Belief v. Belief: Resolving Religious Conflicts in the Workplace

by

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Hobby Lobby. Masterpiece Cakeshop. Walgreens. Vistaprint. Family Dollar. These are just a few of the organizations that have recently been in the news for disputes centered on conflicting moral and religious values of corporations, their employees, and their customers.[3] In a time of heightened partisan and ideological divides, these conflicts are especially challenging when they involve the rights of lesbian, gay, bisexual, and transsexual (LGBT) employees and customers and conflicting religious beliefs of corporations and their owners.[4] When religious values compete with civil rights in the employment context, a complex web of legal protections make the outcome unclear. Recent case law, however, illuminates some of the principles courts may now apply in order to develop a hierarchy of rights and interests in such cases. This paper seeks to illustrate the reasons for this growing tension, identify examples of potential specific conflicts, analyze their likely resolution, and address some of the troubling implications that arise as a result.

Value conflicts in the workplace can take many forms. Corporations seeking to protect values related to diversity, equity, or women's access to reproductive care may be challenged by employees who view corporate policies as impermissible political viewpoint discrimination[5] or as infringement on their personal religious values.[6] Employees may assert the right not to abide by diversity policies requiring equal treatment and non-harassment of LGBT employees and customers,[7] while corporations may seek exemption from otherwise generally applicable laws on the basis that they conflict with the corporation's religious beliefs.[8]

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[3] Katy Barnitz, *Walgreens Sued Over Refusal to Fill Prescription*, ALBUQUERQUE J. (Nov. 18, 2017), https://www.abqjournal.com/1094997/walgreens-sued-over-refusal-to-fill-prescription.html (Walgreens sued when pharmacist refuses to fill prescription for birth control); Beth Greenfield, *Gay Couple Sues Printing Company Over Homophobic Wedding Pamphlets*, HUFFPOST (Jan. 17, 2018), https://www.huffingtonpost.com/entry/gay-couple-sues-printing-company-over-homophobic-wedding-pamphlets_us_5a5f661ce4b096ecfca9831d (Vistaprint employee delivers anti-gay pamphlet to gay couple); Curtis M. Wong, *Woman Says a Family Dollar Clerk Refused to Serve Her Because She's Gay*, HUFFPOST (Apr. 25, 2016), https://www.huffingtonpost.com/entry/family-dollar-gay-woman_us_571e38f7e4b0d4d3f723dfd3 (Family Dollar clerk accused of refusing to serve gay customer); *see also infra* notes 45–53 and 101–03 and accompanying text.

[4] *See infra* Part III; *see also Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 2017*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Apr. 24, 2018) (showing that complaints based on religious discrimination have roughly doubled since 1997, both in total number and as a percentage of complaints filed).

[5] *See, e.g.*, Camila Domonoske, *James Damore Sues Google, Alleging Discrimination Against Conservative White Men*, NAT'L PUB. RADIO (Jan. 9, 2018), https://www.npr.org/sections/thetwo-way/2018/01/09/576682765/james-damore-sues-google-alleging-discrimination-against-conservative-white-men.

[6] *See, e.g.*, Marina Fang, *Counselors in Tennessee Can Now Legally Refuse LGBT Patients*, HUFFPOST (Apr. 27, 2016), https://www.huffingtonpost.com/entry/tennessee-anti-lgbt-counselors-law_us_57212b06e4b01a5ebde46cbd; Colin Kalmbacher, *Sessions Suggests Social Security Employees Can Refuse to Process LGBT Claims*, LAW & CRIME (Oct. 18, 2017), https://lawandcrime.com/video/sessions-suggests-social-security-employees-can-refuse-to-process-lgbt-claims-video/; Robert Pear & Jeremy W. Peters, *Trump Gives Health Workers New Religious Liberty Protections*, N.Y. TIMES (Jan. 18, 2018), https://www.nytimes.com/2018/01/18/us/health-care-office-abortion-contraception.html.

[7] *See, e.g.*, Matthews v. Wal-Mart Stores, Inc., 417 Fed. Appx. 552, 553 (7th Cir. 2011) (Apostolic Christian employee berated and admonished gay co-workers at work); Peterson v. Hewlett-Packard Co., 358 F.3d 599, 601–02 (9th Cir. 2004) (employee sought to post Biblical passages condemning homosexuality on top of company diversity posters); Buonanno v. AT&T Broadband, LLC, 313 F. Supp. 2d 1069, 1074–76 (D. Colo. 2004) (Christian employee refused to sign pledge to comply with company diversity policy).

[8] *See infra* note 156 and accompanying text.

Employee rights to religious freedom are not new. Decades of case law under Title VII of the Civil Rights Act of 1964[9] (Title VII) establishes the right of employees to be free from discrimination on the basis of religion,[10] while the Religious Freedom Restoration Act of 1993[11] (RFRA) protects individuals' religious freedom from some government interference. But in recent years, key elements of the employment landscape have changed, setting up new and complex conflicts between employers and employees. The first is that corporations are espousing increasingly specific beliefs, values, and guiding principles. Some corporations have adopted religious beliefs, while others, including many publicly held corporations, have adopted values and principles that may be classified as secular but are nonetheless sincere and deeply held. Either trend may exacerbate conflict, as some feel religious liberty arguments can fuel discrimination while others feel movements for LGBT rights may infringe on their religious liberty.[12]

A second key element of change is that there is now expanded legal protection for corporate beliefs. Based on *Burwell v. Hobby Lobby Stores, Inc.*,[13] closely held corporations can assert rights to religious freedom under RFRA, setting up potential conflicts between the religious beliefs of the *corporation* and the religious beliefs of the *employee*. At the same time, states are passing new religious freedom laws, some of which are modeled after RFRA, others of which narrowly target the purported rights of employers and employees to refuse to serve LGBT customers. These laws similarly set up potential conflicts between the rights of employers and employees, or between the rights of employees and customers.

The changing employment landscape comes as claims for religious liberty are receiving an increasing amount of attention from the courts. High profile Supreme Court cases like *Trinity Lutheran Church of Columbia, Inc. v. Comer*,[14] *Hobby Lobby*, and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*[15] all involve efforts to protect religious freedom, even when an individual's claim to religious freedom has the potential to interfere with a third party's rights. The recent proliferation of state laws protecting religious freedom will only feed this trend, especially as the constitutionality of these laws is tested in the courts.[16] Conflicts over these competing rights can involve a number of broad, thorny legal disputes, including those concerning

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[9] 42 U.S.C. §§ 2000e–2000e-17 (2012).
[10] *See infra* Section II.B.
[11] 42 U.S.C. §§ 2000bb–2000bb-4 (2012).
[12] *See* Warren Richey, *How the Push for Gay Rights is Reshaping Religious Liberty in America*, CHRISTIAN SCI. MONITOR (July 11, 2016), https://www.csmonitor.com/USA/Justice/2016/0711/How-the-push-for-gay-rights-is-reshaping-religious-liberty-in-America; *End the Use of Religion to Discriminate*, AM. CIVIL LIBERTIES UNION, https://www.aclu.org/issues/religious-liberty/using-religion-discriminate/end-use-religion-discriminate (last visited Apr. 24, 2018).
[13] 134 S. Ct. 2751, 2785 (2014).
[14] 137 S. Ct. 2012, 2017, 2024 (2017) (finding that a state program restricting churches from applying for grants violated the free exercise of religion clause of the First Amendment).
[15] No. 16-111 (U.S. filed July 25, 2016). The Supreme Court heard oral argument in *Masterpiece Cakeshop* on December 17, 2017. *See* Henry Gass, *Religious Liberty or Right to Discriminate? High Court to Hear Arguments in Wedding Cake Case*, CHRISTIAN SCI. MONITOR (Dec. 4, 2017), https://www.csmonitor.com/USA/Justice/2017/1204/Religious-liberty-or-right-to-discriminate-High-court-to-hear-arguments-in-wedding-cake-case; *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/masterpiece-cakeshop-ltd-v-colorado-civil-rights-commn/ (last visited Apr. 24, 2018).
[16] *See infra* Section I.C.1.

the First Amendment and Title VII, fights between secular and religious beliefs, and competition between religious beliefs and Equal Protection rights under the Fourteenth Amendment.[17]

Whether the First Amendment, Fourteenth Amendment, Title VII, or some other source of law determines the outcome when employee and employer values conflict in the workplace should reflect a comprehensive analysis of the relative importance of values and rights in this post-*Hobby Lobby* environment. A recent decision from the Sixth Circuit, *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*,[18] bolstered by a Second Circuit decision issued days earlier,[19] provides some guidance as to the ways in which courts may analyze conflicts between RFRA and Title VII in the future. Other than *Harris*, however, courts have rarely articulated the bases on which conflicts among beliefs, values, and rights should be resolved, including the relative priorities of religious beliefs and interests not protected by Title VII.

In response to this void in existing jurisprudence, this paper explores recent conflicts between religion and rights in the workplace, the ways in which state-level regulation complicates those conflicts, and the potential impact of the *Harris* decision. In doing so, we seek to clarify the principles that should guide the resolution of these cases and offer scholars and employers a framework for assessing the likely hierarchy that a court may use in resolving cases in which values conflict with rights in the workplace.

The paper proceeds in five parts. In Part I, we explore the recent expansion of both corporate values and religious protection in the workplace under RFRA, *Hobby Lobby*, and state religious freedom laws. In this part, we also identify some hypothetical (but realistic) value-based conflicts between employers and employees, with particular attention to specific conflicts involving LGBT rights. Part II describes the sources of law and legal principles most relevant to resolving these conflicts, with particular attention to constitutional and statutory protections developed in the *Obergefell v. Hodges*[20] and *Harris* decisions. In Part III, we analyze the likely resolution of the conflicting rights and interests in our hypothetical scenarios, given recent case developments examined in Part II. In Part IV, we discuss the implications of this changing legal landscape and suggest ways in which the Fourteenth Amendment might be used to help develop guiding principles for future decisions in this area. We conclude in Part V.

I. The Rising Storm: Bringing Religion to Work

A. Corporations Increasingly Adopt Religious and Secular Values

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[17] *See* Dominic Adams, *Religion Kept Woman From Getting Flu Shot Needed For Hospital Job, Lawsuit Claims*, MLIVE (Feb. 22, 2018), http://www.mlive.com/news/flint/index.ssf/2018/02/woman_sues_owosso_hospital_for.html; Sydney Greene, *In Lawsuit, Texas Couple Claims They Were Illegally Turned Down as Foster Parents Because They Are Lesbians*, TEX. TRIB. (Feb. 20, 2018), https://www.texastribune.org/2018/02/20/texas-lesbian-couples-sues-trump-administration-over-refugee-adoption/.

[18] 884 F.3d 560 (6th Cir. 2018).

[19] Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018) (holding that discrimination on the basis of sexual orientation is prohibited by Title VII).

[20] 135 S. Ct. 2584 (2015).

Corporations have espoused their own institutional values for decades.[21] However, the old conventional wisdom was that corporations tried to avoid conflicts in order not to be seen as adopting controversial positions with regard to cultural divides.[22] Increasingly today, corporations deliberately and consciously take a stand on controversial issues. In the wake of recent tragic school shootings, a number of corporations decided to limit or cease the sale of guns, despite facing a backlash from gun enthusiasts.[23] Corporations have publicly confronted President Trump and his administration on a range of issues from racism to the Deferred Action for Childhood Arrivals program.[24] Many corporations now espouse certain "liberal"[25] values, including equity and diversity, as an integral part of their corporate mission and culture, as well as a distinct value

[21] A study of corporate values must include both the notion of corporations as religious bodies and the adoption of secular corporate values, often described as corporate social responsibility (CSR). *See generally* AMANDA PORTERFIELD, CORPORATE SPIRIT: RELIGION AND THE RISE OF THE MODERN CORPORATION (2018) (focusing on the development of corporations in the United States and the significant similarities between commercial and religious corporations); Archie B. Carroll, *Corporate Social Responsibility: Evolution of a Definitional Construct*, 38 BUS. & SOC'Y 268 (1999) (seminal work tracing the development of CSR from the 1950s to the 1990s, and offering a model for understanding the role of CSR in corporations); Max B. E. Clarkson, *A Stakeholder Framework for Analyzing and Evaluating Corporate Social Performance*, 20 ACAD. MGMT. REV. 92 (1995) (creating a framework for analyzing corporate social performance and CSR). Business scholars have long argued that building strong-shared values is an essential aspect of successful corporate management. *See* Paul C. Nystrom, *Differences in Moral Values Between Corporations*, 9 J. BUS. ETHICS 971, 971 (1990).

[22] Daniel Korschun & N. Craig Smith, *Companies Can't Avoid Politics—and Shouldn't Try To*, HARV. BUS. REV. (Mar. 7, 2018), https://hbr.org/2018/03/companies-cant-avoid-politics-and-shouldnt-try-to.

[23] Damian J. Troise, *Walmart, Dick's Expand Corporate Rift with Gun Lobby*, CHI. TRIB. (Mar. 1, 2018), http://www.chicagotribune.com/news/nationworld/ct-walmart-firearms-ammunition-20180228-story.html.

[24] Laurent Belsie, *Trump-Era Shift: CEOs Find a Voice for Moral Outrage*, CHRISTIAN SCI. MONITOR (Aug. 17, 2017), https://www.csmonitor.com/Business/2017/0817/Trump-era-shift-CEOs-find-a-voice-for-moral-outrage; Tara I. Burton, *Are Corporations Becoming the New Arbiters of Public Morality?*, VOX (Aug. 17, 2017), https://www.vox.com/identities/2017/8/17/16162226/corporations-replacing-churches-americas-conscience; Steven Mufson, *Inside the Call Where CEOs Found Their Moral Compass and Steered Away from Trump*, WASH. POST (Aug. 18, 2017), https://www.washingtonpost.com/business/economy/inside-the-call-where-ceos-found-their-moral-compass-and-steered-away-from-trump/2017/08/18/06e8b00e-8363-11e7-ab27-1a21a8e006ab_story.html?utm_term=.70c06bc60064.

