

CORPORATE DISESTABLISHMENT

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*Across the American economy, the wall between church and company is crumbling. Businesses large and small have taken on religious identities and now conduct their corporate affairs according to religious principles. The Supreme Court’s decision in *Burwell v. Hobby Lobby*, which held that for-profit corporations are eligible to claim religious exemptions from general laws, added significant legal momentum to this emerging cultural phenomenon.*

In the wake of Hobby Lobby, scholars concerned about the expansion of corporate religion have searched in vain for coherent limiting principles. Drawing on an underexplored set of cases in which employees claim that companies have impermissibly imposed religion, this Article identifies such principles. It argues—on both doctrinal and normative grounds—that values of conscience, non-domination, and mutual respect work in tandem to constitute the outer boundaries of corporate religion. These values, in turn, mirror norms central to the Establishment Clause of the First Amendment, making a parallel case for “corporate disestablishment.” The idea of corporate disestablishment reflects structural similarities between political and private governments and clarifies the proper relationship between religion and business in a diverse modern economy.

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INTRODUCTION

Corporate religion is on the rise.¹ In recent years, a growing number of businesses have chosen to integrate religious beliefs into everyday corporate affairs.² And in the wake of *Burwell v. Hobby Lobby*, which held that for-profit corporations are eligible to claim religious exemptions from general laws,³ the corporate religion “movement” has gained considerable momentum.⁴

¹ See *The Rise of Corporate Religious Liberty* (Micah Schwartzman et al. eds., 2016); Paul Horwitz, *The Hobby Lobby Moment*, 128 Harv. L. Rev. 154, 180–86 (2014); see also Alan J. Meese & Nathan B. Oman, *Hobby Lobby, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations Are RFRA Persons*, 127 Harv. L. Rev. F. 273 (2014) (discussing religion in business); Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Money-makers*, 21 Geo. Mason L. Rev. 59, 62–80 (2013) (same); Ronald J. Colombo, *The Naked Private Square*, 51 Hous. L. Rev. 1 (2013) (same); Michael A. Helfand & Barak D. Richman, *The Challenge of Co-Religionist Commerce*, 64 Duke L.J. 769 (2015) (same); Lake Lambert III, *Spirituality, Inc.: Religion in the American Workplace* (2009) (same); David W. Miller, *God at Work: The History and Promise of the Faith at Work Movement* (2007) (same); Helen J. Alford & Michael J. Naughton, *Managing as if Faith Mattered: Christian Social Principles in the Modern Organization* (2001) (same).

² See, e.g., Hobby Lobby, *Our Story*, <http://www.hobbylobby.com/about-us/our-story> [<https://perma.cc/R3RL-GSUM>] (“We are committed to: Honoring the Lord in all we do by operating the company in a manner consistent with Biblical principles.”); Interstate Batteries, *Purpose and Values*, <https://www.interstatebatteries.com/about/our-culture> [<https://perma.cc/Y9N6-HJRT>] (“Our Purpose: To glorify God and enrich lives as we deliver the most trustworthy source of power to the world.”); Tyson Foods, *Core Values: What We Believe*, <https://www.tysoncodeofconduct.com/introduction/what-we-believe> [<https://perma.cc/Z2-CV-6CWT>] (“We strive to honor God and be respectful to each other, our customers, and other stakeholders.”).

³ See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

⁴ See Alliance Defending Freedom, *An Employer’s Guide to Faith in the Workplace: Legal Protections for Christians Who Own a Business*, <http://www.adflegal.org/campaigns/faith-in-the-workplace> [<https://perma.cc/T725-6QGK>] (noting “significant cultural and legal changes in our society”); see also Colombo, *supra* note 1, at 20 (referring to religious integration in business as a “social movement”); Miller, *supra* note 1, at 20 (same).

Against the backdrop of surging corporate religiosity, critics have struggled to identify the outer boundaries of corporate religion.⁵ For example, if a company can refuse to facilitate employee access to contraceptives, can it also pressure those employees to participate in workplace religious practices? Can it adopt religious codes of conduct to govern their private lives? Can it threaten employment consequences for failure to accept the company's religious views? *Hobby Lobby* invited such escalating assertions of corporate religious liberty without providing any clear sense of their limits.⁶

⁵ See, e.g., Caroline Mala Corbin, *Corporate Religious Liberty*, 30 *Const. Comment.* 277 (2015); Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 *Yale L.J.* 2516 (2015); Elizabeth Sepper, *Zombie Religious Institutions*, 112 *Nw. U. L. Rev.* 929 (2018). For an early argument against expansion of free exercise doctrine to cover business corporations, see James D. Nelson, *Conscience, Incorporated*, 2013 *Mich. St. L. Rev.* 1565.

⁶ See NeJaime & Siegel, *supra* note 5 (discussing escalation of religious liberty claims based on complicity); Sepper, *supra* note 5 (discussing the expansion of corporate religion via private contract); see also *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837, 841–42 (E.D. Mich. 2016) (holding that a funeral home is eligible for a religious exemption from Title VII under the Religious Freedom Restoration Act), *rev'd* 884 F.3d 560 (6th Cir. 2018); Nomination of Senator Jeff Sessions to be Attorney General of the United States: Questions for the Record (Jan. 17, 2017), <https://www.judiciary.senate.gov/imo/media/doc/Sessions%20Responses%20to%20Franken%20QFRs.pdf> [<https://perma.cc/3TD8-UJ7L>] (stating Jeff Sessions' strong support for the First Amendment Defense Act); The First Amendment Defense Act (FADA): Hearing on H.R. 2802 Before the H. Comm. on Oversight and Gov't Reform, 114th Cong. 1–2, 83 (July 12, 2016) (considering legislation that would provide broad religious exemptions for business corporations); Draft Interim Final Rule, Coverage of Certain Preventive Services Under the Affordable Care Act 62 (May 23, 2017), <https://www.documentcloud.org/documents/3761268-Preventive-Services-Final-Rule-0.html> [<https://perma.cc/R4QU-JCLG>] (“[B]usinesses large and small take positions on matters of social justice, community benefit, and ethical concerns beyond profit. . . . Therefore, the Departments consider it appropriate to exempt any entity possessing religious beliefs or moral convictions against the coverage required by the Mandate, regardless of its corporate structure or ownership interests.”); Office of the Attorney General, Memorandum for All Executive Departments and Agencies: Federal Law Protections for Religious Liberty 2 (2017), <https://www.justice.gov/opa/press-release/file/1001891/download> [<https://perma.cc/WA48-NRRJ>] (“Americans do not give up their freedom of religion by participating in the marketplace. . . .”); Attorney General Jeff Sessions, Remarks at the Department of Justice's Religious Liberty Summit (July 30, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-department-justice-s-religious-liberty-summit> [<https://perma.cc/P249-DC3Z>] (announcing creation of Religious Liberty Task Force to implement the Department of Justice's religious liberty guidance); The Public Rights/Private Conscience Project, Church, State & the Trump Administration (Jan. 30, 2017), http://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/PRPCP/prpcp_trump_church_state.pdf [<https://perma.cc/W399-6TN2>] (detailing the Trump Administration's efforts on matters related to religious liberty and civil rights).

But the expansion of corporate religion is not inexorable. Drawing on a set of cases in which employees claim that for-profit companies have impermissibly imposed religion, this Article begins to sketch the boundaries between faith and business in the modern corporate world. To date, these corporate religion cases have been largely overlooked or misunderstood because they lay scattered across disjointed doctrines within employment discrimination law. This Article assembles these cases in an effort to identify and distill a set of limiting principles for corporate religion.⁷

These limiting principles, in turn, are grounded in three distinct, yet interrelated, values: freedom of conscience, non-domination, and mutual respect. The conscience principle recognizes the right of employees to select their own deepest commitments and live their lives, to the extent feasible, in accordance with those commitments.⁸ The non-domination principle works to prevent employers from exercising arbitrary or

⁷ See *infra* Part II. Some of these cases are discussed in George W. Dent, Jr., *Civil Rights for Whom?: Gay Rights Versus Religious Freedom*, 95 Ky. L.J. 553 (2006–2007); Andrew C. Nichols, *Exemptions for “Religious Corporations” from Employment Discrimination Statutes: Should Non-Profit Status Be Required?*, 3 Geo. J.L. & Pub. Pol’y 133 (2005); Julie Manning Magid & Jamie Darin Prenkert, *The Religious and Associational Freedoms of Business Owners*, 7 U. Pa. J. Lab. & Emp. L. 191 (2005); Eugene Volokh, *Freedom of Speech, Religious Harassment Law, and Religious Accommodation Law*, 33 Loy. U. Chi. L.J. 57 (2001); Debbie N. Kaminer, *When Religious Expression Creates a Hostile Work Environment: The Challenge of Balancing Competing Fundamental Rights*, 4 N.Y.U. J. Legis. & Pub. Pol’y 81 (2000–2001); Thomas C. Berg, *Religious Speech in the Workplace: Harassment or Protected Speech?*, 22 Harv. J.L. & Pub. Pol’y 959 (1999); Kimball E. Gilmer & Jeffrey M. Anderson, *Zero Tolerance for God?: Religious Expression in the Workplace after *Ellerth* and *Faragher**, 42 How. L.J. 327 (1999); Theresa M. Beiner & John M.A. DiPippa, *Hostile Environments and the Religious Employee*, 19 UALR L.J. 577 (1997); Josh Schopf, *Religious Activity and Proselytization in the Workplace: The Murky Line Between Healthy Expressions and Unlawful Harrassment [sic]*, 31 Colum. J.L. & Soc. Probs. 39 (1997); Betty L. Dunkum, *Where to Draw the Line: Handling Religious Harassment Issues in the Wake of the Failed EEOC Guidelines*, 71 Notre Dame L. Rev. 953 (1996); Steven D. Jamar, *Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom*, 40 N.Y. L. Sch. L. Rev. 719 (1996); David L. Gregory, *Religious Harassment in the Workplace: An Analysis of the EEOC’s Proposed Guidelines*, 56 Mont. L. Rev. 119 (1995) [hereinafter Gregory, *Religious Harassment*]; Thomas D. Brierton, *An Unjustified Hostility Toward Religion in the Workplace*, 34 Cath. Law. 289 (1991); David L. Gregory, *The Role of Religion in the Secular Workplace*, 4 Notre Dame J.L. Ethics & Pub. Pol’y 749 (1990); and Laura S. Underkuffler, *“Discrimination” on the Basis of Religion: An Examination of Attempted Value Neutrality in Employment*, 30 Wm. & Mary L. Rev. 581 (1989). But this Article reaches some starkly different conclusions than the ones reached in previous work in this area.

⁸ See *infra* Section II.A.

uncontrolled power over employees' spiritual lives.⁹ And the principle of mutual respect responds to widespread diversity in modern businesses with an attitude of reciprocity and toleration.¹⁰ Together, these principles seek to avoid harms that accompany imposition of pervasively religious workplaces. In doing so, they provide a doctrinally and normatively satisfying case for fixing constraints around the perimeter of corporate religious liberty.

Although these constraints on corporate religion apply to private businesses, they parallel a central strand of Establishment Clause doctrine and theory. Whatever else it might mean, the First Amendment's disestablishment norm prohibits the state from imposing religion on its diverse citizens.¹¹ And, much like the limiting principles embedded in corporate religion cases, the disestablishment norm is grounded in the values of conscience, non-domination, and mutual respect.¹² The limits on corporate imposition of religion, then, can be thought of as a sort of "corporate disestablishment." Thinking of corporate religion's limiting principles in terms of disestablishment reflects certain fundamental similarities between governmental and corporate authority and follows a long tradition of extending compelling constitutional norms into the private workplace.¹³

Part I of this Article foregrounds the argument for corporate disestablishment by briefly sketching the recent cultural and legal ascendance of corporate religion in the United States. Part II then identifies and distills the limiting principles embedded in corporate religion cases. Part III analogizes those limiting principles to a parallel set of constraints placed on state imposition of religion and defends the claim that a disestablishment norm ought to govern the modern corporate workplace. Finally, Part IV applies that norm to several concrete practices that sit on the borderlines of corporate disestablishment.

⁹ See *infra* Section II.B.

¹⁰ See *infra* Section II.C.

¹¹ See Alan Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 *Yale L.J.* 692 (1968).

¹² See *infra* Section III.A.

¹³ See *infra* Sections III.B–III.C.

I. THE RISE OF CORPORATE RELIGION

In recent years, religious businesses have become increasingly visible in American culture. A growing number of companies arrayed across the economy have come to reject the idea that businesses should be religiously “neutral.” These businesses regard the neutrality model as constraining and unnecessary, and have chosen instead to adopt explicitly religious principles to govern their corporate affairs.¹⁴ In the words of one prominent commentator, the marketplace has now become “imbricated with thick religiosity.”¹⁵

Evidence of corporate religion’s cultural ascendance comes in numerous forms. Supporters now boast of “a \$4.6 billion Christian products industry, a \$12.5 billion kosher food market, and . . . an \$800 billion global sharia-compliant finance market.”¹⁶ Many companies have hired “corporate chaplains” to provide employees with spiritual guidance and to encourage a more satisfying relationship with their companies.¹⁷ And religious business groups, including the Christian Business Network,¹⁸ the Catholic Business League,¹⁹ and the C12 Group—“the nation’s largest network of Christian CEOs, business owners, and executives”—have proliferated.²⁰

¹⁴ See Horwitz, *supra* note 1, at 180.

¹⁵ *Id.* at 183.

¹⁶ See Meese & Oman, *supra* note 1, at 278 (quoting Helfand & Richman, *supra* note 1, at 771).

¹⁷ See Colombo, *supra* note 1, at 83 n.538 (arguing that corporate chaplains are a “growth industry which has ‘grown fastest since 2001’ and is expanding from its roots in the Bible Belt to regions across America” (quoting Sue Shellenbarger, *Praying with the Office Chaplain*, *Wall St. J.*, June 23, 2010, at D1)); *Corporate Chaplains: Praying for Gain*, *The Economist* (Aug. 23, 2007), <http://www.economist.com/node/9687820> [<https://perma.cc/BU86-R9NB>] (declaring that “[c]orporate chaplains are a booming business in America”); *Marketplace Chaplains, Organizational Statistics*, <https://mchapusa.com/about/> [<https://perma.cc/N99A-CDHJ>] (reporting 1548 active corporate chaplains serving over 780,000 employees in fifty states and at 906 total companies) (last visited Apr. 3, 2019).

¹⁸ See Christian Business Network, *About CBN*, <https://christianbusinessnetwork.com/about-cbn/our-profile> [<https://perma.cc/HPB4-MVBJ>] (“Our Mission: We work to provide you with valuable resources, networking opportunities, and world-class services that empower you to fulfill your calling and maximize your impact in the marketplace.”).

¹⁹ See Catholic Business League, *About*, <http://catholicbusinessleague.org/about/> [<https://perma.cc/QA36-3UHD>] (“Vision Statement: To connect, develop, and inspire Catholic Professionals to live their faith at work, at home, and in their community.”).

²⁰ See C12 Group, *About*, <https://www.c12group.com/about/> [<https://perma.cc/45L8-QWNZ>].

The rise of corporate religion, in turn, reflects a growing cultural acceptance of religious “integralism.”²¹ The integralist view denies the idea that faith should be confined to one’s home or one’s church and instead holds that religious beliefs ought to pervade all aspects of a person’s life.²² Perhaps chief among their targets, religious integralists seek to bring faith into the business world, overcoming the pernicious notion that “religion and business simply don’t mix.”²³ Given that corporations play an enormous role in our daily lives, integralists contend, religious people should not be asked to leave their convictions at the office door.²⁴ To do so would not only demand that people live “divided li[ves],”²⁵ but also require both individuals and businesses to take religion less seriously.²⁶

Legal scholars sympathetic to the integralist view have argued that the corporate form embraces this growing demand for religion in business.²⁷ In their view, the corporation is merely a “nexus of contracts” among various firm participants—including shareholders, managers, and other corporate constituencies—each of whom may wish to infuse religion into the corporation.²⁸ And corporate law, for its part, is almost entirely

²¹ See Horwitz, *supra* note 1, at 180 (“To a growing and increasingly visible extent, a range of faiths and sects take an ‘integralist’ view that sees ‘religion not as one isolated aspect of human existence but rather as a comprehensive system more or less present in all domains of the individual’s life.’” (quoting Kenneth D. Wald, *Religion and the Workplace: A Social Science Perspective*, 30 *Comp. Lab. L. & Pol’y J.* 471, 481 (2009))); Colombo, *supra* note 1, at 18 (discussing religious integralism); see also Alford & Naughton, *supra* note 1 (discussing religion in the workplace); Raymond F. Gregory, *Encountering Religion in the Workplace: The Legal Rights and Responsibilities of Workers and Employers* 1–14 (2011) (same); Lambert, *supra* note 1 (same); Miller, *supra* note 1 (same).

²² See Horwitz, *supra* note 1, at 180; Colombo, *supra* note 1, at 3, 6, 18; Rienzi, *supra* note 1, at 60; Robert K. Vischer, *Conscience and the Common Good: Reclaiming the Space Between Person and State* 179–205 (2010).

²³ See Miller, *supra* note 1, at 3 (referencing a statement by an IBM instructor at a new employee training class).

²⁴ See Colombo, *supra* note 1, at 87.

²⁵ See Alford & Naughton, *supra* note 1, at 7.

²⁶ See Colombo, *supra* note 1, at 14; see also Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* 3–101 (1993) (discussing legal and cultural factors that encourage believers to treat religion as a “hobby”). For a more moderate position, see Douglas A. Hicks, *Religion and the Workplace: Pluralism, Spirituality, Leadership* 1–7 (2003).

²⁷ See Meese & Oman, *supra* note 1, at 280–94 (disputing claim that the corporate form precludes religious exercise).

