that has been and will be applied to a number of countries, including the United States, to measure the extent to which a country acts in conformity with the rule of law.51 A pilot study performed for the Project by the Vera Institute measured the rule of law to a limited extent in three cities outside the United States and in New York City to "gauge the extent to which all people, particularly those who are poor or otherwise marginalized, experience and benefit from the rule of law. 52

2. What is Economic Development?

Although the rule of law obviously applies to the United States as well as other countries, the phrase is still most commonly used these days in the field of international development work. 53 For example, starting in the early 1990s, the World Bank and LMF "began conditioning the provision of financial assistance on the implementation of the rule of law in recipient countries," justified in order to "provide a secure environment for investments, property, contracts, and market transactions. 54 Over the past couple of decades, this has grown to be a professional field, whose practitioners use funding from international development institutions, such as USAID, to promote the rule of law in developing countries and post-conflict environments.55

Many articles refer to the rule of law and economic development; however, little is said in those articles about the definition of economic development, as if all readers knew what this term meant. Sometimes the word "economic growth" is used instead of "economic development," as if both words were the same; and sometimes the words "development" and "growth" both appear in the same definition, as follows:

Outside the U.S., the concept of local economic development (LED) refers to a broad set of financial and technical assistance provided to less developed countries (LDCs) to reduce global poverty. In this sense, policies and programs focus on a comprehensive approach to economic growth that includes capacity building for citizen, public and private sector participation and collaboration. These efforts may focus on improvements to political, legal, financial, transportation, communications, education, environmental, or healthcare systems. Business or employment specific aspects of LED may focus on entrepreneurial development, foreign direct investment, and the development and maintenance of efficient production and distribution systems for goods and services. 56

Although the subject is not free from doubt, development is sometimes perceived to be the broader term and more representative of permanent economic progress. Nonetheless, nothing precludes the rule of law from supporting less extensive forms of economic progress.

The definition of economic development may differ from country to country and context to context, especially to the extent that it depends on priorities. For example, for a country with insufficient housing, power plants, highways, and jobs, it might mean more houses, power plants, road construction, and new jobs. For a country with lots of housing, power plants and roads, it might mean, among other things, more hospitals and manufacturing, if those were deficient. If the country lacked certain goods and services, development might mean the production of those goods and services. The definition depends on what is needed in each case.58 Furthermore, whether development in particular areas should be left to market forces in laissez-faire economies or otherwise directed or encouraged is a fair ground for discussion in a country-bycountry context.

As an alternative or supplemental tool for assessing economic development, one might consider large measures of wealth, such as gross domestic product or per capita income. To the extent that they do not take into account disparities in wealth within a country, however, those measures may be insufficiently meaningful. Therefore, to counterbalance this, one might need to reflect on the "Gini coefficient of inequality." According to the World Bank, the Gini coefficient "is the most commonly used measure of inequality. The coefficient varies between 0 [zero], which reflects complete equality, and 1 [one], which indicates complete inequality (one person has all the income or consumption, all others have none)." 59 "To begin to understand what life is like in a country-to know, for example, how many of its inhabitants are poor-it is not enough to know that country's per capita income. The number of poor people in a country and the average quality of life also depend on how equally-or unequally-income is distributed. 6°

Thus one might not regard something which exacerbates wealth disparities (*e.g.*, by leaving virtually all the wealth in the hands of a few, such as a dictator or an aristocracy, while the rest of the population remains impoverished) to be positive economic development, even if it raises the country's overall wealth dramatically. Countries with extraordinary disparities of wealth and poverty may also be unstable and thus be poor investment climates for business. "High inequality threatens a country's political stability because more people are dissatisfied with their economic status, which makes it harder to reach political consensus among population groups with higher and lower incomes. Political instability increases the risks of investing in a country and so significantly undermines its development potential .... ,,

Regardless of the measure of economic development, certain principles arguably support economic progress-namely, enforcement rather than violation of legitimate bargains, 62 encouragement rather than discouragement of investment in useful enterprises, creation rather than dissipation of legitimate and useful employment opportunities, and increase rather than shrinkage in the production of valuable goods and services. The words "legitimate" and "useful" in this sentence are intended to reflect the notion that there is no societal interest in enforcing corrupt contracts or contracts otherwise against public policy, 63 creating unlawful employment opportunities or ones which are not socially useful, or in providing poor quality or undesirable goods and services. For example, undesirable employment opportunities might be the following: jobs building x when the country already makes too much x, and there is no export market for x; or jobs in industries which do not benefit society, such as building arms for aggressive war, serving in a dictator's secret police, and engaging in narcotics production and human trafficking. The armaments and narcotics themselves might also be examples of undesirable production.

The use of the phrase "public policy" brings up the question of "whose public policy," since public policy may vary from country to country. 64 Western institutions attempting to bring rule of law reforms to foreign countries would undoubtedly find it difficult to encourage enforcement which substantially offended their own public policy standards; and ignoring foreign standards of public policy would presumably lead to resistance from the foreign nations concerned.

3. The Linkage Between the Rule of Law and Economic Development

Many have linked the rule of law to economic development in developing countries, and statements to that effect are common and longstanding.65 "The argument that the rule of law fosters economic development has been made many times.' 66 Although the principal focus of the rule of law and economic development discussion is in the context of international development, some American business organizations have noted the relationship between law and American economic prosperity as well.67 For example, one multinational company has recognized that "the business community [has] a particular opportunity to help spread the word that if countries want to grow economically, if they want to create better futures for their people, if they want to build new jobs, the independence of the judiciary in fact plays a critical role in economic development."68 In addition, the United States Chamber of Commerce has concluded as part of its "tort" or "civil justice" reform agenda that the American tort system costs businesses billions and harms both employment and productivity.69 Similar statements have been made by others, including the American Tort Reform Association:

While most judges honor their commitment to be unbiased arbiters in the pursuit of truth and justice, judges in Judicial Hellholes do not. These few judges may simply favor local plaintiffs' lawyers and their clients over defendant corporations. Some, in remarkable moments of candor, have admitted their biases. More often, judges may, with the best of intentions, make rulings for the sake of expediency or efficiency that have the effect of depriving a party of its right to a proper defense. What Judicial Hellholes have in common is that they systematically fail to adhere to core judicial tenets or principles of the law. They have strayed from the mission of being places where legitimate victims can seek compensation from those whose wrongful acts caused their injuries .... *Rulings in these Judicial Hellholes often have national implications because they involve parties from across the country, can result in excessive awards that bankrupt businesses and destroy jobs, and can leave a local judge to regulate an entire industry*.70

The linkage between the rule of law and economic development (including foreign investment) has been described as the "dominant theory." 7 1

A set of common sense assumptions appears to underlie the connection between rule of law and economic development, with some limited or questioned empirical study covering various possibilities,72 including a 73 country's historical origins. These assumptions relate to the key components of the rule of law. For example, "[m]ore independent judges are often more efficient judges .... [T]he combination of judicial independence and efficiency seems to be essential for judicial reforms to have a positive effect on economic development., 74 "Judicial independence is a key determinant of growth as it promotes a stable investment environment., 75 Reforms which strengthen judicial accountability-and thus efficiency-improve judicial performance.76 A sound judicial system promotes economic development "[b]y enforcing property rights, checking abuses of government power, and otherwise upholding the rule of law and in enabling exchanges between private parties., 77 "[T]he claim that judicial independence is a necessary condition for the protection of property rights or economic growth should give any American political ,,78 scientist pause.

