American Business Law Journal

ACADEMY OF LEGAL STUDIES IN BUSINESS

American Business Law Journal
Volume 56, Issue 1, 55–113, Spring 2019

Belief v. Belief: Resolving LGBTQ Rights Conflicts in the Religious Workplace

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Employment disputes are increasingly centered on the conflicting moral and religious values of corporations, their employees, and their customers. These conflicts are especially challenging when they involve the rights of lesbian, gay, bisexual, transsexual, and queer/questioning (LGBTQ) employees and customers contraposed against the religious beliefs of corporations and their owners. When religious values compete with civil rights in the employment context, a complex web of legal protections renders the outcome unclear. Conflicts over these competing rights can involve a number of broad, thorny legal disputes, including those concerning 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. This article illustrates the reasons for this growing tension between the beliefs of business owners and the beliefs of their employees. It explores recent conflicts between religion and rights in the workplace particularly in the context of LGBTQ rights, the ways in which state-level regulation complicates these conflicts, and the potential impact of recent cases addressing these concerns. It also identifies examples of potential specific conflicts in the context of LGBTQ rights and suggests the principles that should guide the resolution of these cases, offering a framework for assessing the hierarchy that a court may use in resolving cases in which values conflict with rights in the workplace. Finally, it addresses some of the troubling implications that arise as a result of the resolution of the potential specific conflicts.

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Introduction

Hobby Lobby, Masterpiece Cakeshop, Walgreens, Vistaprint, Family Dollar: these are just a few of the organizations that have recently been in the news because of disputes centered on the conflicting moral and religious values of corporations, their employees, and their customers.[1] In a time of heightened partisan and ideological divides, these conflicts are especially challenging when they involve the rights of lesbian, gay, bisexual, transsexual, and queer/questioning (LGBTQ) employees and customers contraposed against the religious beliefs of corporations and their owners.[2] When religious values compete with civil rights in the employment context, a complex web of legal protections renders 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 article seeks to illustrate the reasons for this growing tension between the beliefs of business owners and the beliefs of their employees. Further, this article seeks to identify examples of potential specific conflicts in the context of LGBTQ rights and analyze their likely resolution. Finally, this article seeks to address some of the troubling implications that arise as a result of the resolution of the potential specific conflicts. We also seek to consider these conflicts from a slightly different perspective than is typically seen. In our analysis, we consider potential conflicts between an employer who seeks to *defend* equal access by LGBTQ individuals and employees holding differing views.

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[1]Katy Barnitz, *Walgreens Sued Over Refusal to Fill Prescription*, Albuquerque J. (Nov. 18, 2017, 11:42 PM), https://www.abqjournal.com/1094997/walgreens-sued-over-refusal-to-fill-prescription.html (Walgreens sued when pharmacist refused to fill prescription for birth control); Beth Greenfield, *Gay Couple Sues Printing Company Over Homophobic Wedding Pamphlets*, HuffPost (Jan. 17, 2018, 10:31 AM), https://www.huffingtonpost.com/entry/gay-couple-sues-printing-company-over-homophobic-wedding-pamphlets_us_5a5f661ce4b096ecfca9831d (Vistaprint employee delivered antigay 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, 1:08 PM), 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.

[2]*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).

Religious conflicts in the workplace can take many forms. Corporations seeking to protect values related to diversity or equity may be challenged by employees who view corporate policies as impermissible political viewpoint discrimination[3] or as infringement on their personal religious values.[4] Employees may assert the right not to abide by diversity policies requiring equal treatment and nonharassment of LGBTQ employees and customers.[5] Likewise, corporations may seek exemption from otherwise generally applicable laws on the basis that they conflict with the corporation's religious beliefs.[6]

Employee rights to religious freedom are not new. Decades of case law under Title VII of the Civil Rights Act of 1964[7] (Title VII) establishes the right of employees to be free from discrimination on the basis of religion,[8] while the Religious Freedom Restoration Act of 1993[9] (RFRA) protects individuals' religious freedom from some government

[3]*See, e.g.*, Camila Domonoske, *James Damore Sues Google, Alleging Discrimination Against Conservative White Men*, NAT'L PUB. RADIO (Jan. 9, 2018, 9:36 AM), https://www.npr.org/sections/thetwo-way/2018/01/09/576682765/james-damore-sues-google-alleging-discrimination-against-conservative-white-men.