²⁸ See *id.* at 285; see also Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 *Colum. L. Rev.* 1416, 1426 (1989) (discussing the “nexus of contracts” view of the corporation); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial*

composed of default rules, which can be modified to suit a wide variety of individual preferences, including religious ones.²⁹

One leading version of this argument focuses on corporate shareholders.³⁰ On this account, shareholders are free to select from among a host of possible corporate purposes—including religious purposes—and adopt them in the corporation’s governing documents.³¹ Given the fact that many shareholders hold strong religious beliefs, the argument goes, it should not be surprising that many existing companies operate according to explicitly religious principles.³²

Corporate flexibility is also said to empower a growing number of corporate managers who wish to run businesses religiously.³³ Like corporate shareholders, many corporate managers are deeply religious, and at least some of them have expressed sincere interest in running their businesses in accord with spiritual commitments.³⁴ The demand for corporate religion from managers is especially significant, moreover, considering the wide scope of their authority. Although shareholders often enjoy rhetorical privilege in the modern corporation, professional managers wield corporate authority in the vast majority of circumstances.³⁵ And so, by integrating their faith into business affairs, integralists claim that executives can maintain their own ethical integrity while infusing businesses with a deeper sense of purpose.³⁶

Finally, the corporate form is said to be responsive to the religious beliefs of constituents other than shareholders and managers. Some customers, for example, wish to buy products from religious companies.³⁷ Some employees want to join businesses that affirm their faith.³⁸ And some creditors prefer to lend money to coreligionists.³⁹ Just as corporate

Behavior, Agency Costs and Ownership Structure, 3 *J. Fin. Econ.* 305, 310 (1976) (describing the firm as “a nexus for a set of contracting relationships among individuals”).

²⁹ See Meese & Oman, *supra* note 1, at 280–89.

³⁰ See *id.*

³¹ See *id.* at 281.

³² See *id.*

³³ See Vischer, *supra* note 22, at 179–205; Colombo, *supra* note 1, at 21; Lyman Johnson, *Re-Enchanting the Corporation*, 1 *Wm. & Mary Bus. L. Rev.* 83 (2010).

³⁴ See Colombo, *supra* note 1, at 5, 21.

³⁵ See Leo E. Strine, Jr., *Toward a True Corporate Republic: A Traditionalist Response to Bebchuk’s Solution for Improving Corporate America*, 119 *Harv. L. Rev.* 1759, 1762–69 (2006).

³⁶ See Vischer, *supra* note 22, at 179–205; Colombo, *supra* note 1; Johnson, *supra* note 33.

³⁷ See Helfand & Richman, *supra* note 1, at 771; Colombo, *supra* note 1, at 23–24.

³⁸ See Colombo, *supra* note 1, at 88; Johnson, *supra* note 33, at 88–98.

³⁹ See Helfand & Richman, *supra* note 1, at 807 (discussing the Islamic bond market).

law is thought to enable religious integration through shareholders and managers, it is also seen as responsive to the rising demand for religious integration among other corporate constituencies.⁴⁰

The Supreme Court's decision in *Burwell v. Hobby Lobby* gave the corporate religion movement considerable legal momentum.⁴¹ It held that for-profit corporations qualify as "persons" under the Religious Freedom Restoration Act and are therefore eligible to claim religious exemptions from general laws.⁴² In the wake of *Hobby Lobby*, several corporate law scholars have sought to capitalize on that momentum, calling on the business and legal worlds to fully embrace corporate religion.⁴³

Even more recently, proponents of corporate religion received substantial encouragement from the Trump Administration. In October 2017, the Office of the Attorney General released a memorandum containing twenty "Principles of Religious Liberty."⁴⁴ That memorandum

⁴⁰ See Colombo, *supra* note 1, at 88; Vischer, *supra* note 22, at 179–205. Proponents of corporate religion emphasize the urgency of these religious interests. For starters, they note that for many serious believers, religious integration is not a mere preference. Instead, in their view, it is part and parcel of what it means to be faithful. They also point to several mainstream religious traditions in support of the idea that religion pervades the lives of believers. See Meese & Oman, *supra* note 1, at 296, 300; Colombo, *supra* note 1, at 18. Among their examples, proponents of corporate religion claim that Judaism requires adherents to apply the same ethical standards in their corporate roles as they do in their private lives. See Rienzi, *supra* note 1, at 68. The teachings of the Catholic Church strike a similar note, in their view, emphasizing that Church goals should not be sacrificed for the sake of profit. See Colombo, *supra* note 1, at 60; Rienzi, *supra* note 1, at 70–71. And as a final example, they note that Islam contains numerous and detailed religious requirements for those engaged in business. See Rienzi, *supra* note 1, at 72–73. Integrating faith and work, on this account, is not only a good idea—it is often religiously required.

⁴¹ 134 S. Ct. 2751 (2014).

⁴² *Id.* at 2768–69.

⁴³ See, e.g., Lyman Johnson & David Millon, *Corporate Law After Hobby Lobby*, 70 *Bus. Law.* 1 (2014); Ronald J. Colombo, *Religious Conceptions of Corporate Purpose*, 74 *Wash. & Lee L. Rev.* 813 (2017). The legal academy has, in some ways, been late to the game on corporate religion. For years, scholars in other academic fields have been writing about faith and business. Management scholars began writing about this topic decades ago. See, e.g., Timothy Fort, *Religious Belief, Corporate Leadership, and Business Ethics*, 33 *Am. Bus. L.J.* 451 (1996). In 2013, the *Journal of Management Spirituality and Religion* celebrated its ten-year anniversary. And just last year, Princeton University's Faith & Work Initiative, which "investigates the ways in which the resources of various religious traditions and spiritual identities shape and inform engagement with diverse workplace issues" did the same. See Princeton University Faith & Work Initiative, *Overview*, <https://www.princeton.edu/-faithandwork/overview/> [https://perma.cc/LA6G-GVQF].

⁴⁴ Office of the Attorney Gen., *Memorandum for All Executive Departments and Agencies: Federal Law Protections for Religious Liberty 1* (2017), <https://www.justice.gov/opa/press-release/file/1001891/download> [https://perma.cc/WA48-NRRJ].

offers an expansive interpretation of federal law's protection of religious organizations, including for-profit corporations.⁴⁵ Since then, the Trump Administration has finalized rules exempting for-profit businesses with "religious beliefs or moral convictions" from the Affordable Care Act's contraceptive coverage mandate⁴⁶ and emphasized its continued commitment to a broad reading of *Hobby Lobby*.⁴⁷

But not everyone is pleased with the rise of corporate religion.⁴⁸ Indeed, many prominent scholars have questioned its normative desirability and, in particular, have cast doubt on whether businesses should be eligible for religious exemptions from general laws when those exemptions harm third parties.⁴⁹ Yet even these skeptics of corporate

⁴⁵ *Id.* at 4.

⁴⁶ See Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47838, 47838 (Oct. 13, 2017) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147).

⁴⁷ See Office of Fed. Contract Compliance Program, Directive 2018-03 2 (2018) (citing *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014)), <https://www.dol.gov/ofccp/regs/compliance/directives/Dir2018-03-ESQA508c.pdf> [<https://perma.cc/RYYV6-WQE4>] ("Recent court decisions have addressed the broad freedoms and anti-discrimination protections that must be afforded religion-exercising organizations and individuals under the United States Constitution and federal law.").

⁴⁸ See, e.g., The Public Rights/Private Conscience Project, Press Statement: Columbia Law Experts Denounce DOJ Religious Liberty Guidance as Attack on Religious Liberty and Fundamental Equality Rights (Oct. 6, 2017), http://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/PRPCP/doj_guidance_final.pdf [<https://perma.cc/9AFP-C63C>].

⁴⁹ The "third-party harm" doctrine is not limited to claims of corporate religious liberty. See, e.g., Frederick Mark Gedicks & Rebecca G. Van Tassell, RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion, 49 *Harv. C.R.-C.L. L. Rev.* 343, 356–71 (2014); Frederick Mark Gedicks & Andrew Koppelman, Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause, 67 *Vand. L. Rev. En Banc* 51, 52–53 (2014); Nelson Tebbe, Micah Schwartzman & Richard Schragger, When Do Religious Accommodations Burden Others?, in *The Conscience Wars: Rethinking the Balance Between Religion, Identity, and Equality* 328 (Susanna Mancini & Michel Rosenfeld eds., 2018); Nelson Tebbe, Micah Schwartzman & Richard Schragger, How Much May Religious Accommodations Burden Others?, in *Law, Religion, and Health in the United States* 215 (Holly Fernandez Lynch et al. eds., 2017); Micah Schwartzman, Richard Schragger & Nelson Tebbe, Hobby Lobby and the Establishment Clause, Part III: Reconciling Amos and Cutter, Balkinization (Dec. 9, 2013), https://balkin.blogspot.com/2013/12/hobby-lobby-and-establishment-clause_9.html [<https://perma.cc/4EL3-5UHB>]. Professors Micah Schwartzman, Nelson Tebbe, and Richard Schragger recently formulated this doctrine as follows: "[W]hen the government accommodates religious believers, it may not impose undue hardship on identifiable third parties." Micah Schwartzman, Nelson Tebbe & Richard Schragger, *The Costs of Conscience*, 106 *Ky. L.J.* 781, 782 (2017–2018) [hereinafter Schwartzman et al., *Costs of Conscience*]. The third-party harm doctrine is a general limiting principle in the sense that it applies to all religious accommodations regardless of whether the

religion seem to acknowledge the force of its cultural and legal momentum.⁵⁰

Working to counter such momentum, scholars and advocates have struggled to identify limiting principles for corporate religion. One reason for that struggle has been the difficulty in locating a doctrinal source of limiting principles that are tailored to religious businesses. Without such tailored principles, critics of corporate religion have been largely unable to resist its expansion.

The next Part seeks to fill this gap. It does so by first isolating a set of cases in which employees claim that *for-profit* companies impermissibly imposed religion.⁵¹ It then synthesizes these cases by reading them

party claiming an exemption is a business, a nonprofit, or an individual. See *id.* At the same time, though, the third-party harm doctrine is narrow in that it only applies when the government acts to accommodate religious believers. See *id.* at 787. For sophisticated work on third-party harms in the marketplace, see Elizabeth Sepper, Free Exercise Lochnerism, 115 Colum. L. Rev. 1453 (2015); Elizabeth Sepper, Gays in the Moralized Marketplace, 7 Ala. C.R.-C.L. L. Rev. 129 (2015); Elizabeth Sepper, Healthcare Exemptions and the Future of Corporate Religious Liberty, in *The Rise of Corporate Religious Liberty* 305, 318–21 (Micah Schwartzman et al. eds., 2016); Elizabeth Sepper, Contracting Religion, in *Law, Religion, and Health in the United States* 113 (Holly Fernandez Lynch et al. eds., 2017).

⁵⁰ See Corbin, *supra* note 5, at 277–78; NeJaime & Siegel, *supra* note 5, at 2518–19; Sepper, *supra* note 5, at 931. Elizabeth Sepper has shown, for example, that the growth of corporate religion has been especially pronounced in the healthcare context. As she explains, many religious hospitals—and formerly religious hospitals—enforce religious restrictions on doctors and restrict patients’ options for medical care. These restrictions are implemented and sustained largely through the mechanism of private contract, which gives them impressive durability. In light of these developments, she has persuasively argued that these contractual mechanisms have created “zombie religious institutions,” and that there is little to stop the spread of corporate religion throughout the economy. Sepper, *supra* note 5.

⁵¹ This methodology excludes cases brought against *nonprofit* organizations, as the interests and legal issues at stake in those cases often differ from those in cases involving for-profit companies. See James D. Nelson, Conscience, Incorporated, 2013 Mich. St. L. Rev. 1565 (defending the distinction between for-profit businesses and nonprofits in the context of free-exercise rights); James D. Nelson, The Freedom of Business Association, 115 Colum. L. Rev. 461 (2015) (defending the distinction between for-profit businesses and nonprofits in the context of freedom of association doctrine); cf. Berg, *supra* note 7, at 987 (discussing nonprofit cases); Kaminer, *supra* note 7, at 134 (same); Nichols, *supra* note 7, at 141 (same); Jamar, *supra* note 7, at 804 n.379 (same); Underkuffler, *supra* note 7, at 582 & n.2 (same). For similar reasons, it also excludes cases in which employees claim that a *governmental* employer has impermissibly imposed religion. Cf. Schopf, *supra* note 7, at 49–51 (discussing public employer cases); Jamar, *supra* note 7, at 820 (same). Finally, the next Part excludes cases in which the company itself is not accused of imposing religion. This exclusion encompasses so called “horizontal” harassment cases, which involve claims against co-workers, and “external” cases, which include claims against those outside the company. See Russell S. Post, Note, The Serpentine Wall and the Serpent’s Tongue: Rethinking the Religious Harassment Debate, 83 Va. L. Rev. 177, 194 (1997) (using the “horizontal” and “external” labels). For discussion of

together as a unified body of considered legal judgments rendered in response to similar factual circumstances.⁵² Finally, it attempts to extract and refine a set of principles that puts this body of doctrine in its most coherent and attractive light.⁵³

II. THE LIMITS OF CORPORATE RELIGION

This Part identifies three limiting principles for corporate religion: freedom of conscience, non-domination, and mutual respect. Although these principles may sound familiar, they have remained largely buried in odd doctrinal locations within American employment discrimination law.⁵⁴ As a result, these principles are dimly perceived—and poorly

cases involving co-worker religious harassment, see Berg, *supra* note 7, at 961, 990; Gregory, Religious Harassment, *supra* note 7, at 136; Schopf, *supra* note 7, at 52; Michael D. Moberly, Bad News for Those Proclaiming the Good News?: The Employer's Ambiguous Duty to Accommodate Religious Proselytizing, 42 Santa Clara L. Rev. 1, 23, 25, 39 (2001); Kaminer, *supra* note 7, at 85; Gilmer & Anderson, *supra* note 7, at 331, 339–40. For discussion of cases involving external harassment, see Post, *supra*, at 194; see also Reed v. Great Lakes Cos., 330 F.3d 931, 933 (7th Cir. 2003) (involving claim of religious imposition by hotel Bible supplier).

⁵² Cases that sidestep issues of corporate religion cannot serve as sources of considered legal judgments on those issues. See, e.g., Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 293 (3d Cir. 2009) (refusing to consider employee's religious harassment claim because it was a "repackaged" sexual orientation discrimination claim); Horton v. Midwest Geriatric Mgmt., LLC, No. 4:17-CV-2324-JCH, 2017 WL 6536576, at *5 (E.D. Mo. Dec. 21, 2017) (citing *Prowel*, 579 F.3d at 293) (same); Tillery v. ATSI, Inc., No. CV-01-S-2736-NE, 2003 WL 25699080, at *7–8 (N.D. Ala. Apr. 14, 2003) (refusing to consider employee's hostile work environment claim because it was not adequately pleaded); Kolodziej v. Smith, 682 N.E.2d 604, 607 (Mass. 1997) (refusing to consider employee's religious discrimination claim based on jury finding). The same goes for cases finding in employees' favor without substantive discussion or analysis. See, e.g., Backus v. Mena Newspapers, Inc., 224 F. Supp. 2d 1228, 1233 (W.D. Ark. 2002); Mandeville v. Quinstar Corp., No. CIV.A. 98-1408-MLB, 2000 WL 1375264, at *5–7 (D. Kan. Aug. 29, 2000).

⁵³ For details on this interpretive methodology, see Ronald Dworkin, *Law's Empire* (1986) (describing the role of "fit" and "justification" in legal interpretation); see also Nelson Tebbe, *Religious Freedom in an Egalitarian Age* 25–36 (2017) (defending a "coherentist" methodology). For far more critical approaches to the doctrine in this area, see, e.g., Berg, *supra* note 7, at 978, 987, 1006; Brierton, *supra* note 7, at 290, 308, 310; Jamar, *supra* note 7, at 805, 810–14; Kaminer, *supra* note 7, at 139, 142; Nichols, *supra* note 7, at 134, 143; Underkuffler, *supra* note 7, at 588, 618.

⁵⁴ When employment discrimination law deals with religion, it typically does so in two circumstances: (1) a religious employee claims that her employer discriminated against her based on her religious beliefs or (2) a religious employee claims that her employer failed to reasonably accommodate her religious practices. See Mark A. Rothstein et al., *Employment Law* 264–67 (5th ed. 2015). But the corporate religion cases do not fit neatly into either of these categories. As a result, courts have handled these cases under various doctrinal labels—

understood—in conversations about corporate religion.⁵⁵ The remainder of this Part develops the three related, yet distinct limiting principles and argues that they provide coherent and attractive guidance for governing the corporate workplace.

A. Freedom of Conscience

The first principle embedded in corporate religion cases is employee freedom of conscience. Although freedom of conscience is commonly considered a fundamental aspect of liberal democracy,⁵⁶ courts have explained that its doctrinal and normative appeal transcends the political sphere, reaching deep into the law of the American workplace. According to the conscience principle, employees may be subject to many incidents of corporate authority, but they should nevertheless retain considerable freedom to live in accordance with their deepest spiritual projects and commitments. The remainder of this section considers a wide array of employment practices that implicate employee conscience.⁵⁷

1. Coerced Religious Practices

To begin with, courts deciding corporate religion cases have repeatedly held that companies may not coerce employees to participate in religious practices. The leading case is *EEOC v. Townley Engineering & Manufacturing Co.*⁵⁸ In *Townley*, a manufacturer of mining equipment required employees to attend weekly devotional services.⁵⁹ These services took place during work hours, and an employee's failure to attend was considered tantamount to skipping work altogether.⁶⁰ In a powerful

such as “reverse religious discrimination,” “hostile work environment,” “religious harassment,” and “failure to accommodate.” See *infra* notes 58–211 and accompanying text.

⁵⁵ Indeed, some of these cases have been invoked *in support* of corporate religion. See, e.g., Brief for Petitioners at 19–20, *Burwell v. Hobby Lobby Stores Inc.*, 134 S. Ct. 2751 (2014) (No. 13-356), 2014 WL 173487 (2014), at *19–20 (citing *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 619–21 (9th Cir. 1988), in support of the argument that for-profit businesses have religious liberty rights); Brief for Petitioners at 20–21, *Burwell v. Hobby Lobby Stores Inc.*, 134 S. Ct. 2751 (2014) (No. 13-356), 2014 WL 173487, at *20–21 (citing *McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 850 (Minn. 1985), in support of the argument that for-profit businesses have religious liberty rights).

⁵⁶ See, e.g., John Rawls, *Political Liberalism* 309–15 (1993).

⁵⁷ The categories of infringement on employee conscience discussed in this section overlap to a considerable degree. As a result, several of the cases fit under more than one category.

⁵⁸ *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988).

⁵⁹ *Id.* at 611–12.