"No one, whether local or foreign, wants to invest in a country that is politically unstable or where there is no confidence in the justice system, as investors would not be assured of a fair return on their investment., 79 “An independent judiciary could thus also be interpreted as a device to turn promises-*e.g.*, to respect property rights and abstain from expropriation-into credible commitments. If it functions like this, citizens will develop a longer time horizon, which will lead to more investment in physical capital. . . .All these arguments imply that [judicial independence] is expected to be conducive to economic growth.”80

"The link between property rights, the integrity of contract, and economic growth comes through several channels, but incentives play a central role: The more well-developed and secure are property rights, the greater incentives individuals have to invest., 81

Thus "the [World Bank] sees law as facilitating market transactions by defining property rights, guaranteeing the enforcement of contracts, and maintaining law and order., 82 As a former president of the World Bank noted:

Without the protection of human and property rights, and a comprehensive framework of laws, no equitable development is possible. A government must ensure that it has an effective system of property, contract, labor, bankruptcy, commercial codes, personal rights laws and other elements of a comprehensive legal system that is effectively, impartially and cleanly administered by a well-functioning, impartial and honest judicial and legal system. 83

Another World Bank commentator stated that "the payoffs from a successful [judicial] reform, in terms of economic growth and development, more than justify the work involved.,, 84 "One conclusion widely agreed upon, not just in the economic literature but also among lawyers and legal scholars, is therefore that the judiciary is a vital factor in the rule of law and more broadly in economic development., 85

*C. The Challenges to Promoting Economic Development through Rule of Law*

1. What to Do and Where to Start

Addressing rule of law reform and economic development in any specific country presents particular challenges. "Specifying the optimal set of judicial and legal institutions for any given country is a ... difficult and context-specific task.",86 "The question ... becomes one of sequencing: Where does one start? ' 87

As in the case of economic development, the answers may depend on what the country needs. Obviously, if the country has undertrained judges, insufficient computer systems,88 and lack of courthouses, one would have to look at those items. Other considerations in deciding on reform include resource constraints, which make it important to prioritize among reform projects: "[E]very dollar spent on judicial reform is a dollar that cannot be spent on other public goods or put toward economically productive private investment,, 8 9 including public health.90 Researchers and policymakers may assess the effectiveness of past reforms, and if inadequate, they may wish to revise their future approach. 9' Other activities beyond legal and judicial reform might be needed to improve ,,92 the rule of law. "Rule of law is an end-state, not a set of activities. For instance, one may need to inquire whether "developing the judiciary is sufficient to advance the rule of law or whether it is also important to invest in improving political processes. 93 Establishing and reviewing the effectiveness of rule of law programs is an ongoing process.

2. Assessing the Level of Causation

a. Recognizing Causation Controversies

Determining, as a social scientific or empirical matter, whether economic development is caused or at least facilitated by rule of law reform or any of its aspects, including sound judicial institutions, is beyond the scope of this article. Such an approach requires an adequately designed research study, perhaps on a country by country basis, controlling for the effect of perhaps many other circumstances that might affect development.94 One commentator, for instance, has identified the questions she would like answered in order to determine the extent to which foreign investment is influenced by legal reform, but noted that the data was so far unavailable.95 The questions are as follows:

* Did or will you investigate Country X's legal system before you deciding [sic] to invest there? (Are legal systems a factor?)
* If yes, did or do you consider it to be an attractive legal system? (What is an attractive legal system?)
* Would you refuse to invest in, or remove investment from, Country X if you did not consider its legal system to be effective? (How much of a factor are legal systems?)
* How much importance do you place on the legal system as a factor in determining where you should invest? (How much of a factor are legal systems?)
* Have you had or do you expect to have much interaction with the legal system in Country X? (How much of a factor are legal systems?) 96

The results may be inconsistent from country to country; and researchers or commentators may not achieve consensus because of disputes over the variables selected, the presence or absence of data,97 the definition of terms (including what is "rule of law" and what is "economic development"),98 other methodological controversies, such as countries that arguably do not fit within the overall theory, and the contention that correlation between rule of law reform and economic development is being confused with cause.99 Some even suggest that causation flows in reverse, with economic development leading to rule of law reform, rather than rule of law reform leading to economic development.1°° Causation may also flow in both directions.' 0'

Moreover, certain northeast Asian countries have weak rule of law and had substantial economic progress 10 2 Some may question, if this is established, what this means for the general rule: for example, are they outliers or anomalies which leave the rule intact; is it too early to tell whether the progress is sustainable; 10 3 might past progress have been greater still in those countries if rule of law were stronger; or is substantial future progress possible only with stronger rule of law?

Even some skeptical commentary, however, would not entirely deny the connection between rule of law reform and economic development, much less suggest that law reform efforts cease; rather, these commentators suggest law reform efforts go forward.1t 4 For example, questions about a World Bank study relating to the connection of law to economic development nonetheless concluded with appreciation for the work and suggestions for improvement, not cessation.105 Another com- mentator noted:

It is hard to argue that an effective, efficient, and fair judicial system is not a good thing or that a country will be better off without "an effective system of property, contracts, labor, bankruptcy, commercial codes, personal rights and other elements of a comprehensive legal system that are effectively, impartially, and cleanly administered by a well-functioning, impartial and honest judicial and legal system," and I will not attempt to do so.106

... I do not intend to discourage legal reform or the borrowing of legal rules or institutions from other countries .... It would be foolish and futile to argue against it, and it would mean arguing against transnational legal learning. 1 07

Still others contend that "[w]hile there appears to be an increasingly firm empirically grounded consensus that institutions are an important determinant of economic development.., there is much less consensus on which *legal* institutions are important .... ,,t8 In any event, although doing a study as an academic or future policy matter is undoubtedly worthwhile and may fall under the heading of "next steps" or "future challenges," it is unnecessary for the purposes of this article. Nor, as shown below, need it delay policymakers from making the decisions that they need to make in light of what they already know.

b. Informal Legal Systems and Incentives

Some contend that formal legal systems are not the only systems causally linked to economic development or are not essential for development. Instead, they identify informal legal systems consisting of various incentives which also help ensure that persons keep their promises: for instance, the negative consequences of failing to maintain a good reputation. 1°9 This, of course, does not prove that formal legal systems are not linked to economic development, but rather suggests only that other informal incentives may be at work too.

For example, "[a] vendor who is a member of a community is unlikely to risk his reputation by failing to perform his obligations under a contract. The result would be a loss of respect and a subsequent lack of business."110 In other words, a company which does not carry out the first bargain may lose the opportunity to have a second bargain, because the company's reputation was harmed. Alternatively, the company may not lose the opportunity to do another deal, but it may lose the opportunity to do so at a reasonable price. Thus the cost of credit or sales price or any other cost indicators may escalate because of the perceived danger of a breach or noncompliance. "A country that cannot establish to the satisfaction of the contracting private party that the rule of law will ensure fair treatment can expect to pay more, perhaps much more, just to cover the risk.""' 1

In developed legal systems, reputation likewise plays a role in ensuring compliance, especially given the uncertainties involved in contract enforcement even in those systems. The availability of an action for breach of contract may be of limited benefit even in developed countries. Even if one has a valid claim, recovery is not assured. For example, the party in breach may assert defenses or counterclaims or be insolvent; a lawsuit may be time-consuming, slow and expensive; and the judge or jury may simply "get it wrong." In many ways, it is important to deal with someone with a good reputation under any circumstances. Although reputation is not referred to as law (a phrase generally restricted to formal law), this does not make reputation any less effective as a persuasive (if not coercive) force to ensure compliance.

Sometimes it will be uncertain which mechanisms (formal or informal) cause some to keep their bargains. Some may keep their bargains because of reputational or informal legal systems, some may do so because of the formal legal system or threat of lawsuit, and others may do so because of the mixture of the two. 112 It might be difficult to guess which is the most efficacious as opposed to supporting both. 1 3 Furthermore, both systems may provide greater safety than one, resources pernitting. 1 4

*D. The Policymakers' Decisions*

A tension exists in the field of law and development between policymakers and researchers. They have different timetables and different knowledge requirements. Policymakers (including international financial institutions) and companies and their CEOs may (and will) act on the basis of sound policy, logic and common sense. None of these factors requires a demonstration of causation to a reasonable degree of social scientific certainty. Nor will they insist on such a high level of proof given their time constraints: if necessary decisions awaited the completion of time-consuming research, the time to act might have passed. Decisions may have to be made on the basis of scientifically imperfect, although otherwise sound, information:

Policy decisions on economic development issues are being made every day in every developing country and in bilateral and multilateral agencies in the developed world as well. Economy policymaking is necessarily carried out under conditions of uncertaintyuncertainty about the facts and about underlying principles and causes. So decisions about whether to change legal institutions and substantive law will be taken-if only by inaction-in substantive fields, such as land, equity markets, and credit markets as well as in enforcement, including the role and nature of the judiciary. Since policymakers know that institutions matter to economic development, it would be foolish for them to assume that legal institutions-both the rules of the game and law's organizations, especially the judiciary-do not matter. 115

