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ABSTRACT

Churches are protected under the autonomy doctrine, which is rooted in the Religion Clauses, to ensure that they are free to define their institutional identity and mission. In more limited circumstances, many religious nonprofits also enjoy autonomy protections. Now that the Supreme Court has decided in Burwell v. Hobby Lobby Stores, Inc. *that for-profit corporations are capable of religious exercise and entitled to statutory free exercise protection, this Article poses a question that is on the horizon: would it ever be plausible to extend the autonomy doctrine to a for-profit institution? This Article identifies several types of for-profits (named "religious for-profits") that appear to deserve autonomy protection. But it concludes that they do not – not as a matter of constitutional law. This Article distinguishes religious for-profits from churches and from those religious nonprofits that warrant autonomy protection. It also notes that autonomy protection for some religious nonprofits that act like for-profits is highly contested; now is certainly not the time to expand the doctrine to include for-profits.*

Why is it wrong to apply the autonomy doctrine to for-profit entities? Autonomy justifies categorical exemptions, which often result in harmful consequences to specific individuals and groups. If autonomy is extended to for-profits, those negative impacts will multiply in number and intensity when coupled with the massive economic power of those entities. Autonomy protections traditionally have been applied exclusively within the church-and-nonprofit sector. Indeed, autonomy is reserved for jurisgenerative communities operating under some type of consent based norms, which is not the case in the for-profit context. Finally, the expansion of autonomy to include for-profits threatens to dilute the entire doctrine, which could result in the loss of protections for churches on core matters of identity and mission. Instead, this Article proposes that the best way for courts, legislators and regulators to protect the religious freedom of for-profit entities is to apply a balancing

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approach, which takes into account and tries to mitigate the impacts on others of any exemption granted to a religious claimant.

INTRODUCTION

When courts decide whether to protect religious exercise by giving a claimant an exemption from a law, they employ one of two approaches: either a balancing of the religious claim against the government's interest or an autonomy approach.[1] The balancing approach is commonly used when the issue is whether to grant a free exercise exemption available under several federal statutes, under the law in about half the states, and (in limited circumstances) under the Free Exercise Clause of the First Amendment.[2] Balancing applies in most situations when a religious claimant – whether an individual or an entity – demonstrates a government infringement on religious exercise.[3] The autonomy approach, rooted in both the Free Exercise and Establishment Clauses, applies only to churches and to religious nonprofits (in certain circumstances) and serves to ensure their institutional freedom to define their identity and pursue their mission.[4] Under the balancing approach, courts are supposed to consider any negative impacts an exemption might have on identifiable persons or groups when assessing whether the exemption is warranted.[5] But under the autonomy approach, which employs categorical exemptions, courts do not take into account the resulting consequences.[6] Even in the face of severe impacts that are not legally redressable, the exemption will be granted in order to ensure the autonomy of the religious institution.

The Supreme Court recently determined in *Burwell v. Hobby Lobby Stores, Inc.* that *for-profit corporations* can exercise religion.[7] Now that this threshold decision on for-profit religious exercise has been made, the normative question emerges: how ought we protect for-profits? Should they be protected under the common understanding of religious liberty, with their claims balanced against governmental interests, and with a full evaluation of the impacts of an exemption? Or should they be protected under an autonomy analysis, with no regard for the consequences of an exemption? As a result of the *Hobby Lobby* decision, companies with a religious objection to contraceptive coverage as part of their employees' health insurance plans are exempt from the requirement to provide it. The *Hobby Lobby* majority employed a balancing approach under the statutory framework of the litigation,

1. For a discussion of the contrast, see Korte v. Sebelius, 735 F.3d 654, 683 (7th Cir. 2013) (holding that the contraception mandate substantially burdened plaintiffs).

2. *See* discussion *infra* note 49.

3. *See infra* Part I.

4. *See infra* Part II.

5. *See infra* Part I.

6. *See infra* Part II.

7. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2771 (2014).

but owing to some unique circumstances in the case, the dissent (which would not have protected the for-profits at all) read the decision as the irresponsible grant of autonomy to a new class of claimants.[8] The dissent's interpretation of the Court's opinion raises several important questions. Must autonomy be limited to the church and religious nonprofit context? Could a for-profit entity explicitly make, and prevail on, an autonomy claim? More pointedly, are there particular types of for-profit entities that might explicitly and plausibly claim that the autonomy doctrine is applicable to them?

The most likely candidate for autonomy protection will be referred to as the "religious for-profit." A religious for-profit is an entity with explicit religious identity, mission, and undeniable "religious character"[9] that provides either: 1) religious goods and services; or 2) education, health care or social services more characteristic of a traditional nonprofit. Such an entity differs substantially from nearly every business that challenged the contraception mandate: closely-held for-profits engaged in secular endeavors, like arts and crafts retailers and cabinet manufacturers, but operated according to the owners' religious principles.[10] It may be that after *Hobby Lobby*, courts will remain within the balancing framework for assessing the free exercise claims of such secular businesses and their owners. But how will courts engage *religious* for-profits? These entities, in contrast to the secular corporations owned and operated by religious families, are not dependent upon or defined by their owners' faith. They are free-standing religious entities with a religious mission and may be closely connected, formally or informally, to a church or religious population. When religious for-profits bring free exercise claims post-*Hobby Lobby*, courts may be tempted to extend autonomy protections to them, perhaps by analogy to religious nonprofits.

An extension of the autonomy doctrine to for-profits as a constitutional mandate would be a mistake. The doctrine should remain limited to churches and religious nonprofits, where it functions to protect their institutional integrity and normative role in civil society, and where norms of consent operate

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8. *Id.* at 2787 (Ginsburg, J., dissenting). Several scholars noted concerns with extending autonomy to the secular corporate plaintiffs in Hobby Lobby. *See, e.g.*, Zoë Robinson, *The Contraception Mandate and the Forgotten Constitutional Question*, 2014 WIS. L. REV. 749, 776-78, 785-93 (2014) (providing guidelines for defining "religious" institutions that enjoy autonomy protection and excluding "faith-based" businesses); Robert K. Vischer, *Do For-Profit Businesses Have Free Exercise Rights?*, 21 J. CONTEMP. LEGAL ISSUES 369, 389 (2013) (explicating prudential concerns of a constitutionally protected right of autonomy for corporations, noting "the pitfalls of extending the same free exercise rights to for-profit businesses as to churches").

9. *See generally* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 345 n.6 (1987) (Brennan, J., concurring).

10. *See* cases cited *infra* note 51. Mardel, also owned by the same family that owned Hobby Lobby, is a chain of religious bookstores that accounts for a smaller part of the family's business. *See* discussion *infra* Part IV.B (discussing Mardel and similar establishments that provide religious goods and services).

(with some qualifications).[11] When courts employ autonomy, they are unconcerned with the negative impacts on identifiable persons and groups that result. Clergy men and women are not entitled to sue their churches for employment discrimination;[12] members cannot sue their churches for wrongful excommunication;[13] dissenting factions have no right to church governance or property;[14] patients denied abortions or sterilizations cannot compel religiously-affiliated hospitals to provide them;[15] employees not conforming to faith requirements cannot sue for religious discrimination;[16] those harmed by church counseling cannot claim clergy malpractice;[17] students and their families have no right to challenge decisions to close a religiously-affiliated school;[18] same-sex couples cannot sue churches for discrimination when denied a church wedding.[19] In most of these situations, there are compelling reasons for this "special solicitude to the rights of religious organizations,"[20] even where the individual or group has suffered a harm that would be legally redressable in another context under federal or state statute or under state tort or contract law.[21]

Those reasons are rooted in the First Amendment, in which the Free Exercise Clause guarantees freedom to religious groups to define and constitute themselves, while the Establishment Clause ensures the structural independence of church and state.[22] Together the Religion Clauses provide a framework in which churches and religious nonprofits enjoy considerable latitude to serve as non-state mediating institutions in civil society. Religious organizations have the right to maintain a religious identity.[23] The autonomy doc-

11. Consent might seem to explain the appropriateness of autonomy in these cases, but the justifications are more complex. *See infra* Part II.D.

12. *See* discussion *infra* Part II.A.

13. *See* discussion *infra* Part II.B.

14. *See* discussion *infra* Part II.B.

15. *See* discussion *infra* Part II.C.

16. *See* discussion *infra* Part II.A.

17. *See* discussion *infra* Part II.B.

18. *See* discussion *infra* Part II.B.

19. *See* discussion *infra* Part II.B.

20. Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 132 S. Ct. 694, 706 (2012).

21. Of course, this "special solicitude" is not without limits, and the doctrine has been narrowed to make churches and religious nonprofits legally accountable for certain actions. *See generally* Angela C. Carmella, *The Protection of Children and Young People: Catholic and Constitutional Visions of Responsible Freedom*, 44 B.C. L. REV. 1031 (2003); Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219 (2000).

22. U.S. CONST. amend. I (providing in relevant part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof").

23. *See* Thomas C. Berg, *Progressive Arguments for Religious Organizational Freedom: Reflections on the HHS Mandate*, 21 J. CONTEMP. LEGAL ISSUES 279, 316 (2013).

trine protects not only the community but, ultimately, the individual who desires to belong to and participate in a faith community. In order to facilitate voluntary decision-making in this arena, it is critical to preserve the freedom of churches and other religious organizations to define and perpetuate themselves as they see fit.

By virtue of constitutional design, then, autonomy is intended to protect the institutional freedom of churches and many religious nonprofits in a categorical way, without regard to the loss of basic legal rights this protection can entail for others. Precisely because this approach is often accompanied by harmful impacts on identifiable persons and groups, it should be contained.[24] Indeed, the appropriate contours of autonomy, as applied to religious nonprofits in certain circumstances, are currently under intense scrutiny and are highly contested.[25] If we struggle over the doctrine's contours in the nonprofit context, then surely it should not be extended to for-profit institutions – not even to undeniably *religious* for-profits. Courts should adjudicate the free exercise claims of all for-profits, whether they are secular corporations operated according to religious beliefs or religious for-profits, within a balancing framework.[26] Although religious for-profits might look like analogs to religious institutions that warrant autonomy protection, courts should resist classifying them as such for several reasons.

First, autonomy is based upon the most fundamental aspect of church-state relations: there are two separate jurisdictions.[27] Churches and many religious nonprofits enjoy a limited sovereignty with respect to theological and ecclesiastical matters, which are outside the state's competence.[28] It is well settled that these matters, and decision-making that relates to them, must remain exclusively in the sphere of religious communities.[29] Churches and nonprofits undertaking charitable works – education, service, health care – have populated this sphere; commercial actors are absent. Even commercial nonprofits like religiously-affiliated hospitals, which are mission driven *and*

24. Legislative exemptions can always be granted to for-profits as a matter of political evaluation of impacts. Daniel O. Conkle, *Free Exercise, Federalism, and the States As Laboratories*, 21 CARDOZO L. REV. 493, 496 (1999).

25. *See, e.g.*, Berg, *supra* note 23, at 303-07; *see also infra* Part II.D.

26. *See infra* note 49 and accompanying text.

27. The jurisdictional concept is an ancient one: "Two There Are," wrote Pope Gelasius in the fifth century. *See* Paul Halsall, *Gelasius I on Spiritual and Temporal Power, 494*, FORDHAM UNIV., http://legacy.fordham.edu/halsall/source/gelasius1.asp (last visited Apr. 6, 2015). For a discussion of church autonomy and its jurisdictional nature, see Vischer, *supra* note 8; *see also* Andrew Koppelman, *"Freedom of the Church" and the Authority of the State*, 21 J. CONTEMP. LEGAL ISSUES 145, 145-46, 162-64 (2013) (criticizing scholars who use a particularly robust autonomy concept referred to as "freedom of the church").

28. *See* Koppelman, *supra* note 27, at 156-57.

29. *See id.* at 149.

participate in competitive secular markets, have enjoyed autonomy on only narrowly targeted religious matters.[30]

The second reason to deny autonomy protection to for-profits is that autonomy is reserved for those institutions that have "jurisgenerative" functions.[31] To be jurisgenerative, groups must "have as their goal uniquely religious objectives, . . . serve norm creating and reinforcing purposes and . . . provide social structures within which societal subgroups can function without state oversight."[32] They must be "organized around a religious mission with a guiding doctrine and goal to facilitate individual and collective religious belief."[33] Churches and many religious nonprofits behave in this way. But do for-profits "generate[] norms for a definable collective group in order to facilitate individual belief"?[34] Even if some for-profits, like providers of religious goods and services, can play a role in the life of a religious community, for-profits – as a class – are not viewed as central "to the lived faith experiences of most Americans."[35] Further, the jurisgenerative nature of an institution may be compromised when "ownership" is involved. Nonprofits can earn a profit, but they have to reinvest it in the corporation or spend it to advance the corporation's purpose.[36] The nondistribution constraint thus requires continued reaffirmation of the religious mission. This intensity is harder to maintain in for-profits, which distribute profit to owners/shareholders and thus cater to interests that can distract attention from the for-profit's mission.[37]

Third, in addition to lacking the necessary jurisdictional and jurisgenerative prerequisites for the application of church autonomy, for-profits are primarily economic actors that wield "enormous market power . . . in the provision of essential goods and services, including the paths by which to earn a livelihood."[38] Given this "massive influence over individuals' access to the building blocks of everyday life," for-profits are "central to our ability to participate in modern life."[39] Churches and religious nonprofits, as a sector,

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30. *See infra* Part II.C.

31. *See* Robert M. Cover, *The Supreme Court 1982 Term – Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 26-33 (1983). All private lawmaking generates norms. *Id.* at 31. The term is used here only with respect to the generation of *religious* norms.

32. Zoë Robinson, *What Is a "Religious Institution"?*, 55 B.C. L. REV. 181, 225 (2014).

33. Robinson, *supra* note 8, at 793.

34. *Id.*

35. Vischer, *supra* note 8, at 397.

36. *See* Andras Kosaras, Note, *Federal Income and State Property Tax Exemption of Commercialized Nonprofits: Should Profit-Seeking Art Museums Be Tax Exempt?*, 35 NEW ENG. L. REV. 115, 150 (2000).

37. *See infra* Part IV.

38. Vischer, *supra* note 8, at 398.

39. *Id.* at 391, 397.

command no comparable control.[40] (Quite tellingly, in situations where religious nonprofits do exercise economic power on par with for-profits, courts have begun to question their entitlement to autonomy protection.)[41]

An additional reason for not applying autonomy to for-profits is that the negative side effects of autonomy should remain circumscribed to the church and religious nonprofit context, where norms of consent operate. If powerful for-profits are allowed the categorical exemptions of the autonomy approach, then countless identifiable persons and groups will suffer harm without legal redress – particularly harm with respect to their ability to access the economic "building blocks of everyday life."[42]

A final reason for not extending autonomy to for-profits is the concern that if the doctrine is applied broadly, courts will decline to apply it even to core religious institutions like churches. We have seen the broad articulation of rights backfire in other areas of Religion Clause jurisprudence, where, for instance, a broad definition of religion, together with an aggressive approach to exemptions, was met with judicial resistance and resulted in watered down protections.[43] If the autonomy doctrine does not make distinctions between businesses and churches, courts may begin to narrow the doctrine across the board, leaving churches without sufficient protection for identity and mission.