[4]*See, e.g.*, Marina Fang, *Counselors in Tennessee Can Now Legally Refuse LGBT Patients*, HUFFPOST (Apr. 27, 2016, 6:36 PM), 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, 5:00 PM), 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.

[5]*See, e.g.*, Matthews v. Wal-Mart Stores, Inc., 417 F. App'x 552, 553 (7th Cir. 2011) (Apostolic Christian employee berated and admonished gay coworkers 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).

[6]*See infra* note 52 and accompanying text.

[7]42 U.S.C. § 2000(j) (2012).

[8]*See infra* Part I.B.

[9]42 U.S.C. §§ 2000bb through 2000bb-4 (2012).

interference.[10] But in recent years, key elements of the employment landscape have changed, setting up new and complex conflicts between employers and employees. The first change 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.[11] Either trend may exacerbate conflict, as some feel religious liberty arguments can fuel discrimination while others feel movements for LGBTQ 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. Under *Burwell v. Hobby Lobby Stores, Inc.*,[13] closely held corporations can assert rights to religious freedom under RFRA, setting the stage for potential conflicts between the religious beliefs of the *corporation* and the religious beliefs of its *employee*. At the same time, states are passing new religious freedom laws, some of which are modeled after RFRA, others narrowly target the purported rights of employers and employees to refuse to serve LGBTQ customers.[14] These laws similarly set the stage for 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*,[15] *Hobby Lobby*, and *Masterpiece Cakeshop, Ltd. v. Colorado*

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[10]RFRA, briefly, provides that a generally applicable law may not be enforced in a way that substantially burdens a complainant's sincere religious belief, unless the law is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000bb(a)(1)–(b)(2) (2012).

[11]*See infra* Part II.A.

[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]*See infra* Part I.D.1.

[15]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).

Civil Rights Commission[16] all involved 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 and civil liberties. 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.[17] Conflicts over these competing rights can involve a number of broad, thorny legal disputes, including those concerning 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.[18]

Consider the following hypotheticals in which religious freedom may conflict with LGBTQ rights:

(1) A wedding dress boutique owner is a member of the More Light Presbyterians, who describe their mission as "following the risen Christ, and seeking to make the Church a true community of hospitality." More Light Presbyterians seek "to work for the full participation of lesbian, gay, bisexual, transgender and queer (LGBTQ) people in the life, ministry and witness of the Presbyterian Church (USA) and in society."[19] An employee who has a strong religious conviction that same-sex marriage is wrong refuses to serve a same-sex couple. The boutique fires the employee based on the owner's strong religious conviction that treating homosexual couples equally is required by her faith.

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[16]138 S. Ct. 1719 (2018). *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).

[17]*See infra* Part I.D.1.

[18]*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/.

[19]*Our Story,* More Light Presbyterians, https://mlp.org/our-story/ (last visited July 16, 2018).

(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, and believing the clinic's policy to be illegal, based on a Tennessee law purporting to allow the practitioner to refuse to see transgender patients.[20] The clinic fires the practitioner.

(3) A bakery owner holds a strong religious commitment to serving all customers equally, and has staff wear T-shirts with a rainbow flag logo and the words "In this bakery, we believe all marriage is beautiful!" An employee believes gay marriage is sinful and refuses to wear the T-shirt. The employee requests an accommodation under Title VII to wear a different T-shirt that only has the bakery's logo on it. The employer believes doing so would send a message to gay couples waited on by this particular employee that they are not welcome and therefore denies the accommodation. The employee sues for religious discrimination under Title VII.