[25] It is important to note that "liberal" and "conservative" are highly suggestive and potentially inflammatory terms without hard-and-fast definitions. While generally associated with political parties (liberal-Democrat/conservative-Republican), the terms liberal and conservative are not entirely co-extensive with party affiliation. That said, certain values, issues, and beliefs are more strongly associated with partisanship than any other demographic. *See* PEW RESEARCH CTR., THE PARTISAN DIVIDE ON POLITICAL VALUES GROWS EVEN WIDER 1, 3, 10 (2017), http://assets.pewresearch.org/wp-content/uploads/sites/5/2017/10/05162647/10-05-2017-Political-landscape-release.pdf. Recent years have seen increasing levels of partisanship and a declining percentage of Americans that express holding a mix of "liberal and conservative" values. *Id.* at 11–13. Party affiliation and liberal/conservative ideologies are highly predictive of beliefs regarding racism, discrimination, immigration and immigrants, foreign policy, homosexuality, gender, and religion. *Id.* at 31–48. Thus, while it is not entirely true to say *all* liberals and Democrats support LGBT rights, or that *all* conservatives and Republicans believe that seeing discrimination where it does not really exist is a bigger problem than actual discrimination, these statements are true by wide majorities. *Id.* at 37, 42.

proposition.[26] Corporate officers may also espouse diversity as a personal value and integrate it into leadership.[27]

Cynical observers may suggest these "values" are simply a ruse for attracting employees and increasing profits. Certainly, evidence suggests that liberal values can be good for business, particularly when it comes to attracting younger talent. A 2017 study found that nearly half of Millennials surveyed felt that diversity and inclusion were important criteria in their job search, compared with just 33 percent of Gen X respondents and 37 percent of Baby Boomer respondents.[28] Having defined corporate values may also improve the general reputation of a company. Rideshare company Lyft experienced a surge in app downloads when it issued a statement, titled "Defending Our Values," announcing a million-dollar donation to the ACLU in the wake of President Trump's first travel ban.[29] Importantly, research suggests companies with higher rates of diversity return higher rates of financial returns.[30]

Besides these profit-driven interests, however, corporate leaders may also genuinely believe it is their moral, ethical, or religious duty to adopt values and take moral stands. After a white supremacist rally in Charlottesville, Virginia, resulted in the death of a peaceful protester and President Trump appeared to offer a kind of moral equivalency between the white supremacists and the protesters, many corporations spoke out against the president.[31] Apple CEO Tim Cook appeared to be expressing a real sense of moral outrage when he said, "We've seen the terror of white supremacy and racist violence before. It is a moral issue—an affront to America. We must all stand against it."[32] A number of large corporations, including well-known fast food chain

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[26] Lydia Dishman, *Millennials Have a Different Definition of Diversity and Inclusion*, FAST COMPANY (May 18, 2015), https://www.fastcompany.com/3046358/millennials-have-a-different-definition-of-diversity-and-inclusion; *see also* DIVERSITY BEST PRACTICES, COMMITMENT TO DIVERSITY & INCLUSION IN THE FORTUNE 500/1000, at 9 (2017), https://www.diversitybestpractices.com/sites/diversitybestpractices.com/files/attachments/2017/07/fortune_500_1000_commitment_0.pdf (finding that 60% of Fortune 500 companies had diversity officers and/or policies).

[27] *See generally* Jacqueline N. Hood, *The Relationship of Leadership Style and CEO Values to Ethical Practices in Organizations*, 43 J. BUS. ETHICS 263 (2003).

[28] Emil Hill, *Rethinking Diversity, Equity and Inclusion as a Value Proposition*, MEDIUM: PURPOSE DECODED (Feb. 28, 2017), https://impact.webershandwick.com/rethinking-diversity-equity-and-inclusion-as-a-value-proposition-701bfca89973.

[29] The company argued that the travel ban was "antithetical to both Lyft's and our nation's core values." Adam Rosenberg, *Lyft Condemns Trump's Immigration Ban, Pledges $1 Million to ACLU*, MASHABLE (Jan. 29, 2017), https://mashable.com/2017/01/29/lyft-aclu-donation-trump-muslim-ban/#.

[30] Oliver Ralph & Laura Noonan, *Diversity Brings Boost to Profitability*, FIN. TIMES (Apr. 4, 2017), https://www.ft.com/content/1bc22040-1302-11e7-80f4-13e067d5072c; Ruchika Tulshyan, *Racially Diverse Companies Outperform Industry Norms by 35%*, FORBES (Jan. 30, 2015), https://www.forbes.com/sites/ruchikatulshyan/2015/01/30/racially-diverse-companies-outperform-industry-norms-by-30/#445745d01132.

[31] Annie Lowrey, *After Charlottesville, Business Leaders Are Dumping the Trump Administration*, ATLANTIC (Aug. 15, 2017), https://www.theatlantic.com/business/archive/2017/08/business-leaders-are-fleeing-their-associations-with-the-trump-administration/536937/; Sheryl G. Stolberg & Brian M. Rosenthal, *Man Charged After White Nationalist Rally in Charlottesville Ends in Deadly Violence*, N.Y. TIMES (Aug. 12, 2017), https://www.nytimes.com/2017/08/12/us/charlottesville-protest-white-nationalist.html; Joanna Walters & Jason Wilson, *Charlottesville: Trump Under Fire for Failure to Condemn Far Right*, GUARDIAN (Aug. 14, 2017), https://www.theguardian.com/us-news/2017/aug/13/civil-rights-inquiry-for-charlottesville-rally-death.

[32] David Choi, *'Hate is a Cancer': Apple CEO Tim Cook Sends a Message to Employees After Charlottesville Violence*, BUS. INSIDER NORDIC (Aug. 17, 2017), http://nordic.businessinsider.com/tim-cook-email-charlottesville-violence-2017-8/.

Chick-fil-A and clothing company Forever 21, have a significant religious foundation, with some expressing it openly, and others adopting a quieter approach.[33] Chick-fil-A in particular has waded openly into the culture wars by vocally opposing same sex marriage, resulting in boycotts from more liberal groups and "Chick-fil-A-Appreciation Days" from social conservatives.[34]

Where in the past corporate religious values would have been attributed more narrowly to corporate owners, today, corporations *themselves* may be considered to have religious values. The Supreme Court first recognized the ability of certain closely held for-profit corporations to have protection for their religious beliefs in 2014, in *Hobby Lobby*.[35] Since then, a records request suggests that over 50 companies have requested a similar exemption from contraceptive care requirements under the Affordable Care Act.[36]

The Trump administration has not been a passive player in these increasingly complex matters. It has actively pursued an agenda in support of what it calls "conscience rights and life," and has sided strongly with claims for religious freedom. Its efforts have included creating a broad exemption for any company that, on religious or secular grounds, does not want to participate in any way in permitting its employees to have access to birth control.[37] In addition, the Trump Administration created a new office within the federal Department of Health and Human Services (HHS)—the Conscience and Religious Freedom Division—intended to capture purported cases of religious discrimination.[38] The division reportedly received 300 complaints of religious rights discrimination from health care workers within its first month of existence.[39]

The courts have not directly addressed precisely *how* a corporation would go about adopting a religion or a religious practice, particularly if there are disagreements between or among owners as to which religious practices should be adopted.[40] Neither have courts considered whether corporations that espouse moral and ethical values and adopt related practices, including equity or diversity policies, can be considered to have adopted a "religion" for purposes other than RFRA or the First Amendment. In *Hobby Lobby*, the Court adopted a "hands-off" approach to assessing the plausibility of religious claims, including making an assessment of whether

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[33] Kate Taylor, *9 American Companies with Extremely Religious Roots*, BUS. INSIDER (Oct. 7, 2017), http://www.businessinsider.com/religious-american-companies-2017-10#in-n-out-4.

[34] Bill Barrow, *Chick-Fil-A: Culture War in a Chicken Sandwich?*, CHRISTIAN SCI. MONITOR (July 27, 2012), https://www.csmonitor.com/USA/Latest-News-Wires/2012/0727/Chick-fil-A-Culture-war-in-a-chicken-sandwich.

[35] 134 S. Ct. 2751, 2785 (2014).

[36] Laura E. Durso et al., *Who Seeks Religious Accommodations to Providing Contraceptive Coverage?*, CTR. FOR AM. PROGRESS (Aug. 11, 2017), https://www.americanprogress.org/issues/lgbt/news/2017/08/11/437265/seeks-religious-accommodations-providing-contraceptive-coverage/.

[37] Robert Pear et al., *Trump Administration Rolls Back Birth Control Mandate*, N.Y. TIMES (Oct. 6, 2017), https://www.nytimes.com/2017/10/06/us/politics/trump-contraception-birth-control.html.

[38] *Conscience and Religious Freedom*, U.S. DEP'T HEALTH & HUM. SERVS., https://www.hhs.gov/conscience/index.html (last visited May 7, 2018).

[39] Jessie Hellmann, *New HHS Office That Enforces Health Workers' Religious Rights Received 300 Complaints in a Month*, HILL (Feb. 20, 2018), http://thehill.com/policy/healthcare/374725-hhs-new-office-that-enforces-religious-moral-rights-of-health-workers.

[40] For an analysis of the question of how a corporation adopts a religion and whether it is the corporation's religion as a real entity or as an aggregate of its owners, see Corey A. Ciocchetti, *Religious Freedom and Closely Held Corporations: The* Hobby Lobby *Case and Its Ethical Implications*, 93 OR. L. REV. 259, 337–44 (2014); Sean Nadel, *Closely Held Conscience: Corporate Personhood in the Post-*Hobby Lobby *World*, 50 COLUM. J.L. & SOC. PROBS. 417, 425–29 (2017); *see generally* Jason Iuliano, *Do Corporations Have Religious Beliefs?*, 90 IND. L.J. 47 (2015).

government practices substantially burden an individual's religious beliefs or practices.[41] If this deferential approach is extended equally toward traditional and non-traditional religions, it is certainly plausible that a claim that being forced to accommodate discrimination against LGBT people substantially burdens an individual or corporation's religion would be upheld.[42]

It is worth noting that although RFRA was passed with broad bipartisan support, recent cases involving religion and the workplace have largely involved conservative and evangelical Christians pushing back against laws regarding the provision of contraception, access to reproductive care and health services, and the provision of services to LGBT people.[43] As a result, case law addressing religious freedom says little about how religious exemptions might provide a means for corporations and individuals to *protect* the rights of LGBT individuals in the workplace. Until cases involving the other side of this debate are decided, these employers and individuals will continue to face an uncertain legal climate with regard to conflicts between their values and the values of their employees and customers.

B. Recent Religious Freedom Decisions

As corporations and organizations take on more concrete and visible positions with regard to their religious and moral values, they are also showing a greater interest in litigating disputes over those positions. The Supreme Court, for its part, has shown an increasing sympathy toward religious plaintiffs, deciding several recent high-profile cases that have shifted the Court's jurisprudence toward greater religious freedom.[44] In this part, we review some of its most significant recent decisions on this topic.

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[41] For example, the Court did not attempt to determine the plausibility of the argument that certain forms of contraception constitute an "abortificant," which was the basis for the claimaint's argument that it was immoral for them to provide contraceptive coverage. *Hobby Lobby* 134 S. Ct. 2751, 2777–78 (2014). The Court's hands-off approach in Hobby Lobby is discussed in various articles. *See* Samuel Levine, *A Critique of* Hobby Lobby *and the Supreme Court's Hands-Off Approach to Religion*, 91 NOTRE DAME L. REV. ONLINE 26, 29 (2015) (arguing that the approach is "unwise and unworkable on its own terms"); Ira C. Lupu, Hobby Lobby *and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35, 81–82 (2015); Priscilla J. Smith, *Who Decides Conscience? RFRA's Catch-22*, 22 J.L. & POL'Y 727, 729–30 (2014).

[42] Though one might question whether refusing to accommodate discrimination is a religious belief, the "religious question" doctrine suggests that courts must not seek to determine the plausibility of religious doctrines or practices. *See* Frederick M. Gedicks, *"Substantial Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA*, 85 GEO. WASH. L. REV. 94, 106–09 (2017). If the business owner claims that her religion requires her to serve all customers without tolerating any discrimination, the court would likely have to accept this as a belief.

[43] *See, e.g.*, *Masterpiece Cakeshop*, No. 16-111 (U.S. filed July 25, 2016); *Hobby Lobby*, 134 S. Ct. at 2764; Aria Bendix, *In Alabama, Faith-Based Adoption Agencies Can Deny Gay Couples*, ATLANTIC (May 4, 2017), https://www.theatlantic.com/news/archive/2017/05/alabama-to-let-adoption-agencies-turn-away-gay-couples/525492/ (seeking to protect adoption agencies that refuse to work with same sex couples); *National Institute of Family and Life Advocates v. Beccera*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/national-institute-family-life-advocates-v-becerra/ (last visited Apr. 24, 2018) (regarding mandatory disclosures about abortion care in California).

[44] For a more complete analysis of the trajectory of recent Supreme Court decisions, see generally B. Jessie Hill, *Law and Religion in an Increasingly Polarized America: Kingdom Without End? The Inevitable Expansion of Religious Sovereignty Claims*, 20 LEWIS & CLARK L. REV. 1177 (2017). "It is possible to trace a trajectory through recent Supreme Court cases in which an organization has asserted a right, as a religious institution, to autonomous ordering of its internal affairs. It is a trajectory both of increasing sympathy on the part of the Court toward such claims, as well as of expanding scope for the autonomy claims." *Id.* at 1180.