The balancing approach should continue to apply to for-profits, both secular for-profits operated by owners with religious convictions (as in *Hobby Lobby*) and religious for-profits. Balancing is broadly inclusive of multiple types of free exercise claims – giving consideration to burdens on religious conscience, expression, practice, and formation of all types. Balancing better protects for-profit claims[44] because it gives courts the flexibility to take into account the degree of burden on religious exercise and the significance and implementation of the law, as well as the magnitude of the impacts that an exemption would produce. Particularly with market actors that have power over goods, services, and jobs, a full airing and balancing of rights and interests is appropriate, especially where consent to religious norms is absent.

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40. *Id.* at 391 ("The primary concern, I believe, is that for-profit corporations are so central to our ability to participate in modern life, including our ability to earn a livelihood. They are inescapable conduits for many goods deemed fundamental to our modern existence. We are uncomfortable exempting corporations from the law's authority because it can be difficult for individuals to exempt themselves from the corporation's authority. Churches, when viewed from the perch of state agnosticism, are optional pursuits. They do not govern access to wide swaths of employment or essential goods and services, and to the extent that church-affiliated organizations do govern such access, we become less comfortable treating those organizations as churches.").

41. *See infra* Part II.D; *see also infra* note 227 (regarding similarities between nonprofit and for-profit hospitals).

42. *See* Vischer, *supra* note 8, at 397.

43. *See infra* note 49 and accompanying text.

44. This argument is in line with the limitations to autonomy protections suggested by Professor Zoë Robinson. Robinson, *supra* note 32, at 230-33.

There will be instances in which judicial balancing is not available to address burdens to religious exercise.[45] But legislatures and regulators are also capable of (and probably better at) tailoring exemptions to protect religious freedom without thwarting the government's interest and causing widespread impacts on third parties.

This Article proceeds as follows: Part I explores the *Hobby Lobby* decision and its conflicting interpretations, and argues that – moving forward – for-profit free exercise protection should be confined to the decision's balancing framework. Part II describes the applicability of the autonomy doctrine to churches and religious nonprofits, noting its sometimes severe consequences on identifiable individuals or groups left without legal recourse. Part III discusses the historic applicability of the balancing approach to for-profit religion claims and the attendant refusal to recognize jurisdictional or jurisgenerative elements in that context. Part IV then evaluates the argument that autonomy principles should be extended to free exercise claims of a "religious for-profit," describing the dangers of such an extension, especially now that changes in corporate law facilitate the creation of for-profits with religious missions. Part IV further explores the compelling reasons to limit the autonomy approach to the church-nonprofit context and contends that, as in *Hobby Lobby*, the protections offered by the balancing approach are sufficient and encourage the development of responsible freedom within the market context: impacts of exemptions will be given adequate consideration and attempts to avoid or mitigate those impacts will be required.

I. CONFINING *HOBBY LOBBY* TO ITS BALANCING FRAMEWORK

The novel question of "for-profit" religious exercise came squarely before the U.S. Supreme Court in the 2014 term in a challenge to regulations issued by the Department of Health and Human Services ("HHS") under the Affordable Care Act (the "ACA").[46] In *Burwell v. Hobby Lobby*, several closely held corporations and their owners objected on religious grounds to providing mandatory insurance coverage to their employees for two drugs and two devices.[47] HHS defined the drugs and devices as contraceptives, while the corporations characterized the exact products as abortifacients.[48] Facing nearly half a billion dollars in fines, the corporations sought an exemption from the requirement under the federal Religious Freedom Restoration Act ("RFRA"), which requires the government to demonstrate that a law substantially burdening a claimant's religious exercise uses the least restric-

45. *See infra* note 49.

46. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2762-63 (2014); *see also* 42 U.S.C. § 300gg-13(a)(4) (2012); 45 C.F.R. §§ 147.100-159.120 (2014).

47. *See Hobby Lobby*, 134 S. Ct. at 2759.

48. *See id.*

tive means to advance a compelling interest.[49] The government argued that for-profit corporations were not "persons" capable of "religious exercise" under RFRA and that, even if they were, RFRA would not permit the denial of coverage to thousands of employees, to which they are otherwise entitled

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49. *Id.*; *see also* 42 U.S.C. § 2000bb-1(a)-(b) (2012). RFRA prohibits government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the government "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." § 2000bb-1(a)-(b). RFRA applies to "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A) (2012).

The balancing test set forth in RFRA has a long history. First set forth in *Sherbert v. Verner*, 374 U.S. 398, 403 (1963), it was abandoned in 1990 in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 882-89 (1990), which held that facially neutral, generally applicable laws could not burden religion. *Smith* did provide for several circumstances in which strict scrutiny continued to apply, so even as a matter of federal constitutional law there may be times when it is invoked. *See, e.g.*, Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 533 (1993).

Three years later, RFRA was passed and currently applies to federal law; it was held unconstitutional as applied to the states in 1997. City of Boerne v. Flores, 521 U.S. 507, 532-36 (1997). In 2000, Congress passed the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), which also contains a balancing approach. 42 U.S.C. §§ 2000cc to 2000cc-5 (2012). It applies to state and local land use regulations and to state prison administration. *See id.*; *see also Religious Land Use and Institutionalized Persons Act (RLUIPA)*, CIVIL RIGHTS DIV., U.S. DEP'T OF JUST., http://www.justice.gov/crt/about/spl/rluipa.php (last visited Mar. 6, 2015); *Religious Land Use and Institutionalized Persons Act Summary*, CIVIL RIGHTS DIV., U.S. DEP'T OF JUST., http://www.justice.gov/crt/about/hce/rluipaexplain.php (last visited Apr. 6, 2015).

About half the states employ a balancing approach, either by statute (state RFRAs) or by state constitutional interpretation. Eugene Volokh, *1A. What Is the Religious Freedom Restoration Act?*, VOLOKH CONSPIRACY (Dec. 2, 2013, 7:34 AM), www.vo-lokh.com/2013/12/02/1a-religious-freedom-restoration-act/. This, of course, means that not every claimed burden on religious exercise will be legally redressable under a balancing test: if no federal or state statute applies, and a court does not interpret the federal or state constitution to require strict scrutiny, then *Smith* applies and an exemption will be denied. Of course, the claimants can appeal to the political process to argue for legislative or regulatory exemption. Dean Robert Vischer thinks this is actually a better route. Vischer, *supra* note 8, at 399 ("There are many good reasons to defend the autonomy of for-profit businesses seeking to maintain or cultivate a distinct religious identity. In most cases, though, legislatures are better suited to make judgments of calibration than courts are. Their focus should be on maintaining access to goods and services deemed essential by the political community, not on rejecting or affirming religious liberty rights as some sort of corporate trump card. Courts should recognize for-profit businesses as legitimate bearers of free exercise rights, but not without some trepidation." (internal citations omitted)).

under federal law.[50] These arguments were made in numerous for-profit challenges to the contraception mandate.[51]

50. *See Hobby Lobby*, 134 S. Ct. at 2759.

51. *See, e.g.*, *Hobby Lobby*, 134 S. Ct. 2751 (2014) (arts and crafts retailer); Autocam Corp. v. Burwell, 134 S. Ct. 2901 (2014) (mem.) (vacating judgment and remanding to Sixth Circuit) (medical equipment manufacturer); Eden Foods, Inc. v. Burwell, 134 S. Ct. 2902 (2014) (mem.) (vacating judgment and remanding to Sixth Circuit) (organic food producer); Gilardi v. Dep't of Health & Human Servs., 134 S. Ct. 2902 (2014) (mem.) (vacating and remanding D.C. Circuit decision) (produce distributor and green product distributor).

As of August 2014, the following results had been reached in each case when these arguments were advanced:

Granting Preliminary Relief: Newland v. Sebelius, 542 Fed. Appx. 706 (10th Cir. 2013) (granting preliminary injunction) (manufacturers and wholesale distributors of high-quality HVAC sheet metal products and equipment); Annex Med., Inc. v. Sebelius, No. 13-1118, 2013 WL 1276025 (8th Cir. Feb. 1, 2013) (granting preliminary injunction pending appeal) (medical device manufacturer); Catholic Benefits Ass'n LCA v. Sebelius, CIV-14-240-R, 2014 WL 2522357 (W.D. Okla. June 4, 2014) (granting Groups II and III preliminary injunction) (for-profit insurance company); Randy Reed Auto., Inc. v. Sebelius, No. 13-6117-CV-SJ-ODS, 2013 U.S. Dist. LEXIS 169966 (W.D. Mo. Dec. 3, 2013) (granting preliminary injunction) (automotive dealership); Armstrong v. Sebelius, No. 13-CV-00563-RBJ, 2013 WL 5213640 (D. Colo. Sept. 17, 2013) (granting preliminary injunction) (residential mortgage banking center); Briscoe v. Sebelius, No. 13-CV-00285-WYD-BNB, 2013 WL 4781711 (D. Colo. Sept. 6, 2013) (granting preliminary injunction) (operating assisted living centers, senior independent residences, and nursing facilities); Beckwith Elec. Co., Inc. v. Sebelius, 960 F. Supp. 2d 1328 (M.D. Fla. 2013) (granting preliminary injunction) (electrical product manufacturer); Legatus v. Sebelius, 988 F. Supp. 2d 794 (E.D. Mich. 2013) (granting preliminary injunction) (Catholic ambassadors); Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., No. 2:12 CV 92 DDN, 2013 WL 6858588 (E.D. Mo. Dec. 30, 2013) (granting preliminary injunction) (agricultural organization); Geneva Coll. v. Sebelius, No. 12–0207, 2013 WL 6835094 (W.D. Pa. Dec. 23, 2013) (granting preliminary injunction) (a college and a lumber business); Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs., No. 12-3459-CV-S-RED, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012) (granting preliminary injunction) (wholesale scrap metal recycling and manufacturing of machines for said businesses); Order Granting Injunction Pending Appeal, O'Brien Indus. Holdings, LLC v. U.S. Dep't of Health & Human Servs., No. 4:12-cv-00476-CEJ (8th Cir. Nov. 28, 2012) (manufacturing, supplying, installation, and mining of refractory products); Order Granting Preliminary Injunction, Holland v. U.S. Dep't of Health & Human Servs., No. 2:13-cv-15487 (S.D.W. Va. July 15, 2014) (selling and servicing motor vehicles); Order Granting Preliminary Injunction, Hastings Auto. v. Sebelius, No. 0:14-cv-00265-PAM-JJG (D. Minn. May 28, 2014) (automotive dealership); Order Granting Preliminary Injunction, Stinson Elec. v. Sebelius, No. 14-CV-00830-PJS-JJG (D. Minn. Apr. 30, 2014) (electrical services); Order Granting Preliminary Injunction, Stewart v. Sebelius, No. 1:13-cv-1879-RCL (D.D.C. Apr. 2, 2014) (architect, design and construction service firm); Order Granting Preliminary Injunction, C.W. Zumbiel Co. v. U. S. Dep't of Health & Human Servs., No. 1:13-cv-01611-RBW (D.D.C. Nov. 27, 2013) (packaging company); Order Granting Preliminary Injunction, Doboszenski & Sons, Inc. v. Burwell, No. 13-3148 (D. Minn. Nov. 27,

2013) (construction company); Order Granting Preliminary Injunction, Williams v. Sebelius, No. 1:13-cv-01699-RLW (D.D.C Nov. 19, 2013) (distributor and manufacturer of high performance materials for high-voltage electrical, thermal insulation, and mechanical applications); Order Granting Preliminary Injunction, Feltl & Co., Inc. v. Sebelius, No. 13-cv-02635-DWF-JJK (D. Minn. Nov. 5, 2013) (securities brokerage and investment banking company); Order Granting Preliminary Injunction, Midwest Fastener Corp. v. Sebelius, No. 13-1337 (D.D.C Oct. 16, 2013) (fastener supplier); Order Granting Preliminary Injunction, Barron Indus., Inc. v. Sebelius, No. 13-CV-1330 (D.D.C. Sept. 25, 2013) (manufacturer of metal components); Order Granting Second Amended Preliminary Injunction, QC Group, Inc. v. Sebelius, No. 13-1726 (D. Minn. Sept. 11, 2013) (quality control services); Order Granting Preliminary Injunction, Willis Law v. Sebelius, No. 13-01124 (D.D.C Aug. 23, 2013) (legal services firm); Order Granting Preliminary Injunction, Bindon v. Sebelius, No. 1:13-cv-1207-EGS (D.D.C. Aug. 15, 2013) (manufacturer of any-light aiming systems); Order Granting Preliminary Injunction, Ozinga v. U.S. Dep't of Health & Human Servs., No. 1:13-cv-3292-TMD (N.D. Ill. July 16, 2013) (concrete company); Order Granting Preliminary Injunction, SMA, LLC v. Sebelius, No. 13-CV-01375-ADM-LIB (D. Minn. July 8, 2013) (agricultural/industrial construction company); Order Granting Preliminary Injunction, Johnson Welded Prods., Inc. v. Sebelius, No. 1:13-cv-00609-ESH (D.D.C. May 24, 2013) (air reservoir manufacturer); Order Granting Voluntary Dismissal, M & N Plastics, Inc., v. Sebelius, 2:13-cv-12036-VAR-DRG (E.D. Mich. May 24, 2013) (supplier of custom injection molding products); Order Granting Preliminary Injunction, Hart Elec., LLC v. Sebelius, No. 1:13-CV-02253 (N.D. Ill. Apr. 18, 2013) (manufacturer of wire harnesses, battery cables, and electrical components); Order Granting Preliminary Injunction, Hall v. Sebelius, No. 13-0295 (D. Minn. Apr. 2, 2013) (manufacturer of replacement parts); Order Granting Preliminary Injunction, Bick Holdings, Inc. v. Sebelius, No. 4:13-cv-00462-AGF (E.D. Mo. Apr. 1, 2013) (data center consulting, design, maintenance, service and cleaning business, and information technology consulting for health care providers); Order Granting Preliminary Injunction, Lindsay, Rappaport & Postel LLC. v. Sebelius, No. 13 C 1210 (N.D. Ill. Mar. 20, 2013) (law firm); Order Granting Preliminary Injunction, Sioux Chief Mfg. Co., Inc. v. Sebelius, No. 13-0036-CV-W-ODS (W.D. Mo. Feb. 28, 2013) (manufacturer of plumbing products); Order Granting Preliminary Injunction, Yep v. U.S. Dep't of Health & Human Servs., No. 12-cv-06756 (N.D. Ill. Jan. 3, 2013) (health care company); Order Granting Preliminary Injunction, Sioux Chief Mfg. Co., Inc. v. Sebelius, No. 13-0036-CV-W-ODS (W.D. Mo. Feb. 28, 2013) (manufacturer of plumbing products).

