Institutional Free Exercise and the Erosion of LGBTQ+ Antidiscrimination Laws

Critical Corporate Theory Collection

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About the Critical Corporate Theory Collection

The Critical Corporate Theory Collection is part of the *Systemic Justice Journal*, published by the Systemic Justice Project at Harvard Law School. The Collection is comprised of papers that analyze the role of corporate law in systemic injustices. The authors are Harvard Law students who were enrolled in Professor Jon Hanson's Corporations course in the spring of 2021.

The Collection addresses the premise that corporate law is a core underlying cause of most systemic injustices and social problems we face today. Each article explores how corporate law facilitates the creation and maintenance of institutions with tremendous wealth and power and provides those institutions a shared, single interest in capturing institutions, policies, lawmakers, and norms, which in turn further enhance that power and legitimates its unjust effects in producing systems of oppression and exploitation.

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Contents

ABSTRACT

In this paper, I explore the ways in which judicial narratives of corporate law have been employed to advance religious freedom protections at the expense of antidiscrimination frameworks. There are two major ways in which religious protections have become a direct threat to LGBTQ+ antidiscrimination laws. The first comes from the extension of individual religious protections to corporations. In *Burwell v. Hobby Lobby Stores*, the Supreme Court invoked the doctrine of corporate personhood to hold that corporations are entitled to the full protections of the Religious Freedom Restoration Act of 1993. This gives religious corporations the ability to exempt themselves entirely from antidiscrimination laws, imposing a serious hurdle on the regulation of corporate conduct. The second way in which religious protections undermine LGBTQ+ rights is through the so-called "ministerial exception." This First Amendment doctrine exempts religious employment decisions from antidiscrimination laws, meaning religious institutions are allowed to wantonly discriminate against "ministerial" employees. I argue that both of these instruments have been dramatically expanded in recent years, and that corporate law has played a critical role in their expansion. Substantively, the doctrine of corporate personhood was critical to the logic of the *Hobby Lobby* decision; rhetorically, the courts have employed various narratives of corporate law when awarding immense power to religious institutions. Together, these trends have given religious corporations and churches the extraordinary ability to entirely circumvent antidiscrimination laws – a problem that has taken on heightened salience after the Supreme Court's landmark decision in *Bostock v. Clayton County*

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INTRODUCTION

The free exercise of religion is a venerable right in our constitutional framework. This is for good reason; from the persecution of the Puritans under King Charles I to the virulent Islamophobia of the 21st Century, America's history amply illustrates the importance of religious freedom. Despite this, religious protections have become a hotly contested battleground for the LGBTQ+ movement. The heart of the problem is that the two areas overlap; religious objections to LGBTQ+ rights have brought free exercise protections into conflict with antidiscrimination statutes like Title VII. In recent years, the balance between these two areas has tipped heavily in favor of religious freedom, to the point that many institutions have become almost totally exempt from antidiscrimination laws.

Prior to this summer's landmark decision *Bostock v. Clayton County*,[1] LGBTQ+ employees enjoyed few protections in the workplace. Only 22 out of 50 states have any state-level prohibitions against discrimination on the basis of sexual orientation or gender identity, and American workplaces are unquestionably hostile toward LGBTQ+ people.[2] 20% of LGBTQ+ Americans have reported experiencing discrimination when job-hunting; this number jumps to 32% for LGBTQ+ people of color.[3] In 2018, 53% of LGBTQ+ people reported hearing offensive jokes about sexual orientation in the workplace; 41% reported hearing jokes about members of the transgender and gender non-conforming (TGNC) community.[4] In addition, 22% of LGBTQ+ Americans are compensated at a lower rate than their peers.[5] Finally, harassment of LGBTQ+ people is rampant, especially for TGNC employees, who experience high rates of misgendering, inappropriate questions, and insults.[6] As a result of all of the above, 46% of LGBTQ+ people hide their sexual orientation or

gender identity at work.[7]

Religious protections have exacerbated these issues by undermining LGBTQ+ antidiscrimination laws in two ways. The first is the extension of individual religious protections to corporations, meaning that "religious corporations" may exempt themselves from almost any federal law, including antidiscrimination laws. The second is through the so-called "ministerial exception," which exempts religious institutions from almost all state and federal antidiscrimination laws. In this paper, I argue that corporate law has contributed to the dramatic expansion of these two instruments, and that the courts have invoked narratives of corporate law to award religious institutions immense power.