That does not mean that research should not proceed and hypotheses and dominant theories should not be tested. Common-sense principles include the concept that economic transactions may be unsafe where there is no reliable legal system to enforce them, and foreign investment is less likely where the chances of investment protection are uncertain. 116 The lack of reliable enforcement may make doing business risky and complicate business planning; among other things, it may impede the formation of long-term or complex contracts or contracts involving large sums:

From the standpoint of economic development, perhaps the most unfortunate consequence of the unreliability of court enforcement is that it impedes the effective use of long-term and complex contracts. ... Today such contracts are essential in developing countries, especially for electric generating plants, ports, highways, and many other infrastructure projects.'17

It may also discourage the formation of new business relationships and lead to more conservative business practices overall. 18 Also, "[the prospect that courts will resolve these disputes impartially if the contracting parties cannot agree often leads to more reasonable bargaining positions and more prompt compromise."' 19 The argument connecting judicial reform and foreign investment has "undeniable common sense appeal-investors will want predictability, security, and the like."' 2 °

In addition, although some countries reportedly have attracted businesses to invest in their economies despite a weak rule of law, the weaknesses still may have been a negative factor for businesses considering whether to invest and may have deterred more investment. 121 Furthermore, even if weak rule of law may not deter investment in some circumstances, strong rule of law may positively encourage it; and investment may have been greater if rule of law were stronger. No one would be expected to argue that strong rule of law is a "negative" or that the rule of law should be weakened or corruption increased in order to improve the investment climate. 22 Also, no one can preclude the possibility that investment may occur even if rule of law is limited: some percentage of companies may tolerate high transaction risks in exchange for high potential gains or even successfully "navigate" corrupt systems through bribery or other means. 123 However, that is not the optimal situation.

*E. The Consequence of Rule of Law Failures or Violations*

Rule of law failures may have important consequences. Unfair judicial decision-making may lead to adverse judgments which will damage litigants and their families economically, harm shareholders, eliminate jobs, and interfere with society's ability to create goods and services. The causes of failure include lack of judicial independence (e.g., cases are not decided on the law and facts but as directed by another branch of government or person or to favor campaign contributors or local voters); lack of accountability (judges are uneducated, inefficient, or otherwise perform poorly); and even criminal conduct, such as corruption.124 As a commentator noted, the rule of law is particularly important to developed societies, including their economies:

The relationship between the rule of law and liberal democracy is profound. The rule of law makes possible individual rights, which are at the core of democracy.... Basic elements of a modern market economy such as property rights and contracts are founded on the law and require competent third-party enforcement. Without the rule of law, major economic institutions such as corporations, banks, and labor unions would not function, and the government's many involvements in the economy-regulatory mechanisms, tax systems, customs structures, monetary policy, and the like-would be unfair, inefficient, and opaque.125

Besides the economic consequences, such violations may also threaten the legitimacy of the court system, dissuade people from using the courts, and effectively deprive them of a fair place for the resolution of their disputes.

II. AMERICAN JUDICIAL ELECTIONS AND THE RULE OF LAW: ARE OUR PRINCIPLES AT HOME CONSISTENT WITH OUR PRINCIPLES ABROAD?

*To casual observers, the epitome of the rule of law is the United States, and the United States is a leading exponent of the new rule-of-law orthodoxy. When we look closely at the U.S. legal system, however, we find few of these characteristics ....* 126

*A dark shadow is falling, fairly or unfairly, upon the perceived integrity of judges in many states that elect judges. Justice has been characterized as being "for sale." Impartiality and the judiciary's rule-of law function are plainly threatened . . . [Clurrent thinking on how to protect the impartiality of the judiciary is gravitating toward the use and refinement of appointive methods of selection and related processe*s. 121

This section suggests that rule of law dialogue should enter the domestic arena, that domestic reform advocacy should reflect rule of law values, and that lessons learned internationally should be introduced into reform in the United States. 21

In supporting the rule of law abroad, Americans are advocating concepts of judicial reform that our judicial systems sometimes fail to comply with at home. For example, although international rule of law efforts stress judicial impartiality, independence and accountability, many Americans tolerate judicial elections that do not adequately protect these qualities.1 29 Some judicial elections seem to be efforts to achieve the opposite: namely, a tilted or slanted judiciary accountable to interest groups seeking to elect judges likely to decide cases "their way" or to hold judges accountable to popular and party preferences.1 30

In addition, the rule of law embodies the predictable application of the laws to all because the rules are open, known, and equally applied. But if the rules for decision depend on which side contributed or might contribute to (or against) the judge's campaign, or on who votes locally, the rules are no longer known or susceptible to equal application. Instead, they may shift-or appear to do so-from case to case according to the varying identities of the parties, depending on whether they are funders or potential funders, or where they vote.

*A. The Rule of Law Concept Is Not Merely International: It Should Be Applied to United States Institutions*

The U.S. and U.S.-based or -supported international development institutions have been looking at rule of law reforms, including judicial reform, worldwide, sometimes country by country.1 31 They have spent considerable time studying and assisting foreign states needing such reform.132 While these organizations are looking outward toward reform, other organizations within the United States are addressing the need for similar reforms in the United States, though rarely under the banner of "the rule of law."'133 In the foreign context, rule of law reform is driven by the need for economic stability and development, and, in some cases, human rights. 134 In the United States context, however, the same principles should apply, with a similar effort, starting with a closer look at state court judicial elections.

#### Development is a risk filter that prevents extinction.

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We agree that more powerful countries are likely to have more influence on the long-term future than less powerful ones, and that a country’s economic development is a strong indicator of its technological and geopolitical power. However, this does not mean that developed countries matter morally more than developing ones. Rather, it underscores the importance of global development—the process of low- and middle-income countries becoming high-income ones. Similarly, although workers in high-income countries generally have higher labor productivity, a large component of this is the place premium. That is, a worker’s productivity increases—sometimes by a factor of 15 or more—when they move from a poor country to a rich country, simply because they are being paid more for the same work. Once again, this speaks to the importance of global development and helping people escape poverty.

This essay describes why it’s important for the long term future for everyone to be in a relatively high-income country, and what it might look like for global development to be a longtermist issue. Global development benefits the long-term future by increasing diversity in global institutions and reducing civilization’s vulnerability to global catastrophic risks like armed conflict and pandemics.

What is global development?

Effective altruists regularly talk about “global health and development” as a category of ways to do good. However, it’s clear now that development drives health much more than health drives development. Global development is the process by which low- and middle-income countries turn into high-income countries. The best modern example of this are the Asian countries of South Korea, Taiwan, Japan, and China. These have been compared with other Asian countries that were thought to be “tiger cubs” in the ‘90s such as the Philippines and Thailand in the book How Asia Works, by Joe Studwell. In this book, Joe lays out a recipe for development. Here’s the summary from Bill Gates:

1. Create conditions for small farmers to thrive.
2. Use the proceeds from agricultural surpluses to build a manufacturing base that is tooled from the start to produce exports.
3. Nurture both these sectors (small farming and export-oriented manufacturing) with financial institutions closely controlled by the government.

Importantly, in South Korea, Taiwan, Japan, and China, these steps were taken by relatively uncorrupted leaders who made it their life’s work to develop their home country. Other countries unable to develop had leadership who were swayed by the neoliberal free-market thinking pervasive at the World Bank and IMF at the time, or who were otherwise too corrupt or incompetent to stay true in delivering their development strategy.

Global development is important for the long-term future

In an EA Forum post, Beckstead defines three types of benefits that an intervention can have: proximate benefits, benefits from speeding up development, and trajectory changes. Global development would have immediate benefits for people alive today: economic development in low-income countries means that fewer people would experience poverty, illness, hunger, and violence. Speeding up development is speeding up the process by which countries become high-income, so it would ensure that people realize these benefits sooner.

But most of the benefits of global development are through trajectory changes that affect the long-term future. We argue that global development creates significant long-term benefits through this route. Global development can also lead to trajectory changes in the global political environment that would not happen if the development timeline were slowed down, since such changes can be locked in over time.

Global development increases diversity in global governance

One of the main ways global development benefits the far future is through its impact on diversity and inclusion in world institutions. As countries get richer, their people get better educated and thus better placed to participate in institutions with great decision-making power over the world, such as multinational corporations, governments, and international organizations. Increasing the diversity of decision makers in global institutions improves the quality of world governance, which enables humanity to better navigate existential risks and other global challenges.