Denying Preliminary Relief: MK Chambers Co. v. Dep't of Health & Human Servs., No. 13-11379, 2013 WL 5182435 (E.D. Mich. Sept. 13, 2013) (denying preliminary injunction) (manufacturer of automotive parts); Mersino Mgmt. Co. v. Sebelius, No. 13-CV-11296, 2013 WL 3546702 (E.D. Mich. July 11, 2013) (denying preliminary injunction) (pumping services).

Rulings Other than Preliminary Injunction: Korte v. Sebelius, 735 F.3d 654 (7th Cir. 2013) (holding that the contraception mandate substantially burdened plaintiffs) (contractors); Order Granting Motion to Dismiss, Infrastructure Alts., Inc. v. Sebelius, No. 1:13-cv-00031-RJJ (W.D. Mich. Sept. 30, 2013) (water operations services); Monaghan v. Sebelius, No. 12-15488, 2013 WL 3212597 (E.D. Mich. June 26, 2013) (granting motion to stay the case) (office park for corporations and property management company); Tyndale House Publishers, Inc. v. Sebelius, No. 13-5018, 2013 WL 2395168 (D.C. Cir. May 3, 2013) (granting voluntary dismissal and dis-

In a path-breaking decision, the Court held 5-4 that RFRA applies to closely-held, for-profit entities and that the contraception mandate substantially burdened the "ability of the objecting parties to conduct business in accordance with *their religious beliefs*."[52] The Court noted that such entities are vehicles through which people of faith participate in the economic life of the nation.[53] Indeed, both Justice Alito for the majority and Justice Kennedy in concurrence made clear that RFRA performed the critical task of preventing the exclusion of religious people from the economy.[54] The Court held that, under RFRA, the burden caused by the mandate was not a permissible one: although the mandate served a compelling governmental interest, the government had failed to meet the least restrictive alternative test.[55] The Court's reasoning pointed to the accommodation that HHS had crafted for religious nonprofits (the "HHS Accommodation") and its possible extension to the for-profit context.[56]

To put the HHS Accommodation in context, it is important to note that the contraception mandate itself contained an exemption for church employers.[57] This was a narrow autonomy-based exemption for churches and their close affiliates.[58] Many religious nonprofits with objections to the contraception coverage – including charities, colleges, and hospitals – demanded to be included in this exemption.[59] But instead of expanding the exemption, feder-

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missing the case) (Christian publisher); Tonn & Blank Constr., LLC v. Sebelius, 968 F. Supp. 2d 990 (N.D. Ind. 2013) (holding that temporary stay was proper) (contractors).

Filing Only: Complaint, Mersino Dewatering, Inc. v. Sebelius, Case No. 1:13-cv-01329-RLW (D.D.C Sept. 3, 2013) (pumping services).

52. *Hobby Lobby*, 134 S. Ct. at 2770-72, 2777-85. The decision is path-breaking not only because of the treatment of for-profits but also because of the Court's deference to Plaintiffs on the issue of moral complicity, a topic outside the scope of this article. Note also that Justices Breyer and Kagan did not join the other dissenters on the question of RFRA's applicability to for-profits.

53. *Id.* at 2783.

54. *Id.* at 2760; *id.* at 2785 (Kennedy, J., concurring).

55. *Id.* at 2780-81 (majority opinion). Justice Kennedy joined the majority opinion but also wrote a separate concurrence. *Id.* at 2785 (Kennedy, J., concurring). He concluded that the government had established a compelling governmental interest. *Id.* at 2785-86.

56. *Id.* at 2781-82 (majority opinion). On August 22, 2014, HHS proposed regulations that do just this. *See Women's Preventive Services Coverage and Non-Profit Religious Organizations*, CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUMAN SERVS., http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/womens-preven-02012013.html (last visited Feb. 12, 2015).

57. *Hobby Lobby*, 134 S. Ct. at 2763.

58. *Id.* The initial religious employer exemption was amended for clarity, but it did not expand its intended beneficiaries. *See* CTRS. FOR MEDICARE & MEDICAID SERVS., *supra* note 56.

59. *See* Jonathan T. Tan, Comment, *Nonprofit Organizations, For-Profit Corporations, and the HHS Mandate: Why the Mandate Does Not Satisfy RFRA's Require-*

al regulators crafted a novel solution: the HHS Accommodation, which requires the nonprofit's insurer (but not the nonprofit itself) to provide the objectionable coverage directly and separately to employees, in an attempt to promote both religious liberty of the employer *and* the government's coverage goals for the employees.[60] In contrast to church and nonprofit employers, for-profit employers were not given any kind of religious accommodation, which prompted numerous closely-held businesses to challenge the mandate.[61] Given the existence of the HHS Accommodation for nonprofits, the *Hobby Lobby* Court found that "HHS itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs."[62] With an extension of the HHS Accommodation to for-profits, the Court found that "[t]he effect . . . on the women employed by [the objecting companies] would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost-sharing."[63] Under this reasoning, neither Justice Alito's majority opinion nor Justice Kennedy's concurrence analyzed the scenario in which a straightforward exemption for employers would leave thousands of women without contraceptive coverage while their peers – employed at other businesses – would receive coverage.

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ments, 47 U. RICH. L. REV. 1301 (2013); *see also*, Letter from Anthony R. Picarello, Jr., Assoc. Gen. Sec'y & Gen. Counsel, U.S. Conf. of Catholic Bishops, to the Dept. of Health & Human Servs. 1-4 (May 15, 2012), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-on-advance-notice-of-proposed-rulemaking-on-preventive-services-12-05-15.pdf.

60. *Hobby Lobby*, 134 S. Ct. at 2763. For nonprofits that are self-insured, the third-party administrator will provide the coverage. Timothy Jost, *Implementing Health Reform: New Accommodations for Employers on Contraceptive Coverage*, HEALTH AFFAIRS BLOG (Aug. 22, 2014), http://healthaffairs.org/blog/2014/08/22/implementing-health-reform-new-accommodations-for-employers-on-contraceptive-coverage.

61. *See Hobby Lobby*, 134 S. Ct. at 2762-63; *see also* sources cited *supra* note 51. There had been some consideration of for-profit coverage during the lengthy comment periods. Initially, the Obama administration refused to expand the religious employer exemption and instead proposed an accommodation that would allow non-exempted *nonprofit religious organizations* with religious objections to contraceptive/sterilization coverage to avoid cost sharing for those services. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (codified at 45 C.F.R. pt. 147). A month later the administration sought comment on ways to structure this proposed accommodation and asked specifically for comments regarding "which religious organizations should be eligible for the accommodation and whether, as some religious stakeholders have suggested, for-profit religious employers with such objections should be considered as well." Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16501, 16504 (Mar. 21, 2012) (codified at 45 C.F.R. pt. 147).

62. *Hobby Lobby*, 134 S. Ct. at 2782.

63. *Id.* at 2760.

Although the Court's analysis was made within the balancing framework of RFRA, Justice Ginsburg's dissent read the decision as an autonomy case. Justice Ginsburg charged the Court with treating for-profit corporations with the same "special solicitude" reserved to churches and religious nonprofits and with ignoring the impacts on women who work for objecting companies who will now be deprived of federally granted rights.[64] Due to uncertainties in extending the HHS Accommodation,[65] the dissent was skeptical of the majority's easy resolution and flatly accused it of now allowing any kind of commercial enterprise to "opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs."[66] In the dissent's view, RFRA – when *properly* applied to "strik[e] sensible balances" between free exercise claims and governmental interests[67] – would yield a win for the government in large part because of "the impact that accommodation may have on [thousands of] third parties who do not share the corporation owners' religious faith."[68]

Under the balancing approach, the relevance of negative impacts on identifiable persons resulting from religious exemptions is well-settled in the law. Hobby Lobby argued that, with an exemption from the contraception mandate, its employees would suffer no "cognizable harm, because nobody is entitled to a 'benefit' from a regulatory scheme that violates RFRA."[69] But

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64. *See id.* at 2802-03 (Ginsburg, J., dissenting). The quoted language comes from *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694, 706 (2012), a recent Supreme Court decision that recognized broad autonomy protection for churches on employment decisions vis-à-vis ministers. *See* discussion *infra* Part II.A.

65. The Court did not decide whether the HHS Accommodation "complies with RFRA for purposes of all religious claims" (referring to the pending challenges from nonprofits), and also raises the option of government providing the contraceptive coverage. *Hobby Lobby*, 134 S. Ct. at 2782. Moreover, the plaintiffs never expressly agreed to the HHS Accommodation as an acceptable alternative. *Id.* at 2803 (Ginsburg, J., dissenting).

66. *Hobby Lobby*, 134 S. Ct. at 2806 (Ginsburg, J., dissenting). The *Hobby Lobby* Court noted that religious exemptions from federal tax laws would not be granted. *Id.* at 2784 (majority opinion) (citing United States v. Lee, 455 U.S. 252, 258-60 (1982) (holding that court-mandated exemptions would completely undermine the comprehensive tax system, which advances a compelling governmental interest in the least restrictive manner)).

67. *See id.* at 2791 (Ginsburg, J., dissenting). RFRA's compelling interest test was intended in its language to "strik[e] sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb-(a)(5) (2012).

68. *Hobby Lobby*, 134 S. Ct. at 2787 (Ginsburg, J., dissenting). The dissent concluded that "in view of what Congress sought to accomplish, i.e., comprehensive preventive care for women furnished through employer-based health plans, none of the proffered alternatives would satisfactorily serve the compelling interests to which Congress responded." *Id.* at 2803.

69. Brief for Respondents at 54-55, *Hobby Lobby*, 134 S. Ct. 2751 (2014) (No. 13-354) 2014 WL 546899, at *55 ("Any time a statute takes the form of a mandate

the very determination of a RFRA violation must take into account the projected impact of the exemption. The Supreme Court, in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, noted that the degree to which the exemption undermines the governmental goal is at the core of RFRA's strict scrutiny test.[70] And, in *Cutter v. Wilkinson*, the Court fully expected lower courts interpreting a RFRA-like sister statute to apply strict scrutiny in a way that was "measured" so as not to "override other significant interests."[71] Indeed, courts typically resist crafting exemptions (or interpreting legislative exemptions) in ways that destabilize and undermine statutory and regulatory schemes.[72] As Professor Perry Dane has noted, the contraception mandate "protects specific third parties, and religious liberty claims are always at their weakest when they prejudice the rights and interests of third parties."[73] This is why the *Hobby Lobby* dissenters challenged the Court to decide "whether accommodating [the RFRA] claim risks depriving others of rights accorded them by the laws of the United States."[74] It is also why the majority emphasized the specificity of its holding: that the HHS Accommodation "constitutes

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that party A must do something for party B, granting a RFRA exemption . . . will make Party B worse off. But there is no reason whatsoever to treat exemptions from such Peter-to-Paul mandates as uniquely disfavored under RFRA.")

70. 546 U.S. 418, 431 (2006) (requiring courts interpreting RFRA to "look[] beyond broadly formulated interests justifying the general applicability of government mandates and *scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants*" (emphasis added)).

71. 544 U.S. 709, 722 (2005). In addition, "adequate account" must be taken of "the burdens a requested accommodation may impose on nonbeneficiaries." *Id.* at 720. *Cutter* involved RLUIPA, which contains language similar to RFRA. *See* discussion *supra* note 49.

72. *See generally, e.g.*, Angela C. Carmella, *Responsible Freedom Under the Religion Clauses: Exemptions, Legal Pluralism, and the Common Good,* 110 W. VA. L. REV. 403 (2007).

73. Perry Dane, Doctrine and Deep Structure in the Contraception Mandate Debate 4 (July 21, 2013) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2296635.

74. *Hobby Lobby*, 134 S. Ct. at 2798 (Ginsburg, J., dissenting). The dissenters also asserted that exemptions "must not significantly impinge on the interests of third parties." *Id.* at 2790. The Court agreed that impacts must be taken into account, but noted that it cannot be the case that any government program that benefits some class of persons automatically creates a "third party harm" if a corporation seeks an exemption, regardless of the magnitude of the burden on the claimant. *See id.* at 2781 n.37 (majority opinion) ("[I]t could not reasonably be maintained that any burden on religious exercise, no matter how onerous and no matter how readily the government interest could be achieved through alternative means, is permissible under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties. . . . By framing any Government regulation as benefitting a third party, the Government could turn all regulations into entitlements to which nobody could object on religious grounds, rendering RFRA meaningless.").

an alternative that achieves all of the Government's aims while providing greater respect for religious liberty."[75]

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.[76] 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.

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75. *Id.* at 2759.

76. This Article does not respond to the arguments of the dissent and other commentators that the Court has imported autonomy considerations into the RFRA interpretation. As long as RFRA provides the framework for the arguments, courts are obligated to engage in a balancing and to take impacts of exemptions into account. As Andrew Koppelman has written, "[I]f you object to the mandate on the basis of *Hosanna-Tabor* [an autonomy case] rather than RFRA, you are relying on the broad idea of freedom of the church." Koppelman, *supra* note 27, at 163.

77. I would assume that courts might now extend any of the available state and federal sources of strict scrutiny balancing, or any other comparable balancing approach, to for-profit entities by analogy to *Hobby Lobby*. *See supra* note 49. Of course, the applicability of balancing does not indicate success on the merits. And where balancing is unavailable, this means that the only avenue for protection is legislative or regulatory exemption, which may or may not be politically feasible.

78. 135 S. Ct. 853 (2015) (holding that prison grooming policy violates RLUIPA because prison failed to demonstrate its prohibition on half-inch beard is the least restrictive means to furthering its compelling interest in prison security).

79. *Id.* at 859. *Holt* involved an interpretation of the prisoner provisions of RLUIPA, which contain the identical strict scrutiny test and an identical definition of religious exercise as that contained in RFRA. *Id.*; 42 U.S.C. §§ 2000bb-1, 2000bb-2; 42 U.S.C. §§ 2000cc-1, 2000cc-5 (2014); *see also* discussion *supra* note 49.

80. *Holt*, 135 S. Ct. at 863 (quoting Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2779 (2014) (quoting Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 431 (2006))).

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-

81. Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1373 (1981).

82. *See id.* at 1388-89.

83. *Id.* at 1389 (internal citations omitted).

84. *See* Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

85. Watson v. Jones, 80 U.S. 679, 732 (1872).

86. Serbian E. Orthodox Diocese for U. S. & Can. v. Milivojevich, 426 U.S. 696, 708 (1976) (reversing decision of the Illinois Supreme Court to reinstate defrocked bishop to former position on grounds that church did not follow its own procedures for removal and holding that the church's highest tribunal has exclusive jurisdiction over religious controversy).

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.[89]

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

87. Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 116, 119 (1952) (striking state law that changed the internal governance structure of church from what had been determined by hierarchical authorities, forcing a change of control of religious matters "from one church authority to another").

88. *See* Bryce v. Episcopal Church in Diocese of Colo., 289 F.3d 648, 655 (10th Cir. 2002) (citing *Kedroff*, 344 U.S. at 116-17).

