## Advantage

### Civil War---1AC

#### 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.

### Uniqueness

#### CBR exemptions regime is terminally unsustainable.

Richard Schragger et al. 25, JD, Professor, Law, University of Virginia School of Law; Dr. Micah J. Schwartzman, DPhil, JD, Professor, Law, University of Virginia School of Law. Director, Karsh Center for Law & Democracy University of Virginia; Dr. Nelson Tebbe, PhD, JD, Professor, Law, Cornell Law School, "Reestablishing Religion," University of Chicago Law Review, Vol. 92, No. 1, pg. 199-284, 01/01/2025, HeinOnline.

The features of preferentialism that support its entrenchment may eventually contribute to its demise. A classic principle of church-state separation holds that the fusion of religion and politics corrupts both the church and the state. 542 The problem of corruption animates the idea of the "wall of separation," which protects the garden from the wilderness, in Roger Williams's famous vision.543 But corruption can also be useful when thinking about the persistence of a conjoined regime. Historically, corruption of religion has induced reformist movements within churches, but corruption of politics has also led to campaigns aimed at extricating the state from matters of religious and theological controversy. 544

An intriguing possibility is that structural preferentialism will induce further alienation from organized religion, increasing the numbers of the disaffiliated and accelerating the country's secularist trend. Some have already attributed the rapid rise of disaffiliation to the politicization of religion in the United States, and specifically to the identification of religion with the political right.545 If this is correct, then preferentialism may, ironically, contribute to a shrinking religious sphere. State funding and exemptions may buttress that sphere in the short term but nevertheless undermine it in the long term.546

Another possibility is institutional collapse. Churches have already faced ideological and theological battles, along with formal schisms, over the treatment of women's equality, reproductive rights, same-sex marriage, and LGBTQ rights.547 As denominations fracture along political lines, some congregants may decide to withdraw from the political sphere or to create countermovements that reject the close identification of religion with a particular partisan construction of the state.548 Those movements could reinvigorate a separationist politics, especially if the benefits and burdens of citizenship increasingly seem to be distributed along religious lines.

### Uniqueness + Turn---1AC

#### 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.

### Uniqueness + Turn---2AC

#### Multiple checks on entanglement.

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's determination of mandatory subjects of bargaining has also raised constitutional concerns.254 "Terms and conditions of employment" are mandatory subjects of bargaining.255 That means employers and unions in collective bargaining relationships are required to bargain over certain matters, specifically issues concerning rates of pay; wages; hours of employment; bonuses; safety practices; seniority; procedures for discharge, layoff, recall, and discipline; and more.256 In *Catholic Bishop*, the Court feared that "nearly everything that goes on in the schools," including religious matters, may be considered a term and condition of employment.257 If a religious matter is a term of employment, it will, consequently, be subject to mandatory bargaining.

It is easy to imagine the constitutional infirmities here. Consider a religiously affiliated hospital that requires its healthcare workers offer religious services to patients. Offering spiritual as well as physical healing is central to the hospital's religious beliefs; giving patients the option for religious services is crucial to its religious practice. The argument posits that if this requirement is considered a term or condition of employment, the NLRA's mandatory bargaining would require the religiously affiliated hospital to bargain over this religious practice. The intrusion of government by mandating such bargaining is not hard to see. Forcing a religious organization to bargain over religious creed, doctrine, or practice clearly intrudes on freedom of religion.

As above, this concern seems reasonable on its face. If religiously affiliated hospital employers did in fact have to negotiate over religious practice or creed, that seems to clearly pose insurmountable First Amendment challenges. Fortunately, that is not the case. Management rights clauses are a common feature of collective bargaining.258 As [\*551] discussed more in depth below, management rights clauses preserve the rights of management to make unilateral decisions over enumerated managerial prerogatives.259 In the religiously affiliated hospital setting, management rights clauses can insulate religious questions from bargaining in complete accord with the requirements of the NLRA. In other words, religion is not a mandatory subject of bargaining and can be avoided by religious employers.

