Religion Law and Political Economy

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ABSTRACT: The field of law and religion has long neglected the economy of church-state disputes. Too often, scholarship and doctrine have relied on conjecture, rather than facts. And some nascent efforts to think through the economics of religious liberty risk repeating early law-and-economics mistakes, including excessive abstraction, reductive individualism, and illusory neutrality. In this Essay, we argue for integrating economics into religion law in a way that welcomes empirical evidence, engages in institutional analysis, and foregrounds normatively desirable economic arrangements. This "Religion Law and Political Economy" approach carries significant benefits for the field. It would allow us to unleash ourselves from the courts and would free religious liberty from its constitutional law silo. We could then see institutional edifices (not just two opposing parties before a judge) and reimagine religious liberty across political and economic structures.

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INTRODUCTION

Twentieth-century Supreme Court cases loom large in theoretical and doctrinal accounts of the Religion Clauses. The Court saw Jehovah's Witnesses travelling door to door[1] and Seventh-day Adventists unwilling to work on Saturdays.[2] Conscientious objectors to the draft, compelled to report for duty, stood before the Justices.[3] Jews, Unitarians, and nonbelievers sought access to public education without religious indoctrination.[4] These paradigm cases of politically vulnerable religious minorities burdened by majoritarian animus or neglect still structure church-state scholarship. The image is of pleas for judicial relief against a state actor—whether an agency official, prison warden, or school district—brought on a one-off basis by an individual of unpopular or unfamiliar faith.

But today, the Supreme Court's docket is replete with claims of religious liberty from commercially successful and politically powerful institutions. In the last decade, for-profit businesses have won the right to religious exemptions under federal law.[5] Social service providers and retailers have successfully invoked the Free Exercise Clause to resist antidiscrimination laws.[6] And doctrine that once precluded state aid now permits, or even requires, it to flow to religious institutions.[7] To be sure, the Court still occasionally hears the classic prisoner and religious dress or diet claims.[8] But with regularity, its law and religion disputes present major questions of political economy.[9]

And many developments at the intersection of religion and economics take place outside the courts. Consider, for example, that $7.3 billion in federal

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1. Cantwell v. Connecticut, 310 U.S. 296, 300 (1940).

2. Sherbert v. Verner, 374 U.S. 398, 399–402 (1963).

3. United States v. Seeger, 380 U.S. 163, 166–67 (1965); Welsh v. United States, 398 U.S. 333, 335 (1970).

4. *See, e.g.*, Engel v. Vitale, 191 N.Y.S.2d 453, 467 (N.Y. Sup. Ct. 1959), *rev'd*, 370 U.S. 421 (1962).

5. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 689–91 (2014); *cf.* United States v. Lee, 455 U.S. 252, 261 (1982) ("When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.").

6. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1723–24 (2018); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1874, 1882 (2021); *cf.* Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 n.5 (referring to free exercise claim against public accommodations law as "patently frivolous").

7. For discussion of this doctrinal transformation, see Elizabeth Sepper & James D. Nelson, *Government's Religious Hospitals*, 109 VA. L. REV. 61, 96–108 (2023).

8. *See, e.g.*, Holt v. Hobbs, 574 U.S. 352, 355–56 (2015); EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 770–71 (2015).

9. "[P]olitical economy investigates the relation of politics to the economy, understanding that the economy is always already political in both its origins and its consequences." Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1792 (2020).

pandemic loans flowed to churches so that they could continue to meet payroll.[10] Or take the political successes of the Christian nationalist movement, which often unites business interests and fundamentalist Christianity[11] in its well-financed and amply-lawyered movement to transform "the seven mountains"—defined to include all of government, education, and business—into explicitly conservative Christian institutions.[12]

Yet, the economy continues to go largely unmentioned in the law and religion field. Scholars tend to overlook wider economic circumstances and developments that surround the Supreme Court's decisions.[13] The major political economic trend of Christian nationalism goes unmentioned.[14] Analyses instead work their way back and forth between particular doctrinal results and

10. *See* U.S. SMALL BUS. ADMIN., PAYCHECK PROTECTION PROGRAM (PPP) REPORT: APPROVALS THROUGH 6/30/2020, at 11, https://www.sba.gov/sites/default/files/2020-07/PPP%20Results%20-%20Sunday%20FINAL-508.pdf [https://perma.cc/7FXN-S82D].

11. For histories of the ties of corporate America to the conservative Christian movement, see generally KEVIN M. KRUSE, ONE NATION UNDER GOD: HOW CORPORATE AMERICA INVENTED CHRISTIAN AMERICA (2015); BETHANY MORETON, TO SERVE GOD AND WAL-MART: THE MAKING OF CHRISTIAN FREE ENTERPRISE (2009); DARREN E. GREM, THE BLESSINGS OF BUSINESS: HOW CORPORATIONS SHAPED CONSERVATIVE CHRISTIANITY (2016); and Joanna Wuest & Briana S. Last, *Church Against State: How Industry Groups Lead the Religious Liberty Assault on Civil Rights, Healthcare Policy, and the Administrative State*, J.L., MED. & ETHICS (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4306283 [https://perma.cc/N29E-UJ7H].

12. KATHERINE STEWART, THE POWER WORSHIPPERS: INSIDE THE DANGEROUS RISE OF RELIGIOUS NATIONALISM 27 (2020). *See generally* KRISTIN KOBES DU MEZ, JESUS AND JOHN WAYNE: HOW WHITE EVANGELICALS CORRUPTED A FAITH AND FRACTURED A NATION (2020) (discussing how Evangelicals have, over the last several decades, centered and pursued Christian nationalism and conflict); PHILIP S. GORSKI & SAMUEL L. PERRY, THE FLAG AND THE CROSS: WHITE CHRISTIAN NATIONALISM AND THE THREAT TO AMERICAN DEMOCRACY (2022) (arguing that white, Christian, nationalist ideology endangers liberal democracy).

13. One notable exception is John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001), though it is worth mentioning that neither author is primarily identified with the field of law and religion. For efforts to apply economic analysis to law and religion, see generally Keith N. Hylton, Yulia Rodionova & Fei Deng, *Church and State: An Economic Analysis*, 13 AM. L. & ECON. REV. 402 (2011); Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989).

Several student notes have considered some economic dimensions of religious liberty issues. *See* Tokufumi Noda, Note, *The Role of Economics in the Discourse on RLUIPA and Nondiscrimination in Religious Land Use*, 53 B.C. L. REV. 1089, 1107–11 (2012) (using Judge Posner's approach to land use under the Religious Land Use and Institutionalized Person Act); Rhett B. Larson, Note, *Holy Water and Human Rights: Indigenous Peoples' Religious-Rights Claims to Water Resources*, 2 ARIZ. J. ENV'T L. & POL'Y 81, 105–06 (2011) (applying McConnell and Posner's "economic analysis framework" to religious rights over water).

14. For isolated examples of law and religion scholars taking up Christian Nationalism, see Caroline Mala Corbin, *The Supreme Court's Facilitation of White Christian Nationalism*, 71 ALA. L. REV. 833 (2020); Caroline Mala Corbin, *Christian Legislative Prayers and Christian Nationalism*, 76 WASH. & LEE L. REV. 453 (2019); STEVEN K. GREEN, INVENTING A CHRISTIAN AMERICA: THE MYTH OF THE RELIGIOUS FOUNDING (2015).

the larger principles of political morality that animate or organize them.[15] Some scholars have taken keen interest in the interaction between the law of religious liberty and the political movements behind it.[16] But these arguments largely remain detached from empirical literature in economics and other social sciences.