89. *See* Walz v. Tax Comm'n, 397 U.S. 664, 674-75 (1970).

90. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 340 (1987) (Brennan, J., concurring).

91. *Id.* at 342-43.

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.[96] 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

92. *See generally* Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781 (2007); *see also* Korte v. Sebelius, 735 F.3d 654, 678 (7th Cir. 2013) ("[C]hurch-autonomy principle operates as a complete immunity, or very nearly so.").

93. 132 S. Ct. 694, 710 (2012) (holding the ministerial exception to be an affirmative defense, not jurisdictional bar, to discrimination claims; the Court did not so hold as to other claims, such as breach of contract).

94. *Id.* at 707.

95. *Id.* at 700. "Once called, a teacher receive[d] the formal title 'Minister of Religion, Commissioned.' A commissioned minister serve[d] for an open-ended term; at Hosanna-Tabor, a call could be rescinded only for cause and by a supermajority vote of the congregation." *Id.* at 699.

96. *Id.* at 701.

97. *Id.* at 705-06.

98. *Id.* at 706.

99. *Id.* at 708.

ministers."[100] 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."[102] 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."[103]

For clergy and any employees who are considered "ministers,"[104] there is a startling lack of legal protection from virtually any kind of employment discrimination.[105] 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,[106] sex,[107] pregnancy,[108] age,[109]

100. *Id.* at 706.

101. *Id.*

102. *Id.* at 707.

103. *Id.* at 702. The Court then clarified that "[t]he Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own." *Id.* at 703.

104. A broad definition has been developed in the lower federal courts. *See, e.g.*, Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 309 (4th Cir. 2004) (including kosher supervisor at Jewish nursing home within definition); EEOC v. Roman Catholic Diocese of Raleigh, N.C., 213 F.3d 795, 802 (4th Cir. 2000) (including church music director within definition). Justice Alito's concurrence in *Hosanna-Tabor* suggested a functional definition that would apply the exception to "positions of substantial religious importance." *Hosanna-Tabor*, 132 S. Ct. at 712 (Alito, J., concurring).

105. The Court did say, however, that "[t]oday we hold only that the ministerial exception bars [an employment discrimination] suit. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers." *Id.* at 710 (majority opinion).

106. *See, e.g.*, Rweyemamu v. Cote, 520 F.3d 198, 209-10 (2d Cir. 2008) (holding that ministerial exception barred priest's race discrimination claim against diocese); Kirby v. Lexington Theological Seminary, 426 S.W.3d 597, 614-15 (Ky. 2014) (holding that ministerial exception barred race discrimination claim, but contract breach claim could proceed).

107. *See, e.g.*, Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1165-72 (4th Cir. 1985) (holding that ministerial exception barred sex and race

sexual orientation[110] and disability.[111] We also see this story repeated outside the church context, as courts have applied the ministerial exception to religiously affiliated nonprofits like universities,[112] hospitals[113] and nursing homes[114] 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.[116] 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

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discrimination claims by woman denied pastoral care internship and position on pastoral staff); McClure v. Salvation Army, 460 F.2d 553, 556-61 (5th Cir. 1972) (holding that court lacked jurisdiction over sex discrimination claim because claim involved ecclesiastical practices).

108. *See, e.g.*, Combs v. Cent. Tex. Annual Conference of United Methodist Church, 173 F.3d 343, 345-51 (5th Cir. 1999) (affirming dismissal of pregnancy and sex discrimination claims because of ministerial exception).

109. *See, e.g.*, Cannata v. Catholic Diocese of Austin, 700 F.3d 169, 180 (5th Cir. 2012) (holding that ministerial exception barred age discrimination claim of music teacher).

110. *See, e.g.*, Bryce v. Episcopal Church in Diocese of Colo., 289 F.3d 648, 658 n.2 (10th Cir. 2002) (discussing ministerial exception in larger context of church autonomy).

111. *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 710 (2012) (holding that ministerial exception barred disability-based claim employment discrimination brought by "called" teacher, who fell within definition of "minister").

112. *See, e.g.*, EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996).

113. *See, e.g.*, Hollins v. Methodist Healthcare, Inc., 474 F.3d 223 (6th Cir. 2007) (barring ADA claims of resident in clinical pastoral education program at religiously affiliated hospital); Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360 (8th Cir. 1991) (holding that sex and age discrimination claims of chaplain at religiously affiliated hospital were barred by Establishment Clause with doctrinal overlap with ministerial exception).

114. Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 309-11 (4th Cir. 2004) (barring kosher supervisor at predominantly Jewish nursing home from asserting Fair Labor Standards Act wage claim and holding that a religious nonprofit is a "religious institution" for purposes of ministerial exception whenever its "mission is marked by clear or obvious religious characteristics").

115. *Id.* at 310. *But see* Caroline Mala Corbin, *Hobby Lobby and Corporate Religious Liberty*, 30 CONST. COMMENT. (forthcoming 2015) (arguing that church autonomy is limited to churches and is based on the notion of voluntary association, so that it should not be applied outside this context), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2327919.

116. *See Catholic Univ. of Am.*, 83 F.3d at 457, 460.

117. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 710 (2012).

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.[118] 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.[120] In addition to churches, many religious nonprofits qualify for the exemption;[121]

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118. *See* Korte v. Sebelius, 735 F.3d 654, 675, 678 (7th Cir. 2013) (noting these exemptions as autonomy-based in contrast to RFRA's balancing approach). According to the court, the Title VII and ADA exemptions are considered "legislative applications of the church autonomy doctrine." *Id.* at 678.

119. *See* 42 U.S.C. § 2000e-2 (2012). Title VII gives employees the right to be free from religious discrimination, the right to reasonable religious accommodation and the right to be free from a religiously hostile work environment. *See id.* The exemption for religious entities provides: "This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. § 2000e-1(a) (2012). The Americans with Disabilities Act (ADA) also contains a similar exemption for religious entities:

> This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. . . . Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

42 U.S.C. § 12113(d)(1)-(2) (2012); *see also* Doe v. Abington Friends Sch., 480 F.3d 252, 258 (3d Cir. 2007) (remanding for determination of whether Quaker school falls within exemption).

120. *See, e.g.*, Kennedy v. St. Joseph's Ministries, 657 F.3d 189, 192-94 (4th Cir. 2011) (holding that the term "employment" for religious organization exemption under Title VII is not limited to hiring and firing decisions).

121. *See, e.g.*, Saeemodarae v. Mercy Health Servs., 456 F. Supp. 2d 1021 (N.D. Iowa 2006). In *Saeemodarae*, a nonprofit hospital founded by the Sisters of Mercy was found to be a religious corporation under the Title VII exemption. *Id.* at 1037-38. Its mission was to "continue the healing ministry of the Catholic Church." *Id.* at 1027. Under its bylaws, the hospital had to conduct itself in accord with church guidelines and the Bishops' Ethical and Religious Directives. *Id.* at 1028. During orientation, new employees learned of the hospital's Catholic history, identity, and mission; the hospital had a pastoral care department with on-site chaplains and daily

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.[124]

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.[127] The Court rejected the argument.[128] 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

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Mass in the chapel; all of its statuary, symbols, decoration, iconography, and artwork identified the hospital as Catholic. *Id.* The court took all of these facts into account to hold that the nature and atmosphere of the hospital were "undisputedly religious." *Id.* at 1037.

122. *See, e.g.*, Spencer v. World Vision, 633 F.3d 723 (9th Cir. 2011) (per curiam) (finding charity that was not church-affiliated eligible for the religious Title VII exemption). For a variety of judicial tests to determine qualifying religious organizations, see Roger W. Dyer, Note, *Qualifying for the Title VII Religious Organization Exemption: Federal Circuits Split over Proper Test*, 76 MO. L. REV. 545 (2010).

123. *See, e.g.*, Lown v. Salvation Army, Inc., 393 F. Supp. 2d 223, 246-52 (S.D.N.Y. 2005) (holding that Title VII exemption barred employment discrimination claim brought by social service employees who refused to give information about church membership); *see also Saeemodarae*, 456 F. Supp. 2d at 1038 (holding that Title VII exemption applied to religiously affiliated hospital even though hospital did not hire co-religionists exclusively).

124. *See, e.g.*, Cline v. Catholic Diocese of Toledo, 206 F.3d 651, 658 (6th Cir. 1999) (discussing issue of fact precluding summary judgment as to whether teacher was terminated because of pregnancy, which would be a Title VII violation, or because of school's religiously based moral stand against non-marital sexual activity as applied to all employees, which would fall within exemption); Little v. Wuerl, 929 F.2d 944, 951 (3d Cir. 1991) (holding that Catholic school operated within the exemption when it fired Protestant teacher who had entered into a canonically invalid marriage with a Catholic).

125. 483 U.S. 327 (1987).

126. Amos v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints, 594 F. Supp. 791, 796 (D. Utah 1984), *rev'd*, 483 U.S. 327 (1987).

127. *Id.* at 331.

128. *Id.* at 336.

missions."[129] 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.[131]

For both the ministerial exception and the broad Title VII exemption, the fundamental right of the church to define and constitute itself – and to choose those who will be part of that effort – is protected, even at great cost (reputational, financial, and other) to individual employees and potential employees.

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.[132] 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.[133] 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."[134] The decision was driven in particular by autonomy concerns over government entanglement in the relationship between the church and teachers in its schools.[135]

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129. *Id.* at 335.

130. *Id.* at 344 (Brennan, J., concurring).

131. *Id.* at 342 (emphasis added) (internal citations omitted).

132. 440 U.S. 490, 507 (1979).

133. *Id.* at 496.

134. *Id.* at 502.

135. Avoiding entanglement was a key provision of Establishment Clause interpretation, particularly before the 1990s, and a proxy for the jurisdictional nature of

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]

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.[138] 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

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proper church-state relations. Entanglement was used widely in Establishment Clause jurisprudence as the vehicle for recognizing the unique role of religious schools and the significant role of all (religious and secular) teachers in advancing religious mission.

136. *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).

137. Spencer v. World Vision, 633 F.3d 723, 738 (9th Cir. 2011) (per curiam) (O'Scannlain, J., concurring).

138. No. M2004-01066-COA-R9-CV, 2007 WL 161035 (Tenn. Ct. App. Jan. 19, 2007).

139. *Id.* at *1.

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."[141] 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. . . ."[142] 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.[144] 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."[146] 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-

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140. *Id.* at *6.

141. *Id.* at *9.

142. *Id.* at *19.

143. *Id.* at *8.

144. *See, e.g.*, Nally v. Grace Cmty. Church of the Valley, 763 P.2d 948, 960-61 (Cal. 1988).

145. Claims of psychological and physical harm should not be dismissed automatically. *See generally* Carmella, *supra* note 21.

146. Constance Frisby Fain, *Minimizing Liability for Church-Related Counseling Services: Clergy Malpractice and First Amendment Religion Clauses*, 44 AKRON L. REV. 221, 250 (2011) (discussing scope of "clergy malpractice" claim, noting types of tort actions allowed to proceed).

147. *See* sources cited *supra* note 21.

148. *See, e.g.*, Pleasant Glade Assembly of God v. Schubert, 264 S.W.3d 1, 8-13 (Tex. 2008) (dismissing claim of physical restraint during youth service). *But see, e.g.*, Gulbraa v. Corp. of President of Church of Jesus Christ of Latter-day Saints, 159 P.3d 392 (2007) (barring father's claims via First Amendment for breach of contract, promissory estoppel, fraud and misrepresentation for church's performance of ordinations on children after promising father that no ordination would occur without his consent but not barring claim of intentional infliction of emotional distress (although facts were not developed to support claim)).

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.[151] 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 same-sex couple.[153] Under both Religion Clauses, government is powerless to compel a church or clergy person to perform a religious ceremony or confer a religious privilege.[154] 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,

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149. Disputes regarding property and other "secular" matters are often justiciable under the "neutral principles" approach, which does not involve any religious inquiry. *See generally* Jeffrey B. Hassler, Comment, *A Multitude of Sins? Constitutional Standards for Legal Resolution of Church Property Disputes in a Time of Escalating Intradenominational Strife*, 35 PEPP. L. REV. 399 (2008).

150. *See, e.g.*, Choi v. Sung, 225 P.3d 425, 432 (Wash. Ct. App. 2010); Lamont Cmty. Church v. Lamont Christian Reformed Church, 777 N.W.2d 15, 23-24 (Mich. Ct. App. 2009).

151. *See* sources cited *infra* note 152.

152. *See, e.g.*, Se. Pa. Synod of Evangelical Lutheran Church in Am. v. Meena, 19 A.3d 1191 (Pa. Commw. Ct. 2011) (court must defer to synod decisions regarding church closings); *see also* Chris Buckley, *St. Anthony Group Plans to Oppose Closure*, TRIBLIVE (Mar. 29, 2014, 12:01 AM), http://triblive.com/neighborhoods/yourmonvalley/yourmonvalleymore/5851540-74/church-anthony-society#axzz3870In0AM; Sharon Otterman, *Tears for New York's Catholics as Church Closings Are Announced*, N.Y. TIMES, Nov. 3, 2014, at A1, *available at* http://www.nytimes.com/2014/11/03/nyregion/new-york-catholics-are-set-to-learn-fate-of-their-parishes.html.

153. *See, e.g.*, Mary Schmich, *A Church Wedding That Will Not Be*, CHI. TRIBUNE (May 10, 2014), http://articles.chicagotribune.com/2014-05-10/news/ct-schmich-met-0511-20140510_1_marriage-certificate-wedding-marriage-fairness-act.

154. *See* Eugene Volokh, *Can Ministers Who Make a Living by Conducting Weddings Be Required to Conduct Same-Sex Weddings?*, VOLOKH CONSPIRACY (Oct. 18, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/10/18/can-ministers-who-make-a-living-by-conducting-weddings-be-required-to-conduct-same-sex-weddings. For general autonomy considerations violated by state-compelled religious ceremonies, see Everson v. Bd. of Educ., 330 U.S. 1, 15-16 (1947) (stating that under the Establishment Clause the government must be neutral with respect to church attendance and is forbidden from participating in the affairs of churches); *supra* notes 81-89 and accompanying text.

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

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155. For example, under New York's exemption, a church "shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization of a [same-sex] marriage." *See* N.Y. DOM. REL. LAW § 10-b(1) (McKinney 2011). Other states have similar provisions. *See, e.g.*, N.H. REV. STAT. ANN. § 457:37 (West 2014) (permitting religious organizations and societies to determine who may marry within their faith and exempting them from any requirement to provide marriage-related services); VT. STAT. ANN. tit. 18, § 5144(b) (West 2014) ("This section does not require a member of the clergy authorized to solemnize a marriage . . . to solemnize any marriage."); VT. STAT. ANN. tit. 8, § 4501(b) (West 2014) (maintaining the ability of societies to determine admission and insurance coverage for their members); VT. STAT. ANN. tit. 9, § 4502(l) (West 2014) (exempting religiously affiliated organizations from being required to provide any marriage-related services). Additionally, refusals under these provisions give rise to no private or governmental cause of action. *See* sources cited *supra*.