This paper has two parts. First, in Part 1, I outline the current state of religious freedom law, including the *Hobby Lobby* case and the "church autonomy doctrine." In Part 2 I examine the ways in which corporate law has helped propagate free exercise protections, both among for-profit corporations and for nonprofit institutions. Finally, I conclude by proposing a counternarrative: that the courts are using discretion as a mechanism for building and reproducing power among corporate and religious institutions, at the expense of LGBTQ+ employees and other vulnerable stakeholders.

PART 1: RELIGIOUS FREEDOM AND CORPORATE PERSONHOOD

Individual Religious Liberties

The entire edifice of modern free exercise law stems from *Employment Division v. Smith*.[8] Before *Smith*, any law that impeded a religious practice was subject to strict scrutiny – meaning it had to be justified by a "compelling state interest," and the law in question had to be narrowly tailored to that interest.[9] If a law failed to meet this high burden, the religious practitioner became entirely exempt. In *Smith*, the court significantly limited this deferential standard, holding that governments could regulate the exercise of religion so long as they did so through a "neutral law of general applicability."[10] This means that, so long as a law impacts everyone equally, and so long as that law does not target a specific faith, it can burden religious practices without being challenged.

However, since then, the Supreme Court and Congress have steadily eroded the *Smith* doctrine, creating a range of expansive exceptions that have eclipsed the rule. What was once a general rule permitting neutral limits on religion has become a complex multi-factor analysis that strikes down laws at the slightest hint of partiality. Perhaps the most notable limit on *Smith* is the Religious Freedom Restoration Act of 1993 (RFRA). In response to *Smith*, Congress passed RFRA to reinstate strict scrutiny for any federal laws that infringe on free exercise. This has severely limited the federal government's ability to even incidentally regulate religious practices – for instance, it was the basis for the *Burwell v. Hobby Lobby* holding, which limited the federal government's ability to require corporations to provide healthcare coverage for contraceptives. RFRA has also been widely replicated at the state level, and many states impose similarly stringent requirements on their own laws.

The next major blow to *Smith* may be hanging in the balance. On November 4th, the Supreme Court held oral arguments for *Fulton v. City of Philadelphia*.[11] *Fulton* involves a Philadelphia ordinance prohibiting sexual orientation discrimination among municipal contractors. A Christian adoption agency sued the city claiming that, by requiring them to adopt out children to same-sex couples, the ordinance infringed on their free exercise rights. On its face, this case seems like a straightforward application of *Smith*: a neutral and generally applicable

law. However, one of the questions in *Fulton* is whether to repeal *Smith* altogether. Such an outcome would be devastating for antidiscrimination law, because it could return us to a time when individuals (and, after *Hobby Lobby*, corporations) are permitted to exempt themselves entirely from neutral laws. Consider, for example, a religious sole proprietorship that doesn't wish to serve LGBTQ+ clients, or a medical practitioner who refuses to offer care on the basis of gender, sexual orientation, or gender identity. Unbridled free exercise protections pave the way for discrimination without consequence, eliminating legal hurdles designed to protect vulnerable communities who might otherwise find it difficult to obtain services. Consistency is critical to deterrence, and a return to religious strict scrutiny would create a patchwork of exceptions to antidiscrimination laws, rendering them toothless.

Religious Freedom and Corporate Personhood

While troubling, religious strict scrutiny was historically limited to individual religious conduct. That changed in 2014 with the Supreme Court's decision in *Burwell v. Hobby Lobby.* In *Hobby Lobby*, the court asked whether RFRA, which was written to apply to individual "persons," could be interpreted to cover corporate entities.

The case concerned an administrative ruling by the federal Department of Health and Human Services (HHS) requiring most employers with more than 50 employees to provide healthcare coverage for contraceptives. In drafting the rule, HHS had specifically exempted religious nonprofits. Despite this, the religious owners of three privately-held companies sued, alleging that the ruling burdened their "sincere Christian beliefs that life begins at conception," and that "it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point."[12] The Supreme Court ruled in the plaintiffs' favor, largely because the federal Dictionary Act definition of "person" includes corporations.[13] Noting there is "nothing in RFRA that suggests a congressional intent to depart from the Dictionary Act definition," the Supreme Court held that corporations are an intended beneficiary of RFRA.[14] This means that any federal action that burdens any corporation's "sincerely held religious beliefs" must now be subject to strict scrutiny; if the corporation wins in court, they are entirely exempt from following that law or regulation.[15]