To the extent that the literature flirts with economics, it often manifests two serious flaws. First, it imports the assumptions of neoclassical economics, including a rigid disciplinary commitment to individualistic explanation that struggles to capture social institutions and power dynamics.[17] Second, it pretends to value neutrality while often adopting an unstated (and therefore undefended) political economy favoring privatization and market supremacy.[18]

Recently, there have been rumblings of change. A small group of scholars has begun to capture new economic topics, such as religious commerce, antitrust, and corporate governance and investment.[19] A proponent of this trend, Paul Horwitz has remarked that the field needs to take "a serious look at economics."[20] Nate Oman likewise has urged us to consider "the proper relationship between religion and the market and how the law should structure that relationship."[21] We agree. But the field should do so without reprising the methods of first-generation law and economics now abandoned by most legal scholarship.[22]

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15. On the method of reflective equilibrium in constitutional law, see generally Richard H. Fallon, Jr., *Arguing in Good Faith About the Constitution: Ideology, Methodology, and Reflective Equilibrium*, 84 U. CHI. L. REV. 123 (2017).

16. Recent examples include Richard Schragger & Micah Schwartzman, *Religious Antiliberalism and the First Amendment*, 104 MINN. L. REV. 1341 (2020) (exploring rising antiliberalism as an intellectual and political movement); Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. 2397, 2462–82 (2021) (examining politics of the Roberts Court's Religion Clause decisions).

17. *See infra* notes 56–58 and accompanying text.

18. *See infra* notes 56–57 and accompanying text. For elaboration of these assumptions in economic analysis of law, see Niklas Olsen, *From Choice to Welfare: The Concept of the Consumer in the Chicago School of Economics*, 14 MOD. INTELL. HIST. 507, 518–28 (2017); David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1, 6, 18 (2014); and Herbert Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. PA. L. Rev. 1843, 1850–51 (2020).

19. *See generally* Michael A. Helfand & Barak D. Richman, *The Challenge of Co-Religionist Commerce*, 64 DUKE L.J. 769 (2015) (discussing the prevalence of religious commerce); Barak D. Richman, *Religious Freedom Through Market Freedom: The Sherman Act and the Marketplace for Religion*, 60 WM. & MARY L. REV. 1523 (2018) [hereinafter Richman, *Religious Freedom Through Market Freedom*] (arguing that the First Amendment requires antitrust enforcement); 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 corporate shareholders with religious motivations).

20. Paul Horwitz, *Freedom of the Church Without Romance*, 21 J. CONTEMP. LEGAL ISSUES 59, 94 (2013).

21. Nathan B. Oman, *The Need for a Law of Church and Market*, 64 DUKE L.J. ONLINE 141, 141 (2015).

22. For an example of work debunking empirical assumptions in early law and economics, see Russell B. Korobkin & Thomas Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000). For recognition of changes within law and economics by leading early practitioners, see GUIDO CALABRESI, THE FUTURE OF LAW AND ECONOMICS:

In this Essay, we argue that three methodological commitments would enrich scholarly work and best inform the development of doctrine. First, religion law scholars should engage with the empirical findings of economists (and their counterparts in cognate social science disciplines) to employ a more accurate factual description of the world. Second, in an increasingly organizational society, religion law scholars must break free from reductionist assumptions of voluntary private ordering among individuals and interrogate the institutional structures that connect law, politics, and the economy. Finally, as they look to social science and institutional dynamics, religion law scholars must recognize, rather than submerge, the values at play.

It is time for a methodological pivot. As the interests of large religious organizations increasingly swamp those of small religious minorities, there is an opportunity to reimagine legal, political, and economic arrangements to ensure religious freedom and equal citizenship. The "Religion Law and Political Economy" approach we propose here seeks to integrate enduring values with factual investigation—to "facilitate traffic" between facts and values—so that values can frame the empirical questions we ask about the social world and so that the facts we discover can feed back into our understanding of the problems we wish to solve.[23] Through new methodological tools, the church-state field might meet the current moment of democratic crisis and provide a fresh perspective in ongoing conversations about political economy and law across the academy.

I. ENGAGING FACTS ABOUT THE POLITICAL ECONOMY

Too often, disputes over religious liberty turn on dueling conjectures—or even myths—about contemporary economic arrangements.[24] As courts focus on resolving conflicts between parties, they of course must reach conclusions about the truth of various factual propositions. These factual conclusions, however, can be highly unreliable; they suffer from selection effects and other well-known epistemic shortcomings associated with adversarial litigation.[25] And once enshrined in a court reporter, they can quickly become outdated.

One advantage of integrating economic study into religion law, then, is that it would provide a richer set of facts about the way the world works. Consider, for example, the litigation against the contraceptive mandate of the Affordable Care Act ("ACA"). There, an array of large for-profit employers

ESSAYS IN REFORM AND RECOLLECTION 1–7 (2016); and Robert E. Scott & George G. Triantis, *What Do Lawyers Contribute to Law and Economics?*, 38 YALE J. ON REG. 707, 717–20 (2021). For a major effort to develop "a new way of teaching and learning economics," see *Welcome to CORE Econ*, CORE ECON., https://www.core-econ.org [https://perma.cc/F7XS-9WKT].

23. *See* Richard Wightman Fox & Robert B. Westbrook, *Introduction: Moral Inquiry in American Scholarship*, *in* IN FACE OF THE FACTS: MORAL INQUIRY IN AMERICAN SCHOLARSHIP 1, 4 (Richard Wightman Fox & Robert B. Westbrook eds., 1998).

24. One example is the description of religiously affiliated healthcare institutions.

25. *See* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 909–10 (2006).

challenged the requirement that employer-sponsored insurance plans cover contraceptives without cost-sharing or, alternatively, that employers pay a tax and permit their employees to purchase plans on the health insurance exchanges.[26] They argued that this pay-or-play mandate imposed a substantial burden on their free exercise of religion.[27]

Despite its relevance for substantial burden analysis, most efforts to defend the contraception mandate missed the chance to explain the factual context surrounding health insurance. To begin with, economists agree that there is a trade-off between health benefits and other compensation as part of workers' total compensation.[28] Workers bear the cost of health insurance through lower wages.[29] The fact that workers use wages to buy contraceptives does not, as employers in the contraception litigation acknowledged, burden their free exercise of religion.[30] Courts that rejected demands for employer religious exemptions recognized that benefits and wages "involve the same economic exchange at the corporate level: [E]mployees will earn a wage or benefit with their labor, and money originating from [the employer] will pay for it."[31] Workers' decisions about their earned benefits, like their purchases with wages, likewise did not burden employer religion.

Second, discussions of whether the burden on employers was "substantial" as required by the Religious Freedom Restoration Act ("RFRA") typically elided the fact that the ACA gave employers three options: (1) refuse to cover contraception in an insurance policy and pay a substantial financial

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26. For extensive discussion of these cases, see generally Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015); and James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565.

27. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 720–23 (2014).

28. Many studies have found that faster-rising health premiums depress wage growth. *See, e.g.*, Craig A. Olson, *Do Workers Accept Lower Wages in Exchange for Health Benefits?*, 20 J. LAB. ECON. 91, 91 (2002); Priyanka Anand, *The Effect of Rising Health Insurance Costs on Compensation and Employment*, SEMANTIC SCHOLAR 1, 1 (2013).

29. As is particularly relevant, a study of Massachusetts's health insurance reform, which the Affordable Care Act largely mirrors, uncovered an almost dollar-for-dollar relationship between the cost of health benefits to the employer and the corresponding fall in wages. Jonathan T. Kolstad & Amanda E. Kowalski, *Mandate-Based Health Reform and the Labor Market: Evidence from the Massachusetts Reform*, 47 J. HEALTH ECON. 81, 83 (2016).

30. *See, e.g.*, Autocam Corp. v. Sebelius, No. 12-cv-1096, 2012 WL 6845677, at *6 (W.D. Mich. Dec. 24, 2012), *aff'd*, 730 F.3d 618 (6th Cir. 2013), *vacated sub nom.* Autocam Corp. v. Burwell, 573 U.S. 956 (2014) ("Plaintiffs do not seek to control what an employee or his or her dependents do with the wages and healthcare dollars we provide. Our employees are free to make decisions with their money—including the funds in their personal health savings account—that we do not agree with.") (quoting an employer-plaintiff's affidavit).

31. *Id.* at *6; *see also id.* ("[I]n neither situation do the wages and benefits earned pay—directly or indirectly—for contraception products and services unless an employee makes an entirely independent decision to purchase them."); *see also* Grote v. Sebelius, 708 F.3d 850, 861 (7th Cir. 2013) (Rovner, J., dissenting) ("[C]onsider that health insurance is an element of employee compensation. How an employee independently chooses to use that insurance arguably may be no different in kind from the ways in which she decides to spend her take-home pay.") (citation omitted).

cost; (2) offer insurance and cover contraception; or (3) decline to offer insurance and pay a smaller amount in the form of a tax.[32] As amici argued to the Supreme Court, the latter option might have been a net economic benefit—not a burden—to objecting employers.[33] They might save money on overall compensation by dropping insurance, paying the (low) tax, and raising wages. But because the government did not actively pursue this argument, Justice Alito asserted that employers had a binary choice between a heavy financial burden and a heavy conscience burden.[34] The analysis by-then forcefully advocated by economists, he said, had been waived.[35]

Netta Barak-Corren's recent work on discrimination in consumer markets provides another illustration of how empirical work might be fruitfully integrated into debates about religious liberty. Barak-Corren shows that after the Supreme Court permitted a religious baker to discriminate against a same-sex couple in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the incidence of discriminatory behavior among similarly situated vendors increased.[36] This finding contravened the common assumption that instances of retail discrimination would be isolated and that any discriminating businesses would be marginalized.[37] More generally, Barak-Corren's work is a reminder that empirical study can confound more casual reasoning about the social consequences of legal decisions.

Unfortunately, many contemporary debates in law and religion take place under substantial factual uncertainty. Consider, for example, whether prohibiting discrimination by providers of foster care services will decrease the overall number of child placements.[38] From the armchair, it might seem that the obvious answer is yes—if some providers say that they will discontinue services if required to place children with LGBTQ couples or with Jewish families, then *ipso facto* antidiscrimination requirements will reduce overall services.

But that conclusion does not necessarily follow. It could be that when antidiscrimination provisions are implemented, objecting providers decide that their mission to place children in safe and loving homes overcomes their

32. *See* Marty Lederman, Hobby Lobby *Part III—There Is No "Employer Mandate,"* BALKINIZATION (Dec. 18, 2013), https://balkin.blogspot.com/2013/12/hobby-lobby-part-iiithe res-no-employer.html [https://perma.cc/XV8T-4VJC]. Very few law and religion scholars—and fewer courts—seemed to grasp the complex insurance arrangements behind the contraception mandate challenges.

33. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 720–21 (2014).

34. *Id.* at 720–23.

35. *Id.*

36. Netta Barak-Corren, *Religious Exemptions Increase Discrimination Toward Same–Sex Couples: Evidence from* Masterpiece Cakeshop, 50 J. LEGAL STUD. 75, 104–05 (2021).

37. *See* ANDREW KOPPELMAN, GAY RIGHTS VS. RELIGIOUS LIBERTY?: THE UNNECESSARY CONFLICT 11 (2020).

38. This was one of the factual disputes in *Fulton*. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881–82 (2021).

objection to serving particular populations.[39] It could also be that more minority families become willing to foster children, knowing that agencies will treat them equally to others. And even if it turns out that some providers shut down, others may step in to perform government contracts. Careful empirical work can shed light on these dynamics.[40]

This is not to say that all—or even many—religion law scholars should become empiricists themselves. But we should begin by admitting what we do not know, identifying questions we want answered, and drawing on empirical work where we can. Pulling back and considering the economics of church-state developments can itself be helpful. The issue of religious funding for school choice, for example, might look different if we connected it to disinvestment in city budgets and urban schools or to the economic precarity exacerbated by the COVID-19 pandemic, which gave the school choice movement what the Cato Institute called perhaps its best year ever.[41] Law and religion scholars might usefully begin by mining the nascent economic study of religion.[42] With regard to religious institutions, for example, new scholarship examines the operations and strategies that religious organizations use to gain competitive advantage and shape larger industries.[43]

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39. For example, under Boston's nondiscrimination ordinance, for over two decades, Catholic Charities placed children with gay foster parents. Elizabeth Sepper, *Doctoring Discrimination in the Same-Sex Marriage Debates*, 89 IND. L.J. 703, 747 (2014). And "[a]fter a journalist revealed these adoptions had taken place, the board of Catholic Charities unanimously affirmed its commitment to continuing such adoptions," but the bishops subsequently intervened, prompting half the board to resign in protest. *Id.* More recently, nearly one hundred employees of Catholic Charities of Buffalo sent the bishop a letter protesting his decision to end the agency's adoption and foster care services. Robert Shine, *Catholic Charities Employees Protest Bishop's Decision to End Adoption Services Over LGBT Non-Discrimination*, NEW WAYS MINISTRY (Sept. 7, 2018), https://www.newwaysministry.org/2018/09/07/catholic-charities-employees-protest-bishops-decision-to-end-adoption-services-over-lgbt-non-discrimination [https://perma.cc/M2VN-Z3FH].

40. Such empirical work has begun. *See generally* Netta Barak-Corren, Yoav Kan-Tor & Nelson Tebbe, *Examining the Effects of Antidiscrimination Laws on Children in the Foster Care and Adoption Systems*, 19 J. EMPIRICAL LEGAL STUD. 1003 (2022) (conducting an empirical analysis of effects of antidiscrimination laws on child placement rates).