Diversity in global institutions improves their efficacy in two ways. First, socially diverse groups outperform homogeneous groups at decision-making because they deliberate more carefully and pay more attention to facts. They also innovate more because diverse group members bring unique perspectives. Second, it improves value alignment between these institutions and humanity as a whole. It has been proposed that humanity should engage in a “long reflection” to decide what is ultimately of value before making potentially irreversible decisions regarding its future. For such decisions to reflect the values and needs of all of humanity, as many people as possible should be able to participate meaningfully in the global institutions making these decisions.

Currently, about 689 million of the 8 billion people worldwide live in extreme poverty, and they cannot participate meaningfully in world governance as long as their basic needs are not met. 2.9 billion people lack Internet access, which is an important communication channel through which people make their voices heard on global issues and influence global institutions. Internet adoption is uneven across social groups: for example, women, people in rural areas, and people over age 25 are less likely to have Internet access. These disparities are especially pronounced in the 46 UN-designated Least Developed Countries (LDCs).

Another barrier to diversity in global governance is the structure of institutions such as the United Nations, which is not designed to represent the general will of humanity. UN institutions represent the will of states—especially the five permanent members of the UN Security Council: the United States, the United Kingdom, France, Russia, and China. Although a diverse group of countries have voices in the UN, their citizens do not, especially in the case of authoritarian states.

Global development reduces existential risks

Another important way in which global development improves the long-term future is by reducing existential risks, particularly risks from pandemics and political instability. 80,000 Hours estimates that the risk of a biological existential catastrophe in the next 100 years is about 1 in 1000. Poverty makes communities more susceptible to spreading infectious diseases. For example, a study of Monrovia, Liberia, in 2014 found that people living in slums who caught the Ebola virus spread it to an average of 3.5 times more people than people living in rich neighborhoods. This is because these neighborhoods are overcrowded, contaminated, and lacking in sanitation and health care infrastructure. Also, malnutrition weakens the immune systems of poor people, thereby making them more vulnerable to disease. Raising national income improves population health and enables countries to invest more in public health infrastructure, which makes populations more resilient to potentially catastrophic pandemics.

Global poverty also causes existential risk through its negative effects on international security. Many developing countries, particularly weak states, are caught in a vicious cycle of poverty, corruption, and political instability: “Inept, corrupt, or weak governance fosters poverty; widespread poverty makes effective, equitable governance more difficult to achieve; and when weak governments fail to improve their people’s lives, their legitimacy suffers.” Weak states often engender terrorism and crime because they are unable to maintain law and order in their territories.

#### Independently, the plan results in limiting the *Noerr* doctrine. That effectively constrains the corruption of governance.

Timothy Wu 20, JD, Professor, Law, Science, & Technology, Columbia Law School, "Antitrust and Corruption," Knight First Amendment Institute, 2020, pg. 1-26. [italics in original]

Since the 1960s, however, the scrutiny of corrupt and deceptive political practices inherent to antitrust law has been sharply limited by the *Noerr-Pennington doctrine*,1 which provides immunity to antitrust liability for conduct that can be characterized as political or legal advocacy.2

The *Noerr* case was strained when it was decided, and it has not aged well. As an interpretation of the antitrust laws, it ignored congressional concern with political mischief undertaken by conspiracy or monopoly. Its legitimacy has always rested on avoidance of the First Amendment, and while *Noerr* itself may have legitimately reflected such avoidance, the subsequent growth of a *Noerr* immunity has blown past any First Amendment-driven defense of its existence. For that reason, some have suggested a reformulation of the doctrine.3 The better answer is that, lacking constitutional or statutory foundation, *Noerr* should be overruled.

The First Amendment guarantees freedom of speech, assembly, and “to petition the government for a redress of grievances.”4 It therefore protects efforts to influence political debate as well as legitimate petitioning in legislative, judicial, or administrative processes.5 The First Amendment does not, however, create a right to bribe government officials, deceive agencies, file false statements, or abuse government process through repeated filings designed only to injure a competitor. Nonetheless, each of these activities has, in some courts at least, been granted immunity under the overgrown *Noerr* immunity.6 For these reasons, it is an extraconstitutional outlier ripe for reexamination.

The case for overruling *Noerr* is buttressed by the fact that, since its decision, *Noerr*’s theoretical foundations have become “wobbly” and “moth-eaten.”7 Written before the dawn of public choice theory or contemporary understanding of interest group influence, *Noerr* relies on an exceptionally stylized model of politics that understates the potential for corruption and the denial of majority will. 8

After several decades, moreover, the judge-made immunity has begun to creep far beyond its original justifications—a well-known problem for doctrines anchored in avoidance (so-called “avoidance creep”).9 Constitutional avoidance, as Charlotte Garden argues, yields decisions that deliberately interpret the statute in a manner at odds with congressional intent. Subsequent decisions building on that interpretation can easily leave behind both congressional intent and the original justifications for the avoidance.10 The result is a free-floating doctrine, as with *Noerr*, that becomes untethered to both statutory goals and constitutional principle.

Overruling *Noerr* would not make political petitioning illegal. It would, instead, require defendants to rely on the First Amendment itself (and not *Noerr*) when seeking to defend what would otherwise be conduct that is illegal under the antitrust laws. Doctrinally, this is to force courts to address whether conduct in question is actually an antitrust violation and, if so, whether it is protected by the First Amendment or not, drawing on an established jurisprudence for some of the problems presented in the Noerr context. For example, while the First Amendment protects false statements in some contexts,11 it has never protected perjury or the making of false statements to government agencies.12 It should take no great leap of insight to conclude that the First Amendment might be the superior vehicle for adjudging a defendant’s First Amendment interests.13

*Noerr* could be overruled by the Supreme Court in an appropriate case. It could also be overruled by Congress. The legislature, of course, is not in a position to overrule the aspects of *Noerr* immunity that are anchored in the First Amendment.14 But Congress could do what this article calls for: namely, return the immunities granted political speech and petitioning to their constitutional limits while reaffirming the purposes of the antitrust laws.

Part I outlines where *Noerr* itself went wrong; Part II details the problem of doctrinal creep; Part III argues that *Noerr* should be overruled; and Part IV details what a First Amendment replacement would look like.

I. WHERE *NOERR* WENT WRONG

The *Noerr* litigation arose out of a long-running battle that stretched from the 1930s through the 1950s between two natural competitors: the railroad and the trucking industries, whose mutual animosity was the stuff of legend. The railroads, the older of the two industries, had already had many run-ins with the antitrust laws.15 By the 1930s the railroads began to suffer from the competitive inroads being made by the newer trucking industry. In response, the railroads began a series of anti-truck campaigns to hold their market position by any means necessary.

The railroads began using a technique that was relatively new to the business world: a public relations campaign piloted through front groups and promulgated through the mass media. Among the front groups used were the “Empire State Transport League,” the “Save Our Highways Clubs,” and the “New Jersey Tax Study Foundation.”16 These groups portrayed truckers as villainous creatures whose driving of heavy vehicles destroyed bridges, fractured roads, and created other public dangers. As the Supreme Court found, the campaign was “made to appear as spontaneously expressed views of independent persons and civic groups when, in fact, it was largely prepared and produced by [a PR firm] and paid for by the railroads.”17 The Court summarized the approach as a “deception of the public, manufacture of bogus sources of reference, [and] distortion of public sources of information.”18 The trial judge wrote that he preferred “to treat the whole procedure in its true light, which is the technique of the ‘Big Lie.’”19

Unseemly as they may have been, however, the campaigns were unquestionably legislative campaigns. The railroads had clear, if anticompetitive, political goals: to lower the statutory weight limits that kept truckers out of heavy transport and to increase the taxes truckers paid. To that end, the front groups presented data (allegedly false, though we don’t know for sure) that, they claimed, revealed the damage done by trucks to roads and bridges. And they deceived the government, said the district court, by hiding just who was behind the presention of the information.20 As suggested already, the complaints were made to seem as if they were from disinterested third parties and concerned citizens when, in fact, they were not.