This decision raises many questions. For instance, what does it mean for a corporation to have religious beliefs or practices? How does a court determine a corporation's beliefs, especially if they are larger or publicly

traded? And why would a corporation need the protections of RFRA – what is the potential mischief? And, if Congress intended RFRA to cover corporations, why wouldn't they have said so more explicitly than by implicit incorporation of the Dictionary Act? The Court's answers to these questions were unsatisfactory. First, the Court noted that the corporate form itself is not intrinsically incompatible with religion, because it is undisputed that nonprofit corporations such as churches can hold religious beliefs.[16] The Court then rejected HHS's argument that for-profit corporations in particular cannot be religious. Their rationale here is murky; the core argument seems to be that profit-seeking behavior can *technically* fall within the definition of religious exercise, which encompasses "not only belief and profession but the performance of (or abstention from) physical acts that are engaged in for religious reasons."[17] By the Court's account, "[b]usiness practices that are compelled or limited by the tenets of a religious doctrine fall comfortably" within this definition.[18]

The *Hobby Lobby* holding is deeply troubling, and implicates a number of LGBTQ+ rights. Employment is not just a source of income; in America, it is also the basis for several critical resources such as healthcare, pensions, and spousal benefits. Although *Hobby Lobby* was a contraceptive case, its logic also applies to various LGBTQ+ issues. For instance, many self-funded employer health plans include an exclusion for transition-related care. The consensus of medical experts is that this care is generally medically necessary, and *Bostock*'s holding seems to prohibit categorical exclusions on transgender medical care.[19] However, *Hobby Lobby* would allow religious corporations to insulate themselves from the requirements of *Bostock* and Title VII, perpetuating exclusions for transition-related care. This is especially troubling given that 45% of Fortune 500 companies do not offer TGNC-inclusive benefits.[20] Corporate free exercise rights might also affect other areas of healthcare, such as coverage for PrEP, or other forms of compensation, such as spousal benefits.

Although the Court took pains to argue that its holding is limited to closely-held corporations, there is no inherent doctrinal limitation; "its logic extends to corporations of any size, public or private."[21] Furthermore, even if the logic of *Hobby Lobby* was limited to private companies, it would still impact huge swathes of the American public. Hobby Lobby employs over 43,000 employees in 47 states;[22] Chick-Fil-A, another closely-held religious corporation, employs 140,000 staff in its restaurants alone.[23] Even under ordinary conditions, the LGBTQ+ community experiences a high degree of workplace discrimination; allowing large corporations to exempt themselves entirely from these

laws will only exacerbate the harm experienced by vulnerable populations.

The Church Autonomy Doctrine and the Ministerial Exception

The extension of free exercise rights to corporations created a powerful tool that could be used to exempt large institutions from antidiscrimination laws. However, it is not the only such tool. The "church autonomy doctrine" allows religious organizations to exempt themselves wholesale from the application of almost any law; more precisely, it demands "judicial deference to religious institutions whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by . . . church judicatories."[24] It has been invoked to bar lawsuits in tort cases, employment relationships, contractual disputes, sexual harassment claims, and a wide variety of civil rights cases.[25] Far older than *Smith* or RFRA, the church autonomy doctrine is a philosophical outgrowth of the separation of church and state. Most people think of church/state separation in one direction: they see it as a protection for the state against theological meddling, shielding the federal government from disestablishment. But from its earliest conception, this doctrine was also designed to protect churches from state influence; "[t]he desire of theologians to preserve church integrity from encroachment by the civil government was always at or near the center" of the doctrine.[26]

The canonical statement of constitutional protection for church autonomy comes from *Watson v. Jones*:[27]

> The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals

> as the organism itself provides for.

This doctrine shields religious institutions in almost every area of the law. When applied to employment law, it is known as the "ministerial exception" – the absolute authority of religious institutions to select, fire, or discipline their "clergy."