41. *Is 2021 the Best Year for School Choice Ever?*, CATO INST. (Apr. 9, 2021), https://www.cato.org/multimedia/cato-daily-podcast/2021-best-year-school-choice-ever [https://perma.cc/RCL7-3RX7]; Benjamin Olneck-Brown, *States Make School Choice Part of COVID-Era Education Response*, NAT'L CONF. STATE LEGISLATURES (April 19, 2021), https://web.archive.org/web/20210421205442/https://www.ncsl.org/research/education/states-make-private-school-choice-part-of-Covid-era-education-response-magazine2021.aspx.

42. This subfield is itself relatively new. *See generally* Laurence R. Iannaccone, *Introduction to the Economics of Religion*, 36 J. ECON. LITERATURE 1465 (1998) (introducing and arguing for the economic study of religion); Srya Iyer, *The New Economics of Religion*, 54 J. ECON. LITERATURE 395 (2016) (performing a survey of major research and its themes); THE OXFORD HANDBOOK OF THE ECONOMICS OF RELIGION (Rachel M. McCleary ed., 2011) (providing overview of the literature); Hylton et al., *supra* note 13, at 407 ("The literature has focused on four topics: the industrial organization of religions, control of free riders, human capital and time allocation, and, more recently, the effects of religion on economic growth." (citation omitted)).

43. *E.g.*, Kent D. Miller, *Competitive Strategies of Religious Organizations*, 23 STRATEGIC MGMT. J. 435 (2002) (reviewing how religious organizations market, use political alliances, and respond

Once a research question generates empirical results, however, we should resist concluding that the question has been answered forever. First, facts on the ground can change, such that earlier studies must be revisited. For example, the fact of once-competitive labor markets (for certain workers) should not be transplanted into contemporary consolidated economies.[44] By the same token, commentators have recently suggested that the rise of gig work or the acute demand for employees in the wake of COVID-19 might reverse the prevailing power relationship between employers and employees.[45] To date, there is little empirical evidence to support these hypotheses.[46] But as with any research program sensitive to social scientific evidence, conclusions ought to be provisional and subject to revision.

Second, conditions and assumptions that led to particular church-state settlements may become obsolete. For example, as Sara Dubow has shown, in 1973 when Congress passed the Church Amendment to exempt religious hospitals from providing abortions, it both assumed the existence of many public hospitals, presumably subject to a duty to treat, and expected the widespread availability of abortion in doctors' offices—assumptions that no longer hold.[47] Likewise, Bill Marshall explains that the effect of permitting conscientious objection to the draft morphed over time; whereas the number of conscientious objectors was manageable during earlier wars, the Vietnam War provoked such resistance that "by 1972, there were more draft registrants

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to pressures, and pointing out that boundaries between religion and other industries have blurred and religious organizations have secularized as secular organizations have become "spiritualized"); Paul Tracey, *Religion and Organization: A Critical Review of Current Trends and Future Directions*, 6 ACAD. MGMT. ANNALS 87 (2012) (identifying contributions to the literature).

44. *See* Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, 105 CORNELL L. REV. 1343, 1360 (discussing fluctuation in labor market concentration).

45. *See, e.g.*, Sandrine Blanc, Book Review, 28 BUS. ETHICS Q. 219, 222 (2018) (reviewing ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) (2017)) (discussing "growing economic activity in the gig economy"); Juliana Kaplan, *The Year Workers Said 'No,'* BUS. INSIDER (May 15, 2022, 5:15 AM), https://www.businessinsider.com/year-workers-said-no-labor-shortages-unions-great-resignation-quits-2022-5 [https://perma.cc/75JQ-WP7U] (suggesting rise of worker power induced by the pandemic).

46. *See* Lawrence Mishel, *The Persistent Absence of Full Employment: A Critical Flaw in the Legal "Freedom of Contract" Framework*, 3 J.L. & POL. ECON. 72, 91 (2022); Chetan Cetty, *Talking About* Private Government*: A Review of the Economic Claims Made to Rebut Anderson's Analysis*, 3 J.L. & POL. ECON. 28, 33 (2022) (arguing that there is not enough gig work to undermine employer power and that available gig work is often exploitative); Suresh Naidu & Michael Carr, *If You Don't Like Your Job, Can You Always Quit? Pervasive Monopsony Power and Freedom in the Labor Market*, 3 J.L. & POL. ECON. 131, 132 (2022).

47. *See* Sara Dubow, *"A Constitutional Right Rendered Utterly Meaningless": Religious Exemptions and Reproductive Politics, 1973–2014*, 27 J. POL'Y HIST. 1, 11–18 (2015); Elizabeth Sepper, *Religious Exemptions, Harm to Others, and the Indeterminacy of a Common Law Baseline*, 106 KY. L.J. 661, 673–77 (2018) (bringing together analysis of the change in economic conditions and shifting common law and statutory obligations of hospitals and healthcare providers).

classified as conscientious objectors than there were men inducted into the army."[48] Historical work can reveal these shifts in underlying conditions.

On the flip side, the work of historians can bust myths about the past that pervade the field of law and religion. A few examples illustrate. One abiding story told about religious liberty in America is that since the early years of the republic, religious organizations have been treated as quasi-sovereign institutions. In this tale, it is said that political governments long ago acknowledged their limited jurisdiction over matters that belong to "the church."[49] The normative thrust of these claims is that we ought to defer to this long historical tradition.[50] But as Sally Gordon's careful historical work has shown, the early American experience of disestablishment was characterized by active state intervention in church affairs.[51] Caps on the size or value of church property were common, as were limitations on maximum allowable income. And the state actively favored control of church assets by lay members, rather than clergy.[52] Gordon's telling of this more accurate, if more complex and nuanced, history about the relationship between church and state blunts the normative edge of tales about religious institutional sovereignty.

Likewise, Kellen Funk's recent work on church corporations in antebellum America undermines common assumptions that the relationship between church and state took shape primarily, if not exclusively, through judicial interpretation of the Constitution's Religion Clauses. Funk shows that courts initially used private law doctrines—especially the law of trusts—to forge the law's treatment of churches.[53] Among other things, this work holds an important lesson for contemporary debates: Church-state relations are not merely (or perhaps not even primarily) a function of constitutional adjudication, but also constituted by the state through a wider web of legal and political structures.

In sum, the proper resolution of disputes in religion law often depends on factual propositions about both the present and the past. Engaging with work from economics, history, and neighboring social sciences would move

48. William P. Marshall, *Third-Party Burdens and Conscientious Objection to War*, 106 KY. L.J. 685, 697 (2018).

49. *See, e.g.*, Steven D. Smith, *Freedom of Religion or Freedom of the Church?* 31–32 (San Diego Legal Stud., Paper No. 11-061, 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1911412 [https://perma.cc/7KU3-DBZ6]; Richard W. Garnett, *The Freedom of the Church*, 4 J. CATH. SOC. THOUGHT 59, 59–60 (2007); Paul Horwitz, *Churches as First Amendment Institutions: of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 124 (2009).

50. Smith, *supra* note 49, at 45–48; Garnett, *supra* note 49, at 80; Horwitz, *supra* note 49, at 127–29.

51. Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Power and Property Before the Civil War*, 162 U. PA. L. REV. 307, 321 (2014).

52. Sarah Barringer Gordon, *Religious Corporations and Disestablishment, 1780-1840*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 63, 67 (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016).