1. Hobby Lobby

In 2014, the Court surprised many when it held in *Hobby Lobby* that a closely held corporation could claim protection for the exercise of religious freedom under RFRA, in no small part because many found the decision to be deeply flawed, with potentially far-reaching impacts.[45] The majority opinion, written by Justice Alito, held that RFRA afforded "very broad protection for religious liberty"[46] that was intended to "effect a complete separation from First Amendment case law."[47] This protection, the Court held, was "exceptionally demanding" and could only be satisfied by the government showing, on an individual basis, that any substantial burden on religion was the least restrictive means of furthering a compelling government interest.[48] Surprisingly, the Court even suggested that the government might be required to pick up the tab for an accommodation, as, for example, purchasing contraceptives for women who were unable to obtain them under their health insurance policies.[49]

The dissent described the opinion as one of "startling breadth" that finds RFRA "demanded accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on third parties."[50] Legal scholars have suggested *Hobby Lobby* could result in a variety of religious accommodations to laws ranging from Title VII to fair housing to public accommodations.[51] Moreover, the legacy of *Hobby Lobby* may extend to non-religious

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[45] *See, e.g.*, Robert M. Ackerman & Lance Cole, *Making Corporate Law More Communitarian: A Proposed Response to the Roberts Court's Personification of Corporations*, 81 BROOK. L. REV. 895, 948–54, 949 n.252 (2016) (citing statement by trial court judge that, "I'm not sure that conclusion [that shareholder beliefs can be attributed to the corporation they control] arises to the status of what Justice Scalia would call a jaw-dropping conclusion, but it seems to me that it gets very fairly close."); Richard A. Epstein, *The Defeat of the Contraceptive Mandate in* Hobby Lobby*: Right Results, Wrong Reasons*, 2013-2014 CATO SUP. CT. REV. 35, 38; Leslie C. Griffin, Hobby Lobby*: The Crafty Case That Threatens Women's Rights and Religious Freedom*, 42 HASTINGS CONST. L.Q. 641, 687 (2015) ("With Hobby Lobby's religion-friendly standard, all federal laws are now subject to challenge, with the possibility off every citizen becoming 'a law unto himself' until the rule of law is undermined."); Patrick McNulty & Adam D. Zenor, *Corporate Free Exercise of Religion and the Interpretation of Congressional Intent: Where Will It End?*, 39 S. Ill. U. L.J. 475, 490 (2015) ("The Court's triple play on the interpretation of RFRA . . . leaves an observer stunned and wondering how the event unfolded so quickly.").

[46] *Hobby Lobby*, 134 S. Ct. at 2760.

[47] *Id.* at 2762. Many, including the dissent, believe that this went beyond RFRA's intended scope, which they believed was limited to restoring the compelling state interest test set out in case law prior to the Smith decision. *Id.* at 2791 (Ginsburg, J., dissenting).

[48] *Id.* at 2780.

[49] *Id.* at 2781.

[50] *Id.* at 2787 (Ginsburg, J., dissenting).

[51] *See, e.g.*, Hanna Martin, *Race, Religion, and RFRA: The Implications of* Burwell v. Hobby Lobby Stores, Inc. *in Employment Discrimination*, 2016 CARDOZO L. REV. DE NOVO 1, 30–34 (arguing dicta in *Hobby Lobby* is insufficient to prevent racial discrimination by employers); Vincent J. Samar, *The Potential Impact of Hobby Lobby on LGBT Civil Rights*, 16 GEO. J. GENDER & L. 547, 590 (2015) (suggesting that Hobby Lobby could threaten LGBT rights "if Justice Alito's majority position is taken for all that its logic implies"); *see generally* Alex J. Luchenitser, *Religious Accommodation in the Age of Civil Rights: A New Era of Inequality? Hobby Lobby and Religious Exemptions from Anti-Discrimination Laws*, 9 HARV. L. & POL'Y REV. 63 (2015) (arguing generally that anti-discrimination claims will survive Hobby Lobby and RFRA, but that they are likely to see more significantly more challenges, and that it is difficult to predict how the Supreme Court will rule); *c.f.* Richard J. D'Amato, *A "Very Specific" Holding: Analyzing the Effect of Hobby Lobby on Religious Liberty Challenges to Housing Discrimination*, 116 Colum. L. Rev. 1063

organizations seeking similar accommodations as those granted religious organizations. In *March for Life v. Burwell*,[52] for example, the court found the contraceptive mandate of the Patient Protection and Affordable Care Act violated the Fifth Amendment because it treated the plaintiff organization, which held a moral but not religious objection to the provision and use of contraceptives, differently than religious organizations.[53]

2. Trinity Lutheran Church

In *Trinity Lutheran Church*, the Court considered a common state practice of limiting the use of public funds for projects involving religious houses of worship.[54] Trinity Lutheran Church sought to apply for state grant money that reimbursed organizations that installed playground surfaces made from recycled tires.[55] In a letter informing Trinity Lutheran Church that it had been disqualified, the Missouri Department of Natural Resources explained that under Article I, Section 7 of the Missouri Constitution it could not award state grant money to a church.[56] On review, the Court held that restricting access to government benefits based on religion constituted "a penalty on the free exercise of religion that must be subjected to the 'most rigorous' scrutiny."[57] It found that the state's reason for instituting this rule—the separation of church and state—was not compelling enough to justify this penalty, because this separation was already ensured by the Establishment Clause of the federal Constitution.[58]

As was the case in *Hobby Lobby*, the dissent in *Trinity Lutheran Church* highlighted the extent to which the decision furthered a reformation of religious freedom jurisprudence: "This case is about nothing less than the relationship between religious institutions and the civil government . . . . The Court today profoundly changes that relationship . . . . Its decision slights both our precedent and our history, and its reasoning weakens this country's longstanding commitment to a separation of church and state beneficial to both."[59]

3. Harris Funeral Homes

The Sixth Circuit's recent decision in *Harris* is also likely to have a significant impact on religious freedom cases, especially those in which an employer accused of discrimination in violation of Title VII seeks an exemption under RFRA. In reversing the trial court's decision, the Sixth Circuit rejected a funeral home's argument that RFRA protected its right to fire a transgender employee and affirmed instead that Title VII prohibited such discrimination on the basis of the

(2016) (analyzing arguments landlords could make to support housing discrimination against LGBT people, but ultimately concluding that such a claim under RFRA would not be successful).

[52] 128 F. Supp. 3d 116 (D.C. Cir. 2015).

[53] *Id.* at 125 (applying a rational basis standard and concluding that March for Life, a non-profit organization with a sincerely held moral objection to contraception, was entitled to the same exception to the contraception mandate as a religious organization).

[54] 137 S. Ct. 2012, 2037–38 (2017) (Sotomayor, J., dissenting).

[55] *Id*. at 2014.

[56] *Id.* at 2018.

[57] *Id.* at 2024.

[58] *Id*. at 2024 (citing Widmar v. Vincent, 454 U.S. 263, 276 (1981)).

[59] *Id.* at 2027 (Sotomayor, J., dissenting).

employee's transgender status.[60] Merely employing someone whose transgender status conflicted with the employer's religious beliefs, the Court held, did not amount to the substantial burden that RFRA requires.[61]

Thomas Rost, a devout Christian, owned 95% of the shares of R.G. & G.R Harris Funeral Homes and was its sole officer. Rost fired Aimee Stephens, a funeral director, two weeks after she announced her impending transition from a male to a female gender identity because Stephens intended to "dress as a woman" at work.[62] He did so because he believed that "the Bible teaches us that it is wrong for a biological male to deny his sex by dressing as a woman" and that "he 'would [have been] violating God's commands' if he were to permit one of the Funeral Home's biologically-male-born funeral directors" to wear a skirt suit at work because he "would be directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift."[63] When Stephens filed a complaint for discrimination under Title VII, the EEOC sued the funeral home on her behalf.[64] The District Court Judge granted the funeral home's summary judgment motion and dismissed the EEOC's claim, finding that enforcing Title VII by compelling the funeral home to allow the transgender employee to wear a skirt would "impose a substantial burden on the ability of Rost to conduct his business in accordance with his sincerely held religious beliefs."[65]

The lower court ruled that the EEOC could not prove that its application of Title VII was, in this case, the least restrictive means of achieving its goal.[66] Noting that the government's interest was in disallowing sex stereotyping, the court questioned the EEOC's failure to propose that the funeral home adopt a sex-neutral dress code in which women could wear pantsuits.[67] The court chided the EEOC for what it apparently viewed as furthering the stereotypes it sought to overturn. "If the compelling governmental interest is truly in *removing* or *eliminating* gender stereotypes in the workplace in terms of clothing (i.e., making gender 'irrelevant')," the court noted, "the EEOC's manner of enforcement in this action (insisting that [the employee] be permitted to dress in a stereotypical feminine manner at work) does not accomplish that goal."[68] In doing so, however, the court failed to consider the specific third party impact in this case, as *Hobby Lobby* requires: the employee was not permitted to dress consistently with her gender identity, and lost her job.

On appeal, the Sixth Circuit Court held that Title VII's prohibitions on discrimination because of "sex" encompasses discrimination on the basis of transgender or transitioning status.[69]

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[60] *Harris*, 884 F.3d 560, 566–67, 574–75, 599 (6th Cir. 2018).
[61] *Id.* at 585–86.
[62] Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837, 840 (E.D. Mich. 2016), *rev'd*, 884 F.3d 560 (6th Cir. 2018).
[63] *Id.* at 847.
[64] *Id.* at 845–86.
[65] *Id.* at 856.
[66] *Id.* at 860–61.
[67] *Id.* For example, if Rost's religious views included a belief that God commanded people to accept Jesus as their savior, then presumably an evenhanded application of his beliefs would have compelled Rost to fire all of his employees who were not practicing Christians so that he would not be "directly involved in supporting the idea" that lacking faith in Jesus is acceptable. *Id.* at 848. The undisputed facts of the case, however, included a finding that the funeral home's employees were "not required to hold any religious views." *Id.* at 843.
[68] *Id.*
[69] *Harris*, 884 F.3d 560, 574–75 (6th Cir. 2018).

This was a landmark decision because no other circuit court had expressed so clearly before that Title VII extended protection to transgender people who experienced discrimination on that basis. It did not strike the Court as a difficult question: "it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex."[70] The Court rejected the funeral home's argument that Title VII did not cover transgender status, noting that other courts had interpreted "sex" in that statute to mean more than a person's "physiology and reproductive role."[71] Noting that Stephens would not have been fired for seeking to dress like a woman if she had been born a woman, the court concluded that "Stephens's sex impermissibly affected Rost's decision to fire Stephens."[72] Discriminating against Stephens because she did not conform to Rost's conception of how she should look (e.g., male, according to her sex at birth) was necessarily discrimination on the basis of sex.[73]

Having concluded that Title VII bars discrimination on the basis of transgender status, the next question was whether RFRA exempted the funeral home from this Title VII claim.[74] As a preliminary matter, the Court noted that the funeral home did not qualify for the ministerial exception to Title VII, which permits otherwise prohibited discrimination to claims "'concerning the employment relationship between a religious institution and its ministers.'"[75] The funeral home itself was not affiliated with any church, nor did its articles of incorporation state any religious purpose.[76] The funeral home's decorations and opening hours also suggested that it was not a religious institution for purposes of this exception.[77]

Next, the court reviewed RFRA's requirements that a challenged government action would "'(1) substantially burden (2) a sincere (3) religious exercise.'"[78] In doing so, the Court distinguished between religious belief and religious exercise.[79] The EEOC had argued that the funeral home had failed to show how employing Stephens "would interfere with any religious 'action or practice.'"[80] The Court agreed with the funeral home, which countered that Rost's operation of the funeral home was a religious exercise, even though operating a funeral home was not "a tenet of his religion, more broadly."[81] The funeral home claimed that continuing Stephens's employment burdened its religious exercise in two ways: first, by distracting customers, and second, by pressuring Rost to "leave the funeral industry and end his ministry to grieving people."[82]

The Court found that neither alleged burden was "substantial" for purposes of the RFRA analysis.[83] Drawing on earlier employment discrimination cases, it held that "a religious claimant

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[70] *Id.* at 575.
[71] *Id.* at 577–78.
[72] *Id.* at 575.
[73] *Id.*
[74] *Id.* at 581.
[75] *Id.* at 581, 583 (quoting Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 565 U.S. 171, 188 (2012)).
[76] *Id.* at 582.
[77] *Id.*
[78] *Id.* at 585 (quoting Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal, 546 U.S. 418, 428 (2006)).
[79] *Id.*
[80] *Id.* (citation omitted).
[81] *Id.*
[82] *Id.* at 586.
[83] *Id.* at 586–87.

cannot rely on customers' presumed biases to establish a substantial burden under RFRA."[84] It noted that even if Rost's business were to suffer from continuing to employ Stephens (which could not be determined at the summary judgment stage in any event), that impact could not justify discriminatory employment practices.[85]

The second burden the funeral home identified was that Rost felt compelled either to provide Stephens with female clothing or to leave the funeral business altogether.[86] After noting that the decision to provide Stephens with female clothing was an obligation Rost created for himself, the Court held that allowing Stephens "to wear attire that reflects a conception of gender that is at odds with Rost's religious beliefs is not a substantial burden under RFRA."[87] Although Rost claimed that permitting his employee to dress as a woman would make him complicit in the notion that gender is mutable, in conflict with his beliefs, the Court disagreed.[88] It noted that eight of the nine circuits to review the legality of the Affordable Care Act's opt-out provision had upheld it over the sincere beliefs of religious non-profit organizations objecting to providing contraceptive access.[89] The funeral home's objections, sincere though they may be, are not determinative of the funeral home's obligations in the face of a potentially contradictory legal mandate.[90]

Perhaps the most important part of the court's analysis is its willingness to suggest potential limits to the religious freedom of employers most fully embraced in *Hobby Lobby*. The fact that Rost sincerely believed that Stephens's transgender status conflicted with his own religious beliefs did not end the inquiry as to the proper scope of Rost's freedom in this context. "[T]he fact that Rost sincerely believes that he is being compelled to make such an endorsement does not make it so," the court held.[91]

Instead, the court differentiated between compliance with the law, which is generally required, and an active role in causing or substantially contributing to something that violates one's beliefs. It held as a matter of law that "bare compliance with Title VII—without actually assisting or facilitating Stephens's transition efforts—does not amount to an endorsement of Stephens's views."[92] In sketching out the limits of religious freedom in this context, the Court ruled that "tolerating Stephens's understanding of her sex and gender identity is not tantamount to supporting it."[93]

In *Harris*, claims of religious burden received both more attention and less deference than they had in *Hobby Lobby*. The court noted, "a party can sincerely believe that he is being coerced into engaging in conduct that violates his religious convictions without actually, as a matter of law, being so engaged."[94] In other words, sincerely believing that one's religious practice is being burdened does not automatically exempt a person from complying with at least some generally applicable laws. Instead, the court emphasized the competing governmental interest in protecting