The ministerial exception is troubling because its limits aren't clear. For instance, it is very difficult to determine who qualifies as a "minister." The Supreme Court has identified a number of relevant factors – the core analysis is "what an employee does" and, more specifically, whether the employee's responsibilities "lie at the very core of the mission" of the religious institution.[28] The problem with this test is it subjects many non-religious employees to the ministerial exception. For instance, in the 2020 Supreme Court Case *Our Lady of Guadalupe Sch.*,[29] one of the plaintiffs was a non-Catholic fifth-grade teacher, with only an oblique and minimal connection to the school's religious mission. Despite this, the Supreme Court held that she was unable to sue the school because she helped advance the school's religious mission. This raises the question: how far does the ministerial exception go? The standard laid out in *Our Lady of Guadalupe Sch.* seems to apply to all manners of non-religious staff – custodians, administrators, maintenance, etc. This raises the troubling prospect that the "exception" has eclipsed the rule, giving free reign to religious institutions to fire or refuse to hire LGBTQ+ employees who have even a slight impact on the institution's religious mission.

The Future of Religious Freedom Law

All of these doctrines – the ministerial exception, federal and state RFRA statutes, free exercise rights, and the extension of individual rights to corporations – have led to a rich panoply of protections for religious institutions. Religious corporations may exempt themselves from contraceptives mandates, from civil rights laws, or even from tort law. But despite the extensive powers that have been amassed by these institutions, there are surprisingly few historical cases dealing with LGBTQ+ antidiscrimination law. This is not because of any doctrinal limitation; rather, it is because these frameworks were historically not necessary to discriminate against LGBTQ+ people. Prior to *Bostock*, corporations did not need to invoke *Hobby Lobby* or the ministerial exception to fire or refuse to hire on the basis of sexual orientation; they could overtly discriminate without consequence.

But because Title VII now encompasses sexual orientation and gender

identity, there has been a recent wave of post-*Bostock* LGBTQ+ ministerial exception cases. For instance, in *Demkovich v. St. Andrew the Apostle Par., Calumet City*,[30] a gay teacher at a Catholic school was subjected to a deeply hostile work environment, including epithets, humiliation, demands for resignation, and, ultimately, termination. The church did not deny the allegations, but moved to have the case thrown out under the ministerial exception. In *Maxon v. Seminary*,[31] two students were expelled from a nondenominational seminary on the basis of their same-sex relationships. Although the court held that the plaintiffs' case against the school was encompassed post-*Bostock* by Title IX, they also found that the school qualified for Title IX's statutory "Religious Organization Exemption," and dismissed the case.[32] And, in *Starkey v. Roman Catholic Archdiocese of Indianapolis*,[33] a religious school declined to renew an employee's contract because of her same-sex relationship; again, the school cited a religious exemption from civil rights laws. Surprisingly, the court in *Starkey* ruled in favor of the plaintiffs, in part for specific reasons relating to the language and legislative history of Title VII; regardless, all three decisions are currently on appeal.

These are just a few examples; there have been a variety of other post-*Bostock* antidiscrimination cases involving LGBTQ+ discrimination and religious freedom protections. Like *Demkovich, Maxon*, and *Starkey*, most of these cases involve overt discrimination and defensive religious doctrines such as the ministerial exception. This trend will only continue - especially if the Supreme Court overturns *Smith* in the *Fulton* case, adding "individual" Free Exercise Clause protections to the arsenals of institutions who oppose antidiscrimination laws. The aggrandizement of legal frameworks like the ministerial exception, state and federal RFRA statutes, and free exercise rights threatens to reduce antidiscrimination regimes to a patchwork of inconsistently-applied protections that are toothless precisely where they are needed most. If these doctrines remain as they stand, they will push the entire edifice of antidiscrimination law to the edge of a precipice; time will tell whether the courts are able to recognize the danger this poses to the LGBTQ+ community.

PART 2: JUDICIAL NARRATIVES OF CORPORATE LAW

Narratives of Corporate Law

Through the doctrine of corporate personhood and the *Hobby Lobby* case, corporate law has allowed the courts to drastically increase the scope of RFRA jurisprudence.[i] But corporate law has also helped propagate religious freedom protections in other ways. In particular, the courts have relied on various narratives of corporate law to justify the dramatic expansion of religious institutional discretion. The courts have also used other narrative techniques, such as attributional bias, to gloss over the harm that their rulings have inflicted on vulnerable communities. Having explored the ways in which religious institutions have amassed the power to circumvent antidiscrimination law, I will now examine the role that these judicial narratives of corporate law played in the formation of those powers.