53. Kellen Funk, *Church Corporations and the Conflict of Laws in Antebellum America*, 32 J.L. & RELIGION 263, 282–84 (2017).

the law and religion field away from conjecture and bolster its credibility, usefulness, and vibrancy.

II. CONSIDERING THE INSTITUTIONAL CONTEXT OF RELIGIOUS LIBERTY

In addition to embracing empirical work, a contemporary approach to law and religion must recognize the increasingly complex organizational world in which church-state questions arise.[54] Too often we think of religious liberty conflicts in particularized terms—it's the religious baker versus the LGBTQ patron; the employee seeking contraceptive coverage versus the religious business owner; the patient needing reproductive care versus the objecting healthcare worker. But this picture risks obscuring the larger institutional arrangements that structure social interactions.

And germinal efforts to bring economic study into the field of law and religion exacerbate this individualized inquiry. Some contemporary analyses of religious liberty, for example, aim to mimic "the type of efficient outcome that would likely result from private bargaining."[55] Others assume that working for a religious business represents "the voluntary choice of individuals to join the religious institution."[56] These efforts model religious liberty disputes as conflicts between symmetrically situated private parties.[57] Hypothetical bargains between "Party A" and "Party B" strip away the institutional details of labor, consumer, insurance, healthcare, or other markets, deflecting inquiries about religious imposition. And by marginalizing the role of legal and political institutions, they tend to prop up or "encase" markets against democratic norms.

These initial attempts risk repeating the mistakes of early law and economics. In the 1970s and 1980s, the neoclassical revival in economics, typically associated with the Chicago School, gained significant momentum, particularly in policymaking circles and in American law schools.[58] Law and economics breathed new intellectual energy into a variety of fields, from antitrust to torts

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54. As David Ciepley puts it, the movement in the industrialized world has been "from status to contract to organization." David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 AM. POL. SCI. REV. 139, 140 (2013). For leading philosophical work on the topic, see generally MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY (1986).

55. Stephanie H. Barclay, *An Economic Approach to Religious Exemptions*, 72 FLA. L. REV. 1211, 1227 (2020) (drawing on Coasean bargaining theory).

56. Michael A. Helfand, *Religious Institutionalism, Implied Consent, and the Value of Voluntarism*, 88 S. CAL. L. REV. 539, 570 (2015) (developing theory of implied consent to employment contracts).

57. For criticisms of Barclay's Coasean analysis, see Frederick Mark Gedicks, *Coase and Accommodation: A Reply*, 71 EMORY L.J. 1457 (2022). For criticism of reasoning from implied consent in religious liberty disputes, see B. Jessie Hill, *Change, Dissent, and the Problem of Consent in Religious Organizations*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 419 (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016).

58. *See* ELIZABETH POPP BERMAN, THINKING LIKE AN ECONOMIST: HOW EFFICIENCY REPLACED EQUALITY IN U.S. PUBLIC POLICY 79–84 (2022); STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 181–219 (2008).

to corporate law.[59] But eventually it became clear that initial applications of economic analysis came with significant baggage.[60] Critics noted that early law and economics tended to rely on a simplistic account of human behavior and to assume the superiority of market outcomes over democratic control of political and economic cooperation.[61] In subjecting neoclassical models to more rigorous empirical investigation, later generations of law and economics scholars debunked many of the assumptions of neoclassical economics and undermined the policy conclusions that flowed from them. As a result, contemporary scholarship in law and in economics now tends to downplay, if not disavow, the free-market ideology of earlier periods.[62]

The shape of religious liberty likewise depends on political and legal decisions about how to structure economic coordination. Indeed, our own writing has increasingly highlighted the relationship between religious liberty and larger economic structures, particularly in labor,[63] insurance,[64] and healthcare markets.[65] The fact that so much economic activity is organized within hierarchical firms, for example, is directly related to religious accommodation or indoctrination of employees.[66] In the case of the consumer marketplace, we might think of the institution of property law, the availability of business organizational forms, and the role of money (said, during the civil rights era,

59. For an early application of economics across law, see generally RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (1973). For more targeted applications, see GUIDO CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970) (torts); ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978) (antitrust); Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259 (1982) (corporate governance).

60. To be clear, there were earlier applications of economic analysis to law that did not carry this same baggage such as Robert Hale's work. *See, e.g.*, ROBERT L. HALE, FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER (1952); *see also* BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT (2001) (discussing Robert Hale's work).

61. *See, e.g.*, C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFFS. 3, 38–39 (1975); Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 223–26 (1980); Jules L. Coleman, *Economics and the Law: A Critical Review of the Foundations of the Economic Approach to Law*, 94 ETHICS 649, 661–79 (1984).

62. *See* sources cited *supra* note 21; *see also* Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649 (2018) (showing how efficiency analysis is often biased against the poor).

63. *See generally* James D. Nelson, *Corporate Disestablishment*, 105 VA. L. REV. 595 (2019) (discussing religious imposition in the workplace).

64. *See generally* Elizabeth Sepper, *Contraception and the Birth of Corporate Conscience*, 22 AM. U. J. GENDER SOC. POL'Y & L. 303 (2014) (exploring the dangers of allowing corporations to contest the employee contraception mandate).

65. *See generally* Elizabeth Sepper & James D. Nelson, *Disestablishing Hospitals*, 49 J.L. MED. & ETHICS 542 (2021) (exploring how disestablishment values should work to require nominally private hospitals to avoid domination over "patients' bodies and convictions"); Sepper & Nelson, *Government's Religious Hospitals*, *supra* note 7 (discussing state-governed, state-run, and/or state-owned religious hospitals).

66. On religious accommodation, see 42 U.S.C. § 2000e-2 (2018). On religious indoctrination, see Nelson, *supra* note 63, at 609–10. On the choice among alternate means of economic coordination, see generally Sanjukta Paul, *On Firms*, 90 U. CHI. L. REV. 579 (2023).

to be the same color in the hand of whomever holds it). This institutional approach would move away from analyzing religious liberty in terms of individual interests isolated from broader social systems. It would instead explore the design and operation of cooperative systems and the wider social interests that they serve.

A closer look at the institutional structure surrounding religion law reveals asymmetric power relations throughout the political economy. Our economic system is full of hierarchal structures, planned administration, and private power.[67] Over the last few decades, many industries—from agriculture to telecommunications to healthcare—have consolidated.[68] Product markets involve the sale of highly differentiated goods under imperfect competition. Capital markets are increasingly dominated by index funds that are controlled by a small handful of people.[69] Labor markets are riddled with regionally or locally dominant employers. Corporate organization and political spending suppress worker power.[70] Noncompete and nondisclosure provisions proliferate in worker contracts[71] as control over productive assets is leveraged in service of control over people.[72]

Thinking in terms of economic power, rather than efficient bargaining, can help to identify impediments to religious freedom and to design new tools to address them. For example, when considering whether employee religious liberty is jeopardized by an employer's practices, it might be relevant to know how easy it would be for employees to get a comparable position elsewhere. An argument for deferring to the employer's prerogative to structure the workplace might include the factual premise that the business operates in a competitive labor market, where their employees' services are likely to be in high demand, and so it would be very easy for any employee who felt

67. For the classic work among business historians, see generally ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS (1977). On the distinction between markets and hierarchies, see R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 387–89 (1937).