Whether the First Amendment, Fourteenth Amendment, Title VII, or some other source of law determines the outcomes of scenarios like these should reflect a comprehensive analysis of the relative importance of values and rights in this post–*Hobby Lobby* environment. Two opposing trends underscore the urgency of resolving such conflicts in a principled manner. First, some recent lower court decisions have upheld the rights of the LGBTQ community to be free from discrimination rooted in the religious beliefs of business owners. These decisions include *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*,[21] upholding the employment rights of a transgender funeral home director, and *Brush & Nib Studio v. City of Phoenix*,[22] affirming that wedding calligraphers may not refuse to serve same-sex couples.[23] In contrast, however, recent Supreme Court decisions suggest a rising level of support for religious freedom potentially at the expense of competing

[20]*See infra* note 66 and accompanying text.

[21]884 F.3d 560 (6th Cir. 2018).

[22]418 P.3d 426 (Ariz. Ct. App. 2018).

[23]*See infra* Part II.D.2.

LGBTQ rights.[24] Other than these recent cases, 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. No court has addressed the type of conflict we envision, in which an employee's religious rights directly conflict with a corporate religion.

In response to this void in existing jurisprudence, this article explores recent conflicts between religion and rights in the workplace particularly in the context of LGBTQ rights, the ways in which state-level regulation complicates these conflicts, and the potential impact of recent state and federal cases addressing these concerns. In doing so, we seek to suggest the principles that should guide the resolution of these cases and offer scholars and employers a framework for assessing the hierarchy that a court may use in resolving cases in which values conflict with rights in the workplace.

This article proceeds in four parts. Part I provides a brief overview of the constitutional and statutory sources of law and legal principles most relevant to resolving these conflicts. In Part II, we explore the reasons behind the increasing rate of conflicts over religious rights in the workplace relating to LGBTQ rights, including the expansion of corporate values and the potential impact of recent Supreme Court and lower court decisions. In Part III, we suggest principles derived from recent case developments examined in Part II and analyze the likely resolution of the conflicting rights and interests in the hypothetical scenarios presented above. 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.

I. Key Constitutional and Statutory Doctrines in Religious Workplace Conflicts

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

[24]Lisa Neff, *Supreme Court, in Narrow Decision, Rules for Anti-Gay Baker in* Master Piece Cakeshop *Case,* Wis. Gazette (June 4, 2018), https://www.wisconsingazette.com/news/supreme-court-in-narrow-decision-rules-for-anti-gay-baker/article_6e92e40c-6802-11e8-9306-d72d0f1f4736.html.

can analyze the likely outcome of the hypothetical conflicts raised above, 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.[25] In the employment context, significant scholarly attention and judicial precedent has focused on the Free Exercise Clause.[26] 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."[27]

Over a century later, in a case affirming the requirement that Amish employers pay social security taxes in violation of 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)."[28] In *Sherbert v. Verner*,[29] the Court's approach to religious freedom claims shifted toward a balancing test, in which the Court

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[25]U.S. Const. amend. I.

[26]*See 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).

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

[28]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).

[29]374 U.S. 398 (1963).

asked whether an alleged burden on a claimant's religious freedom advances a compelling state interest in the least restrictive manner.[30]

In *Employment Division, Department of Human Resources of Oregon v. Smith*,[31] the Court took a significant step to limit 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.[32] 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.[33] 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."[34]

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 permitted. RFRA allows persons to challenge federal laws that substantially burden their religious beliefs, at which 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*.[35] Notably, most scholars have concluded that RFRA is not likely to be a defense in an action where the government is

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

[31]494 U.S. 872 (1990).

[32]*Id.* at 881–82.

[33]*See supra* notes 9–10 and accompanying text.

[34]42 U.S.C. § 2000bb(a)(4) (2012). For a more detailed description of the response to *Smith* culminating in the passage of RFRA, see generally Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act,* 73 Tex. L. Rev. 209 (1994–95).