⁶⁰ *Id.*

statement rejecting this practice as inconsistent with the law, the Ninth Circuit explained that “[p]rotecting an employee’s right to be free from forced observance of the religion of his employer is at the heart of Title VII’s prohibition against religious discrimination.”⁶¹

The *Townley* case is now familiar, but it was not the first to limit a company’s power to coerce religious observance. More than a decade earlier, the Fifth Circuit highlighted the importance of employee conscience in *Young v. Southwestern Savings & Loan Ass’n*.⁶² In *Young*, a bank teller objected to her employer’s practice of starting monthly meetings with prayer.⁶³ She claimed that “her freedom of conscience was being violated by forced attendance” at these meetings, and the Fifth Circuit agreed.⁶⁴ Writing for the court, Judge Irving Goldberg started his opinion by noting that “Title VII[] has provided the courts with a means to preserve religious diversity from forced religious conformity.”⁶⁵ Mandatory “prayer meetings,” in turn, were repugnant to conscience and therefore outside the bounds of permissible employment practices.⁶⁶

More recently, courts have extended the conscience principle to cover a wider variety of compelled religious performances in the corporate workplace. For example, in *EEOC v. Preferred Management Corp.*, a home healthcare company required its employees to sign a statement confirming active support for the company’s religious values.⁶⁷ At least one employee testified that she was uncomfortable with this requirement, but that she signed the statement “in order to keep her job.”⁶⁸ In considering the employee’s claim, the court explained that the company’s actions interfered with her right to be free from religious imposition.⁶⁹

In *EEOC v. United Health Programs of America, Inc.*, the court reached similar conclusions.⁷⁰ *United Health* involved a discount medical plan provider who had arranged religious practices that “permeated the office environment.”⁷¹ Among other things, United Health’s employees

⁶¹ *Id.* at 620–21.

⁶² *Young v. Sw. Sav. & Loan Ass’n*, 509 F.2d 140 (5th Cir. 1975).

⁶³ *Id.* at 142.

⁶⁴ *Id.* at 142–43.

⁶⁵ *Id.* at 141.

⁶⁶ *Id.* at 144.

⁶⁷ *EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp. 2d 763, at 773, 820, 825, 845 (S.D. Ind. 2002).

⁶⁸ *Id.* at 825.

⁶⁹ *Id.* at 825–27.

⁷⁰ *EEOC v. United Health Programs of Am., Inc.*, 213 F. Supp. 3d 377 (E.D.N.Y. 2016).

⁷¹ *Id.* at 386, 417.

were told to “hold hands, hug, kiss and express love” at workplace meetings.⁷² Employees claimed that these requirements constituted “coerced adherence” to the company’s preferred religion.⁷³ And the court agreed that such claims, if proven at trial, would constitute “reverse religious discrimination.”⁷⁴

2. Indoctrination

In addition to resisting religious coercion in the workplace, the corporate religion cases also vindicate conscience principles by condemning employers’ attempts at religious indoctrination. For example, in *McClure v. Sports & Health Club, Inc.*, the operator of a health-club chain repeatedly questioned employees about their religious beliefs and marital status.⁷⁵ When the owners heard answers that did not conform to their own religious principles, they “preached at” employees for not living up to the company’s standards.⁷⁶ In response to employees’ complaints, the *McClure* court noted that although “the owners share an evangelical fervor to proselytize or convert others to their beliefs,” such practices in the corporate workplace amount to illegal discrimination on the basis of religion.⁷⁷

Likewise, in *Garcimonde-Fisher v. Area203 Marketing, LLC*, the court rejected a marketing company’s efforts to indoctrinate its employees.⁷⁸ The owner of Area203 was an evangelical Protestant who “believed his business should reflect his values.”⁷⁹ In carrying forward this belief, he was “openly defiant about the extent to which he brought religion into the workplace.”⁸⁰ One aspect of this defiance was subjecting employees to religious sermons about the evils of abortion and “homosexuals.”⁸¹ When company employees sued, claiming that the owner’s actions could interfere with their right to be free of religious indoctrination at work, the court found in the employees’ favor.⁸²

⁷² *Id.* at 417.

⁷³ *Id.* at 391.

⁷⁴ *Id.* at 405–19.

⁷⁵ *McClure v. Sports & Health Club, Inc.*, 370 N.W. 2d 844, 849 (Minn. 1985).

⁷⁶ *Id.*

⁷⁷ *Id.* at 847.

⁷⁸ *Garcimonde-Fisher v. Area203 Mktg., LLC*, 105 F. Supp. 3d 825, 831 (E.D. Tenn. 2015).

⁷⁹ *Id.*

⁸⁰ *Id.* at 832.

⁸¹ *Id.*

⁸² *Id.* at 841.

The *United Health* case also dealt with the issue of religious indoctrination.⁸³ In addition to work rules that required chanting and expressions of love, employees were exposed to repeated religious “preaching.”⁸⁴ Some employees were even expected to attend weekend retreats that were designed to promote “spiritual enlightenment.”⁸⁵ These efforts by the company and its management to push a particular religious program on its employees were characterized as “imposing religious practices and beliefs” and strongly supported employees’ claim that they were victims of reverse religious discrimination.⁸⁶

In the *Preferred Management* case, the court described perhaps the most extensive program of indoctrination. Preferred Management was accused of “push[ing]” religion on its employees in a variety of ways⁸⁷: It sent religious newsletters,⁸⁸ sponsored religious presentations and testimonials,⁸⁹ designed work rules around religious principles,⁹⁰ attempted to convert employees,⁹¹ showed religious videos at work,⁹² distributed Bible verses to employees,⁹³ and designed training and “improvement” programs along religious lines.⁹⁴ The *Preferred Management* court detailed these practices at great length, validating the EEOC’s claim that the company “*routinely* made their own religious values and preferences the guiding principals [sic] of daily work life.”⁹⁵ This program of indoctrination, in turn, was more than enough to support a claim that the company had established a hostile work environment.⁹⁶

⁸³ EEOC v. United Health Programs of Am., Inc., 213 F. Supp. 3d 377, 408 (E.D.N.Y. 2016).

⁸⁴ Id.

⁸⁵ Id. at 409.

⁸⁶ Id. at 391. In a similar case, *Yochum v. FJW Investment, Inc.*, the court found that a bathroom renovation company employee’s subjection to weekly training sessions that “consisted primarily of religious indoctrination and proselytizing” supported a finding of religious discrimination and constructive discharge. No. 2:11-0378, 2016 WL 1255289, at *1 (W.D. Pa. Mar. 31, 2016).

⁸⁷ EEOC v. Preferred Mgmt. Corp., 216 F. Supp. 2d 763, 777 (S.D. Ind. 2002).

⁸⁸ Id. at 778.

⁸⁹ Id. at 789.

⁹⁰ Id. at 818.

⁹¹ Id. at 819.

⁹² Id. at 825.

⁹³ Id. at 835–36.

⁹⁴ Id. at 839, 840, 842, 854.

⁹⁵ Id. at 818.

⁹⁶ Id. at 818–42.

3. *Religious Evaluation*

Beyond mandatory religious practices and explicit efforts at indoctrination, the corporate religion cases recognize that employee conscience can be threatened in more subtle ways. To begin with, courts have explained that when a company utilizes religious criteria in evaluating employees, those employees will feel significant pressure to conform to the company's religion. For example, in *McClure*, the corporate owners made all employment decisions—including hiring, promotion, and termination—based on religiously grounded precepts.⁹⁷ When the company conducted interviews, prospective employees were evaluated on the basis of whether they had a “teachable spirit.”⁹⁸ Only born-again Christians were permitted to assume managerial positions.⁹⁹ And employees were terminated for violation of work rules based on the Bible, including exhibiting a “non-joyful” attitude.¹⁰⁰ The Supreme Court of Minnesota explained that these various practices infringed on the rights of those who did not share the owners' religious beliefs.¹⁰¹

Employees in *Preferred Management* made similar claims against their corporate employer.¹⁰² For example, the company gave a supervisor explicit instructions “to include ‘trust in the Lord’ as part of the employee evaluation process.”¹⁰³ Likewise, management evaluated—and disciplined—employees on the basis of their conformity with the company's “Mission and Values Statement,” which was religious in nature.¹⁰⁴ In addition, workplace promotions were based in significant part on whether employees' religious views were consistent with the owner's.¹⁰⁵

In response to these allegations, the company's owner claimed that none of its practices violated the law. But the court was incredulous, explaining that the owner “wants it both ways”¹⁰⁶—that is, she wants to “operate her for-profit enterprise openly according to religious precepts” and at the same time to deny that “her decisions were based on the very

⁹⁷ *McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 847 (Minn. 1985).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 853.

¹⁰² *EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp. 2d 763 (S.D. Ind. 2002).

¹⁰³ *Id.* at 779.

¹⁰⁴ *Id.* at 823.

¹⁰⁵ *Id.* at 820.

¹⁰⁶ *Id.* at 843.

religious values and practices that she esteems and seeks to institutionalize.”¹⁰⁷ To evaluate employees according to religious criteria, the court continued, counted as direct evidence of discrimination, even without the owner’s admission that her motivation was illegal.¹⁰⁸

4. Religious Expectations

The corporate religion cases also recognize that a company’s religious “expectations” can have subtly coercive effects. For example, in *Garcimonde-Fisher*,¹⁰⁹ the court was highly skeptical of the idea that employee participation in the company’s religious programming was truly voluntary, given the deeply religious environment that the owner had established in the workplace.¹¹⁰ Despite the owner’s contention that there was no formal rule requiring employees to participate in the company’s religious practices, the court found that there was “[o]verwhelming pressure to conform” to the owner’s religion.¹¹¹

Indeed, the *Garcimonde-Fisher* court could detect little difference between this form of pressure and the outright coercion of employees in *Townley*.¹¹² In both cases, courts saw that employees were faced with a Hobson’s choice: “My religion or my job?”¹¹³ The *Garcimonde-Fisher* court found such a dilemma unacceptable, insisting that the law “forbids employers from forcing employees to make this choice whether overtly or covertly.”¹¹⁴

Similarly, the *United Health* court was sensitive to the power of an employer’s religious expectations.¹¹⁵ In *United Health*, company managers frequently distributed religious materials and encouraged workplace devotions.¹¹⁶ Although management did not promulgate any official rule making these devotions mandatory, the court noted that at least one employee “felt obligated” to read the company’s religious messages and participate in workplace prayers.¹¹⁷ This feeling of

¹⁰⁷ Id.

¹⁰⁸ Id. at 844 (evaluating the employees’ claims under a disparate treatment analysis).

¹⁰⁹ *Garcimonde-Fisher v. Area203 Mktg., LLC*, 105 F. Supp. 3d 825, 839 (E.D. Tenn. 2015).

¹¹⁰ Id. at 840.

¹¹¹ Id.

¹¹² See id.

¹¹³ Id.

¹¹⁴ Id.

¹¹⁵ *EEOC v. United Health Programs of Am., Inc.*, 213 F. Supp. 3d 377 (E.D.N.Y. 2016).

¹¹⁶ Id. at 407–19.

¹¹⁷ Id. at 415.

obligation, in turn, operated in much the same manner as an explicit company policy making those religious practices mandatory.

In *Erdmann v. Tranquility Inc.*, the court carefully explained how powerful employer expectations can be, even when employers insist that participation in religious activities is voluntary.¹¹⁸ In *Erdmann*, the owner and operator of a for-profit assisted living facility conducted daily prayers after morning meetings.¹¹⁹ The owner testified that it was her custom to inform employees that their participation in these prayers was not required. But when the owner asked a dissenting employee to say the daily prayers and she refused, the employee testified that the owner “appeared offended.”¹²⁰ When paired with the owner’s infusion of religion into the company’s daily environment, the court had little trouble perceiving how even such non-verbal pressure could significantly interfere with employee conscience.¹²¹

The *Preferred Management* court struck similar notes regarding the coercive power of employer expectations.¹²² Much like in *Erdmann*, the company in *Preferred Management* insisted that employees were free to opt out of the company’s extensive religious programming.¹²³ But the court saw right through this technical contention. While acknowledging that there was no written policy requiring employees to participate, the court noted that the owner’s expectations could amount to “a form of coercion—more subtle, perhaps, than an express policy on pain of discharge, but no less coercive.”¹²⁴ That is, a company’s expectations become requirements when they are backed by the implicit threat of consequences for failure to comply.¹²⁵

5. *Mixing Religion and Business*

The corporate religion cases also explain how the mixture of religion and ordinary business affairs can constitute yet another form of subtle coercion. For example, in *Blalock v. Metal Trades, Inc.*, the owner of an engineering company encouraged one of his employees to obey orders

¹¹⁸ *Erdmann v. Tranquility Inc.*, 155 F. Supp. 2d 1152 (N.D. Cal. 2001).

¹¹⁹ *Id.* at 1157.

¹²⁰ *Id.* at 1158.

¹²¹ *Id.* at 1162–66.

¹²² *EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp. 2d 763, 837 (S.D. Ind. 2002).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

issued by the owner's own spiritual guide.¹²⁶ At first, the employee agreed, but soon decided that he wished to distance himself from that relationship. Unhappy with this turn of events, the owner informed the employee that he was "laid off" until he made amends with the guide.¹²⁷ Although the employee pleaded with the owner not to mix his religion into business affairs, the owner refused, stating that the employee had "full knowledge and understanding that Metal Trades is a Christian Company and our rule book is the word of God, or the Bible."¹²⁸ In characterizing this situation, the *Blalock* court found that the company "spun an entangled web of work, religion and personal relationships."¹²⁹ This entangled web, in turn, pressured employees to conform to the company's religion and thereby constituted illegal discrimination.¹³⁰

Garcimonde-Fisher involved a similar mixture of religion and official business, leading the court to similar legal conclusions.¹³¹ In *Garcimonde-Fisher*, the company pervasively integrated religion into its affairs, sponsoring religious presentations, chaplains, decorations, and prayers during work hours.¹³² But even meetings that were ostensibly for "work" began with religious prayers.¹³³ The court explained that by keeping close tabs on those who chose not to participate in these prayers, the owner strongly conveyed the notion that negative employment consequences could follow from employees' lack of religious enthusiasm.¹³⁴

6. Religious Favoritism

Finally, the corporate religion cases describe how religious favoritism can infringe on employee conscience. The *Blalock* case provides a stark example. Recall that when the employee in *Blalock* began working for Metal Trades, he enjoyed a close religious relationship with the company's owner. On the basis of that relationship, the employee received preferential treatment. But when the employee began to change his religious views, he fell out of favor and was eventually discharged. Despite the fact that the employee's performance was substandard when

¹²⁶ *Blalock v. Metal Trades, Inc.*, 775 F.2d 703, 704–05 (6th Cir. 1985).

¹²⁷ *Id.* at 705.

¹²⁸ *Id.* at 705–06.

¹²⁹ *Id.* at 708 (quoting the district court).

¹³⁰ *Id.*

¹³¹ *Garcimonde-Fisher v. Area203 Mktg., LLC*, 105 F. Supp. 3d 825 (E.D. Tenn. 2015).

¹³² *Id.* at 831–33.

¹³³ *Id.* at 838.

¹³⁴ *Id.*

he was terminated, the court found that according him preferential treatment on the basis of religion interfered with his rights.¹³⁵

The *United Health* court went even further in illustrating the problems with religious favoritism in the workplace. In *United Health*, the court found that the company had given “favorable treatment to employees subscribing to the religious beliefs of the employer.”¹³⁶ But when some of those favored employees began pulling away from the company’s spiritual activities, they were terminated.¹³⁷ It was not hard for the court to perceive the power of such contingent religious preferences and how they could interfere with employees’ ability to follow their own conscientious commitments, wherever they may lead.¹³⁸

Taken together, the corporate religion cases provide strong support for the conscience principle. When a company takes on its own religious identity, employee conscience can be jeopardized in a variety of ways, from coercing participation in religious practices to religious indoctrination to the application of several more subtle forms of pressure to conform to the company’s religious orthodoxy. Under the banner of combating employment discrimination, courts hearing corporate religion cases have protected employee conscience from these various forms of religious imposition.

B. Non-domination

The second major principle embedded in the corporate religion cases is non-domination. The non-domination principle is concerned with limiting the arbitrary use of employer power. This principle does not hold that employer power is always problematic or abusive. To the contrary, it concedes that corporate employers may—and often must—police workplaces in the interest of efficient production. But at the same time, the cases recognize that there are limits to the scope of employer power,

¹³⁵ *Blalock v. Metal Trades, Inc.*, 775 F.2d 703, 708–09 (6th Cir. 1985).

¹³⁶ *EEOC v. United Health Programs of Am., Inc.*, 213 F. Supp. 3d 377, 408 (E.D.N.Y. 2016).

¹³⁷ *Id.* at 409–10.

¹³⁸ *Id.* at 413–17. For another corporate religion case discussing religious favoritism, see *Noyes v. Kelly Servs.*, 488 F.3d 1163, 1172 (9th Cir. 2007) (holding that religious favoritism toward co-religionists supported reverse religious discrimination claim against an office staffing company).

and that those limits are tied to the business rationales for organizing production through firms in the first place.

1. Domination at Work

Once again, *Townley* is a leading case.¹³⁹ Although the *Townley* court was concerned with employee conscience,¹⁴⁰ it was careful not to ignore the interests of the business itself. More specifically, the court explained that a business need not suffer significant hardship to accommodate employee conscience.¹⁴¹ But at the same time, the court emphasized that the company must demonstrate that such hardship would have an “adverse impact on the conduct of the business.”¹⁴²

According to the *Townley* court, this business limitation on the use of corporate authority is baked into Title VII itself. The court explained that the statute “posits a gain-seeking employer” concerned with “promoting its economic efficiency.”¹⁴³ Moreover, the court explained that this is a “legitimate supposition with respect to corporate employers.”¹⁴⁴ And so, according to the *Townley* court, a business’s need to control the workplace may trump employee conscience in any number of circumstances, but only when that control is premised on reasons related to the economic logic of the corporate workplace. The flip side of this limitation is that the company is *not* permitted to enforce its own religious views. Stripping an employer of such enforcement power may restrict its autonomy, but a company’s complaints about such a restriction are “irrelevant if it has no effect on [the company’s] economic well-being.”¹⁴⁵

¹³⁹ EEOC v. *Townley Eng’g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988).

¹⁴⁰ See *supra* notes 58–61 and accompanying discussion.