68. *See* TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 14 (2018); Exec. Order No. 14,036, 86 Fed. Reg. 36987 (July 9, 2021) (affirming the Executive's authority to scrutinize excessive industry consolidations under the Sherman and Clayton Antitrust Acts).

69. *See* John C. Coates, *The Future of Corporate Governance Part I: The Problem of Twelve* 1–3 (Harv. Pub. L. Working Paper, Paper No. 19-07, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3247337 [https://perma.cc/Z5K7-8UVF].

70. *See* WHITE HOUSE TASK FORCE ON WORKER ORG. & EMPOWERMENT, REPORT TO THE PRESIDENT 23, 29 (2022), https://www.whitehouse.gov/wp-content/uploads/2022/02/White-House-Task-Force-on-Worker-Organizing-and-Empowerment-Report.pdf [https://perma.cc/R9FC-N679].

71. *See* Orly Lobel, *Gentlemen Prefer Bonds: How Employers Fix the Talent Market*, 59 SANTA CLARA L. REV. 663, 681–85 (2020); José Azar, Ioana Marinescu & Marshall Steinbaum, *Labor Market Concentration*, 57 J. HUM. RES. S167, S168 (2022).

72. SURESH NAIDU & AARON SOJOURNER, ROOSEVELT INST., EMPLOYER POWER AND EMPLOYEE SKILLS: UNDERSTANDING WORKFORCE TRAINING PROGRAMS IN THE CONTEXT OF LABOR MARKET POWER 20–23 (2020).

burdened by the employer's policies to go find another job. The idea here might be that if employees are free to choose among many different employers in a competitive labor market, then their choice to work for a particular company implies that they consented to that employer's policies.[73] Factual evidence of employer power instead would bolster the opposite conclusion—that the employer's practices ought to be constrained or otherwise regulated because of the burden they put on objecting employees.

Recent work by Barak Richman illustrates such an institutional approach. Richman explores the economic power of American rabbis and argues that they operate cartels that "require both rabbis seeking employment and congregations hoping to hire a pulpit rabbi to exclusively use designated placement offices run by the rabbinical associations."[74] He argues that antitrust law should operate to disperse this accumulation of private power and foster a competitive labor market for rabbis.[75] More generally, Richman points out the ways in which accumulation of private power—whether by religious groups or secular actors—can threaten religious liberty and how efforts at dispersing that power promote free religious choice, a central constitutional value.[76] The realization (or frustration) of religious liberty, he makes clear, depends on wider institutional arrangements in the political economy.

In many sectors, we now have considerable evidence about the concentration of labor markets around the country and the resulting monopsony power enjoyed by employers.[77] Many markets today are dominated by powerful employers, leaving potential employees with few choices of where to work. Moreover, high employee search costs and firm-specific investments combine to exacerbate employer power.[78] When employees are choosing where to work—and especially when they are choosing whether to leave their current job—many of them are making something less than a fully voluntary decision. On the flip side, labor market conditions leave employers with considerable power to alter the initial terms of employment without fear of significant employee pushback.[79] Under these real-world conditions, the idea that employees meaningfully assent to all terms offered by their employers loses much of its force.

The asymmetric power of employers lends support to two ideas that do not typically come packaged together. First, religious impositions on employees

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73. *See* Helfand, *supra* note 56, at 575.

74. Barak D. Richman, *Saving the First Amendment from Itself: Relief from the Sherman Act Against the Rabbinic Cartels*, 39 PEPP. L. REV. 1347, 1348 (2013).

75. *Id.* at 1348–49.

76. Richman, *Religious Freedom Through Market Freedom*, *supra* note 19, at 1525.

77. For a useful overview of the literature, see Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 549–53 (2018).

78. *See id.* at 553–54; Azar et al., *supra* note 71, at S168–70.

79. *See* Kathryn Anne Edwards, *Worker Mobility in Practice: Is Quitting a Right, or a Luxury?*, 3 J.L. & POL. ECON. 104, 104–05 (2022).

ought to be curtailed. As one of us has explored elsewhere, a variety of employment law doctrines limit the power of large employers to impose religion on their employees.[80] In the words of one court, employment law is "a means to preserve religious diversity from forced religious conformity."[81] By contrast, an expanding "ministerial exception"—meant to permit churches to select their leaders—now authorizes large institutional employers, school systems, and social services, to fire a wide range of employees for any reason or none at all.[82] More broadly, Christian nationalist groups provide school curricula in private and public charter schools and training materials for business management that use "biblical slavery as injunctions to present-day employers" and instruct that "God thus mandates the subservience and obedience of work to employer."[83]

Second, the power of employers favors protecting employee religious practices more stringently than current doctrine seems to require. Title VII of the Civil Rights Act of 1964 gives employees a right to reasonable religious accommodations from their employers, unless those accommodations impose "undue hardship on the conduct of the employer's business."[84] But in *Trans World Airlines v. Hardison*, the Supreme Court noted that employers need not grant religious accommodations if the costs of doing so are more than "de minimis."[85] Scholars and activists have long objected to this formulation, arguing that the employer's duty to accommodate ought to be stronger.[86] And in practice, lower courts may hold employers to something higher than the "de minimis" standard.[87] Highlighting the institutional fact of widespread and overwhelming employer power could further bolster the argument for employee accommodations.

Recent attempts to grapple with employer power illustrate the potential normative payoffs. For example, emphasizing the reality of private coercion

80. Nelson, *supra* note 63, at 606–15.

81. Young v. Sw. Sav. & Loan Ass'n, 509 F.2d 140, 141 (5th Cir. 1975).

82. *See, e.g.*, Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2063–66 (2020); Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 41 F.4th 931, 939–40 (7th Cir. 2022). Sabine Tsuruda has constructed such an institutional account of the economic, social, and legal strictures of the workplace that give employers sweeping authority over workers in the paid workforce, belying comparisons to voluntary associations. *See* Sabine Tsuruda, *Disentangling Religion and Public Reason: An Alternative to the Ministerial Exception*, 106 CORNELL L. REV. 1255, 1257–58, 1263 (2021).

83. KATHLEEN WELLMAN, HIJACKING HISTORY: HOW THE CHRISTIAN RIGHT TEACHES HISTORY AND WHY IT MATTERS 203 (2021).

84. 42 U.S.C. § 2000e(j).

85. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977).

86. For a recent articulation of this longstanding dissatisfaction, see Brief of Religious Liberty Scholars and Employment Law Scholars as Amici Curiae in Support of Petitioner at 6–8, Groff v. DeJoy, 143 S. Ct. 646 (2023) (No. 22-174), 2023 WL 2382079, at *6–8.