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[84] *Id.* at 586.
[85] *Id.* at 586–87.
[86] *Id.* at 586.
[87] *Id.* at 587–88.
[88] *Id.* at 588.
[89] *Id.*
[90] *Id.* at 589.
[91] *Id.*
[92] *Id.*
[93] *Id.* at 588.
[94] *Id.*

people like Stephens from discrimination under Title VII.[95] The sincerity of the employer's religious beliefs did not end the inquiry. In the view of the court, "the Supreme Court has expressly recognized that compelling interests can, at times, override religious beliefs."[96]

The *Harris* case provides critical guidance on the extent to which courts faced with future challenges to the enforcement of civil rights laws such as Title VII will defer to employers' claims of religious exemption. The most important takeaways of the *Harris* decision include the following:

- **Active assistance versus passive tolerance**. By ruling that employing a transgender person is not a burden on religious practice that would violate RFRA because it is merely "tolerance," the court suggested that the difference between active assistance and passive tolerance is significant in terms of assessing a RFRA burden. This effectively raised the bar for determining when something might burden religious exercise. It did not specify where tolerance ended and something more active, and presumably more burdensome, might begin. What would actual endorsement of, for example, transgender status look like? What does it mean to "assist or facilitate" something that offends your religious sensibilities? The court did not answer these questions, but presumably they will be addressed in subsequent decisions.
- **Broad interpretation of "religious exercise."** While the standards for burdening religious exercise arguably were raised in *Harris*, the standards for what qualifies as religious exercise itself remained broad. The *Harris* court did not question the sincerity of Rost's assertion that running a funeral home was, for him, a religious exercise. It assumed that sincerity since all parties encouraged it to do so.[97] Neither the funeral home's failure to claim a religion of its own nor Rost's failure to suggest that operating a funeral home is a tenet of his religion dissuaded the court from this assumption.[98] What qualifies as religious exercise therefore remains a relatively open question, and a claimant's sincerity will not be questioned closely if at all.
- **Rejection of customer bias to justify burden**. Relying on earlier gender discrimination cases such as *Diaz v. Pan American World Airways, Inc.*,[99] the *Harris* court held as a matter of law that neither real nor perceived customer biases establish a "substantial burden" under RFRA, nor can customer preference be used to establish a bona fide occupational qualification.[100] As a consequence, employers in future cases bound by Harris will be unable to use intolerant community standards or client preferences to justify discriminatory practices allegedly in violation of Title VII.

Although the *Harris* case is important for these reasons, its impact is limited in certain ways. As a Sixth Circuit case, it is not binding in other circuits. While the Supreme Court may take up the extent to which RFRA limits compliance with Title VII in the future, it is unlikely to do so soon because there is no circuit split yet on this issue. Additionally, not all employers are

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[95] *Id.* at 593.
[96] *Id.* at 592.
[97] *Id.* at 585.
[98] *Id.*
[99] 442 F.2d 385 (5th Cir. 1971).
[100] 884 F.3d at 586–87 (citing *Diaz*, 442 F.2d at 389).

bound by Title VII, which applies only to entities with 15 or more employees. Smaller employers and entities that rely on independent contractors, which is increasingly common in the gig economy, are not necessarily bound by Title VII. Equivalent state antidiscrimination laws may, however, apply.

4. Masterpiece Cakeshop

A final high-profile case likely to shape the Court's religious liberty jurisprudence is *Masterpiece Cakeshop*, which centers on the right of a business to refuse to serve a gay couple, in violation of the public accommodations law of the state of Colorado.[101] In an important distinction from other religion cases, the plaintiff, a small, closely-held business organized as an LLC, argued that it would violate the company's Free Speech right to force it to make a wedding cake for a gay couple.[102] The Supreme Court's decision is expected in June 2018.[103]

C. Legislating the Right to Discriminate at the State Level

At the same time that corporations are increasingly expressing political, moral, and religious positions, states and the federal government are seeking ways to protect religious freedom and ensure individuals and businesses do not have to comply with anti-discrimination mandates that protect LGBT people, or laws that facilitate contraception and the provision of reproductive care services to women. In this part, we identify examples of state laws that may ultimately conflict with the rights of LGBT people, or the beliefs of individuals and employers with regard to equity and diversity in the workplace.

1. The Expansion of State Religious Freedom Laws

After the passage of RFRA, many states that did not already have such laws adopted state RFRAs or similar religious freedom statutes.[104] There are currently twenty-one state laws that seek to protect religious freedom.[105] In addition, a number of new and proposed laws specifically seek

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[101] Gass, *supra* note 15.

[102] Brief of Amici Curiae Corporate Law Professors in Support of Respondents at 4–5, *Masterpiece Cakeshop*, No. 16-111 (U.S. filed July 25, 2016); Gass, *supra* note 15.

[103] Though the decision is still pending, it has nonetheless already featured prominently in multiple scholarly articles. *See generally, e.g.*, Andrew Jensen, *Compelled Speech, Expressive Conduct, and Wedding Cakes: A Commentary on Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 13 DUKE J. CONST. LAW & PP SIDEBAR 147 (2018); Alex Riley, *Religious Liberty v. Discrimination: Striking a Balance When Business Owners Refuse Service to Same-Sex Couples Due to Religious Beliefs*, 40 S. ILL. U. L.J. 301 (2016).

[104] *See* Lucien J. Dhooge, *The Impact of State Religious Freedom Restoration Acts: An Analysis of the Interpretive Case Law*, 52 WAKE FOREST L. REV. 585, 588, 588 n.15 (2017).

[105] *See* ARIZ. REV. STAT. ANN. §§ 41-1493. to -1493.02 (2016) (effective 1999); ARK. CODE ANN. §§ 16-123-401 to -407 (2016) (effective 2015); CONN. GEN. STAT. ANN. § 52-571b (West 2016) (effective 1993); FLA. STAT. ANN. §§ 761.01–.05 (West 2016) (effective 1998); IDAHO CODE ANN. §§ 73-401 to -404 (West 2016) (effective 2000); 775 ILL. COMP. STAT. 35/1–/99 (2016) (effective 1998); IND. CODE §§ 34-13-9-0.7 to -11 (2016) (effective 2015); KAN. STAT. ANN. §§ 60-5301 to -5307 (2016) (effective 2013); KY. REV. STAT. ANN. § 446.350 (West 2016) (effective 2013); LA. STAT. ANN. §§ 13:5231–:5242 (2016) (effective 2010); MISS. CODE ANN. § 11-61-1 (West 2016) (effective 2014); MO. REV. STAT. § 1.302 (2016) (effective 2004); N.M. STAT. ANN. §§ 28-22-2 to -5 (2016) (effective 2000);

to provide exemptions for individuals and businesses that do not want to serve LGBT customers.[106] Some scholars have posited that state religious freedom statutes intend to "clarify the status of religious freedom" and elevate it to a "predominant, constitutional level freedom."[107] However, some of the recently enacted state laws are more limited and arguably more invidious in their purpose. Rather than seeking to address religious freedom globally, these new laws seek to provide legal grounds for individuals to avoid otherwise generally applicable laws requiring equal treatment for LGBT people. For example, an Alabama law enacted in 2017 allows private adoption agencies to turn away gay and lesbian couples on religious grounds was enacted in 2017.[108] Similarly, a Tennessee law allows therapists and counselors to refuse to treat patients if doing so would violate their "sincerely held principles," which some have interpreted as facilitating discrimination against putative LGBT clients.[109]

Under a controversial Mississippi law that went into effect in October of 2017, businesses and government officials are permitted to deny services to LGBT people if serving them would conflict with a person's sincerely held "religious beliefs or moral convictions."[110] These beliefs or convictions are expressly limited to beliefs that: "(a) [m]arriage is or should be recognized as the union of one man and one woman; (b) [s]exual relations are properly reserved to such a marriage; and (c) [m]ale (man) or female (woman) refer[s] to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth."[111] The statute attracted national attention in February 2018 when it was used to justify the town of Starkville, Mississippi's denial of a permit to a local LGBT pride parade.[112] Importantly, the Mississippi statute is not even limited

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OKLA. STAT. tit. 51, §§ 251–58 (2016) (effective 2000); 71 PA. CONS. STAT. §§ 2401–2407 (2016) (effective 2002); 42 R.I. GEN. LAWS §§ 42-80.1-1 to -4 (2016) (effective 1993); S.C. CODE ANN. §§ 1-32-10 to -60 (2016) (effective 1999); TENN. CODE ANN. § 4-1-407 (West 2016) (effective 2009); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001–.012 (West 2016) (effective 1999); VA. CODE ANN. § 57-2.02 (2016) (effective 2007). Protection of the free exercise of religion in Alabama is set forth in the state constitution. *See* ALA. CONST. art. I, § 3.01.

[106] Jennifer Bendery & Michelangelo Signorile, *Everything You Need to Know About the Wave of 100+ Anti-LGBT Bills Pending in States*, HUFFPOST (Apr. 15, 2016), https://www.huffingtonpost.com/entry/lgbt-state-bills-discrimination_us_570ff4f2e4b0060ccda2a7a9.

[107] Eric Yordy, *Clamorous Co-Existence: The U.S. Commission on Civil Rights and the Internal Battle Between Religion and Nondiscrimination Laws*, 8.2 WM. & MARY POL'Y REV. 1, 30 (2017).

[108] Bendix, *supra* note 43.

[109] *See* Marina Fang, *Tennessee Passes Anti-LGBT Counseling Bill*, HUFFPOST (Jan. 4, 2017), https://www.huffingtonpost.com/entry/tennessee-lgbt-counseling_us_570c4c4de4b0836057a23d63; *see also* Hayley Miller, *Tennessee Governor Signs Mean-Spirited "Counseling Discrimination Bill" Into Law*, HUM. RTS. CAMPAIGN (Apr. 28, 2016), https://www.hrc.org/blog/tennessee-governor-signs-mean-spirited-counseling-discrimination-bill-into. The bill, which went into effect in 2017, is currently the subject of a lawsuit. Adam Tamburin, *East Tennessee Man Challenges Counseling Law in Federal Suit Against Gov. Bill Haslam*, TENNESSEAN (Nov. 15, 2017), https://www.tennessean.com/story/news/2017/11/14/east-tennessee-man-challenges-counseling-law-federal-suit-against-gov-bill-haslam/864392001/. The lawsuit is still pending as of this writing.

[110] H.R. 1523, 2016 Reg. Sess. (Miss. 2016).

[111] *Id.* § 2.

[112] Logan Kirkland, *Starkville Denies Request for LGBT Pride Parade*, STARKVILLE DAILY NEWS (Feb. 21, 2018), http://starkvilledailynews.com/content/starkville-denies-request-lgbt-pride-parade. In 2017, the Fifth Circuit Court of Appeals dismissed a challenge to the law based on the plaintiff's lack of standing. Barber v. Bryant, 860 F.3d 345, 350, 358 (5th Cir. 2017). The Supreme Court declined certiorari in the case in January 2018. Barber v. Bryant, 138 S. Ct. 652 (Mem) (2018).

to the protection of explicitly religious values. Rather, the statute provides that the three protected beliefs may be *either* "religious beliefs *or* moral convictions."[113]

This tendency in many of the new laws to conflate religious beliefs and secular values creates a heightened potential for complex conflict in the workplace. First, these laws broaden the scope of *who* may claim this pseudo-religious protection to any who share a favored viewpoint (i.e., a limited vision of the concept of marriage). This creates a wider pool of potential complainants. Next, these laws fundamentally alter the conversation about the basis for this legal protection. Rather than seeking to protect the freedom of *religion*, in a manner rooted in the Free Exercise clause of the First Amendment, these laws seek to prioritize a particular belief, and use that belief to drive the exemption from a law of otherwise general applicability. This potentially pits a complainant with a moral conviction that she does not want to serve gay people against an employer who has a religious conviction that he must.

> While the concept of religion as imagined by the First Amendment and by laws such as Title VII may include non-traditional religions, or even atheism, courts have generally looked in religious freedom cases to see if the beliefs in question are grounded in a moral tradition that holds a similar place in an individual's life to a traditional religion.[114] The new state laws make no pretense of such a scheme. Rather, they are wholly focused on the protection of a particular belief, regardless of its origins or discriminatory animus. These laws are not about protecting religion. They are about elevating and protecting a particular belief with regard to LGBT people, sexual orientation, and same sex marriage.

2. Third Party Burdens and the Constitutionality of State Laws Permitting Discrimination

Another concern raised by these new laws is that they may violate the Establishment Clause if they impermissibly elevate particular religious practices without regard for the burden such practices may place on third parties, further complicating their application in the employment context. It is unclear whether state law permitting religious-based or "moral conviction"-based discrimination against people on the basis of their gender, sexual orientation, or gender identity[115] will withstand constitutional scrutiny. The Supreme Court ruled in *Bob Jones University v. United States*[116] that freedom of religion did not override certain compelling state interests, including the

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[113] H.R. 1523, 2016 Reg. Sess. (Miss. 2016).

[114] United States v. Seeger, 380 U.S. 163, 164-65 (1965) (describing the test for religious belief under the conscientious objector exception to the Universal Military Training and Service Act as "is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God"). For a broad discussion of the definition of religion, and its relationship to secular values, see generally Ethan Blevins, *A Fixed Meaning of 'Religion' in the First Amendment*, 53 WILLAMETTE L. REV. 1 (2016); Lucien J. Dhooge, *The Equivalence of Religion and Conscience*, 31 NOTRE DAME J.L., ETHICS & PUB. POL'Y 253, 259–60 (2017); Mark Strasser, *Free Exercise and the Definition of Religion: Confusion in the Federal Courts*, 53 HOUS. L. REV. 909 (2016).

[115] *See supra* Section I.C.1.