¹⁴¹ *Townley*, 859 F.2d at 615.

¹⁴² *Id.*

¹⁴³ *Id.* at 616.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* One might be inclined to question whether the recent rise of corporate religion described in Part I renders the *Townley* court’s “gain-seeking employer” anachronistic. But a close reading of *Townley* reveals that by positing a gain-seeking employer, the court was not merely reporting on an empirical regularity, either at the time Title VII was passed or at the time of the decision. Instead, the court was offering a moral reading of Title VII, which says that the best account of the statutory scheme assumes weaker religious interests among corporate employers. The best evidence for this view is that the *Townley* court explicitly acknowledged the sincerity of the owner’s religious beliefs with regard to integrating religious practices in the workplace and yet denied that those sincere beliefs entitled the company to a religious exemption from Title VII. See *id.* at 621.

The *McClure* court expressed a similar idea about the limits of corporate authority. Much like in *Townley*, the corporate owners in *McClure* wanted to extend their control over the workplace so as to enforce their own view of religious piety.¹⁴⁶ And once again, the *McClure* court was sensitive to the owners' interests, conceding that state antidiscrimination law "infringes upon sincerely held religious beliefs and imposes upon the free exercise thereof."¹⁴⁷ Yet in the "economic arena," the *McClure* court found that enforcement of religious conformity would erect yet another "irrelevant barrier . . . to the main decision of competence to perform the work."¹⁴⁸

A recent case, *Mathis v. Christian Heating & Air Conditioning, Inc.*, crystallizes the link between legitimate exercise of employer power and the employer's business interests.¹⁴⁹ In *Mathis*, an HVAC company fired an employee because he refused to remove a piece of tape he had placed over a religious message on the back of his company nametag.¹⁵⁰ The company moved for summary judgement, claiming that it would suffer an undue hardship if it had to "suppress[]" its religious beliefs.¹⁵¹ But the court rejected that argument, noting that the company "presented no evidence showing that its business would suffer or be made more difficult if it permitted plaintiff to cover the mission statement."¹⁵² Importantly, the court never questioned whether the company could use its authority to require employees to wear nametags—a practice with a clear and close nexus to business objectives. Yet it refused to accept the company's extension of that power to secure support for its religious expression.

2. Domination Outside the Workplace

The non-domination principle also prevents corporate employers from extending their authority to enforce religious conformity outside the workplace. In *United Health*, for example, an employee claimed that the company had ordered her to move her residence so that the managers

¹⁴⁶ *McClure v. Sports & Health Club, Inc.*, 370 N.W. 2d 844, 846 (Minn. 1985).

¹⁴⁷ *Id.* at 853.

¹⁴⁸ *Id.*

¹⁴⁹ *Mathis v. Christian Heating & Air Conditioning, Inc.*, 158 F. Supp. 3d 317 (E.D. Pa. 2016).

¹⁵⁰ *Id.* at 320–23.

¹⁵¹ *Id.* at 333.

¹⁵² *Id.*

could be her family.¹⁵³ In assessing evidence against the company, the court explained that this “religious dictate” contributed to a finding of illegal religious discrimination.¹⁵⁴

The non-domination principle also informed the court’s decision in *Erdmann*.¹⁵⁵ In *Erdmann*, the court recounted how the company tried to exert religious control over various aspects of an employee’s life.¹⁵⁶ For example, the court considered evidence that the owner pressured the employee to “give up his homosexuality and become a Mormon.”¹⁵⁷ It also noted that the company appeared to tell the employee to reveal private details about his sex life so that other employees would not assume that he was promiscuous.¹⁵⁸ Such employer overreach, according to the *Erdmann* court, supported a finding of religious harassment based on a hostile work environment.¹⁵⁹

Sarenpa v. Express Images Inc. provides yet another example of resistance to employer domination outside the workplace.¹⁶⁰ In *Express Images*, the court described efforts by company managers to convince an employee that he should reconsider his decision to leave his wife.¹⁶¹ After seeing the employee with another woman, the owners of the company confronted him and told him that “there was never a reason for adultery.”¹⁶² Just as in *United Health* and *Erdmann*, the *Express Images* court found that the corporate employer was impermissibly attempting to extend its authority beyond its legitimate economic scope.¹⁶³

Finally, in *Mathis*, the court was troubled by the company’s attempt to influence an employee’s religious behavior outside the office.¹⁶⁴ In addition to requiring its employee to wear a nametag with a religious message, the company also repeatedly pressured him to attend church.¹⁶⁵

¹⁵³ EEOC v. United Health Programs of Am., Inc., 213 F. Supp. 3d 377, 408 (E.D.N.Y. 2016).

¹⁵⁴ Id. at 408–10.

¹⁵⁵ Erdmann v. Tranquility Inc., 155 F. Supp. 2d 1152 (N.D. Cal. 2001).

¹⁵⁶ Id. at 1154–58.

¹⁵⁷ Id. at 1161.

¹⁵⁸ Id.

¹⁵⁹ Id.

¹⁶⁰ Sarenpa v. Express Images Inc., No. Civ. 04-1538, 2005 WL 3299455 (D. Minn. Dec. 1, 2005).

¹⁶¹ Id. at *1–4.

¹⁶² Id. at *1.

¹⁶³ Id. at *4.

¹⁶⁴ Mathis v. Christian Heating & Air Conditioning, 158 F. Supp. 3d 317, 334 (E.D. Pa. 2016).

¹⁶⁵ Id. at 321, 331, 334.

In finding that the employee's retaliation claim survived a motion for summary judgment, the court had no trouble concluding that such pressure, if proven at trial, would be unlawful under Title VII.¹⁶⁶

3. *Paying for (Religious) Performance?*

To be sure, corporate employers have resisted the idea that their authority is limited in these ways. In several of the corporate religion cases, companies have advanced some version of the claim that they *pay* for employees' time and can therefore do whatever they want with it.¹⁶⁷ In *Townley*, for example, the company insisted that "[e]mployees are paid for their time while attending [religious] services."¹⁶⁸ Amplifying this point in dissent, Judge John T. Noonan observed that the religious services "took place on company property during company time."¹⁶⁹

Indeed, the corporate employer in *McClure* went even further, insisting that the terms of the employment contract required complete employee submission.¹⁷⁰ In other words, the company argued that it was legally entitled to have employees conform their private lives, including their family and marital relationships, to the company's religious views.¹⁷¹ Writing in dissent, Justice Peterson sharpened this point, arguing that the company should not be forced to "subsidize [immoral relationships] with employment" and should be entitled to insist on "submission to authority."¹⁷² Lying barely beneath the surface of these statements is the notion that an employee's salary pays for religious compliance.

But courts have resisted this expansive use of economic leverage over employees. In *Townley*, the court emphatically rejected the notion that an employer is entitled to religious subservience in return for paying an employee's salary.¹⁷³ And in *McClure*, the court similarly denounced the

¹⁶⁶ Id. at 334.

¹⁶⁷ See, e.g., *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 622 (9th Cir. 1988) (Noonan, J., dissenting); *Young v. Sw. Sav. & Loan Ass'n*, 509 F.2d 140, 142 (5th Cir. 1975); *EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp. 2d 763, 827 (S.D. Ind. 2002); *Sarenpa v. Express Images Inc.*, No. Civ. 04-1538, 2005 WL 3299455, at *2 (D. Minn. Dec. 1, 2005); see also *Brown Transp. Corp. v. Pa. Human Relations Comm'n*, 578 A.2d 555, 561 (Pa. Commw. Ct. 1990) (recounting supervisor's statement to "[b]e happy you have a job and are getting a paycheck" in response to employee complaint about company religious practices).

¹⁶⁸ *Townley*, 859 F.2d at 612.

¹⁶⁹ Id. at 622 (Noonan, J., dissenting).

¹⁷⁰ *McClure v. Sports & Health Club, Inc.*, 370 N.W. 2d 844, 846-53 (Minn. 1985).

¹⁷¹ Id.

¹⁷² Id. at 858 (Peterson, J., dissenting).

¹⁷³ *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 615-17 (9th Cir. 1988).

claim that corporate employers can demand “submissiveness” and “obedien[ce]” over all matters.¹⁷⁴

More specifically, the corporate religion cases stand for the idea that exercising corporate authority requires a legitimate *economic* justification. In *Young*, for example, an employee’s request to be excused from religiously infused business meetings was met with the response that “it was a part of her job to attend.”¹⁷⁵ The court found that such an attitude on the part of the corporate employer amounted not to a reasonable balance of an employer’s business needs and an employee’s rights, but instead to a demand of “unconditional surrender to the company policy of compulsory attendance at religious services.”¹⁷⁶

Similarly, in *McClure*, the company insisted that employees surrender not only their time and effort while at work, but also their entire personalities.¹⁷⁷ For example, employees were required to comply with religious work rules “in a cheerful and obedient spirit,”¹⁷⁸ reflecting a high degree of “submissiveness.”¹⁷⁹ Justice Peterson’s dissent defended this demand for complete submission to the employer’s will on the grounds that “an employer is entitled to the undivided loyalty of its representatives.”¹⁸⁰ But the majority in *McClure* rejected this anachronistic conception of employment, according to which corporate employers are masters and employees are put in a position of subservience and tutelage.¹⁸¹

The *Blalock* case also involved an employee’s claim that he was terminated over failure to live up to the company’s religious expectations for his private life.¹⁸² To support this claim, the employee produced a letter in which the company defended its decision to terminate him on the grounds that he refused “to submit himself to those in authority over him and the Bible makes it clear that we are to be in submission.”¹⁸³ The court

¹⁷⁴ *McClure*, 370 N.W. 2d at 847–48.

¹⁷⁵ *Young v. Sw. Sav. & Loan Ass’n*, 509 F.2d 140, 142 n.4 (5th Cir. 1975).

¹⁷⁶ *Id.* at 145.

¹⁷⁷ *McClure v. Sports & Health Club, Inc.*, 370 N.W. 2d 844, 847 (Minn. 1985).

¹⁷⁸ *Id.* at 848.

¹⁷⁹ *Id.* at 847.

¹⁸⁰ *Id.* at 858 (Peterson, J., dissenting).

¹⁸¹ *Id.* at 853.

¹⁸² *Blalock v. Metal Trades, Inc.*, 775 F.2d 703, 704–06 (6th Cir. 1985).

¹⁸³ *Id.* at 706.

found, however, that such demands of ultimate submission are inconsistent with the law.¹⁸⁴

Finally, in *Preferred Management*, employees were expected to be in complete submission to their employer's will.¹⁸⁵ The *Preferred Management* court recounted one instance in which an employee complained about religion in the workplace, and the owner responded that "her kind was the hardest kind to break."¹⁸⁶ Another employee observed that "as far as religious views were concerned, 'it was [the owner's] way or the highway.'"¹⁸⁷ In short, the company expected not only productive labor from its employees, but also unconditional religious surrender. But the court in *Preferred Management* was clear that such unconditional surrender was not a permissible term of corporate employment.¹⁸⁸

In *Young, McClure, Blalock*, and *Preferred Management*, courts could not perceive any significant relationship between the companies' expansive assertions of religious authority and the efficient operation of their economic affairs. Instead, these courts saw only impermissible efforts to dominate employees' wills.¹⁸⁹ These cases, then, reflect the idea that neo-feudal notions of employer dominion, in which employees "bow and scrape" for the favor of their employers, are deeply antithetical to the law's commitment to worker freedom and dignity.¹⁹⁰

The corporate religion cases, in short, show that companies are not permitted to extend their authority over workers indefinitely. Companies are forbidden from leveraging their considerable economic power to achieve employees' religious compliance, whether those employees are at work or outside the office. And while a salary may pay for many things, it does not entitle companies to dominate employees' deepest projects and commitments.

¹⁸⁴ Id. at 713 (remanding case to the district court).

¹⁸⁵ EEOC v. Preferred Mgmt. Corp., 216 F. Supp. 2d 763, 830, 835 (S.D. Ind. 2002).

¹⁸⁶ Id. at 821.

¹⁸⁷ Id.

¹⁸⁸ Id. at 818–24.

¹⁸⁹ See, e.g., id. at 821, 823, 830, 835.

¹⁹⁰ See Elizabeth Anderson, *Private Government: How Employers Rule Our Lives (and Why We Don't Talk About It)* 20 (2017) [hereinafter Anderson, *Private Government*]; Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 Mich. L. Rev. 225, 227 (2013). Philip Pettit has given the most sophisticated philosophical elaboration of the non-domination principle. See, e.g., Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (2012); Philip Pettit, *Republicanism: A Theory of Freedom and Government* (1997); Philip Pettit, *Freedom as Antipower*, 106 Ethics 576 (1996).

C. Mutual Respect

The corporate religion cases contain a third major principle, namely, mutual respect. The idea of mutual respect may seem abstract at first, but it springs from recognition that participants in the modern business world hold diverse and irreconcilable views on the deepest religious, philosophical, and moral questions. Rather than viewing this diversity of deep commitments as a problem for social cohesion, the principle of mutual respect instead encourages a spirit of reciprocity and equal dignity.

1. Reciprocity

In a powerful and enduring passage, the *Townley* court captured the idea of reciprocity in the face of diversity. The court explained that when employees do not share their company's religion, "Title VII attempts to reach a mutual accommodation of the conflicting religious practices."¹⁹¹ This mutual accommodation, according to the *Townley* court, "is consistent with the First Amendment's goal of ensuring religious freedom in a society with many different religions and religious groups."¹⁹² On this view, we have strong reasons to let others determine for themselves what is most important in life, provided that they do the same for us, and to resist the temptation to leverage economic advantages in service of religious ends.

Similarly, the *McClure* court emphasized the need for mutual respect and toleration in a diverse modern workplace. It observed that "[i]n a pluralistic and democratic society, government has a responsibility to insure that all its citizens have equal opportunity for employment, promotion, and job retention without having to overcome the artificial and largely irrelevant barriers occurring from gender, status, or beliefs"¹⁹³ Consistent with the rest of antidiscrimination law, the *McClure* court urged companies not to indoctrinate or proselytize employees, but instead to focus on their "competence to perform the work."¹⁹⁴

¹⁹¹ EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 621 (9th Cir. 1988).

¹⁹² *Id.*

¹⁹³ McClure v. Sports & Health Club, Inc., 370 N.W. 2d 844, 853 (Minn. 1985).

¹⁹⁴ *Id.*

2. Equal Dignity

Perhaps most importantly, courts have blocked the path of religious companies that attempt to deny employees equal dignity by denigrating or disparaging them on the basis of their deepest commitments. Examples from the corporate religion cases abound. For starters, in *Preferred Management*, the company engaged in numerous acts of overt religious disparagement. These acts ranged from telling an employee that she would “burn in hell forever”¹⁹⁵ to calling non-conforming employees “vain sinner[s]”¹⁹⁶ to repeatedly referring to those same employees as “broken people” with “wounded spirits.”¹⁹⁷ Employees testified that these comments led to feelings of “ostracism,” “marginalization,” and “the sense of having been cast out or excluded.”¹⁹⁸ Crediting that testimony, the court explained that it supported a finding that nonconforming employees experienced “intimidating or humiliating” conditions at work.¹⁹⁹

Similarly, in *Meltebeke v. Bureau of Labor & Industries*, the owner of a painting company explicitly disparaged an employee on the basis of his religion. For example, the employee was told multiple times that he was “a sinner who would go to hell.”²⁰⁰ And in an attempt to justify its religious preferences in hiring, the company claimed that employees who do not share the owner’s religious beliefs would be more likely to commit theft.²⁰¹ According to the court, the employer’s arguments trying to justify its religious practices were “not well taken.”²⁰²

Finally, in *Garcimonde-Fisher*, the corporate employer denigrated employees based on their acceptance of different Christian beliefs.²⁰³ For example, several employees were told that they were using the wrong version of the Bible.²⁰⁴ These employees were also informed that they were “not the right kind of Christian.”²⁰⁵ In short, anyone not sharing the precise religious beliefs of the employer was subject to ridicule. But the

¹⁹⁵ EEOC v. Preferred Mgmt. Corp., 216 F. Supp. 2d 763, 777 (S.D. Ind. 2002).

¹⁹⁶ Id. at 823, 835, 849.

¹⁹⁷ Id. at 800, 830, 846, 854.

¹⁹⁸ Id. at 838.

¹⁹⁹ Id. at 824.

²⁰⁰ Meltebeke v. Bureau of Labor & Industry, 903 P.2d 351, 353 (Or. 1995).

²⁰¹ Id. at 359.

²⁰² Id.

²⁰³ Garcimonde-Fisher v. Area203 Mktg., LLC, 105 F. Supp. 3d 825 (E.D. Tenn. 2015).

²⁰⁴ Id. at 832.

²⁰⁵ Id. at 833.

court held that such ridicule, in a religiously diverse workplace, supported employees' hostile work environment claims.²⁰⁶

3. *Respect or Regret?*

Although the principle of mutual respect is ingrained in the corporate religion cases, it is only one possible reaction to increasing religious diversity. Critics of the mutual respect principle have resisted the idea that religious diversity should be celebrated—or at least tolerated—on the grounds that such diversity makes it more difficult to get along with each other and to share values as a community. For proponents of this view, the proper response to growing religious diversity is not mutual respect, but instead moral regret.