87. *See* Nelson Tebbe, Micah Schwartzman & Richard Schragger, *How Much May Religious Accommodations Burden Others?*, *in* LAW, RELIGION, AND HEALTH IN THE UNITED STATES 215, 223–28 (Holly Fernandez Lynch, I. Glenn Cohen & Elizabeth Sepper eds., 2017).

in the workplace and the threat posed by employers using their authority to infringe on the religious liberty of employees, Christopher Lund argues that the Supreme Court should reinterpret Title VII to be more permissive toward religious accommodations for workers.[88] Similarly, Sabine Tsuruda explores how the workplace is part of our basic social and economic structure and contends that realizing goals of liberty and equality requires limitations on employer, not just state, power—including that of religious institutions.[89] Finally, Charlotte Garden shines a light on the dire consequences faced by employees who are denied ordinary legal protections against discrimination in religious workplaces.[90]

Greater analysis of how economic institutions function might also help develop legislative or administrative solutions to religious liberty problems. Litigation over the ACA's contraception mandate, for example, highlighted the linkage between work and insurance in the United States. For decades, health economists have bemoaned the inefficiency and costs of turning firms into benefits managers. Scholars on the left and the right support eliminating or reducing reliance on employers. Thinking institutionally, Holly Fernandez Lynch and Gregory Curfman have proposed to avoid future incursions on employer religious liberty by moving away from the system of employer-sponsored health insurance. Although they recognize the political obstacles, they argue that a more economically efficient insurance system would also benefit religious employers.[91]

Our point here is straightforward and perhaps obvious. Exemption claims brought by powerful religious institutions are not the same as ones brought by small religious minorities. These institutional objectors often control critical goods and services, and their claims for exemption may threaten political equality in a way that individual claims rarely do. Analysis should acknowledge and evaluate this real-life asymmetry.

III. ARTICULATING A POLITICAL ECONOMY

In a field as contentious as law and religion, it can be tempting to seek ways to sidestep value conflicts, which can seem intractable or even threatening to political stability and social peace. We suspect that this instinct may be behind

88. Christopher C. Lund, *Reconsidering* Thornton v. Caldor, 97 WASH. U. L. REV. 1687, 1698–1700 (2020).

89. *See generally* Tsuruda, *supra* note 82 (arguing for an alternative theory—an "authenticity exception"—to replace the ministerial exception).

90. Charlotte Garden, *Ministerial Employees and Discrimination Without Remedy*, 97 IND. L.J. 1007, 1024 (2022).

91. Holly Fernandez Lynch & Gregory Curfman, *Bosses in the Bedroom: Religious Employers and the Future of Employer-Sponsored Health Care*, *in* LAW, RELIGION, AND HEALTH IN THE UNITED STATES 154, 155 (Holly Fernandez Lynch, I. Glenn Cohen & Elizabeth Sepper eds., 2017) (arguing that RFRA can benefit religious employers).

recent attempts to bracket or abstract away from value questions by arguing that economics offers a more "clinical" approach to disputed issues.[92]

But proponents of importing economic analysis from private law into religion law often bring their own substantive commitments. Michael McConnell and Richard Posner, for example, argue that the economic approach proves useful because it sets "a free-market benchmark" and that "the 'market'—the realm of private choice—will reach the 'best' religious results; or, more accurately, that the government has no authority to alter such results."[93] Similarly, Stephanie Barclay follows Todd Zywicki in erecting a presumption against "forced transfers," which would systematically disfavor social regulation of the economy.[94]

Perhaps one is persuaded that markets work best as a procedure for discovering localized and private information.[95] Or perhaps one thinks that maintaining free markets is essential to ensuring political freedom.[96] Either way, the case for markets rests on claims about the values that they promote, rather than their ability to avoid taking sides in social controversies. And the idea that markets are a superior form of social organization or that private ordering is preferable to public ordering must be stated and defended, not assumed.

A useful contrast might be drawn here with Robert Vischer's work on conscience in the commercial sphere.[97] In making his case for recognizing free exercise claims of wedding vendors, fast-food chains, and even mega-companies like Wal-Mart, Vischer does not pretend that choosing such a path would cool social tensions. Instead, he puts front and center the value he sees in creating a "moral marketplace" filled with companies espousing pluralistic moral identities.[98] Vischer's articulation of what he takes to be an ideal political economy allows for more productive discourse, debate, and, of course, disagreement.[99]

As they engage with economics, scholars of law and religion ought to be similarly forthright. Consider, for example, the issue of state funding for

92. *See, e.g.*, Barclay, *supra* note 55, at 1218–19 (expressing suspicion of moral theory and "normative rhetoric"); *see also* Charles L. Barzun & Michael D. Gilbert, *Conflict Avoidance in Constitutional Law*, 107 VA. L. REV. 1, 7 (2021) (defending a conflict-avoidance principle in constitutional law to avoid "brute clashes of values").

93. McConnell & Posner, *supra* note 13, at 14.

94. Barclay, *supra* note 55, at 1253. On the idea of social regulation of the economy, see William J. Novak, *Law and the Social Control of American Capitalism*, 60 EMORY L.J. 377 (2010).

95. *See* F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 520 (1945).

96. *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 7–21 (1962).

97. *See* ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE 179–205 (2010).

98. *Id.*

99. *Id.* For our respective disagreements with Vischer, see Elizabeth Sepper & James D. Nelson, *The Religious Conversion of Corporate Social Responsibility*, 71 EMORY L.J. 217, 255 (2021); Elizabeth Sepper, *Gays in the Moralized Marketplace*, 7 ALA. C.R. & C.L. L. REV. 129, 133–34, 152 (2015); Nelson, *Conscience, Incorporated*, *supra* note 26, at 1613–14.

religious schools. Since the 1970s, neoliberals and social conservatives have joined forces against public institutions as part of the "realignment of American democracy."[100] The so-called school choice movement thus made religious liberty claims "predicated on the notion that schools are never neutral regarding values," defined to mean commitments to racial and gender equality and the teaching of evolution.[101] But the movement also laid claim to a particular political economy that emphasizes privatization and jockeying between parents to advance their individual children's interests.[102] On this view, money should follow the child. Schools should compete for that money by appealing to parents and their values. And private schools can outcompete "government schools" in delivering educational results and aligning with parental preferences.[103] Still another version of the political economy of this movement imagines that, as Jerry Falwell put it in 1979, there will no longer be "any public schools—the churches will have taken them over and Christians will be running them."[104]

Here, a competing vision might be built around public education's infrastructural role in our shared economic system. On this account, public schools would be recognized as central institutions for transmitting values of toleration and cooperation across racial, cultural, and socioeconomic lines.[105] They would be seen as an indispensable training ground for learning to work together in an increasingly interconnected economy.[106] The issue of "school choice," then, would be set against the backdrop of an economic system

100. ROBERT O. SELF, ALL IN THE FAMILY: THE REALIGNMENT OF AMERICAN DEMOCRACY SINCE THE 1960S 399–401 (2012); MELINDA COOPER, FAMILY VALUES: BETWEEN NEOLIBERALISM AND THE NEW SOCIAL CONSERVATISM 62–63 (2017) (discussing "vouchers" as a mechanism to stimulate consumer "choice" and return functions of the welfare state to the family).

101. James Forman, Jr., *The Rise and Fall of School Vouchers: A Story of Religion, Race, and Politics*, 54 UCLA L. REV. 547, 560–63 (2007).