In *Federation of Teachers v. Hill-Murray High School*, the Minnesota high court held that "negotiable terms and conditions of employment are limited to exclude matters of inherent managerial policy . . . [and, accordingly,] matters of religious doctrine and practice at a religiously affiliated school are intrinsically inherent matters of managerial policy and therefore nonnegotiable."260 Although in the context of a religious school and under state law, this principle applies with equal force to religiously affiliated hospitals operating under the NLRA. Mandatory subjects of bargaining exclude inherent managerial policy.261 Inherent managerial policy or decisions are generally "matters that relate to the nature and direction" of the employer.262 While an employer and union may bargain over these topics, the NLRA does not mandate it and the parties "can refuse to discuss them without fear of an unfair labor practice charge."263 Religious creed and religious practice is part of a religiously affiliated hospital's inherent managerial policy. As such, mandatory subjects of bargaining exclude religious creed and questions. To put a finer point on this: although religious hospitals under NLRB jurisdiction must bargain over mandatory subjects of bargaining, religious hospitals need not bargain over religious practice.

In addition, and importantly, the Act merely requires bargaining in good faith. The duty of good faith bargaining includes "the mutual [\*552] obligation of the employer and [union] to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment," as well as "the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached . . ."264 But, the Act imposes no obligation on either party to "agree to a proposal or require the making of a concession . . ."265 Additionally, "the Act does not regulate the substantive terms governing wages, hours, and working conditions because agreement, if reached, is voluntary."266

The NLRA "never requires an employer to accept a bargaining proposal from a union, much less one that conflicts with the employer's religious commitments." 267 Not only does the law not require the employer to agree to anything, but "about 50% of the time they don't [.]" 268 Employers regularly and legally refuse union requests and demands. The NLRA allows an employer who has reached an impasse in the bargaining process to "unilaterally implement its final offer."269 Because the NLRA imposes a duty to bargain in good faith but does not compel agreement on any given term of employment, and because the state's role is to bring the parties to the table but then "leave them alone[,]"270 there is no excessive entanglement created by the duty to bargain and mandatory subjects of bargaining therein.271 Religion is not a mandatory subject of bargaining and a religious employer need never accept a union proposition. Together, this ensures that religious employers maintain control over religious doctrine and practice, thereby protecting First Amendment rights.

#### BUT, chilling effect is inevitable AND only the plan solves.

Dr. Christopher M. Gaul 07, PhD, JD, Associate, Law, Sidley Austin LLP, "Catholic Bishop Revisited: Resolving the Problem of Labor Board Jurisdiction over Religious Schools," University of Illinois Law Review, Vol. 7, No. 5, pg. 1505-1542, 2007, HeinOnline. [italics in original]

Nonetheless, the chilling effect argument is flawed in three crucial respects. Its first shortcoming lies in the fact that exempting religious schools from NLRA jurisdiction avoids the excessive entanglement problem only at the cost of creating even more intractable establishment issues.5 8 When a court grants a religious exemption on the basis of excessive entanglement concerns, this would seem to violate *Lemon*'s second prong, which precludes the government from taking actions that have a primary effect of advancing religion.159 The chief consequence of creating such an exemption would be to promote religion. Moreover, because the court would be exempting church-operated schools from NLRA coverage precisely on account of their religious character, fashioning this exemption may also violate *Lemon*'s first prong, which forbids government actions that have nonsecular purposes.

These establishment concerns intensify when one considers that the NLRA continues to apply to nonreligious private schools. Not only is the appearance of government favoritism of religion inescapable, but the financial burden of such favoritism surely falls on nonsectarian private schools. These types of educational institutions must compete with pub lic schools, which enjoy virtually unconstrained access to the public fisc, and religious schools, which enjoy various exemptions from regulatory laws that apply to their nonsectarian competitors. In this regard, carving out an exemption for parochial schools is tantamount to granting a government subsidy of religious education."6 This subsidy effect raises undeniable establishment concerns. 6'

### No Link---Narrow Exemptions

#### Even at that---it still allows sincere claims to go through. ‘Narrowest exemptions possible’!

Tanner Bean 19, JD, Research Assistant, Law, University of Illinois College of Law. Baptist Joint Committee for Religious Liberty Fellow, "'To the Person': RFRA's Blueprint for a Sustainable Exemption Regime," Brigham Young University Law Review, Vol. 1, 2019, Nexis Uni. [italics in original]