156. *See, e.g.*, Frank Gulino, *A Match Made in Albany: The Uneasy Wedding of Marriage Equality and Religious Liberty*, 84-Jan N.Y. ST. B.J. 38, 39 (2012).

157. Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013) (ordering business refusing to photograph same-sex commitment ceremony to pay money to couple that was turned away).

158. *See, e.g.*, 745 ILL. COMP. STAT. ANN. 30/1(a)-(b) (West 2014); MD. CODE ANN., HEALTH-GEN. § 20-214(b) (West 2014).

159. *See* Angela C. Carmella, *For-Profit v. Nonprofit: Does Corporate Form Matter? The Question of For-Profit Eligibility for Religious Exemptions Under Conscience Statutes and the First Amendment*, *in* IS A FOR-PROFIT STRUCTURE A VIABLE ALTERNATIVE FOR CATHOLIC HEALTH CARE MINISTRY? 75, 77-80 (2012), *available at* https://law.shu.edu/Health-Law/upload/Catholic-Health-Care-Symposium-Proceedings.pdf.

abortions and sterilizations;[160] 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.[163] With one-sixth of all hospital patients cared for at Catholic hospitals, the Church's commitment to health care is substantial.[164] Obviously a woman cannot obtain an abortion, sterilization or contraception in Catholic hospitals.[165] Other facilities might provide these services, although in some communities there may be few or no alternatives.[166]

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160. *Id.*

161. *See generally* Catherine Grealis, Note, *Religion in the Pharmacy: A Balanced Approach to Pharmacists' Right to Refuse to Provide Plan B*, 97 GEO. L.J. 1715 (2009).

162. *See, e.g.*, OR. REV. STAT. § 127.885 § 4.01(4) (providing that no individual or health care facility has a duty to participate in physician-assisted suicide); *see also* Charles H. Baron et al., *A Model State Act to Authorize and Regulate Physician-Assisted Suicide*, 33 HARV. J. ON LEGIS. 1, 33 (1996) (Section 11 of the Model Act, Provider's Freedom of Conscience, states that no individual or health care facility, or its staff, can be required to participate).

163. As the Catholic Health Association has written,

> Catholic health care providers are participants in the healing ministry of Jesus Christ. Our mission and our ethical standards in health care are rooted in and inseparable from the Catholic Church's teaching about the dignity of the human person and the sanctity of human life from conception to natural death. . . . . The explicit recognition of the right of Catholic organizations to perform their ministries in fidelity to their faith is almost as old as our nation itself.

Letter from Carol Keehan, President & CEO, Catholic Health Association of the United States, to Centers for Medicare & Medicaid Services (Sept. 22, 2011), *available at* http://ncrnews.org/documents/employerexceptionrelativetopreventiveservices9-22-11final.pdf. President & CEO Carol Keehan also noted that President Jefferson promised the Ursuline nuns the right to govern their institutions according to their own rules and "without interference from the civil authority." *Id.*

164. Jerry Filteau, *Catholic Hospitals Serve One in Six Patients in the United States*, NAT'L CATHOLIC REPORTER (Oct. 20, 2010), http://ncronline.org/news/catholic-hospitals-serve-one-six-patients-united-states.

165. *See* Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308 (9th Cir. 1974) (holding that refusal of sterilization procedure was legal and hospital was not a state actor); Taylor v. St. Vincent's Hosp., 369 F. Supp. 948 (D. Mont. 1973) (holding that refusal of sterilization procedure was legal and hospital was not a state actor; precipitating passage of federal conscience clause), *aff'd*, 523 F.2d 75 (9th Cir. 1975); *see also* Brownfield v. Freeman Marina Hosp., 208 Cal. App. 3d 405, 414 (1989) (discussing Catholic hospital's denial of contraception to rape victim and availability of malpractice damages). *See generally* Steph Sterling & Jessica L. Waters, *Beyond Religious Refusals: The Case for Protecting Health Care Workers' Provision of*

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.[167]

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.[170] 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-

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Abortion Care, 34 HARV. J. L. & GENDER 463 (2011); Cathleen Kaveny, *The ACLU Takes on the Bishops: Tragedy Leads to a Misguided Lawsuit*, COMMONWEAL (Dec. 18, 2013), https://www.commonwealmagazine.org/aclu-takes-bishops.

166. The literature on this issue is substantial. *See generally* Kathleen M. Boozang, *Deciding the Fate of Religious Hospitals in the Emerging Health Care Market*, 31 HOUS. L. REV. 1429, 1447-51 (1995); Catherine A. White, Note, *Crisis of Conscience: Reconciling Religious Health Care Providers' Beliefs and Patients' Rights*, 51 STAN. L. REV. 1703, 1749 (1999).

167. *See* sources cited *infra* notes 177-207 and accompanying text.

168. *See* discussion *supra* notes 118-36 and accompanying text.

169. *See* Dyer, *supra* note 122, at 545; *see also* Ockletree v. Franciscan Health Sys., 317 P.3d 1009, 1020, 1024-26 (Wash. 2014) (Stephens, J., dissenting) (rejecting distinction between religious and secular nonprofits in state anti-discrimination law).

170. *See generally* Dyer, *supra* note 122, at 554-61 (describing the secularization test, the sufficiently religious test, the primarily religious test, the multifactor test, and the nominal fee test).

ters, camps, and religious publishers ineligible.[171] 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.[174]

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."[176]

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.

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171. Spencer v. World Vision, Inc., 633 F.3d 723, 724 (9th Cir. 2011) (per curiam); *see also* Dyer, *supra* note 122, at 569 (discussing exemption of religiously affiliated higher education from this narrow test).

172. Fike v. United Methodist Children's Home of Va., Inc., 547 F. Supp. 286, 290 (E.D. Va. 1982) (finding Methodist orphanage to be, "quite literally, Methodist only in name"), *aff'd*, 709 F.2d 284 (4th Cir. 1983).

173. *See, e.g.*, Cline v. Catholic Diocese of Toledo, 206 F.3d 651 (6th Cir. 2000) (discussing premarital sex); Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991) (discussing canonically invalid remarriage); Vigars v. Valley Christian Ctr. of Dublin, Cal., 805 F. Supp. 802 (N.D. Cal. 1992) (discussing adultery).

174. EEOC v. Fremont Christian Sch., 781 F.2d 1362 (9th Cir. 1986) (holding that conferral of benefits to men but not women based on religious beliefs constitutes sex discrimination); EEOC v. Pac. Press Publ'g Ass'n., 676 F.2d 1272 (9th Cir. 1982) (holding that a religious belief that men and women should be paid differently constitutes sex discrimination).

175. *See* discussion *supra* note 136 and accompanying text.

176. Pac. Lutheran Univ. & Serv. Emps. Int'l Union, 361 N.L.R.B. No. 157 (2014), 2014 WL 7330993. *See also generally* Kathleen A. Brady, *Religious Organizations and Mandatory Collective Bargaining Under Federal and State Labor Laws: Freedom From and Freedom For*, 49 VILL. L. REV. 77 (2004); Nicholas Macri, Note, *Missing God in Some Things: The NLRB's Jurisdictional Test Fails to Grasp the Religious Nature of Catholic Colleges and Universities*, 55 B.C. L. REV. 609 (2014); Susan J. Stabile, *Blame It on Catholic Bishop: The Question of NLRB Jurisdiction over Religious Colleges and Universities*, 39 PEPP. L. REV. 1317 (2013).

1. Employee Benefits

Until recently, churches and religious nonprofits were free to tailor their health insurance benefits to their religious teachings.[177] 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.[179] 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.[183] 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

177. Caroline Mala Corbin, *The Contraception Mandate*, 107 NW. U. L. REV. COLLOQUY 151, 151-52 (2012).

178. *See* Chad Booker, Comment, *Making Contraception Easier to Swallow: Background and Religious Challenges to the HHS Rule Mandating Coverage of Contraceptives*, 12 U. MD. LJ. RACE RELIG. GENDER & CLASS 169, 171-72 (2012).

179. *Id.* at 171.

180. *See* Carmella, *supra* note 159, at 77-80.

181. *See* CAL. HEALTH & SAFETY CODE § 1367.25(c) (West 2014); N.Y. INS. LAW § 3221(h)(16)(A) (McKinney 2014).

182. *See* Camille Fischer & Jaye Kasper, *Access to Contraception*, 15 GEO. J. GENDER & L. 37, 42-43 (2014).

183. *See, e.g.*, Catholic Charities of Diocese of Albany v. Serio, 859 N.E.2d 459, 463 (N.Y. 2006); Catholic Charities of Sacramento, Inc. v. Superior Ct., 85 P.3d 67, 87 (Cal. 2004).

184. *Serio*, 859 N.E.2d at 465; *Catholic Charities of Sacramento*, 85 P.3d at 77.

185. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39870-01 (July 2, 2013); *see also* Roman Catholic Archdiocese of N.Y. v. Sebelius, 987 F. Supp. 2d 232, 236 (E.D.N.Y. 2013).

although the broader class of religious nonprofits does not get the benefit of this exemption, it does enjoy the HHS Accommodation.[186]

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.[188] 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.[189]

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.[192]

But as we have seen, autonomy protections are also extended to contexts outside a church community of "consenting" believers, to religious nonprofits

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186. But note the numerous ongoing challenges to the HHS Accommodation by nonprofits. *See, e.g.*, Wheaton Coll. v. Burwell, 134 S. Ct. 2806 (2014).

187. 29 U.S.C. §§ 1001-1461 (2012).

188. 29 U.S.C. §§ 1002(33), 1003, 1321 (2012).

189. *See, e.g.*, Rollins v. Dignity Health, 19 F. Supp. 3d 909 (N.D. Cal. 2013) (nonprofit health care employer not eligible for church plan exemption); Kaplan v. Saint Peter's Healthcare Sys., No. 13-2941 (MAS)(TJB), 2014 WL 1284854 (D.N.J. 2014). *See generally Courts Increasingly Challenging Assumptions Underlying Expansion of Church Plan Exemption* (Sept. 2014), Pension Plan Guide CCH, 2014 WL 4410678.

190. *See supra* Part II.A-B.

191. *See* Mark E. Chopko & Michael F. Moses, *Freedom to Be a Church: Confronting Challenges to the Right of Church Autonomy*, 3 GEO. J.L. & PUB. POL'Y 387, 451-52 (2005).

192. Robert Joseph Renaud & Lael Daniel Weinberger, *Spheres of Sovereignty: Church Autonomy Doctrine and the Theological Heritage of the Separation of Church and State*, 35 N. KY. L. REV. 67, 85-86 (2008).

that hire outside the faith and serve the public.[193] 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.[195] 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.[196] 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.[197] In order to foster participa-

193. This is especially the case in areas like health care and social work where professional standards, licensing, and accreditation set the prerequisites to entry into a field. *See generally* William W. Bassett, *Private Religious Hospitals: Limitations upon Autonomous Moral Choices in Reproductive Medicine*, 17 J. CONTEMP. HEALTH L. & POL'Y 455 (2001); Thomas C. Berg, *Religious Organizational Freedom and Conditions on Government Benefits*, 7 GEO. J.L. & PUB. POL'Y 165 (2009).

194. *See, e.g.*, MARCI A. HAMILTON, GOD VS. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY (2d ed. 2014); Leslie C. Griffin, Smith *and Women's Equality*, 32 CARDOZO L. REV. 1831, 1842-44 (2011).

195. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2795 (2014) (Ginsburg, J., dissenting) ("Religious organizations exist to foster the interests of persons subscribing to the same religious faith."). In Justice Ginsburg's view "[t]he distinction between a community made up of believers in the same religion and one embracing persons of diverse beliefs . . . constantly escapes the Court's attention." *Id.* at 2796. She reasoned that "[r]eligious organizations exist to serve a community of believers." *Id.* She then reiterated that "[she had] already discussed the 'special solicitude' generally accorded nonprofit religion-based organizations that exist to serve a community of believers." *Id.* at 2802-03.

196. *See* ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE 149-51(2010). Note, however, that some scholars have extended the traditional "implied consent" argument to this context. *See, e.g.*, Michael A. Helfand, *What Is a "Church"?: Implied Consent and the Contraception Mandate*, 21 J. CONTEMP. LEGAL ISSUES 401, 401 (2013) (contending that employee consent to rules that employers make "to achiev[e] . . . religious goals" should be implied "so long as [the employer is] both organized around a core religious mission and where that religious mission [is] open and obvious to employees.")

197. *See generally* Carmella, *supra* note 72; Angela C. Carmella, *Exemptions and the Establishment Clause*, 32 CARDOZO L. REV. 1731 (2011).

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.[199] 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.[201] 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.[202] 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.[203] In response, several Catholic Charities agencies decided to terminate their involvement in adoption services altogether.[204] 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.[205]

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198. *See* Thomas C. Berg, *The Voluntary Principle and Church Autonomy, Then and Now*, 2004 B.Y.U. L. REV. 1593, 1604-09 (2004).

199. *See* VISCHER, *supra* note 196, at 149-51; *see also* Carmella, *supra* note 197, at 1733-37; Robert C. Post & Nancy L. Rosenblum, *Introduction* to CIVIL SOCIETY AND GOVERNMENT 4 (Nancy L. Rosenblum & Robert C. Post eds., 2002).

200. Exec. Order No. 13559, 75 Fed. Reg. 71319 (Nov. 17, 2010) (amending Exec. Order No. 13279, 67 Fed. Reg. 77141 (Dec. 12, 2002)); Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1, 105-08 (2005).

201. *See, e.g.*, Catholic League for Religious & Civil Rights v. City & Cnty. of S.F., 624 F.3d 1043 (9th Cir. 2010).

202. *See* Matthew W. Clark, Note, *The Gospel According to the State: An Analysis of Massachusetts Adoption Laws and the Closing of Catholic Charities Adoption Services*, 41 SUFFOLK U. L. REV. 871, 893 (2008).

203. Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417, 1446-47 (2012).

204. *See id.* at 1447; *see also* Minow, *supra* note 92, at 831-43.

205. *See* Minow, *supra* note 92, at 831-43 (describing the problems of polarized positions, using example of same-sex adoption). For more information about same-sex couples and adoption, see generally 3 Religious Organizations and the Law § 14:28 (2013). In Illinois, a circuit court judge decided that the state could terminate its relationship with Catholic Charities for refusing to assist gay adoptions. *See id.*

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.[206] Under these laws, objecting providers retain their licenses as well as government funds and contracts.[207]

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.[208] 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 ex-

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The court rejected the argument that the social service agency had a "legally protected property interest" in the renewal of its century-old contract for child services. *Id.* A bill with similar provisions was recently passed by the Michigan House of Representatives. *See* H.R. 4991, 97th Legis. (Mich. 2014), *available at* http://www.legislature.mi.gov/%28S%28jtwmkyvp0pqdcui0km2oqmbo%29%29/mileg.aspx?page=GetObject&objectname=2013-HB-4991.