As described earlier, one of the defendant's main arguments in the *Hobby Lobby* case was that for-profit corporations cannot have a purpose other than profit. The Supreme Court rejected this argument, claiming that it "flies in the face of modern corporate law . . . While it is certainly true that a central objective of for-profit corporations is to make money, modern 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. Many examples come readily to mind. So long as its owners agree, a for-profit corporation may take costly pollution-control and energy-conservation measures that go beyond what the law requires. A for-profit corporation that

[i] Although the doctrine of corporate personhood plays a critical role in the expansion of free exercise rights, it is tangential to this paper's focus on judicial narratives of corporate law. For a closer look at the jurisprudence of corporate personhood, please see *Corporate Standing: The Loose Application of a Rigorous Doctrine*, which is also published by the Justice Initiative.

> operates facilities in other countries may exceed the requirements of local law regarding working conditions and benefits. If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well.[34]

It may be true that business activities can overlap with religious practices; by the Court's account, a religious sole proprietorship would unquestionably enjoy Free Exercise Clause protections, as Justice Alito is quick to point out. However, it does not follow that for-profit incorporated entities should receive religious protections. The "personhood" of a sole proprietorship is coterminous with the "personhood" of its owner; their objectives, their liability, and the limits of their authority are one and the same. In contrast, by definition and design, a corporation is separate and distinct from its owners. Legal separation is a core purpose of incorporation, and granting religious rights to a corporation based on the religious convictions of its owners undermines this purpose. The fact that the corporations in this case are closely held does little to resolve this problem. Unlike a sole proprietorship, a corporation may be sold without "altering" its corporate personhood. If a religious corporation is sold to nonreligious owners, does it remain religious? Connecting corporate personhood to the identity of its ownership produces perverse results because such a connection is contrary to the fundamental goals of incorporation.

The Court's appeal to "modern" corporate law is rhetorically unsatisfying. Their argument seems to be that because corporations are simply neutral legal vehicles, they are capable of any type of conduct, rather than just profit-seeking. However, this view of for-profit corporations is not "modern;" in fact, it is naïve and outdated. "Modern" corporate law is characterized by an ever-increasing pressure to seek profit, both among publicly- and privately-owned corporations. The emphasis on shareholder primacy, the increasing use of equity as compensation, and cases like *Smith v. Van Gorkom*[35] all stand for the proposition that for-profit corporations cannot easily evade their responsibility to serve owners by pursuing profit.[36] In short, the Supreme Court's appeal to corporate law was predicated on a highly formal and narrow view of corporate law, and one that is out of touch with the financial and governance mechanisms that have been developed to guide corporate conduct toward economic efficiency.

Also unpersuasive is the argument that, because a corporation *can* have an objective other than profit-seeking, it should enjoy all of the protections of purely religious nonprofit corporations. Even accepting

the Court's dubious claim that for-profit corporations can ever have an objective other than profit, and even accepting the argument that this non-economic objective might be religious, the fact that a corporation pursues religious objectives does not mean that it should be afforded the protections of organizations such as churches, whose *sole* objective is the perpetuation of their faith.

Frameshifting

Another narrative tool used by the courts is "frameshifting" – swapping between treating religious institutions as corporations and churches, as is convenient. This is illustrated by the contrast between the rhetoric of the *Hobby Lobby* case and the "church autonomy doctrine" cases. In *Hobby Lobby,* the Court made extensive reference to corporate law to support the conclusion that a for-profit corporation could be a religious institution. However, when faced with evidence of discrimination or other misconduct by religious institutions (as in the ministerial exception cases), religious institutions are no longer 501(c)(3) corporations or employers – they become "ecclesiastical government[s]" or "religious unions."[37] In *Bryce v. Episcopal Church in the Diocese of Colorado*,[38] a church autonomy case involving derogatory and sexual remarks toward and LGBTQ+ youth minister, the Tenth Circuit stated that it didn't want to "insert itself" into "ecclesiastical discussions."[39] In other words, rhetorically, the case wasn't about an employer harassing an employee; it was a "church" engaging in "ecclesiastical deliberations." This lofty rhetoric has been used to paper over misconduct in a number of cases and circuit courts.[40]