²⁰⁶ *Id.* at 837–41. In the time since these cases were decided, the concern for equal dignity in a diverse, modern workplace has only grown more pressing. In the last decade, the American workplace has come to see unprecedented levels of religious pluralism, which has largely tracked societal trends more generally. See Dallan F. Flake, *Religious Discrimination Based on Employer Misperception*, 2016 *Wis. L. Rev.* 87, 92 (“The growing diversity of religions in American society is likewise evident in its workforce.”); see also Survey Report, Society for Human Resource Management, *Religion and Corporate Culture: Accommodating Religious Diversity in the Workplace* 5–6 (2008), https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Documents/08-0625ReligionSR_updtFINAL.pdf [<https://perma.cc/Y9WA-QAAQ>] (discussing data on religious diversity in the workplace). For example, over the last ten years there has been a significant decline in the percentage of Americans who profess Christian beliefs. Pew Research Ctr., *America’s Changing Religious Landscape* 3 (2015). During that same time, there has also been a sharp rise in the number of Americans who do not identify with any particular religious tradition. See *id.* at 30. That trend has been especially stark among those who identify as atheist or agnostic. *Id.* at 10. This phenomenon, often referred to as the “rise of the nones,” has been so dramatic that, as a group, the religiously unaffiliated are now second in size only to evangelical Protestants in the United States. *Id.* at 3, 32. The last decade has also seen a significant uptick in the number of Americans professing non-Christian faiths, especially among Muslims and Hindus. Since 2007, for example, the number of Muslims in the United States has more than doubled according to the best available estimates. *Id.* at 28. And, due to difficulties in collecting data in this area, these estimates likely understate the current size of the overall Muslim population. *Id.* But even among Christians, diversity is the order of the day. That is, even within the purportedly “dominant” religious tradition in the United States, there are innumerable differences in denominational affiliation and creedal commitment. For example, researchers divide Protestants into more than a dozen subcategories—including Baptist, Methodist, Lutheran, and Presbyterian. *Id.* at 38. These subcategories, moreover, tend to gloss over significant differences and variations within each named group. For example, they do not account for the considerable differences between the Evangelical Lutheran Church in America (ELCA), see <https://www.elca.org/> [<https://perma.cc/XE9V-5NQR>], and the Lutheran Church—Missouri Synod, see <https://www.lcms.org/> [<https://perma.cc/4K4G-G7A3>].

This attitude of moral regret is palpable in Justice Peterson's *McClure* dissent.²⁰⁷ For example, Justice Peterson quotes at length theologians who lament our "secular and pluralistic republic," which poses "a problem when it comes to reaching people and reforming society."²⁰⁸ He even accuses the state attorney general of "com[ing] close to defaming Jesus" in trying to enforce the state's antidiscrimination laws.²⁰⁹ Justice Peterson's account, in turn, poses a serious challenge to the principle of mutual respect. If religious diversity is best regarded as an impediment to community, as his dissent implies, then antidiscrimination law's goal of preserving that diversity is fundamentally misguided.

But courts hearing corporate religion cases have had good reason to reject this view. They have recognized that most employees join a corporate workplace to share in the mutual benefits of economic cooperation. In doing so, employees bring with them a wide variety of deep commitments and projects, shaped by their own individual processes of identity formation. Courts have understood that corporate employees, when exercising their moral powers conscientiously, should not be expected to come to the same conclusions about religion.²¹⁰

Instead, the corporate religion cases treat deep pluralism of constitutive projects and commitments as the inevitable result of living in a free society. And these cases have concluded, as a consequence, that the proper attitude with regard to that pluralism is not moral regret, but instead mutual respect.²¹¹ The mutual respect principle recognizes that

²⁰⁷ *McClure v. Sports & Health Club, Inc.*, 370 N.W. 2d 844, 854–76 (Minn. 1985) (Peterson, J., dissenting).

²⁰⁸ *Id.* at 860 (Peterson, J., dissenting).

²⁰⁹ *Id.* at 859 (Peterson, J., dissenting).

²¹⁰ Rather than argue that increasing religious diversity is a matter of moral regret, a critic might instead make the more modest claim that such diversity is best accommodated on an institutional level. On this account, the fact of religious pluralism means that we need to have a diversity of mediating institutions—including for-profit businesses—that respond to it. But given the wide variety in people's religious projects and commitments, it seems unlikely that the market would supply jobs that match employees' skills and their precise religious preferences. And even if the variety of religious businesses could match the variety of individual religious commitments, the institutional pluralist strategy would need to assume away monopsony power in labor markets and employees' firm-specific investments for its sorting mechanism to produce desirable outcomes. For further discussion of this point, see James D. Nelson, *The Trouble with Corporate Conscience*, 71 *Vand. L. Rev.* 1655, 1684–85 (2018).

²¹¹ See *supra* notes 191–206 and accompanying text. For more on the idea of mutual respect, see Rawls, *supra* note 56, at xvii, 36; Martha C. Nussbaum, *Perfectionist Liberalism and Political Liberalism*, 39 *Phil. & Pub. Aff.* 3, 16 (2011); Colin Bird, *Mutual Respect and Neutral*

employers may have serious religious commitments, but it forbids them from engaging in religious proselytization and denigration in the workplace.

III. CORPORATE DISESTABLISHMENT

The previous Part developed three limiting principles for corporate religion: freedom of conscience, non-domination, and mutual respect. These principles emerge from cases involving employee challenges to their companies' religious practices. This Part argues that the limiting principles embedded in the corporate religion cases resemble a central strand of Establishment Clause doctrine and theory that prohibits *state* imposition of religion. It then argues that this convergence of limiting principles should not be surprising, given structural similarities between corporate and state power, and attempts to situate the idea of corporate disestablishment within the larger practice of extending compelling constitutional values to the private workplace.

A. Establishment Clause Symmetry

In *Everson v. Board of Education of the Township of Ewing*, the Supreme Court set forth the central organizing principles of modern Establishment Clause jurisprudence.²¹² Among its core precepts, the *Everson* Court explained that the government may not “force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion.”²¹³ To do so would amount to enforcing religious orthodoxy, which is constitutionally forbidden.²¹⁴ That is, the *Everson* Court explained that whatever else it

Justification, 107 Ethics 62 (1996); Jonathan Quong, Liberalism Without Perfection 256–65 (2011); see also Christopher L. Eisgruber & Lawrence G. Sager, Religious Freedom and the Constitution 53 (2007) (arguing in favor of equal respect for persons who have diverse religious commitments); cf. Brian Leiter, Why Tolerate Religion? 69–72 (2013) (discussing Stephen Darwall’s distinction between the minimal concept of “recognition respect” and the more positive concept of “appraisal respect”).

²¹² 330 U.S. 1 (1947).

²¹³ *Id.* at 15.

²¹⁴ See *id.* at 15–16; see also *Lee v. Weisman*, 505 U.S. 577, 587, 591–92 (1992) (discussing *Everson*); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

might cover, at the very least the Establishment Clause bars the government from imposing religion on its citizens.²¹⁵

Following *Everson*, the Supreme Court's Establishment Clause cases have elaborated this central meaning in terms of conscience, non-domination, and mutual respect. Beginning with freedom of conscience, the Court in *Abington School District v. Schempp* amplified *Everson's* core message of religious liberty, stating that "[n]othing but the most telling of personal experiences in religious persecution suffered by our forebears . . . could have planted our belief in liberty of religious opinion any more deeply in our heritage."²¹⁶ This account of conscience drew heavily on the views of James Madison, Thomas Jefferson, and Roger Williams. In fact, the *Schempp* Court went so far as to say that "the views of Madison and Jefferson, preceded by Roger Williams, came to be incorporated not only in the Federal Constitution but likewise in those of most of our States."²¹⁷

As for Madison's views on religious liberty, his famous *Memorial and Remonstrance Against Religious Assessments* remains the canonical text.²¹⁸ In the *Memorial*, Madison protested the Virginia legislature's efforts to levy a tax in support of clergy. Finding that such a tax would pose grave threats to citizens' liberty, Madison wrote that "[t]he Religion

²¹⁵ See Schwarz, *supra* note 11. Scholars and courts continue to debate the outer boundaries of the Establishment Clause. For example, the question whether pure religious "endorsements," absent coercion, amount to Establishment Clause violations remains in hot contention. See, e.g., *Town of Greece v. Galloway*, 572 U.S. 565 (2014) (holding that town's legislative prayer does not violate the Establishment Clause); *Elmbrook Sch. Dist. v. Doe*, 573 U.S. 922, 922–926 (2014) (Scalia, J., dissenting from denial of certiorari) (arguing that *Town of Greece* rejected the "endorsement test"); Gary J. Simson, *Religious Arguments by Citizens to Influence Public Policy: The Lessons of the Establishment Clause*, 66 *Mercer L. Rev.* 273, 288–308 (2015) (disputing Justice Scalia's claim that the Supreme Court has abandoned the "endorsement test").

²¹⁶ 374 U.S. 203, 214 (1963) (citation omitted).

²¹⁷ *Id.* (footnote omitted). Indeed, the *Schempp* Court quoted Williams at length: "There goes many a ship to sea, with many hundred souls in one ship, whose weal and woe is common, and is a true picture of a commonwealth, or human combination, or society. It hath fallen out sometimes, that both Papists and Protestants, Jews and Turks, may be embarked in one ship; upon which supposal, I affirm that all the liberty of conscience I ever pleaded for, turns upon these two hinges, that none of the Papists, Protestants, Jews, or Turks be forced to come to the ship's prayers or worship, nor compelled from their own particular prayers or worship, if they practice any." *Id.* at 214 n.6 (quoting Roger Williams, *Letter to the Town of Providence* (Jan. 1655), available at http://press-pubs.uchicago.edu/founders/documents/amendI_religions6.html [<https://perma.cc/3SLA-3XT4>]).

²¹⁸ James Madison, *Memorial and Remonstrance Against Religious Assessments*, in James Madison, *Writings* 29, 29–36 (Jack N. Rakove ed., 1999).

then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.”²¹⁹ For Madison, freedom of conscience was a “sacred” right, no less important than any of our other political freedoms.²²⁰

Jefferson’s views on freedom of conscience ran along similar lines. In his preface to the Virginia Bill for Establishing Religious Freedom, for example, Jefferson wrote that “no man . . . shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion”²²¹ Like Madison’s *Memorial*, Jefferson’s preface—and the conscience principles contained therein—has proven enormously influential in the Court’s understanding of the Establishment Clause.²²²

Perhaps the clearest modern articulation of the Establishment Clause’s conscience principle came in *Wallace v. Jaffree*.²²³ In the course of striking down Alabama’s moment-of-silence law, the *Wallace* Court explained that “the First Amendment was adopted to curtail the power of Congress to interfere with the individual’s freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience.”²²⁴ Relying heavily on Madison’s *Memorial*, the *Wallace* Court emphasized that freedom of conscience was not limited to “the individual’s freedom to choose his own creed,” but extended naturally to “his right to refrain from accepting the creed established by the majority,”²²⁵ including “the right to select any religious faith or none at all.”²²⁶ Going even further, the *Wallace* Court explained that freedom of conscience is not only central to the Establishment Clause, but “unifies the various Clauses in the First Amendment.”²²⁷

Through the years, the Supreme Court has explored several more specific aspects of the conscience principle. In *Torcaso v. Watkins*, for

²¹⁹ *Id.* at 30.

²²⁰ *Id.* at 35.

²²¹ Thomas Jefferson, A Bill for Establishing Religious Freedom, in 2 *The Papers of Thomas Jefferson* 545, 546 (Julian P. Boyd et al. eds., 1950).

²²² See, e.g., *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 878–80 (2005) (discussing Jefferson’s views).

²²³ 472 U.S. 38 (1985).

²²⁴ *Id.* at 49.

²²⁵ *Id.* at 52.

²²⁶ *Id.* at 53.

²²⁷ *Id.* at 50.

example, the Court confronted the issue of forced religious conformity.²²⁸ In *Torcaso*, the Governor of Maryland had appointed Roy Torcaso as a notary public, but the state withheld his commission because he refused to declare belief in God.²²⁹ Quoting *Everson*, the *Torcaso* Court reaffirmed that the government may not force a person “to profess a belief or disbelief in any religion.”²³⁰ Such forced religious conformity, according to the Court, is patently unconstitutional.²³¹

The Supreme Court has also condemned explicit efforts at religious indoctrination, particularly in the context of public schools.²³² In *McCullum v. Board of Education*, for example, the Court struck down an Illinois public school program that provided weekly religious instruction in the classroom.²³³ This program, according to Justice Frankfurter’s concurrence, “actively further[ed] inculcation in the religious tenets of some faiths,” which violates the Constitution.²³⁴

The Court has also been attentive to less direct methods of religious imposition. In the *Schempp* case, for example, the Court considered an Establishment Clause challenge to a Pennsylvania statute that provided for Bible readings in public schools.²³⁵ Although these Bible readings took place at the beginning of every school day, there was a procedure by which students could be excused if their parents so desired.²³⁶ The *Schempp* Court recognized that the excusal procedure made it so that these daily prayers were not technically mandatory, but held that this

²²⁸ 367 U.S. 488 (1961).

²²⁹ *Id.* at 489.

²³⁰ *Id.* at 495.

²³¹ *Id.*

²³² See, e.g., *McCullum v. Bd. of Educ.*, 333 U.S. 203 (1948); *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Lee v. Weisman*, 505 U.S. 577 (1992). The Court has suggested that mature adults may not be as susceptible to indoctrination as school children. See *Marsh v. Chambers*, 463 U.S. 783, 792 (1983); *Town of Greece v. Galloway*, 572 U.S. 565, 582–83, 590–91 (2014). But these comments were made in the course of deciding legislative prayer cases, in which the Court was concerned primarily with the audience of fellow legislators, rather than subordinates. See, e.g., *Town of Greece*, 572 U.S. at 587–88; *id.* at 633–34 (Kagan, J., dissenting). Moreover, the Court has elsewhere been explicit that its concern with indoctrination is not limited to schools. See *Lee*, 505 U.S. at 592. This broader view is consistent with courts’ solicitude for employee indoctrination in the corporate religion cases. See *supra* Subsection II.A.2.

²³³ 333 U.S. 203 (1948).

²³⁴ *Id.* at 228 (Frankfurter, J., concurring).

²³⁵ *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 205 (1963).

²³⁶ *Id.*

feature of Pennsylvania's statute made little difference.²³⁷ As Justice Brennan explained in his concurrence, "by requiring what is tantamount in the eyes of teachers and schoolmates to a profession of disbelief, or at least of nonconformity, the [excusal] procedure may well deter those children who do not wish to participate for any reason based upon the dictates of conscience"²³⁸

In *Lee v. Weisman*, the Court reaffirmed the notion that indirect pressure toward religious conformity can be just as powerful as outright religious coercion.²³⁹ In *Weisman*, the Court had to decide whether inclusion of prayers during a middle school graduation violated the Establishment Clause.²⁴⁰ Writing for the Court, Justice Kennedy explained that the prayer at issue was technically voluntary, in that attendance at the graduation ceremony was not required for students to receive their diplomas.²⁴¹ Yet despite this technicality, the Court found that participation in the ceremony—and therefore the religious prayer—was "in a fair and real sense obligatory."²⁴² The indirect pressure felt by students who found themselves in this situation, the Court concluded, was "as real as any overt compulsion."²⁴³

The Court's Establishment Clause jurisprudence also reflects deep concern for religious preferences or favoritism and the accompanying disadvantages felt by religious minorities. In *Wallace*, for example, the Alabama legislature inserted the words "or voluntary prayer" in its otherwise facially neutral moment-of-silence law.²⁴⁴ This insertion, according to the Court, was meant to "characterize prayer as a favored practice."²⁴⁵ Finding that such favoritism violates the Establishment Clause, the Court observed that "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."²⁴⁶

²³⁷ Id. at 224–25.

²³⁸ Id. at 289 (Brennan, J., concurring).

²³⁹ *Lee v. Weisman*, 505 U.S. 577, 593 (1992).

²⁴⁰ Id. at 580–87.

²⁴¹ Id. at 583, 586.

²⁴² Id. at 586.

²⁴³ Id. at 593.

²⁴⁴ *Wallace v. Jaffree*, 472 U.S. 38, 59–60 (1985).

²⁴⁵ Id. at 60.

²⁴⁶ Id. at 60–61 n.51 (alteration in original) (quoting *Engel v. Vitale*, 370 U.S. 421, 431 (1962)).

In addition to protecting individual conscience, the Court's Establishment Clause jurisprudence parallels the non-domination principle from the corporate religion cases. In *Engel v. Vitale*, for example, the Court found that New York's daily school prayers were unconstitutional,²⁴⁷ invoking Madison's worry about the creeping nature of uncontrolled state power.²⁴⁸ Quoting the *Memorial*, the Court declared that "[i]t is proper to take alarm at the first experiment on our liberties. . . . Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?"²⁴⁹ In support of the non-domination principle, the Court continued to quote Madison, writing "[t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever[.]"²⁵⁰ Like Madison, the *Engel* Court was sensitive to the tendency of uncontrolled power to grow to its outer limits.²⁵¹

Only a year later, the *Schempp* Court had occasion to echo *Engel*—and Madison.²⁵² Writing for the Court, Justice Clark acknowledged that Pennsylvania's Bible readings may have seemed like "relatively minor encroachments."²⁵³ But drawing on Madisonian worries about abuse of power, he then issued the stern warning that what is "today a trickling stream may all too soon become a raging torrent."²⁵⁴

In the Court's view, the problem with state power over religion is not only one of expansiveness, but also of legitimacy. In *McCullum*, for example, the Court was adamant that public schools are not proper authorities for religious instruction.²⁵⁵ As Justice Frankfurter explained in

²⁴⁷ *Engel v. Vitale*, 370 U.S. 421, 424 (1962).

²⁴⁸ *Id.* at 436.

²⁴⁹ *Id.* (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 2 *The Writings of Madison* 183, 185–86 (Gaillard Hunt ed., 1901)).

²⁵⁰ *Id.* (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 2 *The Writings of Madison* 183, 186 (Gaillard Hunt ed., 1901)).

²⁵¹ See also James Madison, *Memorial and Remonstrance Against Religious Assessments*, in *James Madison: Writings* 29, 33 (Jack N. Rakove ed., 1999) ("Distant as it may be in its present form from the Inquisition, it differs from it only in degree. The one is the first step, the other the last in the career of intolerance.").

²⁵² *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 224–25 (1963).

²⁵³ *Id.* at 225.

²⁵⁴ *Id.* (citing James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 2 *Writings of Madison* 183, 185 (1901)).

²⁵⁵ *McCullum v. Bd. of Educ.*, 333 U.S. 203, 209–10 (1948).

concurrence, public schools were designed for matters other than religious teaching, “leaving to the individual’s church and home, indoctrination in the faith of his choice.”²⁵⁶ The *Schempp* Court made essentially this same point, referring to the “long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind” in matters of religion.²⁵⁷ In other words, the government, through its public schools, has not been entrusted by the people with the authority to serve as a guide over their religious and spiritual lives. To act on these matters “outside the school’s domain” is a stark example of government overreaching its limited authority.²⁵⁸

Finally, the Supreme Court’s Establishment Clause jurisprudence parallels the corporate religion cases in their call for mutual respect. In *McCullum*, for example, Justice Frankfurter teed up the mutual respect principle by focusing on the fact of American religious diversity.²⁵⁹ He observed that when communities were small and relatively homogeneous, the need for disestablishment “presented no urgencies.”²⁶⁰ But in a pluralistic society, disestablishment is “one of the vital reliances of our Constitutional system for assuring unities among our people stronger than our diversities.”²⁶¹ Toleration and reciprocity, in other words, are vital means for maintaining a fair system of social cooperation among people who differ on fundamental questions.