[35]*See* Elizabeth Brown & Inara Scott, *Sanctuary Corporations: Should Liberal Corporations Get Religion?*, 20 U. Pa. J. Const. L. 1101, 1122 nn.146–47 and accompanying text.

not a party.[36] 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, but it may be raised occasionally, particularly in cases involving the ministerial exemption.[37] 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.[38] The court's refusal to address the issue stemmed from the fact that no party had "presse[d] the broad constitutional argument" raised by the amici.[39]

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.[40] 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.[41] If a workplace obligation conflicts with an employee's religious beliefs, the employer must make

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[36]*See* EEOC v. Harris, 884 F.3d 560, 584 (2018). 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 that there have been a small number of cases applying RFRA in disputes involving private parties, where the defendants 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)).

[37]*See* Robert A. Sedler, *Understanding the Establishment Clause: A Revisit*, 59 Wayne L. Rev. 589, 647–55, 659–61 (discussing application of the Establishment Clause in employment situations).

[38]*Harris,* 884 F.3d at 585 n.8. For a full discussion of *Harris,* see *infra* Part II.C.1.

[39]*Harris,* 884 F.3d at 585 n.8.

[40]42 U.S.C. § 2000e-2(a)(1) (2012).

[41]42 § 2000e-2(a)(2).

accommodations, including "flexible scheduling, voluntary shift substitutions or swaps, job reassignments, and modifications to workplace policies or practices."[42] 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."[43]

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.[44] 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—because employers cannot suffer adverse employee actions. However, it is important to note that "religious organizations" are generally exempt from Title VII claims by employees,[45] and are broadly protected from interference with decisions regarding the hiring and firing of ministers under the ministerial exemption.[46]

Morality may also be a basis for protection. The EEOC defines "religion" broadly for purposes of Title VII enforcement, so it may encompass general beliefs about what is right and what is wrong.[47] 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

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[42]*Religious Discrimination*, U.S. Equal Emp. Opportunity Comm'n, https://www.eeoc.gov/laws/types/religion.cfm (last visited May 8, 2018).

[43]*Id.*

[44]*See infra* Part II.C.1.

[45]*See, e.g.*, 42 U.S.C. § 2000e-1(a) (2012) (exempting religious organizations from antidiscrimination provisions) and 42 U.S.C. § 2000e-2(e)(2) (providing that religious educational institutions may prefer to hire members of their own religion under certain circumstances).

[46]Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 183 (2012) (holding that a "ministerial exception" grounded in the First Amendment exempts qualified religious organizations from compliance with Title VII).

[47]EEOC Directive No. 915.003 § 12-I(A)(1) (2008), https://www.eeoc.gov/policy/docs/religion.html.

concepts of religion."[48] Therefore, Title VII may protect against discrimination based on sincerely held moral and ethical convictions, not just religious beliefs.[49]

C. RFRA and Similar State Laws

RFRA provides a safe harbor for the religious beliefs and practices of people that would 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.[50] A religious claimant may be able to use RFRA as a shield against enforcement of a generally applicable federal law if the claimant can demonstrate that the law substantially burdens its religious exercise, unless the law is the least restrictive means of furthering a compelling government interest.[51]

Although 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 receive protection for their religious beliefs in 2014, in *Hobby Lobby*.[52] 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.[53] However, it is unclear 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

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[48]*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. 713, 715–16 (2012) (describing EEOC's evolving definition of religion).

[49]EEOC Directive, *supra* note 47.

[50]Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014).

[51]42 U.S.C. § 2000bb(a)(1)–(b)(2) (2012).

[52]*Hobby Lobby*, 134 S. Ct. at 2785.

[53]*Id.*

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. However, since the decision was announced, a records request suggests that over fifty companies have requested a similar exemption from contraceptive care requirements under the Affordable Care Act.[54]

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.[55] 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 of 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 government practices substantially burden an individual's religious beliefs or practices.[56] If this deferential approach is extended

[54]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/.

[55]For an analysis of the question of what it means for a corporation to have religious beliefs, 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).