And yet in *Fulton*, where one of the critical questions is whether the Catholic adoption agency is a contractor or licensee, conservative members of the Court are eager to paint the adoption agency as an independent commercial actor, akin to a private hospital.[41] Similarly, in an important case concerning religious tax exemptions for institutions such as religious schools, the Supreme Court ruled in favor of the religious instructions by focusing on the legal and economic boundaries of the churches managing those institutions.[42] The Court held that, for tax purposes, a "church" is not a physical "house of worship;" instead, it is comprised of legal entities that are in an "employment" relationship with the church, as well as the administrators "who conduct the business of hiring, discharging, and directing church employees."[43]

In summary, this frameshifting – between religious institutions as "churches" versus "corporations" – is employed to paper over the harms caused by church autonomy. When a church harms an employee or

engages in tortious conduct, they are not held accountable as employers or corporations; but when determining the extent of tax benefits or extending religious rights, the courts are happy to invoke corporate law and treat religious institutions as legal rather than ecclesiastical entities.

Attributional Bias

Another important judicial narrative employed by the courts is attributional bias. In simple terms, this means that the court shifts between treating parties as having agency or being passive participants, as is necessary to maximize the benefits awarded to religious institutions. When it benefits religious entities, the courts will treat them as passive agents with no control over their circumstances – at the mercy of the world around them. By contrast, when confronted by the harm these religious institutions inflict (for instance, on LGBTQ+ employees or customers), the court is happy to treat the victims as fully in control of the harm they experience. For instance, in oral arguments for *Fulton*, Justice Kavanaugh downplayed the harm caused when an adoption agency refuses to serve a same-sex couple, opining that the agency "would refer that couple to another agency that works with same-sex couples so that the couple could participate and be a foster -- foster parents."[44] In another question, Justice Kavanaugh asked whether "a same-sex couple in Philadelphia can become foster parents by going to one of the [other] 30 agencies."[45] Conversely, Justice Coney Barrett analogized Philadelphia's monopoly on adoption services to a government "tak[ing] over" all medical providers, noting that the Catholic adoption agency "can't even enter the business" without dealing with the city.[46] In other question, Justice Kavanaugh described Philadelphia as artificially "creat[ing] a clash" with the adoption agency, and "looking for" a "serious, controversial fight," despite no wrong-doing by the Catholic agency.[47] In short, conservative Justices like Justice Coney Barrett and Justice Kavanaugh seem to treat same-sex couples as empowered actors with ample ability to avoid discrimination, while also treating the adoption agency as at the mercy of an over-aggressive city with a political agenda.

Other good examples of this attributional bias can be found in the church autonomy doctrine cases. In a canonical articulation of the doctrine, the Court rationalized the harm caused to church members by claiming that their membership in the church indicated "an implied consent" to "ecclesiastical government."[48] Conversely, the Court reasoned, any intervention by the judiciary on behalf of the church's

members would "lead to the total subversion of such religious bodies."[49] Again, those who are harmed by the church autonomy doctrine are treated as empowered actors who consented to church's authority; meanwhile religious institutions are at the mercy of the government, and would be profoundly injured by the application of secular law.

CONCLUSION AND COUNTERNARRATIVE

The powers granted to religious institutions (and the associated potential for harm against the LGBTQ+ community) might be imagined in terms of "means, motive, and opportunity." For many years, religious institutions have possessed the "means" to use these tools against the LGBTQ+ community; however, with the introduction of federal LGBTQ+ protections through *Bostock* (and, potentially, the Equality Act that is currently being debated by Congress), religious institutions and corporations have now acquired the "motive" and "opportunity" to employ these expansive doctrines. LGBTQ+ employees already experience high rates of employment-related discrimination; the current legal and political climate will likely exacerbate the many harms LGBTQ+ Americans experience in the workplace. The victims of religious anti-LGBTQ+ bias face little recourse in the courts, and the law has created many opportunities for discrimination. A religious corporation that declines to provide insurance coverage for transition-related care, a Catholic university that fires a custodian for entering into a same-sex union, and an adoption agency refuses to serve same-sex couples might all be shielded under a veneer of religious freedom.

Corporate law and adjacent judicial narratives have contributed significantly to this problem. The courts have been happy to treat religious institutions as corporations and employers when it suits them, while elevating those institutions with lofty rhetoric to paper over the harms they inflict. In fact, I propose that the doctrines in this paper are best understood as tools for extending discretion to corporations and churches; in other words, that the courts use discretion as a mechanism for building and maintaining institutional power. But discretion does not exist in a vacuum. When a corporation or employer gains discretion, it has to come from somewhere else: employees, church members, and other victims of misconduct are usually the ones who lose discretion as a result of expanded institutional power.