[116] 461 U.S. 574 (1983).

eradication of racial discrimination in education.[117] It reiterated this conclusion with regard to the application of RFRA to racial discrimination in the workplace in *Hobby Lobby*.[118]

The Supreme Court has also invalidated state religious freedom laws that purport to accommodate religious belief but risk significantly burdening third parties in the process. For example, in *Estate of Thornton v. Caldor, Inc.*,[119] the Court held that a Connecticut statute allowing any person to refuse to work on the day of the week that person chose as his Sabbath was unconstitutional because it violated the Establishment Clause.[120] In that case, an employee asked to be excused from working for a store on Sundays, but the employer would not allow him to do so without a cut in pay or a transfer to another location.[121] When the employee sued for violation of the statute granting employees the absolute right to their chosen Sabbath, the employer challenged the constitutionality of that statute.[122] Relying on its decision in *Lemon v. Kurtzman*[123] that the primary effect of a law may not be to advance or inhibit religion, an eight-justice majority ruled that the Connecticut statute did precisely that.[124]

By "arm[ing] observers with an absolute and unqualified right not to work on whatever day they designate as their Sabbath," the Court noted, Connecticut "commands that Sabbath religious concerns automatically control over all secular interests at the workplace . . . ."[125] It did not allow for any consideration of significant burdens that the employer would in turn have to impose on other employees who might, for example, be compelled to work in place of the Sabbath observer.[126] This automatic preference for the Sabbath observer constituted a "primary effect that impermissibly advances a particular religious practice."[127] In so ruling, the Court quoted an earlier decision by Judge Learned Hand: "The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities."[128]

Nearly twenty years later, in *Cutter v. Wilkinson*,[129] the Court reaffirmed that third party burdens must be considered when applying another religious statute, the Religious Land Use and Institutionalized Persons Act (RLUIPA).[130] The Court also affirmed, to some extent, the principle of avoiding shifting the burden of religious accommodation to third parties in *Hobby Lobby*.[131]

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[117] *Id.* at 604.
[118] *Hobby Lobby*, 134 S. Ct. 2751, 2783 (2014) ("The Government has a compelling state interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal."). For a criticism of the third-party burden analysis in Hobby Lobby, see Frederick Mark Gedicks, *One Cheer for Hobby Lobby: Improbable Alternatives, Truly Strict Scrutiny, and Third-Party Employee Burdens*, 38 HARV. J.L. & GENDER 153, 168-176 (2015).
[119] 472 U.S. 703 (1985)
[120] *Id.* at 706, 710–11.
[121] *Id.* at 706.
[122] *Id.* at 707.
[123] 403 U.S. 602 (1971).
[124] *Estate of Thornton*, 472 U.S. at 708, 710.
[125] *Id.* at 709.
[126] *Id.*
[127] *Id.* at 710.
[128] *Id.* (quoting Otten v. Baltimore & Ohio R. Co., 205 F.2d 58, 61 (2d Cir. 1953)).
[129] 544 U.S. 709 (2005).
[130] *Id.* at 720 ("Properly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries . . . ." (citing *Estate of Thornton*, 472 U.S. at 709–10)).
[131] *Hobby Lobby*, 134 S. Ct. 2751, 2786–87 (2014) (Kennedy, J., concurring).

Justice Kennedy wrote in that case that religious exemptions may not "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling."[132] As others have observed, however, the Court was incorrect in its assumption that third parties would not be harmed by the exemption that the employers sought in that case. As a result of *Hobby Lobby*, thousands of employees were denied coverage for emergency birth control and other contraceptive access.[133] Although the Court's factual assumptions were arguably incorrect, its legal conclusion that the burden on third parties must be considered remains instructive.

In *Hobby Lobby*, the Court expressly noted that RFRA would not be a defense against a charge of racial discrimination.[134] However, it is important to note that while expressly carving out race for protection against religious discrimination, the *Hobby Lobby* Court made no similar assurance with regard to any other form of discrimination, including discrimination based on gender, gender identity, or sexual orientation. In fact, the opinion dismisses the dissent's concern that allowing religious parties an exemption from generally applicable laws could undermine almost any civic obligation.[135] While acknowledging that this concern had been raised by Justice Scalia in *Employment Division, Department of Human Resources of Oregon v. Smith*,[136] the majority pointed out that it had effectively been overridden by Congress in enacting RFRA: "The wisdom of Congress' judgment on this matter is not our concern. Our responsibility is to enforce RFRA as written . . . ."[137]

D. Hypothetical Conflicts

The fact that employers and employees now can *each* maintain religious values, as well as the heightened interest in bringing religious and moral convictions into the workplace and increasing protection for religious values by the Supreme Court, has created an environment primed for conflict. We have identified below three hypothetical scenarios that we believe illustrate how tangled these issues can become as well as their potential for creating complex interactions between competing statutes and constitutional values. These hypotheticals also flip traditional scenarios by recognizing the possibility that an employer or employee might have a religious conviction that compels them to act toward ensuring equal treatment for all customers and employees, and not simply a religious conviction that compels discriminatory activities.

- Scenario 1: An employee in a wedding dress boutique refuses to serve a lesbian customer based on a religious conviction that same-sex marriage is wrong. The employer, who is a member of the United Church of Christ and has a religious conviction that all people are equal under God's eyes, fires the employee for failing to comply with the

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[132] *Id.*
[133] Donna Barry et al., *Infographic: The Ripple Effect of the* Hobby Lobby *Decision*, CTR. FOR AM. PROGRESS (Sept. 9, 2014), https://www.americanprogress.org/issues/religion/news/2014/09/09/96460/infographic-the-ripple-effect-of-the-hobby-lobby-decision/.
[134] 134 S. Ct. at 2783.
[135] *Id.* at 2784–85.
[136] *Id.* at 2784 (citing *Smith,* 494 U.S. 872, 888–89 (1990), *superseded by* RFRA, 42 U.S.C. §§ 2000bb–2000bb-4 (2012)).
[137] *Id.* at 2785.

company's diversity policy and refusing to serve customers. The employee sues under Title VII for failure to accommodate her religion. The employer defends itself under RFRA, claiming that any accommodation of discrimination would substantially burden its religious convictions with regard to diversity and equality.

- Scenario 2: A mental health clinic requires all staff to see transgender patients based on a religious conviction of the owners that all people must be treated equitably and with compassionate care. An individual practitioner at the clinic ignores the rule based on his religious conviction that being transgender is sinful. The clinic fires the practitioner. As in Scenario 1, this could lead to a conflict between the employee's Title VII rights to accommodation and the employer's religious freedom rights under RFRA. Imagine here, though, that the scenario arises in Tennessee, and the employee claims a right under state law to refuse to serve transgender people. Federal RFRA does not apply to state law claims, so the employer would have to raise a state RFRA defense to the state law, if a state RFRA existed. The employer could also raise an Establishment Clause claim, as the state law appears to elevate one religious conviction over another.
- Scenario 3: An employer at a wedding cake shop insists on serving LGBT customers on religious grounds. When a gay couple comes into the shop, an employee refuses to provide them with services based on her moral conviction against gay marriage. The employer fires the employee for refusing to serve the gay couple. If this case were to take place in Mississippi, the employee might have a state law defense. The twist here is that for the employee to win, a court would have to elevate the employee's *moral* conviction above the employer's *religious* conviction, raising an interesting question under the First Amendment's Free Exercise Clause.

Scenarios like these do not just illustrate the complexity of legal rights in this context. They also suggest the inconsistent general principles with which a court may be compelled to determine the limits of religious freedom, the potential impact of characterizing a belief as religious or nonreligious, and the unpredictability as to whether the LGBT community will be free from religiously or morally motivated discrimination in any given conflict. These issues will be explored further in Part III.

II. The Complex Interaction of Constitutional and Statutory Doctrines in Religious Workplace Conflicts

As Part I demonstrates, the increasing interest in bringing religious, moral, and ethical values into the workplace has heightened the potential for religious conflict between employees, employers, customers, and governments. Before we can analyze the likely outcome of these conflicts, we must identify the most relevant statutes and constitutional rights that might be raised in such conflicts.

A. The First Amendment

The First Amendment guarantees, among other things, both the right of free exercise of religion and the right to be free from government establishment of religion.[138] In the employment context, significant scholarly attention and judicial precedent has focused on the Free Exercise Clause.[139] Despite these guarantees, these rights, like all constitutional rights, have always had parameters. Courts have regarded such parameters as essential to the rule of law. In an early case considering whether the laws criminalizing polygamy could be applied to someone whose religious beliefs compelled it, the Supreme Court held that excusing a person from compliance with laws on the basis of religious belief impermissibly "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[140]

Over a century later, in a case affirming the requirement that Amish employers pay social security taxes violating their faith, the Court observed that religious beliefs do not excuse people from compliance with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[141] In *Sherbert v. Verner*,[142] the Court's approach to religious freedom claims shifted toward a balancing test, in which the Court asked whether an alleged burden on a claimant's religious freedom advances a compelling state interest in the least restrictive manner.[143] In *Smith*, the Court further limited Free Exercise rights by abandoning the compelling interest test set out in *Sherbert*, ruling that religious practices could not be used to exempt people from a "neutral law of general applicability," such as Oregon's ban on the use of peyote.[144] In response to what many felt was *Smith's* overly-broad limitation on religious freedom, Congress passed RFRA with broad bipartisan support, seeking to extend the pre-*Smith* case law that permitted burdens on religious freedom only to the extent that they served a compelling state interest, and were narrowly tailored for that purpose. The text of RFRA itself refers directly to *Smith*, noting that "in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion."[145]

The adoption of RFRA and the Court's interpretation of it in *Hobby Lobby* elevated the protection of religious rights beyond what previous Free Exercise case law had allowed. RFRA allows persons to challenge federal laws that substantially burden their religious beliefs, at which

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[138] U.S. CONST. amend. I.

[139] *See generally, e.g.*, Henry L. Chambers, Jr., *The Problems Inherent in Litigating Employer Free Exercise Rights*, 86 U. COLO. L. REV 1141 (2015) (describing how employer free exercise rights can impact employees and stakeholders); Jennifer A. Drobac & Jill L. Wesley, *Religion and Employment Antidiscrimination Law: Past, Present, and Post Hosanna-Tabor*, 69 N.Y.U. ANN. SURV. AM. L. 761 (2014) (reviewing the history of and recent trends regarding legal claims raised by religious individuals claiming discrimination, harassment, or a failure to accommodate).

[140] Reynolds v. United States, 98 U.S. 145, 166–67 (1878).

[141] United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring); *see also* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 595 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[142] 374 U.S. 398 (1963).

[143] *Id.* at 403, 406–07; *see also* Wisconsin v. Yoder, 406 U.S. 205, 213–15 (1972) (elaborating on the compelling interest test).

[144] *Smith,* 494 U.S. 872, 881–82 (1990).

[145] 42 U.S.C. § 2000bb(a)(4) (1993). For a more detailed description of the response to Smith culminating in the passage of RFRA, see generally Douglas Laycock and Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act,* 73 TEX. L. REV. 209 (1994-1995).

point the federal government bears the burden of showing that the challenged laws further a compelling interest in the least restrictive manner, *as applied to that individual*. However, most scholars have concluded that RFRA is not likely to be a defense in a private party action where the government is not a party to the case.[146] Thus, in a case in which the government does not bring the Title VII claim, an employer would have to defend its right to religious freedom under the First Amendment, not RFRA.

The Establishment Clause is invoked less often in the context of employment disputes, and there is less recent case law on the extent to which it may be used in workplace religious conflicts. The *Harris* court noted, but refused to rule on, an argument raised by some amici that allowing a religious accommodation on the basis of RFRA that materially harms a third party or interferes with another person's free exercise rights would violate the Establishment Clause.[147] The court's refusal to address the issue stemmed from the fact that no party had "presse[d] the broad constitutional argument" that the amici raised.[148]

B. Title VII

Under Title VII, private employers may not discriminate against an employee because of that employee's race, color, religion, sex, or national origin.[149] Nor may an employer treat employees or job applicants in a way that might "adversely affect [their] status" because of their race, color, religion, sex, or national origin.[150] If a workplace obligation conflicts with an employees' religious beliefs, the employer must make accommodations, including "flexible scheduling, voluntary shift substitutions or swaps, job reassignments, and modifications to workplace policies or practices."[151] The employer need not make such accommodations, however, if doing so would create an "undue hardship," which the EEOC describes as more than a "minimal burden."[152]

In religious conflict cases, Title VII could be used in various ways. It could be used to protect the rights of an employee who claims to have suffered employment discrimination based on her sex, as Aimee Stephens did in the *Harris* case. It could be used to protect the rights of an employee whose employer compels her to do something in the course of her job that violates her religious beliefs, such as providing birth control to another person. It cannot, however, be used to protect employers from legal claims by employees, even when those claims concern any of Title VII's protected classes. For example, a Catholic medical clinic operating as a closely held corporation may have religious freedom pursuant to the *Hobby Lobby* decision, and its religious beliefs might include resistance to providing certain kinds of contraception including the morning-after pill. If an employee who did not share these beliefs were to offer a morning-after pill

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[146] *Harris*, 884 F.3d 560, 584 (2018).
[147] *Id.* at 585 n.8.
[148] *Id.*
[149] 42 U.S.C. § 2000e-2(a)(1).
[150] *Id.* § 2000e-2(a)(2).
[151] *Religious Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/laws/types/religion.cfm (last visited May 8, 2018).
[152] *Id.* The "undue hardship" standard is discussed in more detail in Section III.A.1.

prescription to a patient, in contravention of the clinic's religious beliefs, the clinic could not make out a Title VII claim because, as an employer, it cannot suffer an adverse employment action.

Morality may also be a basis for protection. "Religion" is broadly defined for purposes of Title VII enforcement and can encompass general beliefs about what is right and wrong.[153] In some instances, Title VII protects against discrimination based on sincerely held moral and ethical convictions, and not just religious beliefs.[154] According to the EEOC's enforcement guidelines, a person's religious beliefs "'need not be confined in either source or content to traditional or parochial concepts of religion.'"[155]

C. RFRA

RFRA provides a safe harbor for the religious beliefs and practices of people, including closely held corporations, which might otherwise be curtailed by generally applicable federal law, unless the government can prove that the law is narrowly tailored to achieve a compelling government interest.[156] As noted in Section II.A above, RFRA was passed in response to *Smith*, a case in which the Supreme Court held that First Amendment protection for religious freedom did *not* extend to generally applicable laws that did not target religion.