As a First Amendment case, *Noerr* is not an easy one. The railroads have in their favor that they were associating to engage in political speech, to present information relevant to government, and to ask for changes in the law. As the Supreme Court put it, “No one denies that the railroads were making a genuine effort to influence legislation and law enforcement practices.”21 If it was true that the truckers were damaging public roads that was speech of of public value. And as the Court stated, a rule that would “disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information.”22

The trickier part comes from the deception: the use of the front groups to deceive government as to the source of the information presented and the allegation that the information provided was false. The crime of making false statements to government is routinely prosecuted.23 Any First Amendment defense would be particularly challenging if the plaintiffs intentionally and maliciously submitted false information to achieve an anticompetitive result—fraud on the legislature—and therefore were like the applicant who submits false information to obtain a patent.24 But if *Noerr* was just a case of creating a false impression of public support, something that is certainly unethical but happens in public discourse with distressing regularity, the question remains difficult.

Leaving the First Amendment aside, what was the proper construction of the Sherman Act? Imagine the same case without government as the target of the campaign. It seems implausible that the Sherman Act would grant automatic immunity in a case in which an industry conspires to exclude a competitor by manipulating a body with the power to determine the conditions of competition. An effort to hamstring a rival by rigging a process to set exclusionary standards mirrors the conduct condemned in cases like *Allied Tube v. Indian Head, Inc.*25 and *Broadcom Corp. v. Qualcomm Inc.* 26 It is the kind of thing meant for a rule of reason analysis: as Justice Brandeis wrote in *Chicago Board of Trade*, the question would be whether the conduct is such that it “promotes competition, or whether it is such as may suppress or even destroy competition ... .”27 Perhaps the railroads would have argued the weight limits were competition-enhancing in some way; it seems more likely that they were a bad-faith effort to exclude their competitors.

Though *Noerr* did involve bodies of government, it did not involve a standard-setting body. That could lead some to believe that the campaigns, even if deceptive, are still not the kind of thing that the Sherman Act or other antitrust laws were intended to have jurisdiction over. Yet even the most cursory tour of the history of the Sherman, Clayton, and Federal Trade Commission Acts reveals that this view of Congress’s aims in passing the antitrust laws is grossly mistaken.

The famous editorial cartoons of the Standard Oil Octopus depict its tentacles encircling legislatures.28 Among the abuses of which companies like Standard Oil and, later, J.P. Morgan’s New Haven railroad were accused was the bribing of public officials to disadvantage smaller competitors or to wrongly grant monopoly status.29 The legislative history is replete with evidence of such concerns.30 As Robert Faulkner writes, “there is nothing on the face of the [Sherman] Act to suggest that the Fifty-first Congress wanted to exempt concerted, unethical and anti-competitive activity.” He adds that it would be strange to do so “on the ironic premise that the Act permits a business combination to destroy or do grievous harm to a competitor by applying large sums of money to deceive elected officials.”31

The best reading of the Sherman and Clayton Acts is that the framers had an overarching concern about monopoly influence over democratic institutions, but also a more specific concern with the obtaining or maintaining of monopoly through corrupt means, especially through bribery or fraud.32 For that reason, whether in pursuit of monopolization or the restraint of trade, corruption and fraud on the government ought to be understood as one form of prohibited conduct.

If that is so, it leads to the conclusion that *Noerr* must be understood as an exercise in constitutional avoidance, a conclusion many other scholars have also reached; or alternatively, that the deception wasn’t quite bad enough to amount to fraud on the legislature.33 That ambiguity is what makes the case frustrating, for despite Justice Black’s bold writing, the *Noerr* opinion, by inventing an immunity instead of resolving the question, took the easy way out.

At this point we need to briefly address an alternative view of *Noerr* that has nothing to do with the First Amendment but has shown up in Supreme Court opinions. That view holds *Noerr* to be a necessary implication of *Parker* immunity (and therefore, potentially, independent of the First Amendment). *Parker* stands for the proposition that state action is immune from antitrust scrutiny.34 Hence, if the federal authorities, or even the states, decide to establish a monopoly, that act would nonetheless not constitute a violation of the antitrust laws. That has led some—most notably Justice Scalia—to suggest that *Noerr* immunity is simply “a corollary to *Parker*” because as it is within the rights of government to act anticompetitively, “the federal antitrust laws also do not regulate the conduct of private individuals in seeking anticompetitive action from the government.”35

If superficially appealing, this logic evaporates on further inspection. To pursue monopoly is not the same thing as to pursue it corruptly, but the view just described brushes over the difference. As already discussed, the framers of the Sherman Act considered the activity of corruptly seeking state-granted monopolies to be within the concerns of the law, especially through bribery, threats, or deception. Even if government can override the antitrust laws, it does not necessarily follow that the courts need immunize efforts to obtain state action, especially if they should go beyond the normal protections for advocacy provided by the First Amendment.

#### That collapses effective management of risk vectors.

Lisa J. Danetz & Eric Petry 25, Advisor, Brennan Center; JD, Counsel, Elections & Government, Brennan Center, "What Is Political Corruption and What Can We Do About It?" Brennan Center for Justice, 08/11/2025, https://www.brennancenter.org/our-work/research-reports/what-political-corruption-and-what-can-we-do-about-it.

When government officials make decisions motivated by money or other forms of undue private gain, it warps policy and hurts the public. Things like public education, healthcare, infrastructure, and public safety lose out as public funds get misdirected and the quality of government services decreases.

The United States has seen corruption and its results many times in its history. During the late-19th century’s Gilded Age, for example, politicians routinely took bribes from corporations in deals that ultimately allowed those with the most wealth — robber barons and industrial conglomerates — to avoid regulation and gobble up public resources on favorable terms. Meanwhile, workers often faced long hours, dangerous jobs, and meager wages with few legal protections. Overcrowded housing, poor sanitation, and contaminated food were common.

Corruption has also played a major role in various financial crises. The lack of regulation bought by Gilded Age tycoons facilitated fraud and speculation, which led to stock market and banking crashes that cost people their life savings.

A century later, deregulation driven by the banking industry and the politicians it supported produced the 1980s savings and loan crisis, a banking collapse that cost taxpayers over $130 billion. But even after that scandal, Congress and regulators succumbed to pressure from the banking industry’s lobbying and campaign contributions to repeal laws designed to ensure market stability, prevent regulation of risky new financial products, and weaken watchdog agencies. These efforts paved the way to the subprime mortgage crisis, which sparked the biggest economic collapse since the Great Depression.

Beyond tangible losses, corruption erodes trust in government. When people feel like the system is rigged against them, many disengage from public life and choose not to vote, making government less representative and even less responsive to their needs. Public confidence in government plummeted in the 1970s after the Watergate scandal exposed abuses of power in the Nixon White House, and it has never fully recovered. Many nonvoters today continue to say they stay home because they don’t trust the government.

Current Political Corruption

The conduct we’re seeing now reflects and amplifies the widespread erosion of norms that has infected all branches of the federal government. While corruption has ebbed and flowed since America’s founding, the worst abuses of the past — the rampant bribes that fueled the Gilded Age and the Teapot Dome scandal in the 1920s that sent the secretary of the interior to prison — consisted of individual personal enrichment.

Subsequent reforms greatly diminished this type of corruption by improving public administration, increasing governmental transparency, and imposing new ethics and anticorruption rules. Starting in the mid-20th century, however, more structural forms of corruption emerged, driven by the increasingly significant role of money in politics. Attempts to curtail this newer form of corruption have been much less successful, due in part to interference by the Supreme Court. Now, with conditions ripe for abuse, personal corruption is again on the rise.

#### Extinction.

Victor Tangermann 25, Senior Editor, Futurism. Citing: Dr. Luke Kemp, PhD, Research Fellow, Center for the Study of Existential Risk, University of Cambridge, "Expert Says Collapse of Human Civilization Looks Like the Most Likely Scenario," Futurism, 08/04/2025, https://futurism.com/collapse-human-civilization-likely-scenario. [italics in original]

As *The Guardian* reports, a sweeping new historical survey that analyzes 5,000 years and the collapse of more than 400 societies makes the case that we’re in for a rude awakening.

“We can’t put a date on Doomsday, but by looking at the 5,000 years of [civilisation], we can understand the trajectories we face today — and self-termination is most likely,” Luke Kemp, research fellow at the Center for the Study of Existential Risk at the University of Cambridge, told the British newspaper.

“I’m pessimistic about the future,” he added. “But I’m optimistic about people.”

Kemp warned of narcissistic and psychopathic leaders — a powerful but small “oligarchy” working against the interests of the rest of us — who turn a blind eye to existential threats like global warming, nuclear weapons, and AI.