As the country became more diverse, the Court continued to emphasize the importance of mutual respect. In *Schempp*, for example, the Court observed that America had been diverse since the very beginning, but that “[t]oday authorities list 83 separate religious bodies, each with membership exceeding 50,000, existing among our people, as well as innumerable smaller groups.”²⁶² Such diversity, in turn, made it even more critical that the power of the state not be enlisted to impose religion on its citizens.²⁶³

²⁵⁶ *Id.* at 217 (Frankfurter, J., concurring).

²⁵⁷ *Schempp*, 374 U.S. at 226.

²⁵⁸ *McCullum*, 333 U.S. at 227 (Frankfurter, J., concurring).

²⁵⁹ *Id.* at 216 n.4 (Frankfurter, J., concurring).

²⁶⁰ *Id.* at 217 (Frankfurter, J., concurring).

²⁶¹ *Id.* at 231 (Frankfurter, J., concurring).

²⁶² 374 U.S. at 214.

²⁶³ *Id.* at 225–26. As described in note 206 *supra*, American religious diversity is even more pronounced today.

The mutual respect principle's spirit of reciprocity can also be seen in *Weisman*.²⁶⁴ In holding that a graduation prayer violated the Establishment Clause, the *Weisman* Court highlighted the tension between free exercise of religion and the disestablishment norm.²⁶⁵ Many—perhaps even most—of the students (and parents) attending that graduation may have appreciated the opportunity to solemnize an important event through participation in religious prayers.²⁶⁶ But the Court keenly perceived that there was also an important distributive component of religious liberty at stake.²⁶⁷ The Court explained that the Religion Clauses work in tandem, that is, promoting not only religious liberty, but also “tolerance” for all.²⁶⁸

Once again, Madison's *Memorial* beautifully captures this dynamic between free exercise and disestablishment. Madison wrote that “[w]hilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us.”²⁶⁹ Reflecting Madison's insights, the Court's Establishment Clause jurisprudence has long affirmed this reciprocity, toleration, and “mutuality of obligation.”²⁷⁰

As a correlative to the idea of toleration, the Court has condemned state efforts to leverage its power to procure or influence religious belief. In *McCullum*, Justice Frankfurter reflected this concern, complaining that the school had put “[t]he momentum of the whole school atmosphere and school planning” behind its efforts at religious instruction.²⁷¹ Similarly, in *Schempp*, Justice Brennan explained that the “Constitution does not permit [a religious teacher's] prestige and capacity for influence to be augmented by investiture of all the symbols of authority at the command of the lay teacher for the enhancement of secular instruction.”²⁷² Such

²⁶⁴ *Lee v. Weisman*, 505 U.S. 577 (1992).

²⁶⁵ *Id.* at 590–92.

²⁶⁶ *Id.* at 595 (acknowledging that “for many persons an occasion of this significance lacks meaning if there is no recognition, however brief, that human achievements cannot be understood apart from their spiritual essence”).

²⁶⁷ *Id.* at 595–96. For the idea that religious freedom has a “distributional element,” see Eisgruber & Sager, *supra* note 211, at 264.

²⁶⁸ *Weisman*, 505 U.S. at 590–91; *id.* at 605 (Blackmun, J., concurring).

²⁶⁹ James Madison, *Memorial and Remonstrance Against Religious Assessments*, in James Madison: Writings 29, 30–31 (Jack N. Rakove ed., 1999).

²⁷⁰ See *Weisman*, 505 U.S. at 590–91.

²⁷¹ *McCullum v. Bd. of Educ.*, 333 U.S. 203, 230 (1948) (Frankfurter, J., concurring).

²⁷² *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 263 (1963) (Brennan, J., concurring).

efforts to leverage the state's resources and power to secure religious adherence are stark departures from the ideal of toleration.

Efforts to impose religion also violate mutual respect by denigrating or disparaging citizens on the basis of their deepest commitments. Quoting an early state court case, the *Schempp* Court explained that “the ideal” of religious freedom involves “absolute equality before the law, of all religious opinions and sects” protected by a government that “prefers none, and [] *disparages* none.”²⁷³ Indeed, in the time since *Schempp*, the Justices have often observed that the natural flip side of religious preference is denigration or disparagement of those not so preferred.²⁷⁴

The inevitable result of such denigration is ostracism, marginalization, and exclusion. In *McCullum*, Justice Frankfurter explained that children subject to religious instruction with which they do not agree “will thus have inculcated in them a feeling of separatism.”²⁷⁵ In *Schempp*, Justice Brennan characterized the potential effects of religious nonconformity as ones of “stigmatiz[ation].”²⁷⁶ And in *Wallace*, the Court feared that similar nonconformity would lead to “ostracism” from those who were in the majority religious group.²⁷⁷

As these cases illustrate, one central strand of Establishment Clause doctrine and theory prohibits state imposition of religion. The no-imposition rule is supported, in turn, by the values of conscience, non-domination, and mutual respect. And as Part II illustrates, these values mirror ones embedded in the corporate religion cases, producing substantial symmetry between the limits on corporate religion and those on state establishments.²⁷⁸

²⁷³ Id. at 214–15 (quoting Opinion of Judge Taft, in *The Bible in the Public Schools: Arguments in the Case of John D. Minor et al. Versus The Board of Education of the City of Cincinnati et al.*, 390, 415–16 (1870)).

²⁷⁴ See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) (explaining that religious endorsements send “a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community”).

²⁷⁵ *McCullum*, 333 U.S. at 227 (Frankfurter, J., concurring).

²⁷⁶ *Schempp*, 374 U.S. at 290 (Brennan, J., concurring).

²⁷⁷ *Wallace v. Jaffree*, 472 U.S. 38, 42 (1985) (describing allegations in the complaint).

²⁷⁸ Cf. Berg, *supra* note 7, at 965 (drawing a sharp distinction between “religious activities of government and those of private speakers”); Joel P. Rudin & Ellen Harshman, *Keeping the Faith but Losing in Court: Legal Implications of Proselytizing in the Workplace*, 16 *Emp. Resp. & Rts. J.* 105, 108 (2004) (stating that doctrine relating to private-sector employers has “nothing to do with the Establishment Clause”); Gregory, *The Role of Religion in the Workplace*, *supra* note 7, at 755 (noting that “the first amendment religion clauses are not directly at issue in [] private sector employment settings”).

B. Public Disestablishment and “Private Government”

The previous section demonstrated that the limiting principles embedded in corporate religion cases correspond to a similar set of principles at the core of Establishment Clause doctrine and theory. This section suggests that such correspondence should not be altogether surprising, given the structural similarities between corporations and political governments.

In recent years, scholars have begun to revive a venerable tradition of analogizing business corporations to political states.²⁷⁹ The “firm as state” metaphor dates back many decades²⁸⁰—if not centuries²⁸¹—in the history of political and social thought. For a time, this metaphor was largely eclipsed by the ascension of a certain brand of economic theory that casts corporations as pure products of market transactions.²⁸² But the idea that firms can be analogized to states, at least for some limited purposes, has been revitalized.²⁸³

The firm-state analogy’s revival, though, has not been uniform across—or even within—various disciplines. Some scholars have been attracted to the idea that firms and states are alike in that both are forms

²⁷⁹ See, e.g., Elizabeth Anderson, *Equality and Freedom in the Workplace: Recovering Republican Insights*, 31 *Soc. Phil. & Pol’y* 48 (2015) [hereinafter Anderson, *Equality and Freedom*]; Anderson, *Private Government*, supra note 190, at 1–36; David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 *Am. Pol. Sci. Rev.* 139 (2013) [hereinafter Ciepley, *Beyond Public and Private*]; David Ciepley, *Is the U.S. Government a Corporation? The Corporate Origins of Modern Constitutionalism*, 111 *Am. Pol. Sci. Rev.* 418 (2017) [hereinafter Ciepley, *Is the U.S. Government a Corporation?*]; H el ene Landemore & Isabelle Ferreras, *In Defense of Workplace Democracy: Towards a Justification of the Firm-State Analogy*, 44 *Pol. Theory* 53 (2016); Christopher McMahon, *Public Capitalism: The Political Authority of Corporate Executives* (2013); Pierre-Yves N eron, *Rethinking the Very Idea of Egalitarian Markets and Corporations: Why Relationships Matter More than Distribution*, 25 *Bus. Ethics Q.* 93 (2015).

²⁸⁰ See, e.g., Carole Pateman, *Participation and Democratic Theory* (1970); Robert Dahl, *A Preface to Economic Democracy* (1985); Joshua Cohen, *The Economic Basis of Deliberative Democracy*, 6 *Soc. Phil. & Pol’y* 25 (1989); Adolf A. Berle, Jr., *The 20th Century Capitalist Revolution* (1954); Adolf A. Berle, Jr., *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 *U. Pa. L. Rev.* 933 (1952).

²⁸¹ See Ciepley, *Is the U.S. Government a Corporation?*, supra note 279.

²⁸² See, e.g., Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *J. Fin. Econ.* 305 (1976); Easterbrook & Fischel, supra note 28.

²⁸³ See, e.g., supra note 279 (collecting sources).

of “government.”²⁸⁴ Others have preferred to speak of the similarities in terms of politics, claiming that corporations function as “political institutions”²⁸⁵ or exercise “political authority.”²⁸⁶ And still others have proposed that the analogy should run in the opposite direction, arguing that governments are really more like corporations.²⁸⁷ What unites these various accounts, however, is the claim that firms and states resemble each other in at least some fundamentally important ways.

For many theorists, the most relevant similarity between business firms and political states is the exercise of *authority*.²⁸⁸ On this view, a relationship of authority exists when one actor has the ability to issue directives to another and to enforce those directives by the threat of sanction or penalty.²⁸⁹ With regard to political states, most people are quite used to thinking about their governments in terms of issuing orders and backing those orders with the threat of penalties for non-compliance.²⁹⁰ But scholars advancing the firm-state analogy have explained that business firms exercise a similar—and in some instances

²⁸⁴ See Anderson, *Private Government*, supra note 190279 (arguing that businesses are “private governments”); Ciepley, *Beyond Public and Private*, supra note 279 (arguing that corporations are “franchise governments”); see also Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. Rev. 144 (2003) (discussing “private governments”); Stewart Macaulay, *Private Government*, in *Law and the Social Sciences* 445 (Leon Lipson & Stanton Wheeler eds., 1986) (same); Michael Walzer, *Liberalism and the Art of Separation*, 12 *Pol. Theory* 315, 325 (1984) (same); Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* 293 (1983) (same); Sanford A. Lakoff, *Private Government in the Managed Society*, in *Nomos XI: Voluntary Associations* 170 (J. Roland Pennock & John W. Chapman eds., 1969) (same).

²⁸⁵ See, e.g., Néron, supra note 279, at 104.

²⁸⁶ See, e.g., McMahon, supra note 279, at 5.

²⁸⁷ See, e.g., Ciepley, *Is the U.S. Government a Corporation?*, supra note 279; David Runciman, *Is the State a Corporation?*, 35 *Gov’t & Opposition* 90 (2000); see also Meir Dan-Cohen, *Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society* 174–84 (1986) (arguing that political states and business corporations are both “organizations”).

²⁸⁸ To evaluate the strength of any analogy, one must first be precise about what makes one thing similar to another in a way that is relevant or important. That is, to support the claim that thing A is similar to thing B in a way that merits some kind of attention, one must specify the feature or features that are similar and then supply a reason why we should care. See Frederick Schauer, *Precedent*, 39 *Stan. L. Rev.* 571, 577 (1987); see also James D. Nelson, *Corporations, Unions, and the Illusion of Symmetry*, 102 *Va. L. Rev.* 1969, 1983 (2016) (discussing Schauer’s argument that analogies require a theory of relevance).

²⁸⁹ See, e.g., Anderson, *Equality and Freedom*, supra note 279, at 55 (“Government exists wherever some have the authority to issue orders, backed by sanctions, to others.”); McMahon, supra note 279, at 91 (discussing managerial authority in terms of issuing “directives” with which employees are “prepared to comply”).

²⁹⁰ The canonical statement of this “command theory” of law is John Austin, *The Province of Jurisprudence Determined* (1832).

more powerful, or at least more sweeping—form of authority.²⁹¹ That is, just as states issue commands to citizens backed by the power to impose penalties, businesses issue commands to employees backed by threat of sanction.

The intellectual heart of this claim can be traced to the pathbreaking work of Professor Ronald Coase.²⁹² In his famous article, *The Nature of the Firm*, Coase confronted a basic question: Why do firms exist? That is, given that the price mechanism is capable of coordinating transactions in the market without any kind of centralized direction, why do we ever see firms acting as “islands of conscious power”?²⁹³

Coase’s answer to this basic question was that sometimes it is less costly to organize transactions by means of an *authority* relation than by means of the price mechanism.²⁹⁴ Using the price mechanism to arrange economic activity—that is, arranging production by means of spot contracts in the open market—has many benefits, but it is not without costs. These costs—commonly referred to as “transaction costs”—include the costs of price discovery,²⁹⁵ the costs of continuous negotiation and adjustment of contracts in light of changed circumstances,²⁹⁶ and the expense and difficulty of specifying in advance the terms that will govern long-term contractual relationships.²⁹⁷

By organizing transactions within a firm, however, an entrepreneur can avoid many of these transaction costs.²⁹⁸ According to Coase, firms are defined by the suppression of the price mechanism²⁹⁹ and the substitution of hierarchy and authority.³⁰⁰ Instead of continually procuring factors of production through a series of contracts negotiated in the external market,

²⁹¹ See Anderson, *Private Government*, supra note 190, at 37–71; David Ciepley, *Authority in the Firm (and the Attempt to Theorize it Away)*, 16 *Critical Rev.* 81 (2004).

²⁹² See R.H. Coase, *The Nature of the Firm*, 4 *Economica* 386 (1937).

²⁹³ *Id.* at 388.

²⁹⁴ *Id.* at 387–93; see also Anderson, *Equality and Freedom*, supra note 279, at 60 (discussing Coase’s theory of the firm).

²⁹⁵ See Coase, supra note 292, at 390–91; Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 *J.L. & Econ.* 233, 251–52 (1979).

²⁹⁶ See Coase, supra note 292, at 390–91; see also Ciepley, supra note 291, at 92–94 (discussing Coase).

²⁹⁷ See Coase, supra note 292, at 391; Anderson, *Private Government*, supra note 190, at 52; Ciepley, supra note 291, at 93; Oliver Hart, *An Economist’s Perspective on the Theory of the Firm*, 89 *Colum. L. Rev.* 1757, 1763 (1989).

²⁹⁸ See Coase, supra note 292, at 392.

²⁹⁹ See *id.* at 387, 389.

³⁰⁰ See *id.* at 391–92.

the firm substitutes one large contract.³⁰¹ This contract, in turn, is ongoing and open-ended, specifying only the limits on firm authority.³⁰²

For Coase, the exemplar of such an open-ended contract was that between master and servant—or, in modern parlance, between employer and employee.³⁰³ The employment contract takes the employee’s labor out of the market and moves it inside the firm. In doing so, the employment contract establishes a *governance* relationship, in which the employee agrees to obey the company’s as-yet unspecified directives.³⁰⁴

In recent work, prominent scholars in various disciplines have drawn on Coase’s theory to support the firm-state analogy. Scholars in business ethics, for example, have taken inspiration from Coase in referring to firm governance as a “command hierarchy”³⁰⁵ or as a mode of “interference” with employees’ will.³⁰⁶ Political scientists have argued that the theory of the firm invites a “natural comparison[.]” of the firm and the state.³⁰⁷ And in an already highly influential 2017 book based on her Tanner Lectures, Professor Elizabeth Anderson has defended the claim that Coasian authority relations inside of firms contribute to their status as “private governments.”³⁰⁸ Each of these accounts, in different ways, picks up on Coase’s enduring insight about the basic difference between relationships in the market and those inside of firms.

This enduring insight, however, has not gone without challenge in the history of economic ideas. Perhaps most notably, in their 1972 article, economists Armen Alchian and Harold Demsetz squarely denied Coase’s

³⁰¹ See *id.* at 391.

³⁰² See *id.* at 391–92.

³⁰³ See *id.* at 403. The employment relationship is defined in the Third Restatement of Agency as follows: “[A]n employee is an agent whose principal controls or has the right to control the manner and means of the agent’s performance of work.” See Restatement (Third) of Agency § 7.07(3)(a) (Am. Law Inst. 2006).

³⁰⁴ See Coase, *supra* note 292, at 392; see also Anderson, *Equality and Freedom*, *supra* note 279, at 61 (“At its simplest, [the employment contract] is an agreement to obey managerial orders, whatever they may be.”).

³⁰⁵ See Néron, *supra* note 279, at 104–05.

³⁰⁶ See Nien-hê Hsieh, *Rawlsian Justice and Workplace Republicanism*, 31 *Soc. Theory & Prac.* 115, 116 (2005); Nien-hê Hsieh, *Justice at Work: Arguing for Property-Owning Democracy*, 40 *J. Soc. Phil.* 397, 405 (2009). Indeed, Coase used the term “interference” in describing the master-servant relationship at the heart of his theory. See Coase, *supra* note 292, at 404 (quoting Francis Raleigh Batt, *The Law of Master and Servant* 6 (2d ed. 1933)).

³⁰⁷ See Landemore & Ferreras, *supra* note 279, at 57.