It remains to be seen how the courts will react to this wave of religious freedom cases. It is possible that these doctrines will face limits now that they are subject to increasing use. If, however, the courts continue to expand and extend these doctrines, then it may very well come to a point where the law "allow[s] a religious employer to convert any claim of discrimination on the basis of one of the protected classes . . . to a case of religious discrimination."[50] Religious freedom protections are important, but they "should not be read to swallow" antidiscrimination laws.[51] This fight is one of the next major challenges facing the LGBTQ+

movement, and only time will tell whether our laws respond to the critical need for balance between the First Amendment and the hard-fought rights of the LGBTQ+ community.

ENDNOTES

[1] 140 S. Ct. 1731 (2020).

[2] *Lesbian, Gay, Bisexual, and Transgender Workplace Issues: Quick Take*, CATALYST (June. 2020), https://www.catalyst.org/research/lesbian-gay-bisexual-and-transgender-workplace-issues/.

[3] *See id.*

[4] *See id.*

[5] *See id.*

[6] *See id.*

[7] *See id.*

[8] 494 U.S. 872 (1990).

[9] *See Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

[10] *Smith*, 494 U.S. at 879.

[11] 140 S. Ct. 1104 (2020).

[12] *Hobby Lobby*, 573 U.S. at 683.

[13] See i*d.* at 684 (citing 1 U.S.C. § 1).

[14] *Id.* at 708.

[15] *Id.* at 723.

[16] *See id.* at 709.

[17] *Id.* at 710 (quotation omitted).

[18] *Id.*

[19] *See* Jay Kapla*n, Denied Access to Essential Transgender Healthcare,* 98 Mich. B.J. 20, 21 (December 2019); *see also* Brietta R. Clark et. al., *Sex-Based Discrimination in Healthcare Under Section 1557: The New Final Rule and Supreme Court Developments*, 33 Health Law. 5, 12 (October 2020).

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[21] *Id.* at 757.

[22] *Our Story*, HOBBY LOBBY, http://www.hobbylobby.com/about-us/our-story (last visited May 2, 2021).

[23] *Taking Care of Restaurant Team Members*, CHICK-FIL-A, https://www.chick-fil-a.com/our-standards/taking-care-of-restaurant-team-members (last visited May 2, 2021).

[24] Michael A. Helfand, *Litigating Religion*, 93 B.U. L. Rev. 493, 494 (2013) (quotation omitted).

[25] *See* Marjorie A. Shields, *Annotation, Construction and Application of Church Autonomy Doctrine*, 123 A.L.R. 5th 385 (2004)

[26] 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 (2008).

[27] 80 U.S. 679, 728–29 (1871).

[28] *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020).

[29] *Id.*

[30] 973 F.3d 718 (7th Cir. 2020), *reh'g en banc granted, opinion vacated* (Dec. 9, 2020).

[31] 219CV09969CBMMRW, 2020 WL 6305460 (C.D. Cal. Oct. 7, 2020).

[32] *See id.* at *9.

[33] 119CV03153RLYTAB, 2020 WL 6434979 (S.D. Ind. Oct. 21, 2020).

[34] *Hobby Lobby Stores, Inc.*, 573 U.S. at at 710–12.

[35] 488 A.2d 858 (Del. 1985).

[36] *See generally* George A. Mocsary*, Freedom of Corporate Purpose*, 2016 B.Y.U. L. Rev. 1319 (2016).

[37] *Id.*

[38] 289 F.3d 648 (10th Cir. 2002).

[39] *Id.* at 651.

[40] *See, e.g.*, *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829 (6th Cir. 2015); *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003); *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985).

[41] *See* Transcript of Oral Argument at 84–85, *Fulton*, 140 S. Ct. 1104 (No. 19-123).

[42] *See St. Martin Evangelical Lutheran Church v. S. Dakota*, 451 U.S. 772, 783–84 (1981).

[43] *Id.*

[44] Transcript of Oral Argument at 27–28 , *Fulton*, 140 S. Ct. 1104 (No. 19-123).

[45] *Id.* at 108.

[46] *Id.* at 85–86.

[47] *Id.* at 81.

[48] *Watson*, 80 U.S. at 728–29.

[49] *Id.*

[50] *Starkey*, 119CV03153RLYTAB, 2020 WL 6434979 at *5.

[51] *Id.*