Scientists have long warned that escalating global temperatures caused by human activities could eventually tip us over the edge, leading to food shortages, unbearable heat, and droughts — not to mention the strain and instability that all those problems place on everything else.

To Kemp, we can learn from thousands of years of human civilization to get a sense of how things will eventually play out. In his book, he used the term “Goliaths” to refer to kingdoms and empires that dominated others using weaponry and other threatening tactics.

“History is best told as a story of organised crime,” he told the *Guardian*. “It is one group creating a monopoly on resources through the use of violence over a certain territory and population.”

But these groups don’t tend to last and eventually collapse under their own weight due to inequality, the researcher argued, and greed by those in power.

“Then as elites extract more wealth from the people and the land, they make societies more fragile, leading to infighting, corruption, immiserization of the masses, less healthy people, overexpansion, environmental degradation, and poor decision making by a small oligarchy,” he said. “The hollowed-out shell of a society is eventually cracked asunder by shocks such as disease, war or climate change.”

So how does this all pertain to the 21st century specifically? Kemp argued that we’re suffering under “one single, interconnected global Goliath,” acting within capitalism.

Collapses in food systems, the constant threat of nuclear war, and a growing climate crisis could eventually lead to the current Goliath’s demise.

### 1AC---Plan

#### Plan: The United States federal government should strengthen collective bargaining rights as the least restrictive means of fulfilling a compelling government interest in cases of insincere religious exemptions from mandatory collective bargaining.

### 1AC---Solvency

#### SOLVENCY.

#### The plan restricts religious exemptions from mandatory bargaining by replacing the *Catholic Bishop* standard with the RFRA.

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.

This Article explores an important question that follows in the wake of last Term's decision in Hobby Lobby v. Burwell: When employee rights under the National Labor Relations Act ("NLRA") and employer religious commitments conflict, which will have priority? This is a surprisingly difficult question to which multiple statutory regimes arguably apply. First, there is the NLRA itself. The NLRA does not exempt religious employers on its face, but the Supreme Court nonetheless construed it to exclude certain religious employers in NLRB v. Catholic Bishop. Catholic Bishop is remarkable: as an exercise of constitutional avoidance the Court adopted an implausible reading of the NLRA in order to avoid an improbable constitutional question. In addition, the decision's vague language has proven difficult to apply to new contexts, leading to pervasive conflicts between the National Labor Relations Board and the circuit courts over its meaning. Yet, despite these many flaws, Catholic Bishop has held fast, even as the law of religious exercise has overtaken it.

There is also the Religious Freedom Restoration Act ("RFRA"), which allows exemptions from federal laws that conflict with religious adherents' sincere beliefs, unless there is no less restrictive means of satisfying a compelling government interest. But RFRA's application leaves many unanswered questions in the labor law context: Does the NLRA qualify as the least restrictive means of satisfying a compelling government interest? Should accommodations be available even if they shift costs onto employees? And if so, how could accommodations be structured to protect religious adherents while minimizing burdens on others?

This Article offers answers to the complex questions associated with statutory religious accommodation claims arising in the labor law context. First, it proposes a new framework for courts to interpret legislative enactments that arguably override constitutional avoidance decisions, like Catholic Bishop. Applying this principle, it argues that courts should treat RFRA - a statute that makes clear Congress's preferred method of accommodating religious objectors to labor law - as having legislatively overturned Catholic Bishop. Second, the Article analyzes the thorny questions that will arise when courts apply RFRA in the NLRA context. Ultimately, the Article concludes that the NLRA constitutes the least restrictive means of furthering a compelling government interest. However, recognizing that some appellate courts may reach the opposite conclusion, it also presents a model of limited accommodations for religious employers that are carefully shaped to minimize burdens on employees.

[\*110]

Introduction

In the wake of the Supreme Court's high-profile decision in Burwell v. Hobby Lobby Stores, Inc., 1 courts and federal administrative agencies will face new types of religious exemption claims from non-profit and closely held for-profit employers. It is a virtual certainty that some of these employers will claim exemption from their obligations under the National Labor Relations Act [\*111] ("NLRA" or "the Act") - generally, to respect workers' rights to engage in concerted activity for mutual aid and protection, and to bargain collectively with elected unions 2 - because of conflicts between these obligations and their religious beliefs. 3

But the National Labor Relations Board ("NLRB" or "the Board") and the lower federal courts will not be drawing on a blank canvas when they address the scope of employer religious exemptions from labor law; they have previously considered a range of arguments that certain employers should be exempt from labor law for religious reasons, with varying results. 4 Many of these cases attempt to apply a thirty-five-year-old Supreme Court decision, NLRB v. Catholic Bishop of Chicago, 5 in which the Court construed the NLRA to exempt parochial high school teachers as a matter of constitutional avoidance. 6 That relatively short decision created considerable disagreement among the Board and the lower federal courts that persists to this day; more than three decades after Catholic Bishop was announced, it is still disputed whether and to what extent it applies outside the context of religious elementary and secondary school teachers. 7 In fact, the Board's most recent attempt to faithfully apply Catholic Bishop resulted in a sharply divided December 2014 decision in the Pacific Lutheran University case involving adjuncts at that religiously affiliated university. 8

Arguably, then, religious non-profits have two possible statutory sources of exemption from the NLRA: the Act itself (as construed by the Court in Catholic Bishop) and the Religious Freedom Restoration Act ("RFRA"). 9 But this Article argues that this two-track approach is contrary to congressional intent and that there is instead only one statutory source of labor law exemptions for religious employers. 10 Specifically, it argues that the Board and the courts should treat Catholic Bishop - in which the Court applied an especially aggressive form of constitutional avoidance to the NLRA - as having been legislatively overruled by RFRA.

[\*112] Aggressive constitutional avoidance decisions - those in which courts adopt improbable or even contraindicated statutory interpretations - are sometimes justified by normative preferences to protect constitutional values. However, those normative preferences only go so far - court decisions that effectively rewrite federal statutes to avoid constitutional questions should not then become practically impervious to congressional override. Instead, Congress should be able to overcome these decisions relatively easily by simply indicating its preferred approach for dealing with the problem. Following this rule, Catholic Bishop was overruled by RFRA, with which Congress amended the NLRA (like all other federal statutes) to indicate how employers' requests for religious exemptions should be treated. Accordingly, RFRA, along with the First Amendment itself, should determine when employers (both for-and non-profit) are entitled to religious accommodation of their obligations under the NLRA; Catholic Bishop should no longer play a role in this determination.

This Article then discusses key remaining questions about religious employers and labor law under RFRA. In short, RFRA entitles persons (including closely held corporations) to accommodations when federal law substantially burdens exercise of their sincere religious beliefs, unless the federal law is the least restrictive way of furthering a compelling government interest. Thus, several questions will arise when employers assert religious exemptions from their obligations under the NLRA, which the Article addresses in turn. It begins by discussing threshold inquiries concerning how the NLRB and the courts can determine whether religious objections to collective bargaining are sincere - particularly considering the economic incentive to make insincere claims - and whether an employer's religious exercise has been substantially burdened. Then, the Article turns to the critical question of whether the NLRA is the least restrictive means of furthering a compelling government interest. The Board and a few U.S. Courts of Appeals have previously found that the NLRA meets this standard, although with limited explanation. This Article takes up where they left off, fleshing out the argument that the NRLA is the least restrictive means of furthering the compelling state interests in labor peace and worker voice. 11

However, it is possible (and even likely) that some courts will reach the opposite conclusion and decide that the NLRA is not the least restrictive means of meeting any compelling government interest. Accordingly, this Article goes on to discuss how the Board might structure religious accommodations to minimize impingements on employees' rights to act collectively for improved working conditions. 12

This Article has two parts. Part I first reviews Catholic Bishop and its reception before the NLRB and the courts. It then explains why the best justifications for the canon of constitutional avoidance assume that Congress has the practical ability to legislatively overturn avoidance decisions. Finally, it [\*113] argues that these principles lead to the perhaps surprising conclusion that RFRA should be read as having overturned Catholic Bishop. Part II discusses the application of RFRA in the context of labor law.

### 1AC---IF TIME

#### Back to Avoidance.

#### Modelling is certain AND legitimacy is essential to credibility.

Sidney H. Stein & Omar Badawi 22, JD, Senior District Judge, Federal Law, United States District Court for the Southern District of New York; JD, Senior Attorney, Federal Court Administration, Administrative Office of the United States Courts. Faculty Member, Paralegal Studies Program, George Washington University, "Judicial Diplomacy and the Global Community of Law: The Federal Judiciary Advancing the Rule of Law Abroad," in Research Handbook on Law & Diplomacy, Chapter 9, 12/08/2022, pg. 156-172.