³⁰⁸ See Anderson, *Private Government*, *supra* note 190, at 39, 41.

core claim.³⁰⁹ Speaking directly to Coase's notion that authority relations define firms, Alchian and Demsetz insisted that "[t]his is delusion."³¹⁰ Instead, they argued that the employment relationship is no different from an ordinary market interaction, such as the one between a consumer and her grocer.³¹¹ In a memorable rhetorical flourish, Alchian and Demsetz claimed that "[t]elling an employee to type this letter rather than to file that document is like my telling a grocer to sell me this brand of tuna rather than that brand of bread."³¹² In both cases, they argued, each side of a transaction is merely engaged in ongoing negotiations over the terms of their continued trade.³¹³

This account, if accepted, would dramatically undermine the firm-state analogy based on relationships of authority. Indeed, if it were true that employers exercise no more power over employees than a consumer does over her grocer, then there would be little reason to maintain that authority is an important—much less a *defining*—feature of the firm. But this claim of symmetry, based on employees' formal power to quit their jobs whenever they like, masks the fundamental asymmetry in costs faced by employees who might wish to resist their employer's directives.³¹⁴ That is, when Alchian and Demsetz's grocer confronts the prospect of being "fired," the grocer has many other potential consumers to whom it can sell tuna and bread. But when most employees act under the direction of a manager, who may fire them for almost any reason, they act under the thumb of employer power.³¹⁵ And that is because they often face the prospect of losing connection to—and investment in—their only source of livelihood.

Modern economic theories of the firm have elaborated this fundamental asymmetry of power between firms and their employees. While Coase provided the foundational insight that firms substitute authority relations for the price mechanism, he left the means of *enforcing*

³⁰⁹ See Armen A. Alchian & Harold Demsetz, Production, Information Costs, and Economic Organization, 62 Am. Econ. Rev. 777 (1972).

³¹⁰ Id. at 777.

³¹¹ See id.

³¹² Id.

³¹³ See id. Several contemporary academic lawyers and economists echo this line of reasoning. See, e.g., Richard A. Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws (1992); Tyler Cowen, Work Isn't So Bad After All, in Anderson, Private Government, supra note 190, at 108–16.

³¹⁴ See Ciepley, supra note 291, at 95.

³¹⁵ See id.

this authority relation underspecified. Understanding the means of enforcement, though, helps explain why Alchian and Demsetz's criticism of Coase is ultimately unpersuasive.

This modern account begins where Coase left off, namely, with the observation that authority relations arise because of incomplete contracts.³¹⁶ When employees first join a firm, it is virtually impossible to specify up front all of the tasks that the company will want the employee to perform. As a result of this difficulty, employment contracts typically establish a broad governance relationship, in which employees agree to comply with the directives issued by managers in the future.³¹⁷

As a technical matter, the typical employment contract leaves employers and employees equally free to terminate their relationship on an ongoing basis.³¹⁸ In Alchian and Demsetz's view, this puts employers and employees in the position of continually negotiating and updating the terms of their interaction. But in this ongoing "negotiation," the deck is usually stacked in the firm's favor. An employee's threat to leave a firm is backed only by the power to deprive the firm of her labor. But the firm's threat to fire an employee is backed by the power to exclude that employee from the firm's productive resources.³¹⁹ The key point here is that firms can enforce their authority over workers by leveraging their rights of control.³²⁰ In simpler terms, "authority over assets translates into authority over people."³²¹

³¹⁶ See Oliver E. Williamson, *Why Law, Economics, and Organization?*, 1 *Ann. Rev. L. Soc. Sci.* 369 (2005); Bengt Holmstrom, *The Firm as a Subeconomy*, 15 *J.L. Econ. & Org.* 74 (1999).

³¹⁷ See Oliver E. Williamson, *The Economic Institutions of Capitalism* (1985).

³¹⁸ See Matthew T. Bodie, *The Best Way Out Is Always Through: Changing the Employment At-Will Default Rule to Protect Personal Autonomy*, 2017 *U. Ill. L. Rev.* 223, 228 ("The notion is that both employers and employees are free to walk away from the relationship at any time.").

³¹⁹ See Raghuram G. Rajan & Luigi Zingales, *Power in a Theory of the Firm*, 113 *Q.J. Econ.* 387 (1998) (arguing that "access to critical resources" explains power in firms); see also Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 *J. Pol. Econ.* 691 (1986) (developing the "property rights" theory of the firm); Oliver Hart & John Moore, *Property Rights and the Nature of the Firm*, 98 *J. Pol. Econ.* 1119 (1990) (same).

³²⁰ See Rajan & Zingales, *supra* note 319, at 388; see also Hart, *supra* note 297, at 1763 n.28 (explaining that employers' control over nonhuman assets gives them disciplinary power).

³²¹ Hart & Moore, *supra* note 319, at 1150; see also Ciepley, *supra* note 291, at 102 (quoting Hart & Moore, *supra* note 319); Anderson, *Equality and Freedom*, *supra* note 279, at 59 (discussing the relationship between property rights and employer authority); Cynthia Estlund, *Rethinking Autocracy at Work*, 131 *Harv. L. Rev.* 795, 798 (2018) (reviewing Anderson, *Private Government*, *supra* note 190); Clyde W. Summers, *Employment at Will in the United*

Thinking of the firm in purely contractual terms has a certain appeal. If employers do not exercise authority, then there is little reason to fret about the legitimate scope of their directives. But authority relations in the workplace cannot be erased by wishful thinking. In most cases, employees face serious barriers to exiting a firm, from the difficulty of finding another job³²² to the prospect that they will not be able to capture the value of specialized skills they have developed in their current firm.³²³ These problems with employee exit, moreover, have been exacerbated by recent trends toward labor market concentration and the resulting monopsony power enjoyed by employers.³²⁴

Authority relations in the workplace, in turn, support the analogy between firm and state. Just as political states are in the position of issuing commands that citizens obey,³²⁵ employers similarly govern the behavior of employees.³²⁶ This is certainly not to say that firms are identical to states. Indeed, there are many ways in which the two entities differ.³²⁷ But by focusing on the structure of authority relations on both sides of the public-private divide, the firm-state analogy is on solid ground.

That analogy not only helps explain corporate religion's limiting principles, it also supports the fundamental intuitions behind corporate disestablishment. It is not surprising, in other words, that corporate religion's limiting principles mirror those at the core of the Establishment Clause, because both firms and states may abuse their power to impose religion. And such abuses of power, whether carried out by firms or by states, threaten the basic rights of employees and citizens alike.

States: The Divine Right of Employers, 3 U. Pa. J. Lab. & Emp. L. 65, 85–86 (2000) (discussing the source of employer authority in the workplace).

³²² See Néron, *supra* note 279, at 105, 114; Landemore & Ferreras, *supra* note 279, at 68; Anderson, *Equality and Freedom*, *supra* note 279, at 67.

³²³ See Estlund, *supra* note 321, at 798–99.

³²⁴ See Eric A. Posner, Glen Weyl & Suresh Naidu, *Antitrust Remedies for Labor Market Power*, 132 Harv. L. Rev. 536 (2018); José Azar, Ioana Marinescu & Marshall Steinbaum, *Labor Market Concentration* (Dec. 20, 2017) (unpublished manuscript) (on file with author); Marshall Steinbaum, *How Widespread is Labor Monopsony? Some New Results Suggest It's Pervasive*, Roosevelt Institute (Dec. 18, 2017), <http://rooseveltinstitute.org/how-widespread-labor-monopsony-some-new-results-suggest-its-pervasive/> [<https://perma.cc/3TC7-Y5BY>].

³²⁵ See Austin, *supra* note 290.

³²⁶ See Anderson, *Private Government*, *supra* note 190, at 37–71.

³²⁷ Perhaps the most salient of which is the monopoly on legitimate use of violence. See Max Weber, *Politics as a Vocation*, in *Max Weber's Complete Writings on Academic and Political Vocations* 155 (John Dreijmanis ed., 2008); Thomas Hobbes, *Leviathan* (1651).

C. Disestablishment and the Employment Constitution

Thus far, this Part has argued that corporate religion's limiting principles resemble the Establishment Clause's central concern with religious imposition and that revival of the firm-state analogy helps explain this resemblance. The remainder of this Part attempts to situate corporate disestablishment within the wider legal practice of extending constitutional values into the private workplace and to defend its inclusion within the employment "constitution."³²⁸

As a formal matter, the state action doctrine prevents direct application of most constitutional provisions to private actors, including corporate employers.³²⁹ For some commentators, this doctrine is regrettable.³³⁰ For others, it is an attractive feature of our constitutional jurisprudence.³³¹ But scholars have long recognized that although constitutional *law* does not directly govern the employment relationship, various constitutional *values* are infused into the law of the workplace.³³²

For many years, labor law was thought to be the primary source of the "workplace constitution,"³³³ and it still vindicates compelling constitutional values today.³³⁴ But union density in the private workplace has plummeted, leaving the vast majority of corporate employees without labor law's robust collective bargaining protections.³³⁵ At the same time, though, the rise of employment mandates—both those prohibiting employment discrimination and those governing individual

³²⁸ See Estlund, *supra* note 321, at 807 (discussing the "constitution of the workplace").

³²⁹ See *Virginia v. Rives*, 100 U.S. 313, 318 (1879).

³³⁰ See, e.g., Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 *Geo. L.J.* 779 (2004); Louis Michael Seidman & Mark V. Tushnet, *Remnants of Belief: Contemporary Constitutional Issues* 49–71 (1996).

³³¹ See Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 *Va. L. Rev.* 1767 (2010).

³³² See, e.g., Clyde W. Summers, *The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons from Labor Law*, 1986 *U. Ill. L. Rev.* 689, 696–702.

³³³ See Sophia Z. Lee, *The Workplace Constitution from the New Deal to the New Right* (2014).

³³⁴ See Estlund, *supra* note 321, at 805–06.

³³⁵ See Sophia Z. Lee, *The Workplace Constitution: The Rise and Fall of the Rightless American Worker*, 15 *Insights on L. & Soc'y* 4, 7 (2015); Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 *Yale L.J.* 148, 177 (2013).

employment³³⁶—have expanded the suite of “quasi-constitutional” rights enjoyed by workers.³³⁷

Chief among these quasi-constitutional provisions is the right of equal protection. The Civil Rights Act of 1964, for example, extended the antidiscrimination norm found in the Equal Protection Clause of the Fourteenth Amendment to various areas of civic and economic life.³³⁸ As part of that landmark legislation, Title VII advances the cause of equal protection in private workplaces by prohibiting discrimination in employment on the basis of race, color, religion, sex, or national origin.³³⁹ As one prominent commentator succinctly puts it, employment discrimination law serves as an “equal protection clause for the workplace.”³⁴⁰

To a lesser extent, individual employment law protects employees’ rights of speech, association, and privacy.³⁴¹ With regard to speech, one scholar recently conducted an extensive survey of federal and state law, concluding that “[a]bout half of Americans live in jurisdictions that protect some private employee speech or political activity from employer retaliation.”³⁴² Among the statutes that protect employee speech, Connecticut’s is the most expansive, covering employer acts that interfere with “rights guaranteed by the first amendment.”³⁴³

³³⁶ See Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 Mich. L. Rev. 225, 227 n.6 (2013) (distinguishing between “individual employment law” and “employment discrimination law”).

³³⁷ See Estlund, *supra* note 321, at 806 (discussing provisions in the “quasi-constitution of the workplace”); Lee, *supra* note 335, at 7–9 (describing the rise of employment law as a primary means of protecting worker rights); cf. Estlund, *supra* note 321, at 819–24 (describing the “fissured workplace” and suggesting that it undermines employment law’s power to protect employees’ rights).

³³⁸ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000e et seq. (2012)).

³³⁹ *Id.* § 2000e-2; see also Summers, *supra* note 332, at 700 (arguing that Title VII “privatized” the constitutional value of equal protection).

³⁴⁰ Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 Colum. L. Rev. 319, 331 (2005); see also Cynthia Estlund, *Working Together: How Workplace Bonds Strengthen a Diverse Democracy* 145–61 (2003) (discussing the importance of antidiscrimination law in achieving workplace integration).

³⁴¹ See Bagenstos, *supra* note 336, at 254–62; Estlund, *supra* note 321, at 806.

³⁴² Eugene Volokh, *Private Employees’ Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 Tex. Rev. L. & Pol. 295, 297 (2012).

³⁴³ Conn. Gen. Stat. § 31-51q (2017); see also Bagenstos, *supra* note 336, at 257 (discussing the Connecticut statute).

Labor law also protects—to a limited but important degree—employee freedom of association.³⁴⁴ Section 1 of the National Labor Relations Act, for example, declares that it is the policy of the United States to protect workers’ “full freedom of association, self-organization, and designation of representatives of their own choosing.”³⁴⁵ But in more general terms, the Act also protects employees’ right to “engage in other concerted activities for . . . mutual aid or protection,” regardless of whether those employees end up choosing to unionize.³⁴⁶ One scholar notes that this provision covers a variety of situations in which employees may seek to associate—including communications that facilitate future formal association³⁴⁷—and analogizes these protections to the “public forum” doctrine of the First Amendment.³⁴⁸

Finally, individual employment laws also protect—again to a limited but important degree—employee privacy.³⁴⁹ Case law in this area is mixed—some courts have held that employees enjoy various aspects of personal privacy, but many have gone the other way.³⁵⁰ Nevertheless, there is at least some legal support, uneven though it may be, for rights of employee privacy concerning their medical information,³⁵¹ sexual history,³⁵² and the contents of their homes, hotel rooms, and other personal spaces.³⁵³ Indeed, the new Restatement of Employment Law explicitly recognizes employee privacy rights over certain locations, information held by employees, and information entrusted to employers.³⁵⁴

³⁴⁴ See Summers, *supra* note 332, at 696–97.

³⁴⁵ 29 U.S.C. § 151 (2012).

³⁴⁶ *Id.* § 157.

³⁴⁷ See Estlund, *supra* note 321, at 805–06; see also Ashutosh Bhagwat, *Associational Speech*, 120 *Yale L.J.* 978, 995–1003 (2011) (arguing that one crucial function of speech rights is to facilitate association).

³⁴⁸ See Estlund, *supra* note 321, at 805–06; see also Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 *Geo. L.J.* 1, 75 (2000) (arguing that § 7 of the NLRA “operates as a kind of First Amendment of the private sector workplace, complete with its own limited ‘public forum’ doctrine”).

³⁴⁹ See Bagenstos, *supra* note 336, at 247–53; Bodie, *supra* note 318, at 244–46.

³⁵⁰ See Bagenstos, *supra* note 336, at 248 (citing Matthew W. Finkin, *Privacy in Employment Law* (3d ed. 2009)).

³⁵¹ See *Pettus v. Cole*, 57 *Cal. Rptr. 2d* 46, 54 (*Cal. Ct. App.* 1996).

³⁵² See Bodie, *supra* note 318, at 247 n.155 (compiling cases).

³⁵³ See *id.* at 246–47 (compiling cases).

³⁵⁴ See Restatement of Employment Law § 7.02 (Am. Law. Inst. 2015); see also Bodie, *supra* note 318, at 246–47 (defending employee rights described in the Restatement).

As a normative matter, commentators have defended these provisions of the employment constitution on two primary grounds: autonomy³⁵⁵ and equality.³⁵⁶ As for autonomy, the basic idea is that this system of workplace rights guarantees employees some measure of control or authorship of their own lives.³⁵⁷ And with regard to equality, the employment constitution helps ensure that the workplace does not entrench social hierarchies that cast employees into an inferior or subordinated social status.³⁵⁸ To be sure, normative arguments based on autonomy and equality are not mutually exclusive. Indeed, with regard to justifying the employment constitution, they work together to form the strongest set of reasons for protecting an attractive suite of workers' rights.

As demonstrated in Part II, corporate disestablishment finds support in arguments from autonomy and in arguments from equality. Protecting employee conscience allows them to be free, to the extent feasible, from employer interference with their deepest projects and commitments.³⁵⁹ Preventing employers from dominating employees' private and personal choices on these matters helps relieve status inequalities and hierarchies, not only in the workplace but in society more generally.³⁶⁰ And refusing to let employers wield economic levers of power in order to impose religion on others reflects a spirit of reciprocity, recognition, and mutual respect.³⁶¹

At this point, a critic of corporate disestablishment might wonder whether the concept adds anything not already captured by an ordinary nondiscrimination norm. That is, antidiscrimination law has long included religion as a prohibited basis on which to make employment decisions. What work, then, is the idea of *disestablishment* doing?

To be sure, nondiscrimination is an important part of the disestablishment norm. Indeed, religious liberty scholars have referred to the Establishment Clause as an "equal protection clause" for religious

³⁵⁵ See, e.g., Bodie, *supra* note 318 (defending workplace rights on autonomy grounds).

³⁵⁶ See, e.g., Bagenstos, *supra* note 336 (defending workplace rights in terms of social equality).

³⁵⁷ See Bodie, *supra* note 318, at 238–41.

³⁵⁸ See Bagenstos, *supra* note 336, at 232–43.

³⁵⁹ See *supra* Section II.A.

³⁶⁰ See *supra* Section II.B.

³⁶¹ See *supra* Section II.C.

minorities.³⁶² And the resemblance of nondiscrimination and disestablishment grows even stronger if one understands the non-discrimination norm primarily in expressive terms.³⁶³

But the disestablishment norm, as explained in Parts II and III, captures a set of values more complex than nondiscrimination.³⁶⁴ Expansive conceptions of nondiscrimination, understood in terms of equal dignity or social equality, can reflect important elements of non-domination and mutual respect. But the various autonomy interests that animate concerns for conscience are just as much a part of the disestablishment norm, and those interests cannot be subsumed under the banner of non-discrimination.

Indeed, one prominent scholar has argued that “liberty of conscience” was the central concern among those who developed the American idea of disestablishment.³⁶⁵ In his view, although the founders sometimes spoke about disestablishment in egalitarian, civic republican, or religious terms, the roots and structure of their arguments can be traced to a Lockean concern for protecting individual conscience.³⁶⁶ An exclusive focus on nondiscrimination, then, would leave out critical aspects of the case in favor of corporate disestablishment.

Moreover, as a strategic matter, speaking in terms of disestablishment rather than nondiscrimination could provide advantages with regard to the discourse and language of employee rights. Critics of corporate religion have tended to rely on notions of nondiscrimination drawn from equal protection jurisprudence.³⁶⁷ As a result, the narrative surrounding debates about the scope of corporate religious freedom has often depicted a showdown between rights of religious liberty and rights of equal treatment.³⁶⁸

³⁶² See, e.g., Caroline Mala Corbin, *Nonbelievers and Government Speech*, 97 *Iowa L. Rev.* 347, 379 (2012).

³⁶³ See, e.g., Deborah Hellman, *When Is Discrimination Wrong?* (2008); Bagenstos, *supra* note 336.