Analyzing RFRA with "to the person" particularity should be in judges' self-interest. If judges are afraid to grant religious exemptions because "behind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe," 126then RFRA's track record since *O Centro* shows this fear is unfounded. Additionally, the reemphasis of the "to the person" language provided by *O Centro*, *Hobby Lobby*, and other decisions should comfort judges - instructing (not whispering) that exemptions can be granted to particularized plaintiffs so narrowly that a flood of exemption claims will not ensue. And even if a flood did ensue, RFRA's statutory burdens would shut out the meritless claims.

Moreover, strictly applying RFRA's "to the person" language serves another judicial interest: faithfully interpreting statutes by their plain meaning. 127Not only does this allow courts to avoid mental gymnastics to kick out a possible exemption, but it also allows the court to disengage from political controversy – focusing on the specificity of RFRA's standard of proof. And judges' confidence in the end product of RFRA litigation – the narrowest exemptions possible to otherwise beneficial legislation – should strengthen courts' resolve to apply RFRA's obvious "to the person" language.

[\*31] Thus, judges should demand plaintiff-level "to the person" specificity when evaluating RFRA claims, both on the compelling interest and least restrictive means considerations. Doing so will focus litigation and ensure that RFRA's original purpose is achieved, without disrupting the government's enforcement of otherwise beneficial legislation. Courts should not forget that RFRA, like the legislation from which RFRA may grant exemptions, was also enacted legislatively.

### No Link---Union Power

#### Prefer specificity. Religious employees won’t abuse the process.

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.

Organizing workers at religiously affiliated hospitals is different than organizing workers elsewhere. Healthcare workers often have deep commitment to their patients and the missions of their employers. Workers at religious organizations may have deep emotional, spiritual, or religious connections to their employers. With these factors at play, organizing healthcare workers at religiously affiliated hospitals is clearly unique and filled with its own challenges.

Professor Eduardo Capulong, analyzing unionization in the nonprofit sector generally, found that nonprofit workers "want to 'do good.' . . . [They] were less motivated by 'job security, the salary, benefits or the paycheck' than they were by the 'chance to help the public, to make a difference, to do something worthwhile, and [to have] pride in the organization . . ."383 Capulong continued:

'[N]onprofit employees love their work so much that they set themselves up for exploitation.' The commitment to clients is, in fact, such a powerful motivator that it sometimes discourages nonprofit workers from leaving substandard employment. Thus, even as nonprofit workers tend to be pro-union generally, they may not be pro-union for themselves. Believing that they should not take funds dedicated to client programs, particularly when budgets are tight, many nonprofit workers minimize their own work-related concerns.384

Capulong is discussing nonprofit workers generally, but it stands to reason that this inclination is even stronger when we consider workers at nonprofit, faith-based organizations that may be similarly (if [\*572] not more so) steeped in the mission of their organization. When we add in the connection healthcare workers have to their patients, Capulong's explanation of nonprofit workers' aversion to unionization only grows more compelling. As others have noted, "the more employees identify with the company, the less likely they will identify with an outside union."385 Amy Gladstein, a New York labor lawyer who, since 2002, has been "responsible for directing the new organizing program for 1199 SEIU,"386 stated that "workers in Catholic hospitals are often more mission focused. [Some] people work there because they believe in the mission, as the Church says, that it is about providing healthcare for and helping the poor."387 With that image of a healthcare worker at a religiously affiliated hospital in mind, the challenge of overcoming worker loyalty to their employers comes into focus.

Although this challenge remains present, the contours of the employment relationship in healthcare, even religiously affiliated healthcare, have changed tremendously due to COVID-19. As discussed *supra*,388 healthcare workers in and out of religiously affiliated hospitals have been mobilized by the widespread death, overwork, underpay, and unsafe worker and patient conditions of the COVID-19 pandemic. Workers who were once devoted to their employers and expected their employers to protect them have both seen, and felt, their employers fail them.389 Workers who were "dead set against a union five years ago," have had their minds changed by COVID-19.390 Facing colleague death, a lack of personal protective equipment, unsafe patient care levels, and personal sickness and hardship has irrevocably changed the workplace experience of healthcare workers.391

COVID-19 has exposed the connection between patient care and working conditions. Healthcare workers committed to patient care have a different relationship with their employers and with the idea of unions than they did even three years ago. The challenge of worker loyalty to hospital employers has been displaced by worker loyalty to patient care. And loyalty to patient care is pro-union.