206. N.D. CENT. CODE ANN. § 50-12-07.1 (West 2013); VA. CODE ANN. § 63.2-1709.3(A) (West 2014); s*ee also* Mark Strasser, *Conscience Clauses and the Placement of Children*, 15 J.L. & FAM. STUD. 1, 11-14 (2013) (discussing Virginia's and North Dakota's statutes granting autonomy-based exemptions to religiously affiliated adoption agencies).

207. *See* VISCHER, *supra* note 196, at 141-47 (discussing the need to protect diversity among grant and contract recipients); *see also* Kaveny, *supra* note 165 (providing an example of autonomy protections even when government funding is present).

208. *See* Amos v. Corp. of Presiding Bishop of Church of Latter-day Saints, 483 U.S. 327, 342 (1983) (Brennan, J., concurring).

emption.[209] 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.[210] 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.[211]

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.[212] 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 in the same markets alongside religious nonprofits.[216] These entities are made all the more possible by new corporate forms that facilitate combinations of charitable and religious mission alongside profit-making.[217] But despite the changes in corporate law that blur the traditional divide between

209. *See* discussion *supra* Part I.
210. *See* discussion *supra* Part II.
211. *See* discussion *supra* Part II.D.
212. *See* discussion *infra* Part III.B-C.
213. *See* discussion *infra* Part III.B.
214. *See* discussion *infra* Part III.C.
215. *See* discussion *infra* Part III.C.
216. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2771 (2014).
217. *Id.*

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.[218] 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-*

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218. *See generally* JOHN WITTE JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES 192-202 (2000).

219. *See id.* at 26 (discussing tax exemptions); *see also, e.g.*, Georgetown Coll. v. Hughes, 130 F.2d 810 (D.C. Cir. 1942) (discussing historical development of charitable immunity in tort law).

220. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 344 (Brennan, J., concurring) (internal citations omitted). Note that *Amos* was limited to nonprofit activities. *See id.* at 329-30 (majority opinion).

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 for-profits.[226] In fact, many nonprofits do earn profits; rather than distribute them to shareholders, they are required to reinvest them in the corporation or spend them to advance the corporation's purpose.[227]

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221. *Id.* at 345 n.6 (Brennan, J., concurring) (emphasis added).

222. *Id.* at 349 (O'Connor, J., concurring).

223. *Id.* at 345 n.6 (Brennan, J., concurring).

224. *See* Rector, Wardens, and Members of Vestry of St. Bartholomew's Church v. City of N.Y., 914 F.2d 348 (2d Cir. 1990). Obviously this was not an attempt to fit within a pre-existing autonomy-based exemption, but it is nonetheless instructive. *See id.* at 353-56. There was no suggestion that the autonomy doctrine might apply to this church's commercial activities, which would have taken the case outside the rule announced in *Smith*. *See id.* The decision was a straight application of the *Smith* rule (i.e., not granting exemptions to generally applicable, facially neutral laws). *See id.*; *see also supra* note 49.

225. Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 840-41 (1980) (coining the term "'commercial' nonprofits").

226. *See id.* at 841.

227. *See supra* note 36 and accompanying text. This has led some courts to rethink exemptions even for some religious nonprofits. Take for example Judge Kleinfeld's concurrence in *Spencer v. World Vision, Inc.*, a case interpreting the scope of the Title VII exemption. 633 F.3d 741, 745-48 (9th Cir. 2011) (per curiam) (Kleinfeld, J., concurring). He argued that any nonprofit that charged a fee should not be eligible. *Id.* Such commercial nonprofits are like for-profits in that both make money; thus, neither should be considered a religious corporation for purposes of the exemption. *Id.* He wrote:

> Nonprofit status affects corporate governance, not eleemosynary activities. . . . "For-profit" and "nonprofit" have nothing to do with making money. . . . For example, physicians may organize a hospital as a non-profit affiliated with a church, stating a religious purpose of healing the sick in its articles and bylaws. The hospital may then charge full market prices to patients and their in-

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, profit-making.[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.[230]

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:

> surers, and pay [market rate salaries to employees]. It can defend its stated religious purpose with the true argument that whatever church it affiliates with promotes healing of the sick as a religious duty. Yet the nonprofit hospital differs from a for-profit hospital only in that the board does not have to concern itself with pesky stockholders and does not have to pay income taxes on the excess of revenues over expenses and depreciation. The free exercise concern protected by the exemption does not suggest that the hospital should be allowed to discriminate by religion in hiring, since physicians, nurses, and other employees can perform their tasks equally well regardless of their religious beliefs.

Id. at 46. Judge Kleinfeld was responding to Judge O'Scannlain's separate concurrence. *See id.* at 741-48. Judge O'Scannlain had argued that a nonprofit corporate form indicated the religious nature of an organization. *See id.* at 741-42.

228. *See, e.g.*, Julie Marie Baworowsky, Note, *From Public Square to Market Square: Theoretical Foundations of First and Fourteenth Amendment Protection of Corporate Religious Speech*, 83 NOTRE DAME L. REV. 1713, 1714 n.4 (2008) (citing other sources for notion that "welcoming religious discourse within the corporation can encourage corporations to act 'beyond' their own self-interest" and give consideration to stakeholders beyond shareholders); Lyman P.Q. Johnson, *Faith and Faithfulness in Corporate Theory*, 56 CATH. U. L. REV. 1, 8 (2006) (describing social responsibilities and fiduciary obligations owed to non-shareholder groups, such as employees, creditors, suppliers, neighbors, localities); Susan J. Stabile, *A Catholic Vision of the Corporation*, 4 SEATTLE J. FOR SOC. JUST. 181, 198 (2005) (describing "non-legal approaches to promoting corporate behavior consistent with the common good").

229. *See infra* Part IV.B-C.

230. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2771 n.27 (2014); Katie Hafner, *Philanthropy Google's Way: Not the Usual*, N.Y. TIMES (Sept. 14, 2006), http://www.nytimes.com/2006/09/14/technology/14google.html?pagewanted=all&_r=0 (explaining that Google.org is a for-profit charity that pays taxes and started with "seed money of about $1 billion and a mandate to tackle poverty, disease and global warming"); *see also*, Anup Malani & Eric A. Posner, *The Case for For-Profit Charities*, 93 VA. L. REV. 2017 (2007).

> [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 for-profit 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.[231]

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

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231. *Hobby Lobby*, 134 S. Ct. at 2771.

232. *Id.*; *see also* Baworowsky, *supra* note 228, at 1746 ("Religion and profit-making coexist in a rich pluralistic framework of groups mediating between individuals, the state, and other groups. The corporation is a flexible entity determined by individual choices through law; its individual creators have the choice whether a corporation shall be single purpose (profit-making) or would do better to have many purposes (profit-making, social responsibility, and religious identity). Absence of corporate religious identity can only come from individual choices to incorporate for other purpose[s], state-created limits on permissible corporate purposes, or both.").

233. *See Hobby Lobby*, 134 S. Ct. at 14; *see also, e.g.*, Kim Bhasin & Melanie Hicken, *17 Big Companies That Are Intensely Religious*, BUS. INSIDER (Jan. 19, 2012, 11:29 AM), http://www.businessinsider.com/17-big-companies-that-are-intensely-religious-2012-1?op=1 (listing the following examples: Forever 21; Tyson Foods (core value of honoring God, employing chaplains to give pastoral care to employees); Chick-fil-A (closed on Sundays); Mary Kay; In-N-Out Burger (Bible passages on cups, wrappers); Timberland (CEO attributing motivation to Jewish faith); Alaska Air (gives inspirational note cards with passages from Old Testament to customers); Marriott Hotels (unavailability of pay-per-view pornography in rooms, known sometimes to place Book of Mormon alongside Bible in rooms); JetBlue (Mormon, family-friendly policies for employees); Interstate Batteries (corporate mission statement "to glorify God"); Trijicon (weapons maker known to inscribe coded Biblical references on rifle sights used by the military); Hobby Lobby; ServiceMaster (Merry Maids, Terminix, American Home Shield) (company commitment to "honor God"); George Foreman Cooking (refusing to invest in sellers who promote alcohol); H.E.B. (grocery chain closed on Sundays); Curves (founder is born-again Christian); and Tom's of Maine (founder graduated from Harvard Divinity School, wrote book with subtitle "Managing for Profit and the Common Good")); Michelle Conlin, *Religion in the Workplace: The Growing Presence of Spirituality in Corporate America*, BUSINESSWEEK (Nov. 1, 1999), http://www.businessweek.com/1999/99_44/b3653001.htm (noting, among other trends, the hiring of chaplains for employees and the development of research centers dedicated to spirituality in the workplace at the Uni-

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."[235] And like nonprofits, for-profits with goals beyond profit can function as mediating institutions between the individual and the state in civil society.[236]

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 for-profits. 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,[238] these claims were general-

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versity of Denver and the University of New Haven); Johnson, *supra* note 228, at 16 (listing UPS, Timberland, Starbucks, Southwest Airlines, and Herman Miller as being influenced by faith and spiritual values); *supra* note 51 (listing companies involved in challenges to the contraception mandate).

234. *See Hobby Lobby*, 134 S. Ct. at 2766.

235. Johnson, *supra* note 228, at 16-17. Given the "wide latitude" of managerial discretion, managers can look to religious traditions to inform their decisions and to enflesh a duty of faithfulness, which "'overarch[es]' the traditional fiduciary duties of care and loyalty." *Id.* at 5, 10; *see also* VISCHER, *supra* note 196, at 179-86 (noting that corporations are "venues for conscience").

236. *See, e.g.*, VISCHER, *supra* note 196, at 147; Baworowsky, *supra* note 228, at 1740-41.

237. *See, e.g.*, Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378, 382 (1990); Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 293-94 (1985); Braunfeld v. Brown, 366 U.S. 599, 601 (1961).

238. *See Braunfeld*, 366 U.S. at 608-09; *see also* Thomas C. Berg, *Religious Structures Under the Federal Constitution*, *in* RELIGIOUS ORGANIZATIONS IN THE UNITED STATES: A STUDY OF IDENTITY, LIBERTY, AND THE LAW 129, 164 (Serritella et al. eds. 2006). This was certainly a concern for the *Amos* court, as voiced by Justice Brennan: religious nonprofits engaged in for-profit activities that could discriminate in hiring would have "the added advantages of economic leverage in the secular

ly 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 anti-discrimination laws).[239] More recently, several pharmacists have refused to stock and sell emergency contraception;[240] several businesses have refused to provide goods or services for same-sex weddings;[241] and some taxi drivers

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realm." Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 343 (1987) (Brennan, J., concurring).

239. *Holding against landlord*: *See, e.g.*, Smith v. Fair Emp't and Hous. Comm'n, 913 P.2d 909, 924 (Cal. 1996) (holding that prohibition against discrimination on basis of marital status was generally applicable and neutral toward religion and, thus, did not violate federal free exercise of religion clause and did not "substantially burden" landlord's religious exercise within meaning of RFRA); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 283 (Alaska 1994) (holding that prohibition against discriminating on the basis of marital status does not infringe landlord's religious freedom because "[v]oluntary commercial activity does not receive the same status accorded to directly religious activity"); Attorney Gen. v. Desilets, 636 N.E.2d 233, 237-43 (Mass. 1994) (holding that statutory mandate that landlords could not discriminate against unmarried couples in renting accommodations substantially burdened landlords' sincerely held religious belief against cohabitation, but reversing and remanding grant of summary judgment because there remained fact questions as to whether Commonwealth had compelling interest in eliminating discrimination in housing based on marital status and whether any such interest was sufficiently compelling).

Holding in favor of landlord: *See, e.g.*, Donahue v. Fair Emp't & Hous. Comm'n, 2 Cal. Rptr. 2d 32, 46 (Cal. Ct. App. 1991) (holding that landlords' refusal to rent violated statute prohibiting "marital status" discrimination but landlords were entitled to exemption from statute because state's interest in protecting unmarried cohabiting couples from discrimination did not outweigh landlords' legitimate assertion of their right to free exercise of religion under state constitution), *superseded by* 825 P.2d 766 (Cal. 1992); State by Cooper v. French, 460 N.W.2d 2, 11 (Minn. 1990) (holding that landlord's conscience rights under state constitution allowed him to refuse to rent to cohabiting couple).

240. *See* Stormans, Inc. v. Selecky, 844 F. Supp. 2d 1172, 1175, 1194-95 (W.D. Wash. 2012) (finding a law requiring pharmacies to stock and dispense such drugs (without any conscience exemption) to be specifically targeted at religious and moral objectors and noting concern with the selective enforcement in that the state enforced it against several small pharmacies but had no plans to enforce it against Catholic hospital pharmacies); Morr-Fitz, Inc. v. Blagojevich, 901 N.E.2d 373, 377-78 (Ill. 2008) (allowing owners of pharmacies to proceed with a claim that their conscientious objections to stock and dispense such drugs were protected by the Free Exercise Clause).

241. *See* Elane Photography, LLC v. Willock, 309 P.3d 53, 59-60 (N.M. 2013) (ordering business that refused to photograph same-sex commitment ceremony to pay money to couple that was turned away); *cf.* State by McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 845-47 (Minn. 1985) (discussing health club owners'

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 package.[243] 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).[245] And of

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refusal to hire potential employees who did not follow strict behavioral code); Grant Rodgers, *Grimes' Gortz Haus to Stop All Weddings in Wake of Discrimination Complaint*, DES MOINES REGISTER (Jan. 28, 2015, 6:49 PM), http://www.desmoinesregister.com/story/news/investigations/2015/01/28/gortz-haus-owners-decide-stop-weddings/22492677 (discussing Mennonite owners of historic hall that serves as a location for private events denying gay couple the use of facilities suing the Iowa Civil Rights Commission to prevent them from being forced to host wedding in violation of their beliefs).

242. *Muslim Cab Drivers Lose Round in Court*, MPRNEWS (Sept. 9, 2008), http://www.mprnews.org/story/2008/09/09/muslim_cabs_court.

243. *See* Burwell v. Hobby Lobby Stores, Inc. 134 S. Ct. 2751, 2766 (2014).

244. *See* David Brodwin, *Businesses Bring Arizona Back from the Brink on Gays*, U.S. NEWS (Feb. 28, 2014), http://www.usnews.com/opinion/economic-intelligence/2014/02/28/why-businesses-opposed-the-arizona-anti-gay-bill; Fernanda Santos, *Arizona Governor Vetoes Bill on Refusal of Service to Gays*, N.Y. TIMES (Feb. 26, 2014), http://www.nytimes.com/2014/02/27/us/Brewer-arizona-gay-service-bill.html?_r=1. Arizona's governor vetoed RFRA-like legislation that, in its application, could have given businesses the right to refuse to supply goods and services to same-sex weddings on religious grounds. *See* Santos, *supra*. Business leaders strenuously opposed the law, predicting it would cause "financial disaster for the state." *Id.* Josh Hicks & Sarah Halzack, *Gov. Pence Defends Religious Freedom Bill Amid Continued Criticism*, WASH. POST (Mar. 29, 2015), http://www.washingtonpost.com/gov-pence-defends-religious-freedom-bill-amid-continued-criticism/2015/03/29/c8174cbe-d63a-11e4-ba28-f2a685dc7f89_story.html (describing criticism that allowing businesses to refuse goods and services to same-sex weddings would harm Indiana's economy).