In *Hobby Lobby*, the Supreme Court ruled that closely held corporations can use RFRA to defend their religious freedom in the face of federal laws that allegedly would otherwise curtail it. It is unclear, however, whether courts will interpret RFRA to protect moral beliefs, as opposed to the more traditionally framed religious beliefs, in the future. In other words, it is not yet clear whether "religious" as used in RFRA extends to beliefs that are not rooted in any recognizable concept of religion. It is also unclear whether RFRA can be asserted as a defense by corporations that are not closely held.

As noted above, the *Harris* court pointed out that RFRA is only available as a defense if the government is a party to the lawsuit.[157] If an employee were to sue a private employer, neither party could use RFRA as a defense to any applicable federal legal obligation. [158]

D. State Laws

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[153] EEOC Directive No. 915.003 § 12-I(A)(1) (2008), https://www.eeoc.gov/policy/docs/religion.html.
[154] *Id.*
[155] *Id.* (quoting Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 716 (1981)); *see also* CYNTHIA BROUGHER, CONG. RESEARCH SERV., RELIGION AND THE WORKPLACE: LEGAL ANALYSIS OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AS IT APPLIES TO RELIGION AND RELIGIOUS ORGANIZATIONS 1–2 (2011), https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1809&context=key_workplace; Molly E. Whitman, *The Intersection of Religion and Sexual Orientation in the Workplace: Unequal Protections, Equal Employees*, 65 SMU L. Rev. 714, 715–16 (describing EEOC's evolving definition of religion).
[156] *Hobby Lobby*, 134 S. Ct. 2751, 2759 (2014).
[157] 884 F.3d 560, 584 (6th Cir. 2018).
[158] One scholar has suggested RFRA may apply in disputes between private parties, but this claim is largely untested in the courts. *See generally* Sara L. Kohen, *Religious Freedom in Private Lawsuits; Untangling when RFRA Applies to Suits Involving only Private Parties*, 10 CARDOZO PUB. L., POL'Y & ETHICS 43 (2011). Kohen notes there have been a small number of cases applying RFRA in disputes involving private parties, where the defendant invoked RFRA to avoid liability under federal law. *Id.* at 50–52 (citing Hankins v. Lyght, 441 F.3d 96 (2d Cir. 2006); In re Young, 82 F.3d 1407 (8th Cir. 1996), *vacated sub nom*, Christians v. Crystal Evangelical Free Church, 521 U.S. 1114 (1997)).

The growing list of state laws protecting religious freedom as RFRA does, as well as state "conscience laws," discussed above in Section I.C.1, may also have a significant impact on the resolution of religious value conflicts between employers and employees.[159]

III. When Values Collide in the Workplace, Who Wins?

In this part, we explore more deeply the legal conflicts that would arise out of our hypothetical scenarios, and posit how they might be resolved, given existing precedent. What makes these scenarios especially challenging for courts is that they present conflicts between employer values and employee values that were less likely to occur before the development of both employer religions and beliefs and the proliferation of religious protection statutes beyond the scope of the First Amendment and Title VII, discussed in Part I.

Because both sides in these conflicts could be motivated by religious or moral beliefs, one could imagine these arguments culminating in a stalemate that would sound something like this:

> Employee: My religion requires me to refuse to serve a gay couple/treat a transsexual patient/collaborate with a lesbian co-worker.
>
> Employer: My religion requires you to serve/treat/collaborate with all people.
>
> Employee: Your religious freedom burdens my religious freedom.
>
> Employer: No, your religious freedom burdens my religious freedom.

In order to resolve these conflicts, courts will need to parse the specific protections to which each side is entitled and consider not only the competing interests but the principles by which they should be prioritized.

A. Scenario 1: Assessing RFRA v. Title VII

In our Scenario 1, the employee is seeking a religious accommodation under Title VII that would allow her to refuse to serve certain customers, while the employer is seeking to prevent her from doing so by arguing that this application of Title VII represents a substantial burden on its religious expression. A number of scholars have written on the question of whether RFRA and *Hobby Lobby* could be used to justify discrimination against certain employees in violation of Title VII, but they have primarily written from the perspective of an employer that seeks to defend a violation of Title VII on the basis of religion.[160] Here, we consider the opposite: the employer seeks to provide equitable service to all customers, and the employee seeks an application of Title VII that might facilitate discrimination against those customers. In a sense, to protect Title VII's anti-discrimination mandate, the employer seeks to override it through reference to RFRA.

While any such case would necessarily have fact-specific issues, our analysis of the likely judicial resolution takes the following representative path: first, the court would have to decide whether allowing an employee not to serve certain customers could be an appropriate religious accommodation or if it would be an undue hardship on the employer. If the court found the

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[159] Some scholarship suggests that the harmful impact of state-level RFRA laws has not been as substantial as initially feared. *See* Dhooge, *supra* note 104, at 646–47.

[160] *See, e.g.*, Martin, *supra* note 51, at 14; *see also supra* notes 50-51 and accompanying text.

accommodation was a reasonable one, the employer could then argue for protection from the requirement to make the accommodation under RFRA.[161]

1. Refusal to Serve as a Religious Accommodation

To bring a claim under Title VII, the employee would claim that she has suffered an adverse employment action because of her religion.[162] An employee's refusal to serve a customer because of that customer's sexual orientation, while noxious to many observers, could be considered a legitimate religious exercise for purposes of Title VII. Like RFRA, Title VII does not require a claimant to prove that the basis for the alleged discrimination is a central part of the claimant's religious practice, but only that the belief is "sincerely held."[163]

The boutique owner is likely to respond that it cannot reasonably accommodate the employee's religious preferences in this instance, and that to do so would create an undue hardship.[164] Certainly, this would be a fact-based analysis that would focus on the extent to which the business would be negatively impacted by the refusal to accommodate. The Supreme Court has held that an employer may face an undue hardship for Title VII purposes when an employee's religion makes him unable to work when the employer finds it necessary for him to do so.[165] Burdening other employees by requiring them to fill the religious employee's shifts could create undue hardships in this way.[166] Employers fulfill their obligation when they offer the employee a reasonable accommodation.[167]

Not all accommodations are reasonable, but a mere assertion of undue hardship, without more, is not enough. Lower courts have required religious employers to describe the ways in which accommodating employees with conflicting beliefs might present an undue hardship by reference to the actual expected burden on the employer.[168] The Sixth Circuit Court of Appeals has noted

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[161] As previously noted, this defense is likely only available if the government is a party to the case. *See supra* note 146 and accompanying text.

[162] 42 U.S.C. § 2000e-2(a)(1) (2012).

[163] *Seeger*, 380 U.S. 163, 185 (1965) ("While the 'truth' of a belief is not open to question, there remains the significant question of whether it is 'truly held.'").

[164] Under Title VII, employers need not make a proposed accommodation if doing so would create an undue hardship, which means imposing more than a *de minimis* cost on the employer. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 65 (1977).

[165] *Id*. at 80-81 (finding that when it "was essential to [the employer's] business to require Saturday and Sunday work from at least a few employees," it was an undue hardship to require other employees to cover the shift of an employee whose religion precluded work on Saturdays); *see also* Equal Emp't Opportunity Comm'n v. Rent-A-Ctr., Inc., 917 F. Supp. 2d 112, 117 (D.D.C. 2013) (noting that employer had demonstrated an undue hardship when religious employee could not work on Saturday, the most important day in the employer's stores). *But see* Equal Emp't Opportunity Comm'n v. Texas Hydraulics, Inc., 583 F. Supp. 2d 904, 911 (E.D. Tenn. 2008) (finding employer had not demonstrated undue hardship when it failed to ask other employees to volunteer to fill religious employee's shift).

[166] *See Trans World Airlines*, 432 U.S. at 80–81.

[167] Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 69 (1986).

[168] *See*, *e.g.*, Mathis v. Christian Heating and Air Conditioning, Inc., 158 F. Supp. 3d 317, 333 (E.D. Pa. 2016) (finding that allowing atheist employee of religious air conditioning company to cover Christian mission statement on employee badge would have been a *de minimis* cost, allowing employee to state Title VII claim for religious discrimination, because no the employer presented no "evidence showing that its business would suffer or be made more difficult" if it did so).

that an employer cannot reasonably accommodate a religious employee by forcing the employee to ask others to do something that the employee considers sinful for all.[169]

In this scenario, whether the boutique owner is able to demonstrate an undue hardship will depend on several factors. As an initial matter, the owner may assert that providing services to the LGBT community is not only important as a religious matter but also as a financial matter. Just as other businesses may find it necessary for their employees to work on a Saturday for scheduling and cost reasons, the boutique owner here may be able to assert that refusing to serve LGBT customers would harm the boutique's brand or reputation in the marketplace. Refusal to serve could also result in a greater than *de minimis* financial impact, if customers boycott the boutique or expose it to negative press coverage as the result of the employee's actions.[170] These harms could occur even if the accommodation requested was for the employee to be able to "refer" the customer to a different salesperson, as the LGBT customer may feel insulted or shamed by this act.

While the *de minimis* standard may appear a low bar for a religious employer to meet,[171] a court may find these earlier undue hardship cases inapplicable, as they result in an imposition of *secular* business practices on religious employees. Here, we have a religious employer seeking to impose its religious practices on an employee. At a minimum, this creates an uncomfortable position for the court, as it must choose between placing the burden on the religion of the employer or the religion of an employee. Some case law suggests the court's sympathy in such a case should lie with the employee, because of the power differential between the two, and the possibility that the employer could be found to have created a hostile environment for the employee.[172]

2. Using RFRA as a Defense to Title VII

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[169] Smith v. Pyro Mining Co., 827 F.2d 1081, 1088 (6th Cir. 1987) ("[W]here an employee sincerely believes that working on Sunday is morally wrong and that it is a sin to try to induce another to work in his stead, then an employer's attempt at accommodation that requires the employee to seek his own replacement is not reasonable."). *But see* Sturgis v. United Parcel Serv., Inc., 512 F.3d 1024, 1031 (8th Cir. 2008) (noting that an employer need not eliminate all religious conflicts in order for its proposed accommodation to be reasonable).

[170] Activists increasingly use social media and press coverage to shame businesses for taking actions that activists disagree with, or to encourage customers to buy from companies that share their values. *See* PR Newswire, *Rising Consumer Activist Movement Emerges to Support Companies and Their Reputations*, MKTS. INSIDER (Jan. 31, 2018), http://markets.businessinsider.com/news/stocks/rising-consumer-activist-movement-emerges-to-support-companies-and-their-reputations-724538; David Pierson, *How a Social Media Campaign Helped Drive Bill O'Reilly Out of Fox News*, L.A. TIMES (Apr. 21, 2017), http://www.latimes.com/business/la-fi-oreilly-social-media-20170420-story.html.

[171] Laura M. Johnson, *Whether to Accommodate Religious Expression that Conflicts with Employer Anti-Discrimination and Diversity Policies Designed to Safeguard Homosexual Rights: A Multi-Factor Approach for the Courts*, 38 CONN. L. REV. 295, 308 (2005) ("[B]ecause the burden on employers is so low, as a practical matter, these cases are, more often than not, resolved in the employers' favor").

[172] Caitlin C. Faye, *Yes You Will Attend: How Employees Can Be Required to Attend Religious Events and Why They Should Be*, 17 RUTGERS J.L. & RELIGION 282, 287–88 (2016). Faye notes, "[b]ecause of the difference in power between employers and employees, courts often view an employer's religious expression as more coercive than an employee's religious expression." *Id.* at 288; *see also* Erdmann v. Tranquility, Inc., 155 F. Supp. 2d 1152, 1159 (N.D. Cal. 2001) (finding constructive discharge under Title VII where Mormon employer made homosexual employee feel unwelcome and as if he might lose his job based on his homosexuality).

If the employee prevailed and the court rejected the undue hardship defense, the employer could raise a claim that RFRA precludes the application of Title VII against it, as the funeral home did in *Harris*.

Interestingly, RFRA could very well supersede Title VII in this instance—the opposite of the *Harris* outcome—because of fundamental differences in the facts at issue. The *Harris* court emphasized the difference between mere tolerance of practices that conflict with one's religious beliefs and active facilitation of the conflicting practice, finding that mere tolerance is not a substantial burden for RFRA purposes. In this scenario, however, the boutique could argue that allowing the employee to refuse service to a lesbian customer actively facilitates the kind of discrimination it religiously opposes.

Much has been made of the "complicity" argument in religious freedom cases. This notion distinguishes between claims for religious protection from statutes that require the individual to directly violate her religious beliefs (i.e., removing a headscarf or working on the Sabbath) and protection from laws that make the individual complicit in the sinful behavior of another individual (like participating in an insurance system that provides coverage for purported abortifacients).[173] Scholars have split as to whether the First Amendment or RFRA should extend to complicity claims.[174] However, in this case we have no need to enter this debate: if the employer is forced to allow discrimination against a customer in its place of business, it is not merely complicit, it will become an active participant in a discriminatory act.

The *Harris* court distinguished between active facilitation of a practice that conflicts with religious belief and mere tolerance of such a practice, suggesting that only the former constitutes the kind of substantial burden required for RFRA to apply.[175] The consequences of an overbroad view of active facilitation would be severe in that it would expand the ability of religious employers like the funeral home in Harris to evade application of Title VII and other federal anti-discrimination laws. Allowing discrimination in providing services to the LGBT community has a powerful cumulative impact.[176] Mary Bonauto points this out with regard to *Masterpiece Cakeshop*, which, like Scenario 1, also concerns the impact of a refusal to serve customers based on their sexual orientation. Bonauto argues that *Masterpiece Cakeshop* is about more than a baker's religious freedom.[177] It is "about equal citizenship of gay people, and whether we may engage in the kinds of ordinary transactions others take for granted."[178] Referring to *Masterpiece Cakeshop*, she goes on to say that "if the Supreme Court were to accept a rule that simply providing commercial goods or services conveys a message of approval and endorsement that cannot be

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[173] *See generally* Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 Yale L.J. 2516 (2015); Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in* Hobby Lobby*'s Wake*, 82 CHI. L. REV. 1897 (2015).