### No Link---Sincerity

#### This sincereity standard is already applied in other areas, and good!

Dr. Brady Earley 24, PhD, JD, Empirical Research Fellow, Brigham Young University, "Responsible Religious Freedom: Factual Scrutiny in Free Exercise Doctrine," Journal of Law and Religion, Vol. 39, No. 3, pg. 297-321, 2024, OUP. [italics in original]

Properly focused on directly evaluating government justifications through facts, scrutiny analysis is a normatively attractive alternative to *Smith*. First, factual scrutiny is supported in practice from the history and precedent of the Free Exercise Clause. Present within legal reasoning from Blackstone to the United States’ founding era is the idea that facts guide judges in interpreting the law rather than just pure text and logic.142 In particular, factual inquiry was historically integral to conducting a scrutiny analysis “in a variety of natural rights contexts.”143 For example, the very first reported Supreme Court free exercise decision involved clear reference to legislative facts to justify denial of a religious exemption.144 In *Permoli v. Municipality No. 1 of City of New Orleans*, the Supreme Court determined that the city of New Orleans could forbid open-casket Catholic funerals during an episode of yellow fever in the city.145 In its reasoning, the court noted how facts demonstrating the “law of necessity” for enacting the public health ordinance “gives warrant” for disallowing open-casket funerals that would otherwise “impair [the ordinance’s] efficacy.”146 Moreover, this is supported by the Supreme Court’s more recent precedent under the Free Exercise Clause. Modern cases demonstrate how free exercise precedent supports a “precise analysis”147 informed by the facts that allow the court to “take relevant differences into account.”148

A second benefit from factual scrutiny in free exercise is the way it supports the institutional roles of courts and legislatures in free exercise conflicts. If courts require lawmakers to show that their law must be free from a religious accommodation to accomplish its purpose, lawmakers will be incentivized to search for that evidence. As Paul Yowell has explained, legislatures in the United States are well equipped to perform this function due to institutional resources such as legislative research services that courts often lack.149 Importantly, this approach also acts as a constraint on courts. Whereas Smith or balancing tests invite greater judicial discretion regarding “comparable” secular exemptions or the size of burden on a religious claimant,150 the question under factual scrutiny boils down to an evaluation of the necessity of fit between the law and its goals. Courts conducting such an analysis will largely be confined to the facts of the case and briefings of the parties before them.151

Moreover, there is already good precedent supporting judicial capability for evaluating government justifications in the free exercise context. Since the enactment of RFRA in 1993 and RLUIPA in 2000, federal and state courts have regularly engaged in a close analysis of government interests burdening religious exercise.152 Moreover, many state governments have shown increasing approval for courts to continue undertaking such scrutiny in free exercise. Currently, twenty-eight states have a RFRA on the books, with seven of those (25 percent) adopting their state-level RFRA since 2020.153 This judicial experience with RFRA and RLUIPA over the past several decades bolsters confidence in the judiciary to ably conduct scrutiny of government justifications.

Finally, and perhaps most importantly, focusing on government justifications through factual scrutiny shifts discourse on religious freedom from rights to responsibilities. Under the current paradigm, religious freedom challenges are framed as a right to be claimed and argued against government power. Both *Smith* and balancing tests encourage religious claimants to view themselves as rightsholders trying to establish entitlement. But under a factual scrutiny approach, this paradigm shifts. With a focus on government’s evidentiary burden to provide justifications, the right to religious freedom is secured by holding government accountable to its constitutional responsibilities.154 In a polarized environment where free exercise is often at the center of fights over competing rights, the reciprocal responsibilities that accompany those rights are often overlooked. Consequently, more cases are decided as one-sided conflicts in the courts and less effort is made to find better tailored resolutions in the legislature.155 But focusing on the facts of each dispute “concretize the interests on both sides, reduce the level of abstraction, and open up possibilities for compromise”—a benefit especially needed in the current constitutional environment.156