³⁶⁴ See *supra* Parts II–III; see also 2 Kent Greenawalt, *Religion and the Constitution: Establishment and Fairness* 462–79 (criticizing Christopher Eisgruber and Lawrence Sager’s nondiscrimination theory of the Religion Clauses).

³⁶⁵ Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 *N.Y.U. L. Rev.* 346 (2002).

³⁶⁶ *Id.* at 372–412. For Locke’s view, see John Locke, *A Letter Concerning Toleration* 23 (James H. Tully ed., Hackett Pub. Co. 1983) (1689).

³⁶⁷ See, e.g., NeJaime & Siegel, *supra* note 5, at 2522–28.

³⁶⁸ See, e.g., David Van Biema, *The Contraception Showdown*, *Time*, July 7, 2014; cf. Dent, *supra* note 7, at 629 (“To reconcile this clash [between religious liberty and gay

But the disestablishment norm is not some intruder into the domain of religious liberty. Instead, disestablishment is internal to the idea of religious liberty itself. Rights to the free exercise of one's religion come paired with reciprocal obligations not to impose that religion on others.³⁶⁹ And so, to borrow a phrase from the Supreme Court's free speech jurisprudence, disestablishment cannot be dismissed as a "wholly foreign" egalitarian value that threatens to strip religious believers of their individual liberties.³⁷⁰ Corporate disestablishment, then, has the potential to change the terms of debate between proponents of religious liberty and defenders of equality, reflecting the fact that there are religious liberty interests on both sides of the corporate religion question.

IV. THE BORDERLINES OF DISESTABLISHMENT

Having defended the claim that a disestablishment norm ought to govern the modern corporate workplace, this Part now considers a set of borderline cases. In doing so, it shows how the principles of corporate disestablishment should shape the frontier of corporate religious liberty even under complicated circumstances.

A. Corporate Religious "Endorsements"

In the run-up to *Hobby Lobby*, proponents of corporate religion compiled an impressive list of real-world corporate religious practices.³⁷¹ Chick-fil-A closes on Sundays in observance of the Christian Sabbath.³⁷² Interstate Batteries' website proclaims that the company's mission is to "glorify God and enrich lives as we deliver the most trustworthy source of power to the world."³⁷³ Forever 21 prints "John 3:16" on the bottom of

rights] . . . requires weighing the relative merits of religious freedom and homosexual conduct."); Andrea J. Sinclair, Note, Delimiting Title VII: Reverse Religious Discrimination and Proxy Claims in Employment Discrimination Litigation, 67 Vand. L. Rev. 239, 245 (2014) (quoting Dent, *supra* note 7, at 629).

³⁶⁹ See Schwartzman et al., *Costs of Conscience*, *supra* note 49.

³⁷⁰ Cf. *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (claiming that the government's interest in equalizing electoral influence is "wholly foreign to the First Amendment").

³⁷¹ See, e.g., Brief for Respondents at 19–21, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 546899, at *19–21; Brief of the C12 Group, LLC, as Amicus Curiae Supporting the Non-Governmental Parties at 23–31, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 343191, at *23–31.

³⁷² See Chick-fil-A, *Who We Are*, <https://www.chick-fil-a.com/About/Who-We-Are> [https://perma.cc/W2DE-QH7Q].

³⁷³ See *Interstate Batteries*, *supra* note 2.

its shopping bags.³⁷⁴ And Hobby Lobby itself plays Christian music in all of its stores.³⁷⁵

Do the principles of corporate disestablishment cast doubt on these popular religious practices? As an initial matter, it would seem that they do not. Corporate disestablishment's principles were derived from cases in which companies *imposed* religion on employees.³⁷⁶ But the examples above seem to contemplate a different sort of situation, in which a company is merely *endorsing* a religious message as a way of expressing its religious identity. In cases of pure endorsements, then, it would appear that the principles of corporate disestablishment do not stand in the way.

But this apparent permissiveness does not mean that corporate disestablishment's principles drop out of the analysis entirely. Instead, pure corporate endorsements operate in the shadow of corporate disestablishment. That is, although corporate practices that merely express the owners' or managers' religious preferences may not run afoul of the law, employees' interests in conscience, non-domination, and mutual respect constitute the boundaries between permissible religious endorsements and impermissible impositions of religion.

A contrast illustrates the point. When Hobby Lobby plays Christian music in its stores, there are sure to be employees who do not agree with the company's religious message. Indeed, some employees may even feel that being forced to listen to music with explicitly religious content is inappropriate or offensive.³⁷⁷ But as long as the company makes clear to its employees that the choice of music is an affirmative expression of the owners' religious identities and does not carry any threat of employment consequences—whether explicit or implicit—then it would be fair to characterize the practice as a pure endorsement rather than a religious imposition.

But one could easily imagine ways in which Hobby Lobby's religious practices could traverse the line between endorsement and imposition. For example, if Hobby Lobby were to establish an expectation that employees

³⁷⁴ See Jena McGregor, *Forever 21's Leaked Memo: Faith at Work?*, Wash. Post (Aug. 19, 2013), https://www.washingtonpost.com/news/on-leadership/wp/2013/08/19/forever-21s-leaked-memo-faith-at-work/?utm_term=.fbd09f5de46 [<https://perma.cc/Q7SU-9TDG>].

³⁷⁵ See Mark Oppenheimer, *At Christian Companies, Religious Principles Complement Business Practices*, N.Y. Times (Aug. 2, 2013), <https://www.nytimes.com/2013/08/03/us/at-christian-companies-religious-principles-complement-business-practices.html> [<https://perma.cc/7VMJ-28HP>].

³⁷⁶ See *supra* Part II.

³⁷⁷ See Oppenheimer, *supra* note 375.

display approval of the music's religious message by singing along or nodding in affirmance, then employee conscience would be at risk. If employees were expected not only to listen to religious music while at work, but also to participate in Christmas caroling during the holiday season, such an expectation would trigger concerns about employer domination. Finally, if the music in Hobby Lobby's stores were to go beyond expressing the owners' personal religious views and instead denigrate or disparage those who do not hold the same beliefs, then the company's practice would deny employees mutual respect.³⁷⁸

Corporate disestablishment does not—and cannot—prohibit *all* corporate religious practices. The *Hobby Lobby* case itself makes at least this much clear.³⁷⁹ But when corporate religious practices cross over from pure endorsements of company religion to religious impositions on employees, the principles of corporate disestablishment circumscribe those practices.³⁸⁰ And so, even when corporate religious practices fall on the right side of the endorsement-imposition line, the principles of corporate disestablishment continue to guard against their unwarranted expansion.

B. Small Businesses

Much of this Article has been dedicated to drawing out a set of limiting principles for corporate religion from cases involving claims that a company impermissibly imposed religion on employees. Although the precise doctrinal labels varied, all of these cases involved claims under

³⁷⁸ For a similar conclusion about music that “denigrates people on the basis of religion,” see Berg, *supra* note 7, at 1007–08.

³⁷⁹ See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

³⁸⁰ At this point, one might wonder whether *Hobby Lobby* itself involved a religious imposition. On Justice Alito's account of the facts, however, the third-party costs to Hobby Lobby's employees were “precisely zero,” because insurers would pay for the contraceptives that Hobby Lobby refused to cover. *Id.* at 2760; see also Henry L. Chambers, Jr., *The Problems Inherent in Litigating Employer Free Exercise Rights*, 86 U. Colo. L. Rev. 1141, 1167 (2015) (noting that “the *Hobby Lobby* Court denied its ruling had any effect on the litigants' employees”). One could certainly question whether Justice Alito's claim was factually accurate. See Nelson Tebbe, Richard Schragger & Micah Schwartzman, *Hobby Lobby's Bitter Anniversary*, Balkinization (June 30, 2015), <https://balkin.blogspot.com/2015/06/hobby-lobbys-bitter-anniversary.html> [<https://perma.cc/2HDJ-SPE6>] (reporting that Hobby Lobby's employees had not yet received coverage for certain contraceptives a year after the Supreme Court granted the company a religious exemption). But the assertion of zero third-party costs was an essential aspect of *Hobby Lobby's* logic, which, if taken at face value, puts the case outside the bounds of corporate disestablishment.

federal or state employment discrimination laws. But most employment discrimination laws do not apply to very small businesses. For example, Title VII prohibits discrimination in employment on the basis of religion, but that prohibition does not apply to companies with fewer than fifteen employees.³⁸¹ And many states have similar minimum employee requirements in their own employment discrimination laws.³⁸²

The asymmetrical protection of employees in small businesses, then, presents a bit of a puzzle for the theory of corporate disestablishment. If the law is supposed to be concerned with the use of corporate authority to impose religion on employees, why does it fail to protect employees in firms with fewer than fifteen employees? If anything, it would seem that employees in smaller firms would be most vulnerable to religious coercion and domination by their employers, given the likelihood of close and personal interactions.

One potential way to explain this asymmetry is to observe that it may be more burdensome for small businesses to comply with various legal requirements than it is for large businesses. Large companies, in most cases, have far more resources to devote to promulgating and enforcing workplace policies that protect employees. But when it comes to small businesses, such internal compliance and enforcement efforts may be thought too costly.³⁸³

This concern about costs may do some work in justifying small business exemptions from corporate disestablishment. But if we think that the disestablishment norm is important, then marginal increases in the costs of compliance may not be sufficient to warrant small business exemptions. Indeed, some states now have trivially low minimum employee requirements for their own employment discrimination laws, indicating that these states may have already reached a similar conclusion.³⁸⁴

³⁸¹ See 42 U.S.C. § 2000e(b) (2012).

³⁸² See Nat'l Conference of State Legislatures, State Laws on Employment-Related Discrimination, <http://www.ncsl.org/research/labor-and-employment/discrimination-employment.aspx> [<https://perma.cc/PA6F-S8G5>] (listing minimum employee requirements).

³⁸³ For a statement of this concern in Title VII's legislative history, see 110 Cong. Rec. 13085 (1964).

³⁸⁴ For example, state employment discrimination laws in Alaska, Arizona, Washington, D.C., Hawaii, Maine, Michigan, Minnesota, Montana, New Jersey, North Dakota, Oklahoma, Oregon, South Dakota, Vermont, West Virginia, and Wisconsin set the minimum number of employees at one. See Nat'l Conference of State Legislatures, *supra* note 382.

Rather than defending the small business exemption on the basis of costs, one might instead argue that the *associational* interests of small businesses are more compelling than those of larger businesses. The idea here would be that although employees in small businesses may have the same interests in avoiding religious impositions by corporate managers, those managers have stronger interests in living out their own religious convictions in an intimate workplace than they might have in larger corporate organizations. Small businesses, on this account, look a lot more like families, or perhaps some voluntary associations, which are paradigm cases for strong associational rights.³⁸⁵

The argument from association gets us closer to a convincing explanation for the typical small business exemption in employment discrimination law. In most cases, it seems more plausible to think of small businesses developing individual identity than it is for large, impersonal organizations.³⁸⁶ And so, for similar reasons of religious identity development, it might make sense to think that some small businesses should be exempt from the demanding principles of corporate disestablishment.

Although concerns about costs and associational interests are significant, the justification for exempting small businesses from corporate disestablishment still seems incomplete. After all, marginal increases in compliance costs are not typically thought sufficient to justify infringement on basic rights.³⁸⁷ And in other areas of the law, associational interests do not outweigh antidiscrimination norms in the commercial sphere.³⁸⁸

This justification gap might be closed, however, by returning to corporate disestablishment's own first principles. Throughout this

³⁸⁵ See Lawrence Sager, *Why Churches (and, Possibly, the Tarpon Bay Women's Blue Water Fishing Club) Can Discriminate*, in *The Rise of Corporate Religious Liberty* 77, 85–89 (Micah Schwartzman et al., eds., 2016) (arguing that strong associational rights should extend to “close associations”); Nelson Tebbe, *Religious Freedom in an Egalitarian Age* 80–97 (2017) (discussing the role of size in justifying associational rights); Elizabeth Sepper, *Taking Conscience Seriously*, 98 *Va. L. Rev.* 1501, 1563–71 (2012) (same).

³⁸⁶ See Meir Dan-Cohen, *Rights, Persons, and Organizations* 49–76 (1986).

³⁸⁷ See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973); *Reed v. Reed*, 404 U.S. 71, 76 (1971).

³⁸⁸ See James D. Nelson, *The Freedom of Business Association*, 115 *Colum. L. Rev.* 461, 464–68 (2015). But see 42 U.S.C. § 3603(b)(2) (2012) (providing a limited exemption under the Fair Housing Act for “rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.”).

Article, a large part of the argument for limiting the expansion of corporate religion appealed to the pervasive religious diversity that characterizes the modern business world. But in very small businesses, perhaps it is more plausible to think that all participants can agree on religious principles, especially in companies composed entirely of family members or members of small, exclusive communities. To be sure, it seems unlikely that the drafters of various federal and state antidiscrimination laws had this argument in mind, given that small business exemptions do not apply exclusively to claims of religious discrimination.³⁸⁹ And yet, it would seem that the strongest normative justification for the small business exemption from corporate disestablishment might draw from its capacity to serve as a reasonable proxy for the types of firms in which religious pluralism cannot be assumed.

But once a business grows beyond a certain size, the law can safely assume the fact of religious pluralism. That assumption, in turn, triggers concerns of conscience, non-domination, and mutual respect. In other words, once we are in the world of diverse modern workplaces, the case for corporate disestablishment operates with all of its force.

C. Religion Without Authority

The principles of corporate disestablishment prohibit companies from imposing religion on *employees*. Strong doctrinal and normative reasons support this focus on the employment relationship. As a doctrinal matter, the corporate religion cases involve claims of employment discrimination, either under Title VII or under state employment discrimination law. But regardless of whether claims were based on federal or state law, corporate religion's limiting principles were derived entirely from cases involving the relationship between a company and its employees.³⁹⁰

As a normative matter, the principles of corporate disestablishment gained considerable traction from the authority relation inherent in the employment context. The argument from conscience demonstrated that employers' control over the workplace gives them outside influence over employees' freedom of thought and belief.³⁹¹ Likewise, the argument

³⁸⁹ I thank Liz Sepper for raising this point.

³⁹⁰ See *supra* Part II.

³⁹¹ See *supra* Section II.A.

from non-domination depended on the capacity of an employer to exert arbitrary or uncontrolled power over its employees.³⁹² And the argument from mutual respect provided reasons to worry in particular about proselytization or denigration carried out by religious employers.³⁹³

But when a company practices religion, employees are not the only corporate constituents who might be affected. Take, for example, the case of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.³⁹⁴ In *Masterpiece*, a for-profit bakery asserted free exercise and free speech rights to resist the state's public accommodations law, which required it to provide wedding cakes to same-sex couples in violation of the owners' religious beliefs.³⁹⁵ The case, therefore, involved a corporate religious liberty claim, but it did not involve any employee's claim to be free from religious imposition.³⁹⁶

Given the absence of an authority relation between Masterpiece Cakeshop and its customers, the principles of corporate disestablishment do not apply to this case in a straightforward manner. That is, when the same-sex couple was denied service by the bakery, the harm they suffered was primarily one of dignitary insult, rather than the imposition of religion by use of organizational power.³⁹⁷ To be sure, that dignitary insult is a real and significant harm, but it is not the result of a governance relation between the firm and its potential customers.

Nevertheless, the principles of corporate disestablishment should put us on the lookout for relationships in the market that bear resemblance to those that characterize corporate employment. For example, if a regionally powerful business were to impose religious conditions on its interactions with local suppliers, disparities in bargaining power could

³⁹² See *supra* Section II.B.

³⁹³ See *supra* Section II.C.

³⁹⁴ 138 S. Ct. 1719 (2018).

³⁹⁵ See Brief for Petitioners at 16–60, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 3913762, at *16–60.

³⁹⁶ See Brief of Amici Curiae Corporate Law Professors in Support of Respondents at 3–25, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 5127303, at *3–25 (discussing corporate-law aspects of the case).

³⁹⁷ See Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 Harv. L. Rev. 133, 159–60 (2018) (arguing that *Masterpiece Cakeshop* “supports the claim that states have a compelling interest in avoiding third-party harms and protecting dignitary interests”); Elizabeth Sepper, *Symposium: More at Stake than Cake—Dignity in Substance and Process*, SCOTUSblog (June 5, 2018), <http://www.scotusblog.com/2018/06/symposium-more-at-stake-than-cake-dignity-in-substance-and-process/> [<https://perma.cc/P945-GYSG>] (arguing that Justice Kennedy's opinion in *Masterpiece Cakeshop* “constructed discrimination in terms of dignity, not markets.”).

threaten conscience.³⁹⁸ Or, if a for-profit hospital were to deny a patient medically recommended treatment based on religious beliefs, patient vulnerability would surely provide reason to worry about the arbitrary use of organizational authority.³⁹⁹ In both of these examples, there is a significant power asymmetry between the business and other market participants that would renew the concerns of corporate disestablishment.

The argument for corporate disestablishment, then, may provide powerful tools for advocates seeking to protect a wider group of corporate constituents. But they are not tools for all occasions. When relationships in the market start to take on significant governance features—due to monopoly power, information asymmetry, or other sorts of market failure—principles of conscience, non-domination, and mutual respect will be paramount. But when a company interacts with suppliers, creditors, customers, or other non-employees without the benefit of asymmetrical power and authority, advocates of equal treatment may not be able to rely on a disestablishment norm to make their case.

CONCLUSION

In a new age of corporate religiosity, scholars and advocates seeking to curb the outward expansion of religion in business have found themselves in need of limiting principles. To date, such principles have been largely elusive. But if one looks beyond certain conventional doctrinal categories within employment discrimination law and reads corporate religion cases together as a unified body of doctrine, a set of coherent and attractive principles emerges. Grounded in concerns for employee conscience, non-domination, and mutual respect, corporate religion's limiting principles prohibit corporate imposition of religion. In doing so, those principles mirror the Establishment Clause's central function with regard to political states. Proscribing religious imposition—whether for corporations or political governments—is both doctrinally and normatively appealing. Corporate disestablishment, then, deserves a place alongside other basic provisions of the employment constitution.

³⁹⁸ See Oppenheimer, *supra* note 375 (“Steve Green, the president of Hobby Lobby and a Southern Baptist, said that the Christian identity of his company affects how it negotiates with vendors.”).

³⁹⁹ See Sepper, *supra* note 5, at 934–40 (discussing numerous instances of care denial by for-profit hospitals on the basis of religion).