Most of the federal judiciary’s international work falls into four cross-cutting areas. First, federal judges work extensively with their foreign counterparts on challenges to judicial independence and integrity, including judicial ethics. This work includes developing accountable and transparent judiciaries capable of fostering public trust. Second, federal judges work on a wide range of issues addressing substantive law and procedure. They help in developing such areas as bankruptcy and insolvency law, commercial law, intellectual property law, tort law, and criminal law and procedure. Third, federal judges and judicial employees31 are routinely asked to work with foreign judiciaries on judicial skills and administration. This category includes case and courtroom management, judicial governance and administration, and alternative dispute resolution. Fourth, federal judges, the IJRC, and especially the FJC work with foreign judiciaries on judicial education. The work described in the first three areas often includes an education component treating law and procedure in workshops convened by national judicial training academies. The FJC has contributed significantly to institutional development efforts for judicial training academies addressing pedagogy and curriculum development, professional training for faculty, feedback and evaluation mechanisms, training needs assessments, and judicial leadership.

3. TRANSNATIONAL JUDICIAL DIALOGUE AND THE GLOBAL COMMUNITY OF LAW

Federal judges’ work with foreign judges is not only a provision of technical assistance. Where it is a provision of technical assistance, that assistance does not only flow in one direction. And whether the exchanges are under the umbrella of an international organization or are court to court, they do not take place out of obligation. Anne-Marie Slaughter describes a process of “judicial globalization,” where judiciaries interact with one another “across, above and below borders, exchanging ideas and cooperating in cases involving national as much as international law.”32 On this process, she writes:

The factors driving these forms of interaction also vary widely, including a structural provision in an international treaty, the globalization of commerce, and the need for judicial training in many fledgling democracies. … [A]ll are examples of judges looking, talking, and sometimes acting beyond the confines of national legal systems, responding to the myriad forces of globalization. All are also contingent on a deep sense of participation in a common global enterprise of judging, an awareness that provides a foundation for a global community of law.33

This work by federal judges with their counterparts abroad forms part of an ongoing “transnational judicial dialogue,” as described by Melissa Waters, where networks of national courts worldwide “collectively engage in the co-constitutive process of creating and shaping international legal norms and, in turn, ensuring that those norms shape and inform domestic norms.”34 Whatever its form, the work by the federal judiciary described in this chapter serves to strengthen the global community of law through transnational judicial dialogue. This strengthening is not just one that eases the interactions between courts and litigants across borders. It also serves to promote the rule of law.35 The rest of this chapter explains how.

3.1 International Law, National Courts

Federal judges work with foreign judiciaries on legal issues related to the implementation of a myriad of international conventions, treaties, and memoranda, sometimes as part of their work with international organizations and sometimes directly with foreign judiciaries. These include the United Nations Convention Against Corruption; International Covenant on Civil and Political Rights; the Bangalore Principles of Judicial Conduct; the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offenses; the Singapore Convention on Mediation; the Hague Convention on the Civil Aspects of International Child Abduction; and the New York Convention on Arbitration, to name a few.36 Consider three recent international initiatives to which federal judges were founding contributors addressing judicial integrity, intellectual property, and the adjudication of terrorism cases.

3.1.1 Judicial integrity

Several federal judges and court staff, including a former IJRC chair, have contributed to the formation and expansion of the United Nations Global Judicial Integrity Network, an initiative that helps judiciaries around the world strengthen judicial integrity and prevent corruption in the justice sector.37 Established in 2018 with the input of approximately 4,000 judges worldwide, it aims to promote international compliance with Article 11 of the United Nations Convention Against Corruption.38 The Network has broader goals in supporting judicial independence and impartiality in line with the Bangalore Principles of Judicial Conduct.39 It facilitates technical assistance, provides training, and develops tools for judges and judiciaries relating to judicial transparency, judicial ethics and discipline, and anti-corruption. The federal judiciary has contributed to drafting non-binding guidelines addressing judges’ use of social media, ethical codes, a model framework on judicial immunities, gender-related judicial integrity issues, and the use of artificial intelligence in the courts.40

3.1.2 Intellectual property

Federal judges, including a former FJC Director, have provided guidance and direction to the World Intellectual Property Organization’s (WIPO) Judges Forum since its establishment in 2018.41 WIPO’s aim in establishing the Judges Forum is to “provide a platform for judges from across the globe to exchange their expertise on the most pressing intellectual property challenges raised by accelerating innovation and the increasing transnational use of intellectual property.”42 The Judges Forum has become a key part of WIPO’s work to provide training and resources in the adjudication and effective judicial administration of intellectual property cases, and to provide networking opportunities for judges with intellectual property dockets.

3.1.3 Terrorism

Federal judges have served as technical advisors to the UN Security Council’s CounterTerrorism Committee Executive Directorate and the Global Center on Cooperative Security (GCCS). 43 They helped draft a Toolkit for South Asian judges and judicial training academies on the effective adjudication of terrorism cases.44 The Toolkit gives guidance on the adjudication of those cases following customary international and human rights law. Based on UN Security Council resolutions and international instruments, including the GCCS’s Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offenses, it also addresses witness and defendant rights, challenging evidentiary matters, international cooperation, and the application of international counterterrorism and human rights frameworks. National judiciaries use the Toolkit as guidance for developing bench books tailored to domestic law and practice. Federal judges have not only contributed to drafting the Toolkit but have also participated in workshops with foreign judicial training academies, judges, and prosecutors on its potential national applications. The Toolkit’s development has involved the input of hundreds of South Asian judges over nine years.

3.2 Common Challenges

Whether it is judicial integrity, intellectual property, or the adjudication of terrorism cases, these new judicial networks’ rapid expansion underscores a basic truth about international judicial cooperation: judges everywhere have common challenges. In undertaking this work, the federal judiciary, and to be sure, judiciaries worldwide, contribute to the formation and strengthening of formal and informal networks directed at addressing these challenges. They also contribute to a shared understanding and even the common creation and application of the law at national and international levels. Judge M. Margaret McKeown has written that “national courts are at the front line of international law,” as there are few international courts to adjudicate it, much less enforce it.45 International law is “infused into national systems as it is pled and used as a tool by litigants in national courts,” sometimes by virtue of international commitments or by the adoption of international norms.46 We add that the infusion of international norms and law into national systems also takes place as judges consider and apply either what is pled by litigants or what judges have themselves learned through their own international work.

The opposite is also true. As international law is infused into national systems, judges through their participation in international fora help to make and shape the international law. Melissa Waters has concluded that “domestic courts are becoming active participants not only in internalizing international legal norms, but also in shaping the content of those norms in the first place.”47 The initiatives we describe in this section are not academic exercises. Judges give substantive and practical guidance in these areas for their foreign counterparts to consider, use, and adopt, either through judicial practice or ultimately through national legislation. The creation of the networks we exemplify are often borne out of national law and practice that has failed to keep up with a rapidly evolving world. Speaking to WIPO’s General Assembly, its Director General explained that WIPO’s Judges Forum helps judiciaries to adjudicate intellectual property cases that “throw up novel questions as a consequence of technological changes that may not have been considered or dealt with by legislatures.”48

3.3 Foreign Law, National Courts

Most federal judges’ rule of law work is “court to court” and “judge to judge” rather than under a supranational entity’s umbrella. Federal judges consider foreign law in transnational cases as a routine matter. And federal judges are often invited to work with their foreign colleagues *because* litigations concerning foreign law or otherwise international in nature are regularly on their dockets.49 These include such areas as bankruptcy, commercial law, the enforcement of foreign settlements and arbitral awards, intellectual property, immigration, extradition, terrorism, and transnational organized crime.

IJRC alumnus Judge Martin Glenn frequently works with foreign judiciaries on addressing challenges in cases involving cross-border insolvency. Framing these challenges, Judge Glenn has asked:

[W]hat rules apply to resolving financial distress where creditors are in more than one jurisdiction? If insolvency or restructuring proceedings are opened, should there be one or more proceedings in different jurisdictions? When will or should the decisions of one court in one country be recognized and enforced in the courts of other countries, and does the answer differ depending on the issue resolved by one court? Do or should the insolvency laws of one jurisdiction apply in other jurisdictions? What law must or should be applied if the priority rules under one country’s laws differ from the priority rules in other jurisdictions in which the distressed enterprise has creditors and assets?50

These questions highlight the increasingly complex procedural and substantive legal issues facing judges in a globalized world.