## Debt DA

### Solves War---1AC

#### 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.

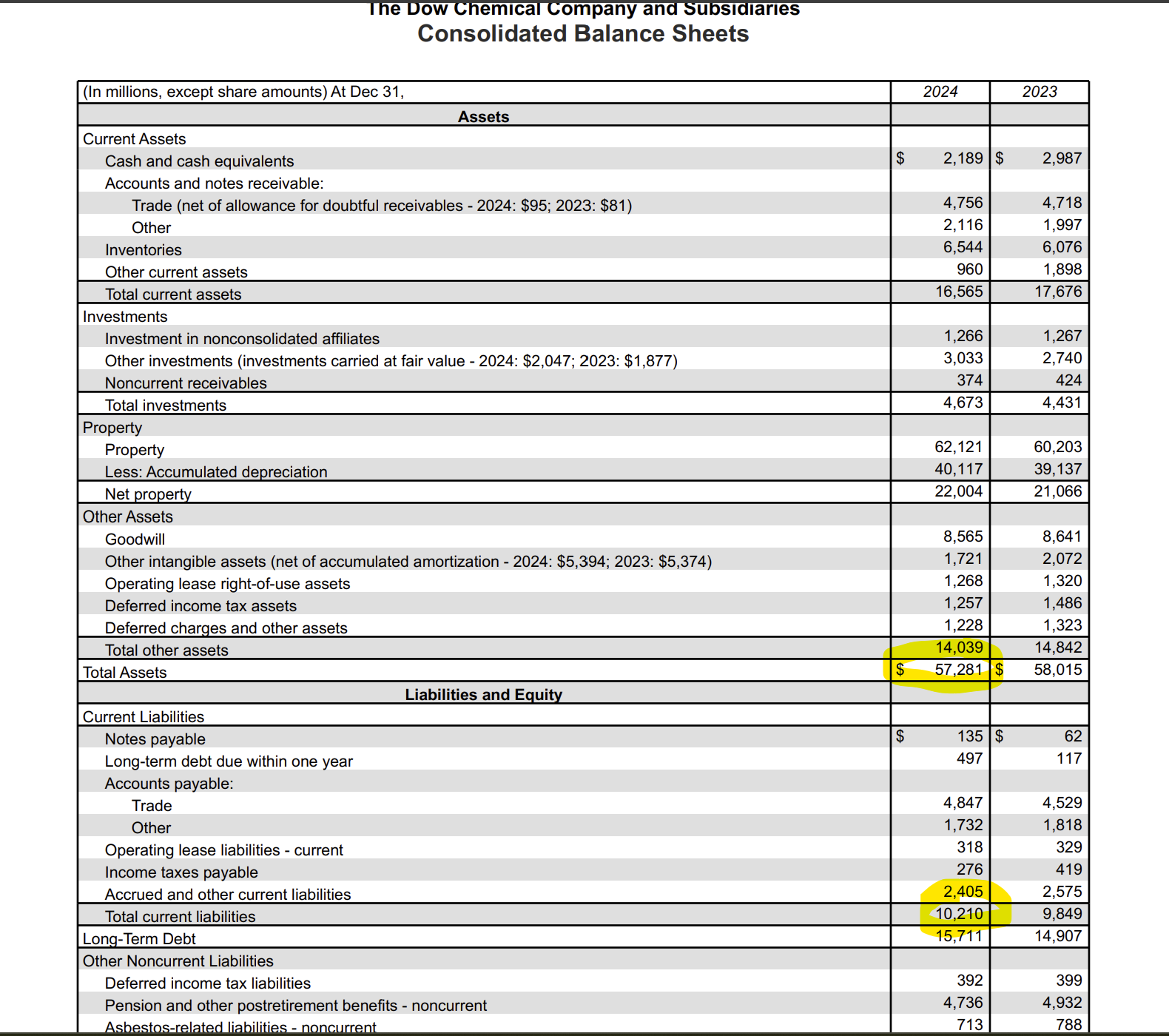
Such a spectacle was deeply embarrassing to President Roosevelt as he sought to mobilize the nation against the Nazi threat (which persecuted Jehovah’s Witnesses along with Jews). Thus his invocation of religious freedom in 1941, though phrased as a global right, was meant to buoy that tradition at home, 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.