[174] *Compare* Nejaime & Siegel, *supra* note 173, at 2591 (concluding complicity-based claims "may undermine, rather than advance, pluralistic values"), *with* Joshua J. Craddock, *The Case for Complicity-Based Religious Accommodations*, 12 TENN. J.L. & POL'Y 233, 236 (2018) (arguing that complicity-based claims are "a traditional and necessary part of the American legal landscape").

[175] *Harris*, 884 F.3d 560, 588 (6th Cir. 2018).

[176] Mary Bonauto, *Commercial Products as Speech—When a Cake is Just a Cake*, SCOTUSBLOG (Sept. 15, 2017), http://www.scotusblog.com/2017/09/symposium-commercial-products-speech-cake-just-cake/.

[177] Brief for Petitioners at 14–16, *Masterpiece Cakeshop*, No. 16-111 (U.S. filed July 25, 2016).

[178] Bonauto, *supra* note 176.

compelled, then public-accommodations protections will evaporate," which may harm far more than the LGBT community.[179]

Professor Elizabeth Sepper calls the trend toward permitting denials of service to LGBT customers the development of a "moralized marketplace."[180] Sepper argues that the assumption that there is no harm to the individual if the customer is served by an alternative place of business or even a different employee is simply false, and contradicts long-settled goals of antidiscrimination laws. "A guarantee of access to goods and services somewhere in the market . . . cannot suffice to ensure the broader aims of antidiscrimination law to address social stigma, construct equal citizenship, and create an inclusive society. . . . Antidiscrimination law . . . targets more than material inequality. In reporting out the Civil Rights Act, the Senate Commerce Committee explained, 'Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public.'"[181]

In light of these concerns, the refusal to serve a lesbian bride on the basis of her sexual orientation in our first scenario may well exceed the proper scope of "active facilitation" of an asserted religious conflict. Selling a wedding dress to a customer is exactly the kind of sale of commercial goods that Bonauto and Sepper identify in their critiques. Although the Harris court did not describe what active facilitation looks like in detail, we can imagine that active facilitation of gay marriage, for example, includes performing the ceremony itself. Simply selling the accoutrements of a wedding, including a wedding dress, is at least one procedural step away from actively making possible the wedding itself. The scope with which future courts define active facilitation will help to clarify its application in scenarios like this. The fact that the boutique owner's religious values loosely coincide with one of the purposes of Title VII and public accommodation laws may affect the court's decision in such a case. In a case like this, both the employer and the employee claim a legal right to their values, with the employer asserting Constitutional rights and the employee claiming Title VII protection, and those values are fundamentally opposed. It may be impossible to square a religious objection to discrimination with a religious compulsion to discriminate. If a court must choose to uphold only one of two conflicting sets of values, as it may have to do in such a case, it is possible that the court might side with those values that are more clearly reflected in public policy to the extent that can be determined. In Harris, for example, both sides conceded that there was a compelling government interest in preventing discrimination.[182] In this instance, the employer's religion more closely aligns with antidiscrimination laws, in that its focus is on the treatment of third parties rather than the employee herself. For this reason, if all other things were equal in terms of claimed religious burden on employer and employee, it is possible to imagine that a court might side with the party whose

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[179] Bonauto, *supra* note 176.

[180] Elizabeth Sepper, *Gays in the Moralized Marketplace*, 7 ALA. C.R. & C.L. L. REV. 129, 131 (2015). Sepper explains, "Religious exemptions for for-profit corporations . . . suggest, not just a moral, but a moralized marketplace. Whereas for-profit corporations previously could pursue moral aims above and beyond legal minimums, the moralized marketplace allows them to seek to opt out of protection of their employees and customers in the interest of corporate religion. It authorizes the refusal of goods and services to particular people based on business owner' judgments that their conduct is wrong." *Id.*

[181] *Id.* at 153–54.

[182] *Harris*, 884 F.3d 560, 590 (6th Cir. 2018).

religious beliefs aligned with the public policy of the federal government. Here, the employer has the stronger argument that its beliefs more closely match that federal antidiscrimination policy because the essence of its claim is that its religion compels it to prevent discrimination against members of the LGBT community.

Would the employer be less likely to prevail if it had only moral, but not religious, objections to discriminating against the LGBT community? Would an avowedly nonreligious employer, or an employer that has a less certain claim to religious freedom under *Hobby Lobby*, such as a public corporation, be less successful in its claim that RFRA prohibits the application of Title VII so as to block its moral objections? In short, yes. While RFRA allows for a broad interpretation of religious exercise,[183] we are unaware of any case in which it has been interpreted to support beliefs that expressly non-religious. If an employer cannot claim that its *religion* necessitates an action that would otherwise be prohibited by Title VII or any other federal law, it would be difficult if not impossible for that employer to avoid the compliance with that law.[184] One potential consequence of this analysis is discussed further in Part IV.

B. Scenario 2: Applying State Law

In Scenario 2, an employer with religious convictions about equality is pitted against an employee who refuses to treat a certain class of patients. In Tennessee, the employee's conduct would be protected by state law. Thus, in this section we explore the unique challenges caused by the new class of state laws that seek to elevate the protection of certain beliefs over others, including, potentially, over other competing religious beliefs.

As in Scenario 1, the employer in Scenario 2 has a religious conviction that compels it to provide service to all people regardless of their sexual orientation. The employee, fired for refusing to provide service to a transgender person because the employee believes that being transgender is sinful, could certainly request religious accommodation under Title VII, and that claim would likely play out in a similar way as we described in the previous section. However, the employee would have an additional level of protection under the Tennessee religious freedom law. As described in Section I.C.1 above, Tennessee's law allows counselors and therapists to refuse treatment to clients when the clients' goals or behaviors would violate a "sincerely held" principle.[185] Many observers have assumed that the Tennessee law would allow counselors to reject clients within the LGBT community, whether the counselor's "sincerely held principles" are religious or irreligious in nature.[186] Unlike in Scenario 1, the employer in Scenario 2 cannot seek to override the Tennessee law by reference to the federal RFRA law, because federal RFRA does

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[183] *Hobby Lobby*, 134 S. Ct. 2751, 2761–62 (2014) (noting that RFRA, as amended by RLUIPA, defined the exercise of religion even more broadly than the First Amendment, "to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'").

[184] Some argue that giving primacy to religious values in such conflicts establishes, in effect, an unconstitutional preference for religion. The ACLU filed two lawsuits in the fall of 2017 alleging that actions to preserve "religious freedom" by state agencies and the federal government have swung so far in the other direction they are now violating the Establishment Clause. Complaint ¶ 3, Am. Civil Liberties Union v. Wright, No. 3:17-cv-05772 (N.D. Cal. filed Oct. 6, 2017).

[185] TENN. CODE ANN. § 63-22-302 (2016).

[186] *See* Fang, *supra* note 109.

not apply to state law claims.[187] Tennessee does have a *state* RFRA law, which is in fact broader than the federal RFRA law, and explicitly applies to claims between private parties.[188] So, oddly enough, the employer could raise a state RFRA defense against the application of the Tennessee counseling law.

This situation neatly illustrates a central problem of the spate of laws and legal decisions purporting to protect individuals' "religious freedom" from generally applicable laws in the workplace. By extending religious freedom to "complicity" claims in which the individual himself is not engaging in a sinful act, but is concerned that he is complicit in *someone else's action*, and where that individual is engaged in commerce in such a way that his actions directly impact employees and customers, we create the possibility that the religious person's beliefs will be imposed on others *with the full protection of the government*. As a logical next step, when employers and employees can *each* exercise these rights, we create the possibility of dueling religious freedom claims, both of which would bind the activities of a third party, with no discernable way to determine which claim should prevail.

Indeed, the court *cannot* be in the position of picking a winner in such a dispute because of the Establishment Clause, which clearly requires that a law not prioritize one set of religious beliefs over another, and the Equal Protection Clause, which requires that similarly situated people be treated similarly. How could a court choose the religion of the employer over the employee, or vice versa, without running afoul of either or other of these clauses?

Previous cases applying these new religious freedom protections, including *Hobby Lobby*, have been able to skirt this issue because the third parties being impacted by the plaintiff's religion did not raise a competing religious claim. Indeed, the authors of these laws appear to presume that religion only goes one way: to the denial of services, and not to the extension of services. It awaits to be seen when a religious plaintiff will face a religious defendant. Beyond the confusion engendered by dueling state law religious freedom claims, the question of whether the Tennessee state law would be upheld on review by the Supreme Court is dubious. The Supreme Court has invalidated state laws that remove gays and lesbians from legal protections without a legitimate public purpose, and promoting religious freedom has not sufficed. In *Romer v. Evans*,[189] for example, the Court rejected Colorado's argument that its law specifically prohibiting gays and lesbians from enjoying certain rights and privileges accorded to other citizens, noting that Colorado, "in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it."[190] Unlike the law at issue in *Romer*, however, the Tennessee law does not mention the LGBT community specifically.[191] This makes its constitutionality less clear than state laws that specifically permit discrimination against gay, lesbian and transgender people.

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[187] Dhooge, *supra* note 104, at 262.

[188] *Tennessee Religious Freedom Restoration Act*, REWIRE NEWS (Dec. 12, 2016), https://rewire.news/legislative-tracker/law/tennessee-religious-freedom-restoration-act/; *see also* TENN. CODE ANN. § 4-1-407 (West 2016).

[189] 517 U.S. 620 (1996).

[190] *Id.* at 635.

[191] Many have criticized the law as having the intended effect of shielding counselors who do not wish to treat LGBT patients. *See* Fang, *supra* note 109.

As a final note, if there were no Tennessee RFRA, the employer would be left to argue that the Tennessee counseling law violates its religious freedom under the First Amendment, because federal RFRA does not apply to state laws.[192] In such a case, *Smith* dictates that a generally applicable statute that burdens an individual's religious expression should be treated under a rational basis review. While the popular conception of constitutional rights may be that religious liberty should trump statutory rights,[193] the reality is the courts have enforced a variety of civil rights laws over religious objections, particularly where those laws protect the rights of third parties.[194] Here, of course, the wrinkle is that the court would be enforcing a *state* law promoting religious (and moral) freedom over the *constitutional* protection for religious freedom. Moreover, as noted above, the Tennessee counseling law does appear vulnerable to charges that it targets LGBT individuals without a rational basis other than impermissible bias. However, if the statute is read literally, it contains no explicit reference to either religion or to LGBT individuals, suggesting that it would be more likely to be upheld, and leaving the employer with little ability to protect its religious convictions.

C. Scenario 3: Moral Convictions Square off Against Religious Convictions

In our final hypothetical, a religious employer who wants to serve LGBT customers squares off against an employee who has a moral objection to serving those customers. In such a scenario, a court would have to decide whether an individual employee's morality can take precedence over an employer's religious practice. In other words, can an avowedly non-religious belief supersede a religious belief? As explained below, we believe it is unlikely that the non-religious employee would be able to state a claim against the employer in the first place.

The fired employee's first recourse would be to claim that he has been wrongfully terminated under Title VII based on his religion. In order to make this case, the EEOC would have to use the broadest possible interpretation of "religion," in that the employee here is not claiming that his beliefs are part of any religion at all. Under the EEOC's own guidelines, "religion" as used in Title VII may be broadly interpreted. It notes that religious beliefs include "non-theistic 'moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.'"[195] Even so, morality is not the equivalent of religion, and "beliefs are not protected merely because they are strongly held."[196] Another way to think of the relation between morality and religion is that morality may be included in religion for Title VII purposes, but is not an equivalent alternative. The EEOC concedes that "social, political, or economic

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[192] Dhooge, *supra* note 104, at 262.

[193] As the conservative-leaning National Review put it, pitting "constitutionally guaranteed liberties (endowed by our Creator) [against] preferred progressive public policies . . . should not be a fair fight. It's not a contest between competing, equivalent interests. Rare is the public policy that can meet the traditional test for overriding a First Amendment liberty interest." David French, *What the* New York Times *Gets Wrong About Conscience*, NAT'L REV. (Jan. 31, 2018), https://www.nationalreview.com/2018/01/nyt-gets-religious-liberty-wrong/.

[194] *See supra* Part I.C.1.

[195] *Questions and Answers: Religious Discrimination in the Workplace*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov//policy/docs/qanda_religion.html (last visited May 8, 2018).

[196] *Id.*

philosophies, as well as mere personal preferences, are not 'religious' beliefs protected by Title VII."[197]

Even if the EEOC asserted that the employee's views are moral beliefs about "ultimate ideas," in order to bring those beliefs here within the ambit of Title VII protection, that assertion would not resolve the issue. These guidelines do not have the force of law, and no court has yet held that a moral and nonreligious belief can be the basis for Title VII protection. The employee is therefore unlikely to succeed on a Title VII claim.

Scenario 3 takes place in Mississippi, where a state law protects against punishment by the state government for actions consistent with certain "religious beliefs or moral convictions" including the belief that gay marriage is wrong.[198] The Mississippi law specifically provides that "the state government shall not take any discriminatory action against a person wholly or partially on the basis that the person has provided or declined to provide . . . cake or pastry artistry . . . or similar marriage-related services . . . or goods."[199] The prohibited "discriminatory action" by the state includes adverse employment actions against people "employed or commissioned by the state government."[200] It does not, however, protect people from being fired by private employers on the basis of their discriminatory beliefs. Our third scenario takes place in the private sector, not the public sector. In this scenario, then, the employee would not be able to make a claim against the employer for violation of this particular state law.

For all of these reasons, we expect that the employer in Scenario 3 would win. The employee who is morally but not religiously opposed to serving members of the LGBT community will get protection neither from Title VII nor Mississippi's state discrimination law.

IV. Belief v. Belief: Outcomes and Implications

The current messy landscape with regard to religious freedom in the workplace has created an environment ripe for conflict. As demonstrated by our three scenarios, conflicting religious beliefs of employers and employees could result in: (1) a religious employer successfully applying RFRA to overcome religious accommodations required under Title VII; (2) a direct conflict between religious employer and employee under state religious freedom laws, resulting in a court finding that it could enforce neither law under the Establishment and Equal Protection Clauses; (3) a religious employer being unable to protect its convictions regarding diversity against an employee's moral convictions regarding a desire not to serve LGBT people; or (4) a religious employer being able to effectively impose its beliefs in equality over the moral objections of an employee. With little consistency, the outcome of these disputes turns on the presence of state religious freedom laws; and whether the employer or employee's convictions are secular and moral or religious. What these cases do not turn on is a consistent interpretation of the limits of religious freedom, a thoughtful analysis of third party burdens, or the rights of LGBT people to be free from discrimination in the workplace or the marketplace.