102. Clint Bolick, *The Dimming of Blaine's Legacy*, 2019-2020 CATO SUP. CT. REV. 287, 291.

103. *See* Lisa Philipps, *Taxing the Market Citizen*: *Fiscal Policy and Inequality in an Age of Privatization*, 63 L. & CONTEMP. PROBS. 111, 115 (2000) ("Just as the state's role is reimagined, so are the terms of citizenship, to emphasize individual self-reliance, competition, and consumer choice."); Osamudia James, *Risky Education*, 89 GEO. WASH. L. REV. 667, 690–91 (2021); Aaron Saiger, *Charter Schools, the Establishment Clause, and the Neoliberal Turn in Public Education*, 34 CARDOZO L. REV. 1163, 1193, 1196 (2013); Carol Vincent, *'The Children Have Only Got One Education and You Have to Make Sure It's a Good One': Parenting and Parent–School Relations in a Neoliberal Age*, 29 GENDER & EDUC. 541, 548–49 (2017).

104. STEWART, *supra* note 12, at 186.

105. *See* Brief of Church-State Scholars as Amici Curiae in Support of Respondent at 18, Kennedy v. Bremerton, 142 S. Ct. 2407 (2022) (No. 21-418) ("Public schools are thus among our society's principal institutions for inculcating civic values and shaping tomorrow's citizens."); Erika K. Wilson, *Racialized Religious School Segregation*, 132 YALE L.J. F. 598 (2022) (exploring how school choice undermines multiracial democracy).

106. On the value of cooperation and association in diverse workplaces to a democratic society, see generally CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY (2003).

increasingly dependent on toleration, trust, and mutual respect for diverse viewpoints.

A political economy lens can also expand our thinking about religious liberty's background conditions. Consider, for example, the debate surrounding *Fulton v. City of Philadelphia* over whether religiously affiliated social service providers should be exempted from antidiscrimination requirements.[107] Most of this discussion accepted the necessity—and even the virtue—of foster care systems instead of interrogating their underlying premises. Litigators and scholars argued over which outcome would ensure *more* children could be placed in foster care.[108] Those arguing in favor of exemption often smuggled in an unstated veneration for market ordering and skepticism of democratic efforts to achieve public values. But even those who insisted on antidiscrimination norms tended to implicitly accept that privatization of foster care is valuable. An alternative political economy might instead have begun with the fact of the racist nature of child removal and parental rights terminations.[109] It might have recognized the institutional structures and interests that developed as a result of political choices to funnel public dollars into family separation.[110] It might suggest that an end to private foster care institutions is a benefit, not a cost, that would encourage our democratic institutions to deploy resources toward keeping families together.[111]

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107. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1874 (2021).

108. *See, e.g.*, Brief of Prospective Foster Parents Subjected to Religiously Motivated Discrimination by Child-Placement Agencies as Amici Curiae in Support of Respondents, *Fulton*, 141 S. Ct. 1868 (No. 19-123), 2020 WL 5044625, at *31 ("Recognizing a constitutional right to be a government agent who turns away otherwise-qualified foster families for not living up to the agent's religious beliefs would mean fewer homes—fewer loving families—for children in need."); Brief of Amici Curiae Former Foster Children and Foster/Adoptive Parents et al. in Support of Petitioners, *Fulton*, 141 S. Ct. 1868 (No. 19-123), 2020 WL 3078494, at *23 ("The staggering number of children in need of safe and stable foster homes demands an 'all-hands-on-deck' approach.").

109. Dorothy Roberts, *How the Child Welfare System Polices Black Mothers*, S&F ONLINE (2019), https://sfonline.barnard.edu/how-the-child-welfare-system-polices-black-mothers/#identifier_0_4255 [https://perma.cc/JBZ7-YKZZ] ("Child welfare policy became increasingly stingy and punitive—and the foster care population has skyrocketed—since the 1970s, as Black children composed a greater proportion of the caseloads. As I note elsewhere, 'As the child welfare system began to serve fewer white children and more minority children, state and federal governments spent more money on out-of-home care and less on in-home services.'") (footnotes omitted). *See generally* DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002) [hereinafter ROBERTS, SHATTERED BONDS] (discussing the racial imbalance in the child welfare system and its effect on minority children and families and proposing changes to the child welfare system).

110. By the 1970s, federal reimbursement to child welfare authorities had created incentives to keep children separated from their families, a trend Congress aimed to reverse; the Adoption and Safe Families Act of 1997, however, came to emphasize adoption of children into new families rather than reunification. *See* ROBERTS, SHATTERED BONDS, *supra* note 109, at 105.

111. For recent scholarship proposing abolition of the child welfare system in favor of family support and unification, see generally DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD (2022); Nancy D. Polikoff & Jane M. Spinak, *Foreword: Strengthened Bonds: Abolishing the Child Welfare System*

Whatever one takes to be the ideal political economy, one thing is clear: Recourse to economics cannot avoid contestation over principles of political morality. In the end, the big fights about religious liberty involve difficult questions about how to order social affairs in light of competing values. We cannot settle these questions through economic analysis alone. To solve the actual problems that we face, the field of law and religion must continue to surface the values at stake in disputes over religious liberty and to consider competing visions for the political economy of law and religion.[112]

CONCLUSION

Our hope is that the methods we have outlined begin to build a bridge between religion law and political economy. If we're successful, scholars on both sides of this divide will reap the benefits. For starters, the field of law and religion is an intellectually robust field, with active and sophisticated work on matters of central importance to liberal democracy. But even the best scholarship is often disconnected from cognate discussions in family law, health law, and employment law as well as discussions that take place in other disciplines. With its transsubstantive appeal and interdisciplinary grounding, engagement with political economy could expand religion law's intellectual reach.

The law and political economy movement, for its part, urgently needs to grapple with religion. Law and political economy has thus far overlooked, for example, the extent to which religious institutions have undermined democratic accountability in healthcare and other social services. To the extent religion enters conversations, it takes on the popular image as small and private. An emerging body of law and political economy scholarship ably contends with how decisions under the Free Speech Clause contribute to conditions of inequality and undermine democratic participation. But Religion Clause doctrine and practice present similar—or perhaps more serious—dangers. As it turns out, large parts of the political economy are religious. And many of the largest institutional players have taken steps to insulate themselves from democratic demands.

The institutional turn in religion law over the last decade means that the claims of well-funded private organizations will repeatedly and forcefully challenge democratically determined political and economic arrangements. Such challenges threaten to entrench the power of large economic institutions, amplifying the influence they have over people's everyday lives. With a sympathetic Court and increasingly favorable constitutional doctrine on their

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and Re-envisioning Child Well-Being, 11 COLUM. J. RACE & L. 427 (2021); Shanta Trivedi, *The Adoption and Safe Families Act Is Not Worth Saving: The Case for Repeal*, 61 FAM. CT. REV. 219 (2023).

112. *See* Danielle Allen, Yochai Benkler, Leah Downey, Rebecca Henderson & Josh Simons, *Introduction* to A POLITICAL ECONOMY OF JUSTICE 7–12 (Danielle Allen, Yochai Benkler, Leah Downey, Rebecca Henderson & Josh Simons eds., 2022). For an analogous point in the context of free speech law, see Nelson Tebbe, *A Democratic Political Economy for the First Amendment*, 105 CORNELL L. REV. 959, 976–80 (2020).

side, such institutions are a force to be reckoned with. Without taking stock of changes in religion law, proponents of a more democratic political economy are likely to encounter systematic opposition from the campaign for religious liberty. To meet these emerging threats to democratic self-government, scholars must take account of religious liberty's legal, political, and economic ascendance.