### No Link---Threshold

#### Uniqueness overwhelms---Dow is the biggest American chemical company and their debt to assets ratio is tiny. Do you really think they’re gonna take out *40 billion in debt* after the AFF? Insert this screenshot from their 10-K.

Dow 24, “2024 ANNUAL REPORT”, https://s23.q4cdn.com/981382065/files/doc\_financials/2024/ar/Dow\_2024\_Annual\_Report\_Web.pdf



### No Link---Union Power

#### Multiple checks on entanglement.

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As above, this concern seems reasonable on its face. If religiously affiliated hospital employers did in fact have to negotiate over religious practice or creed, that seems to clearly pose insurmountable First Amendment challenges. Fortunately, that is not the case. Management rights clauses are a common feature of collective bargaining.258 As [\*551] discussed more in depth below, management rights clauses preserve the rights of management to make unilateral decisions over enumerated managerial prerogatives.259 In the religiously affiliated hospital setting, management rights clauses can insulate religious questions from bargaining in complete accord with the requirements of the NLRA. In other words, religion is not a mandatory subject of bargaining and can be avoided by religious employers.

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Professor Eduardo Capulong, analyzing unionization in the nonprofit sector generally, found that nonprofit workers "want to 'do good.' . . . [They] were less motivated by 'job security, the salary, benefits or the paycheck' than they were by the 'chance to help the public, to make a difference, to do something worthwhile, and [to have] pride in the organization . . ."383 Capulong continued:

'[N]onprofit employees love their work so much that they set themselves up for exploitation.' The commitment to clients is, in fact, such a powerful motivator that it sometimes discourages nonprofit workers from leaving substandard employment. Thus, even as nonprofit workers tend to be pro-union generally, they may not be pro-union for themselves. Believing that they should not take funds dedicated to client programs, particularly when budgets are tight, many nonprofit workers minimize their own work-related concerns.384

Capulong is discussing nonprofit workers generally, but it stands to reason that this inclination is even stronger when we consider workers at nonprofit, faith-based organizations that may be similarly (if [\*572] not more so) steeped in the mission of their organization. When we add in the connection healthcare workers have to their patients, Capulong's explanation of nonprofit workers' aversion to unionization only grows more compelling. As others have noted, "the more employees identify with the company, the less likely they will identify with an outside union."385 Amy Gladstein, a New York labor lawyer who, since 2002, has been "responsible for directing the new organizing program for 1199 SEIU,"386 stated that "workers in Catholic hospitals are often more mission focused. [Some] people work there because they believe in the mission, as the Church says, that it is about providing healthcare for and helping the poor."387 With that image of a healthcare worker at a religiously affiliated hospital in mind, the challenge of overcoming worker loyalty to their employers comes into focus.

Although this challenge remains present, the contours of the employment relationship in healthcare, even religiously affiliated healthcare, have changed tremendously due to COVID-19. As discussed *supra*,388 healthcare workers in and out of religiously affiliated hospitals have been mobilized by the widespread death, overwork, underpay, and unsafe worker and patient conditions of the COVID-19 pandemic. Workers who were once devoted to their employers and expected their employers to protect them have both seen, and felt, their employers fail them.389 Workers who were "dead set against a union five years ago," have had their minds changed by COVID-19.390 Facing colleague death, a lack of personal protective equipment, unsafe patient care levels, and personal sickness and hardship has irrevocably changed the workplace experience of healthcare workers.391

COVID-19 has exposed the connection between patient care and working conditions. Healthcare workers committed to patient care have a different relationship with their employers and with the idea of unions than they did even three years ago. The challenge of worker loyalty to hospital employers has been displaced by worker loyalty to patient care. And loyalty to patient care is pro-union.

### No Link---No Spillover

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

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

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E. Not Every Corporation Does or Will Practice Religion

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

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

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

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