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[197] *Id.*
[198] MISS. CODE ANN. § 11-62-3 (2016).
[199] *Id.* § 11-62-5(1).
[200] *Id.* § 11-62-7(1)(g).

The potential unintended consequences of this mixed bag of outcomes and lack of consistent legal determinates should trouble businesses and individuals alike. First, the weaponization of religion in the workplace may result in a counterintuitive result: an increasing number of liberal businesses adopting explicitly religious values. Companies concerned about protecting values of diversity and equity, or those that are concerned about becoming a vehicle for perpetuating discrimination, may want to cast their corporate values as religion, in order to be able to claim protection under federal and state religious freedom laws.[201] This "arms race" of religion would only heighten existing conflicts in the workplace, and could raise concerns about the authenticity of religious beliefs and the value of business ethics as a secular practice.

Second, competing state laws could—and indeed, already have—drive businesses to move to areas where they are better able to protect their corporate values.[202] States with laws seeking to protect certain religious or moral values over religious values of diversity and equity, may find an increasingly—and perhaps even visibly—segregated marketplace.[203] In a time of increasing polarization, businesses are likely to continue find themselves at the front line of political conflicts and culture wars.

As a legal matter, the lack of consistency with regard to basic human and constitutional rights should raise significant questions as well. Why does an LGBT individual have the right to be free from workplace discrimination in California, but not Tennessee? Should a religious individual have the ability to protect a belief in Tennessee but not New York? How far can federal antidiscrimination laws go, if they can be fundamentally undermined by claims of religious freedom? Conversely, how should we understand religious freedom, if it has a far different implication in Mississippi than in Minnesota?

At root, the fundamental question here is: where are the common boundaries of American civil society that transcend state lines? Put another way, what fundamental rights do we hold in common that cannot be abrogated by another person's religious beliefs?

This is not a simple question. Religious freedom, while a bedrock principle of the United States, has always been limited by what courts determine to be privileged government interests,[204]

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[201] *See generally* Elizabeth Brown & Inara Scott, *Sanctuary Corporations: Should Liberal Corporations Get Religion?* 20 U. PA. J. CONSTL. LAW 101 (forthcoming 2018).

[202] *Businesses Follow 'Public's Will' in Denouncing 'Religious Freedom' Laws*, NAT'L PUB. RADIO (Apr. 6, 2016), https://www.npr.org/2016/04/06/473279670/businesses-follow-publics-will-in-denouncing-religious-freedom-laws; Adam Chandler, *The Economics of Religious Freedom Bills*, ATLANTIC (Mar. 27, 2015), https://www.theatlantic.com/national/archive/2015/03/the-business-of-religious-freedom-bills/388898/. The pressure from business not to pass similar statutes may be the reason a number of new anti-LGBT laws have stalled in state capitols. Associated Press, *Anti-LGBTQ Bills Are Failing in State Legislatures*, NBC NEWS (Apr. 17, 2018), https://www.nbcnews.com/feature/nbc-out/anti-lgbtq-bills-are-failing-state-legislatures-n866791.

[203] One of the greatest divides in America today is the split between conservative rural areas and liberal urban areas. David A. Graham, *Red State, Blue City*, ATLANTIC (Mar. 2017), https://www.theatlantic.com/magazine/archive/2017/03/red-state-blue-city/513857/. The split turned into an economic catastrophe for North Carolina, as conservative state legislators' sought to overturn antidiscrimination bills passed by liberal cities. *Id.* Amazon's process of choosing a home for its new headquarters is reportedly driving some states, including Georgia, to reconsider passing religious freedom statutes that may appear hostile to LGBT people. Sarah Holder, *How a Bid for Amazon HQ2 Got Tangled Up in a Fight for LGBTQ Rights*, CITYLAB (Dec. 11, 2017), https://www.citylab.com/life/2017/12/how-a-bid-for-amazon-hq2-got-tangled-up-in-a-fight-for-lgbtq-rights/547304/.

[204] *See, e.g.*, Davis v. Beason, 133 U.S. 333, 342 (1890) (noting the Free Exercise Clause "was never intended . . . as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society").

and the boundaries of those limits have been hotly disputed—and subject to change. While few would argue that a religious sect should have the right to sacrifice children as part of a worship service, significant disputes have been adjudicated over the rights of parents to withhold medical treatment or to restrict schooling for their children.[205] In the Civil Rights Era, federal judicial decisions settled hard-fought battles over religious beliefs regarding interracial marriage and racial discrimination.[206] The Free Exercise clause has been the subject of numerous disputes, as the Supreme Court has struggled to balance the constitutional right to religious freedom and the government's interest in regulating behavior.[207]

The Fourteenth Amendment guarantees that no person can be deprived of the "equal protection of the laws" by any state, nor can any person be deprived of life, liberty or property without due process.[208] The Supreme Court has long held that some rights are fundamental, and the liberty and equality interests secured by the Fourteenth Amendment have been interpreted to include these fundamental rights. These include the right to marry, the right of contraceptive access, the right to procreate, the right to travel between states, and the right to vote.[209] The Court has struggled, however, with the process by which such rights are defined. As some scholars have noted, the Court sometimes has relied on vague phrases, reasoning that fundamental rights are those that are "implicit in ordered liberty," decided according to the Court's "reasoned judgment," and limited by national "history and tradition."[210] In *Obergefell*, the Court explained that "rights come not from ancient sources alone. They rise, too, from a better-informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."[211]

The Court also concluded in *Obergefell* that same-sex couples had a fundamental right to marriage under the Due Process Clause of the Fourteenth Amendment and that right could not be denied under state law.[212] Under these precedents, the Court might well conclude that laws purporting to limit the services available to LGBT people interfere with their fundamental right to receive equal treatment as they seek a marriage license, apply to adopt a child, or attempt to purchase goods and services. This fundamental right might be broadly identified as the right to

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[205] Hillel Y. Levin, *To Accommodate or Not to Accommodate: (When) Should the State Regulate Religion to Protect the Rights of Children and Third Parties?*, 73 WASH. & LEE L. REV. 915, 935–36, 982 nn.331–32 (2016). Note that states differ significantly as to the nature of religious exceptions to child abuse and neglect laws. Aleksandra Sandstrom, *Most States Allow Religious Exemptions from Child Abuse and Neglect Laws*, PEW RES. CTR. (Aug. 12, 2016), http://www.pewresearch.org/fact-tank/2016/08/12/most-states-allow-religious-exemptions-from-child-abuse-and-neglect-laws/.

[206] For a fascinating look at the disparity in legal opinions regarding interracial and same-sex marriage, see generally James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages,* 50 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 99 (2015).

[207] *See* Eric Rassbach, *Is* Hobby Lobby *Really A Brave New World? Litigation Truths About Religious Exercise by For-Profit Organizations*, 42 HASTINGS CONST. L. Q. 625, 626-628 (2015) (describing high profile, unpopular religious freedom cases decided prior to *Hobby Lobby*); Caleb C. Wolanek & Heidi Liu, *Applying Strict Scrutiny: An Empirical Analysis of Free Exercise Cases*, 78 MONT. L. REV. 275, 276–81 (2017) (reviewing legal standard applied in free exercise cases).

[208] U.S. CONST. amend. XIV, § 1.

[209] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003); *see generally* Evan Gerstmann, *Fourteenth Amendment, Fundamental Rights, and Same-Sex Marriage*, 2017 A.B.A. INSIGHTS ON L. & SOC'Y 18.

[210] Gerstmann, *supra* note 209.

[211] 135 S. Ct. 2584, 2602 (2015).

[212] *Id.*

participate in the workplace and the marketplace without discrimination, regardless of sexual orientation or gender identity.

The *Obergefell* decision suggests that fundamental rights cannot be abridged by contradictory religious beliefs or, for that matter, "philosophical premises":

> Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.[213]

The Court took pains to recognize religious and other objections to same-sex marriage. It emphasized that the First Amendment allows "religions[] and those who adhere to religious doctrines" to advocate against same-sex marriage, and that "[t]he same is true of those who oppose same-sex marriage for other reasons."[214] While debate on this issue is permissible, the Court explained, it is impermissible under the Constitution to make same-sex marriage illegal.[215] In other words, while the First Amendment protects the objector's rights to hold and express their beliefs, it was limited in *Obergefell* by the Fourteenth Amendment's guarantee of equal rights.

Obergefell thus suggests that the Fourteenth Amendment's guarantees of equal protection and due process must be given precedence over general objections, religious or otherwise, to a fundamental right. Advocates for LGBT rights may then ask whether freedom from discrimination on the basis of sexual orientation or transgender status is a fundamental right that may also be protected by the Fourteenth Amendment. If so, this right could upend the RFRA discussion and replace it with a far different one—how does the fundamental right to a workplace free from discrimination stack up against the right to religious freedom? In the future, how will we resolve hypotheticals like the ones posed in this paper?

V. Conclusion

As the trend toward increasing protection for religious freedom continues, scholars have sought to identify conceptual frameworks by which to resolve complex constitutional and statutory disputes. Whether it is through the lens of religious identity or complicity-based religious claims,[216] these conceptual frameworks offer a defensible legal resolution to complex and

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[213] *Id.*

[214] *Id.* at 2607.

[215] *Id.* Some rights may be considered fundamental and also may be religious beliefs for a minority of people. For example, a member of the Satanic Temple sued Missouri, claiming that the state's abortion restrictions effectively violate her religious beliefs that a woman's body "is inviolable and subject to her will alone." Eli Rosenberg, *Woman says Missouri's Strict Abortion Regulations Violate Her Religion: The Satanic Temple*, SALT LAKE TRIB. (Jan. 24, 2018), https://www.sltrib.com/news/nation-world/2018/01/24/woman-says-missouris-strict-abortion-regulations-violate-her-religion-the-satanic-temple/.

[216] *See supra* notes 173–74 and accompanying text; *see also* Lauren S. Lucas, *The Free Exercise of Religious Identity*, 64 UCLA L. REV. 54, 115 (2017) (distinguishing between protective and projective religious identity, and arguing that, "When individuals or groups attempt to protect the definition or purpose of their own identity within the internal sphere, the law should help them do so; when, however, they attempt to use identity to co-opt or displace the role of law outside of that realm, the law should resist and the Constitution should not enable them.").

troubling conflicts. We offer our own roadmap for addressing complex legal conflicts and propose the recognition of a Fourteenth Amendment right to a workplace and marketplace free from discrimination as one means of resolving competing claims for religious freedom in the workplace. Yet the heart of this paper is not simply the identification of a new theoretical or conceptual framework. While this work is important, we ultimately do not believe that conceptual legal frameworks alone will be sufficient to resolve these conflicts.

Our greater concern derives from the morass in which we now find ourselves, exacerbated by the growth of religious expressions and protections described in Part I and illustrated by the conflict scenarios in Part III. The clearest illustration of this quagmire lies in the dialog provided at the beginning of Part III: "Your religious freedom burdens my religious freedom. . . . No, *your* religious freedom burdens *my* religious freedom." The hypothetical but not unlikely face-off between competing religious claims tells us more about our current social and political situation than any conceptual framework could. The larger question it raises is whether there is a fundamental right to freedom from discrimination based on sexual orientation or transgender status everywhere in the United States. This question can only be answered by reference to shared values, not complex theoretical frameworks.

Alexis de Tocqueville said,

> If everyone undertook to form all his own opinions and to seek for truth by isolated paths struck out by himself alone, it would follow that no considerable number of men would ever unite in any common belief. But obviously without such common belief no society can prosper; say, rather, no society can exist; for without ideas held in common there is no common action, and without common action there may still be men, but there is no social body.[217]

The challenge of a democratic, multi-cultural, and diverse society is identifying those shared, common values. When a society is made up of (and ordered by) a homogeneous set of individuals, it is relatively easy to claim adherence to the tradition of religious freedom and still maintain common values. But that situation no longer describes the United States, which is rapidly becoming more diverse in religious beliefs.[218] We are therefore at a crucial moment in history, when we must redefine the common values that unite us as a society *outside* of, and perhaps even in defiance of, a singular dominant religious tradition. The scenarios identified in this paper suggest some of the limits of religious pluralism in modern employment contexts. They also invite further discussion of the ways in which we may advance specific social goals by identifying the common, fundamental values that establish those limits. The next and more difficult step is to define them.

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[217] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (last visited May 12, 2018), http://xroads.virginia.edu/~hyper/detoc/ch1_02.htm.

[218] *America's Changing Religious Landscape*, PEW RES. CTR. (May 12, 2015), http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/ (finding that the percentage of adult Americans identifying as Christian dropped nearly eight percent in seven years); *When Americans Say They Believe in God, What Do They Mean?*, PEW RES. CTR. (Apr. 25, 2018), http://www.pewforum.org/2018/04/25/when-americans-say-they-believe-in-god-what-do-they-mean/ (finding that only a small majority of Americans who believe in "God" or a higher power believe in God as described in the Bible). It is perhaps not unimportant that the beliefs of those in Congress do not reflect this trend. Aleksandra Sandstrom, *Faith on the Hill*, PEW RES. CTR. (Jan. 3, 2017), http://www.pewforum.org/2017/01/03/faith-on-the-hill-115/.

The Supreme Court has begun to articulate such values. In *Obergefell*, Justice Kennedy identified a shared American constitutional value in the right to liberty and the opportunity to define one's own identity.[219] The majority opinion rejects the enactment of government laws or policies that would deny some individuals of their opportunity to live out this shared value. This, perhaps, is the place we should start: with the assumption that we are drawn together by a shared value and honor for liberty and identity, and that this, and not religious freedom in general, is our highest calling.

[219] *Obergefell*, 135 S. Ct. 2584, 2593 (2015).