Comity can also inform how courts approach and address these questions. Generally, comity is “the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to the international duty and convenience, and to the rights of its own citizens …”.51 At the core of judges’ international rule of law work is another form of comity – judicial comity, as explained by US Supreme Court Justice Stephen Breyer in his book, *The Court and the World*:

Today it [comity] means something more. In applying it, our Court has increasingly sought interpretations of domestic law that would allow it to work in harmony with related foreign laws, so that together they can more effectively achieve common objectives. … And so our Court does, and should, listen to foreign voices, to those who understand and can illuminate relevant foreign laws and practices.52

Justice Breyer also describes how his engagement with foreign judiciaries has helped him in cases before the Supreme Court. “To learn from foreign opinions or to consider their reasoning is to find in them something of use in interpreting American, not foreign law.”53 How incisive: learning from foreign jurisprudence assists us to better interpret our own. Justice Breyer’s observation applies as much to judicial practice as it does to law. No doubt, foreign judges learning from American law and practice may find use in interpreting their own. That is the inevitable product of judicial exchange taking place across the wide range of areas in which federal judges contribute to international rule of law promotion. This conclusion stands regardless of whether a judicial exchange occurs out of frequent conflict of laws or traditional comity issues between cooperating judiciaries. No doubt, executive branch agencies may invite federal judges to work with foreign judiciaries with this deliberate purpose. But the raison-d’être of the FJC’s and the IJRC’s international work, and that by federal judges, is not to ease our own judiciary’s or another’s task in adjudicating complex issues of foreign law. Rather, that is one possible outcome among many in the federal judiciary’s effort to advance the rule of law.

4. JUDICIAL DIPLOMACY

The IJRC marked its 25th anniversary during this judge-author’s tenure as its Chair. Have we succeeded in doing our part to advance the rule of law? If so, in what measure? Over the many years federal judges have engaged in rule of law work, we have witnessed a growing demand by foreign judiciaries for technical assistance and judicial exchange in cooperation with our own. That fact alone suggests that the need for the federal judiciary’s work in international rule of law promotion is real. What lessons can be drawn from decades in undertaking it and what value does the work bring? Similar questions are common to all development work in democracy and governance.

4.1 Impact

Given the impressive investment in rule of law promotion by the United States limned in Section 2, it is unsurprising that foreign assistance led by the State Department and USAID must adhere to deliberate program design, monitoring, and evaluation guidelines.54 Federal agencies have developed guidance for aligning their international development work with US Government foreign assistance priorities.55 The United Nations, World Bank, and World Justice Project, among others, have developed indices to track the rule of law worldwide. Donors and implementers undertaking rule of law promotion use these indices to inform their efforts. Many countries track their progress against them and attempt to improve their standing by initiating legislative and structural reforms.

There are practical realities that make the federal judiciary and its judges ill-placed to undertake extensive effort in program design, monitoring, and evaluation. The judiciary has no budget of its own for international work; all programming in which federal judges are involved is directly funded by the entity organizing the program. Federal judges also have full-time jobs, and busy ones at that; they volunteer their time for international work between packed judicial calendars and lend their expertise to international initiatives as requested. Rule of law programs in which federal judges are involved are designed and implemented by others; we believe they are therefore best systematically evaluated by others. Key questions nevertheless remain: what results have been shown in rule of law programs in which federal judges have worked and how do federal judges’ contributions assist in advancing the rule of law? We consider two recent examples of USAID-funded rule of law projects in the Republics of Georgia and Kosovo, countries where the federal judiciary has had long engagement.

4.1.1 Georgia

Georgia faces challenges in consolidating its judicial independence and uprooting judicial corruption. USAID funded a $19 million rule of law project in Georgia from 2015–21 with objectives to increase access to justice and build institutional capacity in the Georgian justice sector. The local partners included Georgia’s High Judicial Council, High School of Justice, parliament, law schools, and local NGOs.56 The project supported USAID’s Georgian partners in creating a new legislative framework for greater judicial independence and accountability in the judiciary and stronger protections for human rights, particularly those of women and minorities.57 USAID concluded that the project led to a revised judicial selection process that is more merit-based and transparent.58 USAID assisted Georgia’s High Judicial Council in determining the appropriate number of judges for Georgia and how they are placed throughout the country. The project reached over 4,000 Georgian judges and lawyers with continuing legal education opportunities. USAID’s project also improved access to justice through grants to NGOs providing approximately 70,000 citizens with advice and representation. The project also supported strategic litigation in the Georgian Constitutional Court and the European Court of Human Rights to protect fundamental rights in the Georgian law.59

4.1.2 Kosovo

USAID funded a $12 million rule of law project in Kosovo between 2015–20. Major objectives included assisting Kosovo’s Judicial Council and trial courts with increasing judicial efficiency, transparency, and professionalism in the justice sector. USAID notes that during the project the trial court case clearance rate increased from 90 percent to over 125 percent.60 The case inventory was reduced to 132,263 cases from 408,803 cases.61 The Kosovo Basic Courts resolved 33,447 backlogged cases through reduction strategies implemented under the project – an 85 percent reduction since the project’s start.62 USAID also credits the project with increasing the number of published court decisions from a mere 87 in 2017 to over 31,000 in 2020; these decisions are available on the Kosovo Judicial Council’s website for the public to view.63 The project supported changes in legislation, regulation, and practice in line with international best practices to promote court efficiency, transparency, integrity, and judicial independence. It also served to increase citizen trust in Kosovo’s judiciary.64 USAID has also supported several judicial development initiatives for Kosovo’s Constitutional Court.

4.2 Federal Judges as Diplomats

Although these results show promise, we should not overstate the judiciary’s contributions and acknowledge that federal judges were involved in only parts of these USAID projects. The type of justice-sector development work we describe in Georgia and Kosovo requires sustained day-to-day effort by on-ground development practitioners working directly with local partners, as USAID has had in place for these projects and those preceding them.65 The projects nonetheless share hallmarks that help illustrate the nature of the federal judiciary’s contributions to the work. Most important, they help to highlight the special attributes of a federal judge in serving as a diplomat for the federal judiciary. As we discuss, the federal judge’s role as diplomat materially furthers the rule of law.

4.2.1 Credibility

Because judicial diplomacy involves judges representing their own judiciaries with foreign judges and officials, there is particular value when an American judge serves as diplomat. The United States has been fortunate to experience, with notable exceptions, a lengthy history of political stability. Its judicial independence is robust, there have been few instances of federal judicial corruption, and surveys consistently show that judges are among our most trusted public officials.66 The federal courts are relatively well-funded and efficiently and transparently administered. Federal judges normally enter the judiciary after a well-respected legal career. As a result, federal judges tend to carry with them a significant degree of credibility.67 That credibility is established through their institutional independence, personal integrity, professionalism and expertise, and accompanies them whenever they serve as diplomats for the American judicial branch.

Several federal judges have worked in Georgia under the USAID program we describe, as well as its predecessors. They have worked with the Georgian judiciary, including the High Council of Justice and the Supreme Court. They have also worked with non-judicial actors, including parliamentarians, executive officials, and civil society. USAID has remarked to the IJRC that the “unique messaging power of the federal judiciary” has had enduring impact in inspiring reform-minded Georgian judges and judicial administrators.68 USPTO once similarly noted that “[t]he mere presence of US judges in IP programs conveys a credibility and legitimacy for the underlying program, and that their participation engenders a degree of trust in the views being expressed, since the foreign judges feel honored and respected by the participation and recognition of U.S. judges.”69 The quality of these exchanges paves the way for the ongoing work undertaken by local partners and development practitioners long after the judges return home. The credibility of the federal judge serves not only to convey support for the underlying substantive program, but for foreign judges themselves. In countries where judges’ independence is threatened, where judiciaries are under-resourced, and where judges command little respect because they are subordinate to the executive branch (usually due to executive overreach, not design), federal judges are a source of both private and public support.70 That support has proven especially important where foreign judges’ very livelihoods or lives are at risk for the work that they do.