245. *See Stormans*, 844 F. Supp. 2d at 1190. The availability of housing alternatives was not a factor in the landlord decisions. *See, e.g.*, Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 282 (Alaska 1994). Indeed, the *Swanner* court noted:

> One could argue that if a prospective tenant finds alternative housing after being initially denied because of a landlord's religious beliefs, the government's derivative interest is satisfied. However, the government also possesses a transactional interest in preventing acts of discrimination based on irrelevant

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.[251] 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 justi-

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> characteristics regardless of whether the prospective tenants ultimately find alternative housing.

Id.

246. *See Hobby Lobby*, 134 S. Ct. at 2759.

247. *See infra* notes 255-82 and accompanying text.

248. *See Hobby Lobby*, 134 S. Ct. at 2773-74.

249. *See id.* at 2774-75.

250. 366 U.S. 599, 601 (1961). Another challenge to Sunday closing laws was decided on the same day; *Braunfeld* controlled in that case, and a majority of the Court assumed, without deciding, that a for-profit business could challenge the Sunday closing law. *See* Gallagher v. Crown Kosher Supermarket of Mass., Inc., 366 U.S. 617 (1961).

251. *See Braunfeld*, 366 U.S. at 601.

252. *Id.* at 605.

253. *Id.* at 606.

fication: 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.[254] 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 employees, all of whom were Amish.[258] 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."[260] The Court analogized social security

254. *Id.* at 608.

255. *See id.* at 608-09.

256. *Id.*

257. *See infra* Part IV.B (discussing businesses that supply religious goods and services to specific religious communities).

258. 455 U.S. 252, 254-56 (1982).

259. *Id.* at 255.

260. *Id.* at 257-59.

payments to more general taxation, noting that "religious belief in conflict with the payment of taxes affords no basis for resisting the tax."[261] 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.[262] Thus, the Court implied that the narrow exemption fulfilled the requirement that the government advance its interest in the least restrictive manner.

The Court took the unusual step of noting the coercive nature of an employer exemption:

> [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 his employees.[265] 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

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261. *Id.* at 260. The court reasoned that "[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious beliefs." *Id.*

262. *Id.* at 260-61.

263. *Id.* at 261.

264. *See id.* at 254.

265. *See id.* at 257. Because the Amish oppose both payment and receipt of social security benefits, the Court noted that requiring payment does not coerce the *acceptance* of benefits. *Id.* at 261 n.12. Though the Court conceded that "[i]t is not for us to speculate whether this would ease or mitigate the perceived sin of participation," it noted nevertheless that "it would be possible for an Amish member . . . to accept social security and pass along to an Amish fund having parallel objectives." *Id.*

266. *See id.* at 261.

267. Wisconsin v. Yoder, 406 U.S. 205, 210 (1972).

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."[271] 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 to be paid wages.[277] Their claim, on its face, was about their connection to the religious community and the religious freedom of the community.[278] 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-

268. *See Lee*, 455 U.S. at 261.

269. 471 U.S. 290, 303 (1985).

270. *Id.* at 292.

271. *Id.*

272. *Id.*

273. *Id.* at 273.

274. *Id.* at 303.

275. *Id.* at 299 ("[T]he payment of substandard wages . . . is exactly this kind of 'unfair method of competition' that the Act was intended to prevent, and the admixture of religious motivations does not alter a business's effect on commerce." (internal citations omitted)). The Labor Department's regulation stated: "Activities of eleemosynary, religious, or educational organization[s] may be performed for a business purpose" and therefore treats those "ordinary commercial activities" the same as "when they are performed by the ordinary business enterprise." *Id.* at 297 (citing 29 C.F.R. § 779.214). The Court even noted the "broad congressional consensus that ordinary commercial businesses should not be exempted from the Act simply because they happened to be owned by religious or other nonprofit organizations." *Id.* at 298.

276. *Id.* at 303.

277. *Id.* at 293.

278. *See id.* at 303.

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.[281] 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 for-profit 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 to attend.[284] 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 corporate documents.[285] 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).[286] While the Townleys were not required to abandon the devotional services, they were required by law to accommodate

279. *Id.* at 303-04. The Foundation had argued a burden due to government entanglement in their internal affairs, which was essentially an autonomy claim; the associates argued that if they were required to receive wages it would burden their free exercise. *Id.* at 303. The former claim was rejected; on the latter claim, the Court said that since associates were already being paid in-kind, no actual change occurred and no burden resulted. *Id.* at 303-04.

280. United States v. Lee, 455 U.S. 252, 261 (1982).

281. *See Alamo*, 471 U.S. at 301 n.22, 302.

282. *See id.* at 306; *Lee*, 455 U.S. at 261.

283. 859 F.2d 610, 617 (9th Cir. 1988).

284. *Id.* at 612.

285. *Id.* at 619.

286. *Id.*

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.'"[290] But the court held that the Townleys had to protect the religious rights of employees who objected to participation.[291] In rejecting the statutory and constitutional claims, the court made clear that in the for-profit context, employers could not create a church.[292] 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

287. *Id.* at 621; *see also* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 76-77 (1977) (holding that employer had duty to accommodate employee's religion unless accommodation placed "undue hardship" on employer); Young v. Sw. Sav. & Loan Ass'n, 509 F.2d 140, 144-45 (5th Cir. 1975) (holding that employer requiring employee to attend monthly staff meetings that opened with a religious exercise was religious discrimination and employer had duty to accommodate).

288. *Townley*, 859 F.2d at 612-13.

289. *See id.* at 612.

290. *Id.* at 616.

291. *Id.* at 621.

292. *See id.* at 618-19.

293. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2765-66 (2014).

294. *See id.* at 2764-66. It might have done this with respect to Conestoga Wood Specialties, where the Mennonite owners shared the faith of their 950 Mennonite employees. *See id.* at 2764-65. It did not. *See id.*

295. *Id.* at 2780-83.

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" for-profits, 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 for-profits 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

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296. *See id.* at 2768-75. In fact, the idea that the focus is on the individual owners' faith helps us to understand and properly restrict Justice Alito's invocation of the similarities between for-profits and religious nonprofits. He wrote,

> The dissent suggests that nonprofit corporations are special because furthering their religious "autonomy . . . often furthers individual religious freedom as well." But this principle applies equally to for-profit corporations: Furthering their religious freedom also "furthers individual religious freedom." In these cases, for example, allowing Hobby Lobby, Conestoga, and Mardel to assert RFRA claims protects the religious liberty of the Greens and the Hahns [the families that own them].

Id. at 2769 (quoting Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints, 483 U.S. 327, 342 (1987) (Brennan, J., concurring)). With this language, Justice Alito is noting only that protecting both types of corporations, for-profit and nonprofit, will advance individual freedom. He is not suggesting that for-profits should be pulled within autonomy protections.

297. *See supra* note 51. *But see Hobby Lobby*, 134 S. Ct. at 2765 (one of the three corporate plaintiffs, Mardel – unlike Hobby Lobby or Conestoga – *is* engaged in a religious endeavor: sales of Christian literature).

298. *See Hobby Lobby*, 134 S. Ct. at 2765 (discussing Mardel, the religious bookseller); Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 111 (D.D.C. 2012) (discussing Tyndale, the religious publishing house).

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.[300] 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 for-profits at a time (like now) when courts and legislatures are struggling to determine whether and when to grant autonomy protections to religious *non-profits* that hire and serve beyond their faith communities and/or that wield economic power in ways similar to for-profit entities.[302] Are we really ready for business entities to claim protection under the ministerial exception for decisions regarding "positions of substantial religious importance"[303] or under the Title VII exemption, NLRB exemption, or other autonomy-based exemptions?

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299. *See infra* Part IV.B-C; *see also Amos*, 483 U.S. at 345 n.6 (Brennan, J., concurring) ("It is also conceivable that some for-profit activities could have a religious character . . . ."); Johnson, *supra* note 228, at 3 ("A business corporation . . . is not, and need not be, inherently secular in nature.").

300. *See infra* Part IV.B-C.

301. *See generally* Baworowsky, *supra* note 228. *But cf.* Usha Rodrigues, *Entity and Identity*, 60 EMORY L.J. 1257, 1283-84 (2011) ("Nonprofits can create and 'sell' a particular kind of identity, one in which an individual may participate as employee, donor, or volunteer. This identity is the organization's chief defense against agency costs: If managers stray too far from the entity's nonprofit ethos, they will not merely suffer a loss of reputation, or risk sanctions for norm violation, or subject themselves and the entity to a reputational loss; they will injure – perhaps severely – the value of the enterprise itself. . . . What sets nonprofits apart as organizations is their ability to create a distinctive kind of identity. . . . While for-profit companies may adopt 'feel good' marketing, branding, or positional strategies, it is understood that those goals are subsidiary to the profit imperative. The core mission of the nonprofit, in contrast, is to maximize the output of some social good.").

302. *See* discussion *supra* Part II.D.

303. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 712 (2012) (Alito, J., concurring).

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."[304] 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 mission-driven 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 autonomy-based 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.[305] But would the autonomy precedents

304. Robinson, *supra* note 8, at 793.

305. *See* Matt Branaugh, *Should Churches Reject Tax Exemption, As Huckabee Suggests?*, CHRISTIANITY TODAY (June 12, 2013, 8:05 AM), http://www.churchlawandtax.com/blog/2013/june/should-churches-reject-tax-exemption-as-huckabee-suggests.html. A church might reject its tax-exempt status, as former presidential

protect it? Could the owners hire and fire ministers with impunity? Could it exclude anyone from membership? Could it discriminate in hiring non-ministers 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?[306]

Such an entity would likely be viewed as a business engaged in political speech.[307] 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 non-profit 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,

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candidate Mike Huckabee suggested all should do, in order to have the right to speak freely on any topic without the restrictions of the Internal Revenue Code (or a church might lose its tax-exempt status because it has violated those restrictions). *See id.*

306. The IRS's website provides:

> Certain characteristics are generally attributed to churches. These attributes of a church have been developed by the IRS and by court decisions. They include:
>
> Distinct legal existence
> Recognized creed and form of worship
> Definite and distinct ecclesiastical government
> Formal code of doctrine and discipline
> Distinct religious history
> Membership not associated with any other church or denomination
> Organization of ordained ministers
> Ordained ministers selected after completing prescribed courses of study
> Literature of its own
> Established places of worship
> Regular congregations
> Regular religious services
> Sunday schools for the religious instruction of the young
> Schools for the preparation of its members
>
> The IRS generally uses a combination of these characteristics, together with other facts and circumstances, to determine whether an organization is considered a church for federal tax purposes.

"Churches" Defined, INTERNAL REVENUE SERV. (Dec. 31, 2014), http://www.irs.gov/Charities-&-Non-Profits/Churches-&-Religious-Organizations/Churches--Defined.

307. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365 (2010).

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,[309] is deeply interconnected with many other federal and state religious exemptions.[310] 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:

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308. *See* Douglas Frantz, *Scientology's Puzzling Journey from Tax Rebel to Tax Exempt*, N.Y. TIMES (Mar. 9, 1997), http://www.nytimes.com/1997/03/09/us/scientology-s-puzzling-journey-from-tax-rebel-to-tax-exempt.html (discussing the criticisms of Scientology, which many have characterized as a business rather than a church). This has been the long-standing criticism of Scientology, despite the IRS's decision in 1993 (after a 25-year-long battle) to give it tax-exempt status. *See id.*

309. *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 675-78 (1970).

310. *See infra* note 311 and accompanying text. The loss of tax status might lead to losses of autonomy-based exemptions under Title VII and the ADA, as well as a host of other exemptions currently available to churches. *See* RICHARD HAMMER, 2014 CHURCH & CLERGY TAX GUIDE 639 (2014).

311. *See* I.R.C. § 501(c)(3) (2012) (granting nonprofit churches and religious nonprofits their tax-exempt status, by providing that "[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.").

312. *See* discussion *supra* Part III.

313. *See, e.g.*, Thomas Reese, *Pope Francis and the Three Temptations of the Church*, NAT'L CATHOLIC REP. (Aug. 13, 2013), http://ncronline.org/news/spiritua-

> 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 immunity under the ministerial exception or under Title VII's exemption.[315] 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 for-profits and many religious nonprofits outside the exemption; but the Third

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lity/pope-francis-and-three-temptations-church. Note that there is a major debate in religious circles on whether or not it is appropriate to run a church like a business, i.e., to use a business model when operating a church. *See id.* Indeed, Pope Francis notes that this is one of the three great temptations of the Church (to run the church like a business, in addition to clericalism and turning the Gospel into an ideology). *Id.*

314. Rodrigues, *supra* note 301, at 1306 (internal citations omitted).

315. S*ee generally* Dyer, *supra* note 122; *see also* Spencer v. World Vision, Inc., 633 F.3d 723, 755-57 (9th Cir. 2011) (per curiam); LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 226-27 (3d Cir. 2007).

316. Altman v. Sterling Caterers, Inc., 879 F. Supp. 2d 1375, 1384-86 (S.D. Fla. 2012) (even if ministerial exception applied to FLSA, no applicability of ministerial exception to claims of *mashgiach*, who certifies food as kosher, because defendant kosher caterer is a for-profit commercial caterer, not a "religious institution"). The court relied on *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299, 307 (4th Cir. 2004); discussed *supra* note 114, in which the Fourth Circuit found the ministerial exception applicable only to noncommercial activities of religious institutions. *Altman*, 879 F. Supp. 2d. at 1384-86.

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."[320] 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

317. *Spencer*, 633 F.3d at 724; *see* Dyer, *supra* note 122, at 551.

318. Commack Self-Serv. Kosher Meats, Inc. v. Weiss, 294 F.3d 415, 432 (2d Cir. 2002); Barghout v. Bureau of Kosher Meat and Food Control, 66 F.3d 1337, 1346 (4th Cir. 1995); Ran-Dav's Cnty. Kosher v. State, 608 A.2d 1353, 1355 (N.J. 1992). In these cases, the courts are concerned with taking sides in religious disputes and taking positions on religious doctrine, since there are competing interpretations as to what is "kosher." *See generally* cases cited *supra*.

319. Elijah L. Milne, *Protecting Islam's Garden from the Wilderness: Halal Fraud Statutes and the First Amendment*, 2 J. FOOD L. & POL'Y 61, 66-67 (2006).

320. *See, e.g.*, *Commack*, 249 F.3d at 425 (quoting Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948)).

321. *Cf.* Milne, *supra* note 319, at 66-69. The kosher food industry is a multi-billion dollar business annually in the United States; there are many incentives to cut corners and perpetrate fraud on consumers. *See id.* at 66.

and purpose: it publishes and distributes Christian literature.[322] 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."[327]

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322. Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 116 (D.D.C. 2012).

323. *See supra* note 51. Mardel is the only other business that seems to be a religious for-profit. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2765 (2014) (explaining that Mardel – unlike Hobby Lobby or Conestoga – *is* engaged in a religious endeavor: sales of Christian literature).

324. *See* Brief of Christian Booksellers Association et al. as Amici Curiae in Support of Hobby Lobby and Conestoga, *Hobby Lobby*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356), 2014 WL 343200, at *26-27.

325. *Id.* at *27.

326. *Id.* at *27-28.

327. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 345 n.6 (1987) (Brennan, J., concurring).

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 pursuits.[328] The LDS Church owns multiple businesses, all organized as for-profits, 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.[330] With the exception of Deseret Book (and other media businesses, assuming they are devoted to the Mormon faith), the "religious for-profit" 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 for-profits, even with the important role the businesses play in the life of a religious community. There are several reasons for this conclusion.

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328. *See id.* at 349 (O'Connor, J., concurring) ("It is not clear, however, 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. While I express no opinion on the issue, I emphasize that under the holding of the Court . . . the question of the constitutionality of the [Section] 702 exemption as applied to for-profit activities of religious organizations remains open."). In her concurrence in *Amos*, Justice O'Connor suggested that inclusion of for-profit businesses within the scope of autonomy-based exemptions is more likely an establishment, giving "an unjustifiable award[] of assistance" rather than accommodating the free exercise of religion. *See id.* at 348.

329. Caroline Winter, *How the Mormons Make Money*, BLOOMBERG BUS. (July 18, 2012), http://www.bloomberg.com/bw/articles/2012-07-10/how-the-mormons-make-money.

330. *Id.*

331. *See supra* note 316 and accompanying text.

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."[332] 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 anti-discrimination 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.

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332. Robinson, *supra* note 8, at 793.

333. 42 U.S.C. § 2000e-2(e)(1) (2012). For the religious exclusivity required, see, for example, EEOC v. Kamehameha Sch./Bishop Estate, 990 F.2d 458 (9th Cir. 1993).

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 nonprofit 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 for-profits.

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 religiously-affiliated 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 for-profit: 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

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334. *See* discussion *supra* Part II.C.

335. *See* Steven Davidoff Solomon, *In a Child's Lemonade Stand, the Transformation of a Corporation*, N.Y. TIMES, Nov. 13, 2013, at B4, *available at* http://dealbook.nytimes.com/2013/11/12/in-a-lemonade-stand-a-transformation-of-the-corporation/?_r=0.

336. *See* DANIEL L. TURNER, STANDING WITHOUT APOLOGY: THE HISTORY OF BOB JONES UNIVERSITY 236 (1st ed. 1997) ("As a result of the tax case, Bob Jones University is now unique among American educational institutions as the only educational institution that is operated 'for-profit' and is therefore taxed. It is also the only 'pervasively religious' organization in America that is taxed.").

337. *See id.* ("Following the decision, the University's organizational structure underwent significant changes. The essential purpose of the organization was still education."). The University (which has repented of its racial policies) seems to continue to be organized as a for-profit entity (gifts to its general fund are not tax deductible), but gifts to particular programs, including scholarships, are tax deductible. *See*

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.

BJU Scholarship Fund, BOB JONES UNIV., http://bjuscholarship.org (last visited Apr. 6, 2015); *Make a Gift*, BOB JONES UNIV., http://www.bju.edu/giving/make-a-gift.php (last visited Apr. 6, 2015).

338. The Title VII exemption for universities is found at 42 U.S.C. § 2000e-1(e). §2000e-1(e) (2014) (exemption for educational institutions that are "owned, supported, controlled or managed by a particular religion" or "the curriculum of such school . . . is directed toward the propagation of a particular religion"). Note that, in the NLRB context, *University of Great Falls v. NLRB* requires a nonprofit corporate form for religiously affiliated universities in order to claim protection under the *Catholic Bishop* exemption from NLRB jurisdiction. *Univ. of Great Falls*, 278 F.3d 1335, 1344 (D.C. Cir. 2002).

339. *See generally* David Wallis, *Gadfly Urges a Corporate Model for Charity*, N.Y. TIMES, Nov. 8, 2013, at F5, *available at* http://www.nytimes.com/2013/11/08/giving/gadfly-urges-a-corporate-model-for-charity.html?pagewanted=all (discussing the blurring of lines between for-profit and nonprofit); *see also* Timothy P. Glynn & Thomas Greaney, *Nonprofit and For-Profit Enterprises: A Side-by-Side Comparison of the Law*, IS A FOR-PROFIT STRUCTURE A VIABLE ALTERNATIVE FOR CATHOLIC HEALTH CARE MINISTRY? 55, 59 (2012), *available at* https://law.shu.edu/HealthLaw/upload/Catholic-Health-Care-Symposium-Proceedings.pdf (noting that for-profit corporations have "tremendous discretion to serve charitable and other purposes," describing constituency statutes in states that allow non-shareholder constituencies to be taken into account, like employees, suppliers, customers, creditors, communities); Rodrigues, *supra* note 301, at 1259-60 ("The distinction between nonprofit organizations and for-profit firms is blurring before our eyes. Corporate social responsibility, sustainability, and green movements have made doing good an important component of many products offered not only by nonprofits, but also by for-profit firms. . . . Corporate philanthropy has a long and distinguished lineage. . . . But there is more: Nonprofits and for-profits now compete in areas formerly occupied almost exclusively by nonprofits [such as of microfinance, hospitals]."); Solomon, *supra* note 335.

340. *See generally What Is the EoC?*, ECON. OF COMMUNION, http://www.edc-online.org/en/eoc/about-eoc.html (last visited Apr. 6, 2015). This movement is connected to the Catholic Focolare Movement, but is not limited to Catholic participants. *See Economy of Communion*, FOCOLARE MOVEMENT, http://www.focolare.org/usa/en/professional-life/economy (last visited Apr. 6, 2015).

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.[341] 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 for-profits the future may bring. One can foresee any number of religious ministries organized under this corporate form. Marc Greendorfer argues that a

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341. Luigino Bruni & Amelia J. Uelmen, *Religious Values and Corporate Decision Making: The Economy of Communion Project*, 11 FORDHAM J. CORP. & FIN. L. 645, 651-57 (2006).

342. Marc A. Greendorfer, *Blurring Lines Between Churches and Secular Corporations: The Compelling Case of the Benefit Corporation's Right to the Free Exercise of Religion (with a Post*-Hobby Lobby *Epilogue)*, 39 DEL. J. CORP. L. (forthcoming 2014) (manuscript at 12), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2372464; *see also* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2771 (2014).

343. Greendorfer, *supra* note 342 (manuscript at 13-14).

344. *Id.* (manuscript at 12).

345. *Id.* (manuscript at 2); *see also* Steven J. Willis, *Corporations, Taxes, and Religion: The Hobby Lobby and Conestoga Contraceptive Cases*, 65 S.C. L. REV. 1, 58-61 (2013) (proposing "faith based corporations" model statute for incorporating commercial enterprises with religious beliefs); Solomon, *supra* note 335 (discussing "socially motivated" for-profits, or for-profits with charitable purposes, noting that "[m]ore [than] a third of states have passed some type of legislation allowing for hybrid corporations, companies that do not have shareholder profits as their primary goal. Instead, these companies can be run for social purposes with some of the money going to social and charitable causes. . . . Real companies have now become quasi-profit companies . . . .").

346. *See* Solomon, *supra* note 335.

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.[351]

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347. Greendorfer, *supra* note 342 (manuscript at 17). Mr. Greendorfer would consider closely held corporations like Hobby Lobby and Conestoga to be "de facto" benefit corporations with a religious purpose, with autonomy eligibility. *Id.* (manuscript at 20). He does not distinguish between the RFRA's balancing approach and the autonomy approach, something that I consider a critical distinction.

348. Rodrigues, *supra* note 301, at 1317.

349. *Id.*

350. *See id.* at 1317-18.

351. The religious nonprofit partner in a joint venture must have at least 51% control so that with a majority vote on the for-profit's board, the sponsor can keep its tax exempt status. *See, e.g.*, St. David's Health Care System v. United States, 349 F.3d 232, 238 (5th Cir. 2003) ("[I]f the non-profit organization enters into a partnership agreement with a for-profit entity, and retains control, we presume that the nonprofit's activities via the partnership primarily further exempt purposes."); *see also* Rev. Rul. 98-15, 1998-1 C.B. 718, 1998 WL 89783 (1998) ("[I]f a private party is

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 non-physicians.[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, for-profit 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

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allowed to control or use the non-profit organization's activities or assets for the benefit of the private party, and the benefit is not incidental to the accomplishment of exempt purposes, the organization will fail to be organized and operated exclusively for exempt purposes.").

352. This rule is known as the corporate practice of medicine doctrine. *See generally* Nicole Huberfeld, *Be Not Afraid of Change: Time to Eliminate the Corporate Practice of Medicine Doctrine*, 14 HEALTH MATRIX 243, 243-44 (2004).

353. *See* Carmella, *supra* note 159, at 79. California is the only state with a conscience law that makes corporate form relevant, protecting only nonprofits. *Id.*

354. T. Dean Maines & Michael J. Naughton, *Identifying Essential Principles for Catholic Health Care*, *in* IS A FOR-PROFIT STRUCTURE A VIABLE ALTERNATIVE FOR CATHOLIC HEALTH CARE MINISTRY?, *supra* note 159, at 14 ("[C]an a for-profit Catholic health care organization participate in the deepest reality of its purpose, namely, 'to continue the healing ministry of Jesus Christ'?").

355. Leo P. Brideau, *Examples of For-Profit Health Care Models*, *in* IS A FOR-PROFIT STRUCTURE A VIABLE ALTERNATIVE FOR CATHOLIC HEALTH CARE MINISTRY?, *supra* note 159, at 27.

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 . . . .[358]

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 health care system.[360] 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-

356. *Id.* at 38.

357. *Id.* at 29.

358. *Id.* at 31.

359. *Id.*

360. *Id.* at 29.

361. Hollins v. Methodist Healthcare, Inc., 474 F.3d 223 (6th Cir. 2007) (religiously-affiliated hospital); Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299 (4th Cir. 2004) (nonprofit nursing home); Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360 (8th Cir. 1991) (religiously-affiliated hospital).

362. *Hollins*, 474 F.3d at 226 (quoting *Shaliehsabou*, 363 F.3d at 310).

363. Saeemodarae v. Mercy Health Servs., 456 F. Supp. 2d 1021, 1038 (N.D. Iowa 2006). *But see* Spencer v. World Vision, Inc., 633 F.3d 723, 746 (9th Cir. 2011)

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.

(Kleinfeld, J., concurring) (specifically describing hospitals, whether nonprofit or for-profit, as ineligible for the Title VII exemption).

364. Sr. Doris Gottemoeller, *Ministry and Catholic Identity: Are They the Same?*, *in* IS A FOR-PROFIT STRUCTURE A VIABLE ALTERNATIVE FOR CATHOLIC HEALTH CARE MINISTRY?, *supra* note 159, at 128 ("To return to the question with which we began, is for-profit health care compatible with our Catholic identity? Can it be a ministry of the Catholic Church? I would suggest that the jury is still out. The judgments involved with regard to 'true good' and 'right means' – the goal of prudence – will take time and experience to discern. Simultaneous with the movement to for-profit models is the development of 'hybridized models' – Catholic systems with significant non-Catholic divisions. How much of this can we do without diluting Catholic identity beyond recognition? Maintaining the integrity of Mission and preserving it through time will take dedicated leaders who see the vision and who have the requisite talent to enact it. It will also take collaboration among Catholic lay leaders and the bishops, because the prudential judgments involved will not reside solely with the hierarchy. Venues for these trusting and mutually respectful conversations are not very common at the present time.").

365. *Id.* at 125. ("In making that prudential judgment – which may vary from one example to another and which may require uncommon wisdom and courage – I would suggest two considerations that ought to guide the discernment: the integrity of the ministry itself and provisions for its continuity. Both call for attention to the possible unintended consequences of any choice.")

366. St. David's Health Care Sys. v. United States, 349 F.3d 232, 239 (5th Cir. 2003).

CONCLUSION

We have moved quite a long distance from the closely-held, secular for-profit corporation that is the paradigmatic business challenging the contraception mandate. With the vast organizational and mission possibilities of religious for-profits, stretching *Hobby Lobby* beyond its balancing framework – and far beyond the type of for-profit entity at issue in the case – would put us dangerously outside the limited circumstances of the case.

The religious for-profit, like the secular for-profit run in accordance with religious principles, receives sufficient protection under a balancing approach. Just because an entity is not categorically exempt from a law, does not preclude a statutory or constitutional claim that the law substantially burdens the religious exercise without advancing a compelling governmental interest. Justice Sotomayor has made this point in a different context. In a pre-*Hosanna-Tabor* decision of the Federal Court of Appeals for the Second Circuit, the majority declined to apply the ministerial exception to the age discrimination claim of a pastor who had been fired from his church.[367] In its place, the court applied RFRA.[368] In a vigorous dissent by then-Judge Sotomayor, who thought it was quite obvious that the ministerial exception should apply, she contended that:

> *Catholic Bishop* requires courts, where possible, to interpret statutes in ways that would avoid raising serious constitutional concerns [by using an autonomy approach]. In some cases, *no such interpretation will be reasonably available*. In those cases, RFRA [i.e., a balancing approach] may provide an independent avenue both for protecting religious rights and for avoiding definitive resolution of constitutional questions. Thus, RFRA should not be read to supplant the *Catholic Bishop* inquiry, but to supplement it.[369]

An autonomy-based exemption may be necessary as part of the constitutional design – in order to give wide berth to institutional free exercise and to foster free choice among individuals to enter and exit. Such an exemption avoids excessively entangling the state into church affairs, prevents the state from making religious assessments that it is not competent to make, and facilitates the mediating role these institutions play in civil society. But as then-Judge Sotomayor noted, when such wide berth is not necessary – which I argue is the case with for-profits of any type – a balancing approach should be sufficient to protect the free exercise of religion.[370] I am well aware that sometimes a balancing approach will not be available, depending upon applicable state or federal law. In those situations, legislative and regulatory solu-

367. Hankins v. Lyght, 441 F.3d 96, 107-09 (2d Cir. 2006).
368. *Id.*
369. *Id.* at 118 (Sotomayor, J., dissenting) (emphasis added).
370. *See id.*

tions might be possible. This is preferable to the sweeping uncertainties the autonomy approach would bring.

In sum, this Article has attempted to raise a new issue that is only a few steps beyond the threshold questions answered in *Hobby Lobby*: should courts read the decision to give autonomy protection to *religious* for-profits? The answer the Article has offered is a resounding no. While these entities may appear to warrant autonomy protection, courts must understand that religious for-profits differ radically from those religious institutions that undeniably warrant autonomy protection. Further, they must understand that a whole new set of negative impacts on the lives and livelihoods of many would not be tolerable under our system of responsible religious freedom.