[56]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 claimant'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). In addition, 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).

equally toward traditional and nontraditional religions, it is certainly plausible that a claim that being forced to accommodate discrimination against LGBTQ people substantially burdens an individual or corporation's religion would be upheld. We do not here take on the question of whether a secularly based diversity policy, or a corporation's strongly held moral conviction could be considered "religious" for purposes of RFRA or the First Amendment, but we do note that this could be a complex analysis.[57] For purposes of our analysis, we assume that the policies of the companies in the hypotheticals we examine are properly considered a religious expression under RFRA and other applicable laws protecting religious freedom.

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 LGBTQ

[57]There are several questions that would have to be answered in order to determine if equity and equal treatment for all employees and customers could be considered a "religious" value for purposes of RFRA or the First Amendment. The first question is whether diversity, equity, or similar values could plausibly be considered part of a religious doctrine. Based on current case law, courts should not find this to be a difficult question. *See Hobby Lobby,* 134 S. Ct. at 2785. The second question would be if this type of belief could properly be considered *religious*, as these values are widely considered secular. If an individual making this claim attributed his or her beliefs to an established religious tradition, such as Judaism or Christianity, this also would also be unlikely to cause much controversy. A number of faith-based organizations and churches specifically designate themselves as "welcoming" to LGBT individuals and families, and explicitly tie their practices to their individual religious traditions. See *Faith Positions,* Hum. Rts. Campaign, https://www.hrc.org/resources/faith-positions (last visited July 18, 2018) for examples of such religious traditions. However, if the individuals making the claim did not explicitly attribute their beliefs to a specific religious tradition, or openly identified their beliefs as secular rather than religious, the court would have to determine if these secular beliefs could constitute a religious expression for RFRA, the First Amendment, or other legal purposes. This would be a complex determination and is outside the scope of this article. However, a number of legal scholars have suggested that secular beliefs can, and in some cases should, be equated with religious beliefs for legal purposes. *See, e.g.,* Lucien J. Dhooge, *The Equivalence of Religion and Conscience*, 31 ND J.L. Ethics & Pub. Pol'y 253 (2017); Courtney Miller, *"Spiritual but Not Religious": Rethinking the Legal Definition of Religion*, 102 Va. L. Rev. 833 (2016); Major Christopher D. Jones, *Redefining "Religious Beliefs" Under Title VII: The Conscience as the Gateway to Protection*, 72 A.F. L. Rev. 1 (2015).

people.[58] 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 LGBTQ 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.

The growing list of state laws patterned after RFRA ("state RFRA" laws), as well as state "conscience laws," discussed in the next section, may also have a significant impact on the resolution of religious value conflicts between employers and employees.[59] For example, in *Brush & Nib*, the appellants unsuccessfully asserted that Arizona's version of RFRA should have shielded them from enforcement of Phoenix's antidiscrimination laws.[60]

D. State Religious and Moral Freedom Laws

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 antidiscrimination mandates that protect LGBTQ 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 LGBTQ people or the beliefs of individuals and employers with regard to equity and diversity in the workplace.

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[58]*See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n, 138 S. Ct. 1719 (2018); *Hobby Lobby,* 134 S. Ct. at 2764; Ala. Code § 26-10D-5 (2017); 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).

[59]Some scholarship suggests that the harmful impact of state RFRA laws has not been as substantial as initially feared. *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, 646–47 (2017).

[60]*See* Brush & Nib Studio, LC v. City of Phx., 418 P.3d 426, 426 (Ariz. Ct. App. 2018).

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.[61] There are currently twenty-one state laws that seek to protect religious freedom.[62] In addition, a number of new and proposed laws specifically seek to provide exemptions for individuals and businesses that do not want to serve LGBTQ customers.[63] 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 [of] freedom."[64]

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 LGBTQ people. For example, an Alabama law enacted in 2017 allows private adoption agencies to turn away gay and lesbian couples on religious grounds.[65] Similarly, a Tennessee law

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[61]*See* Dhooge, *supra* note 59, at 588, 588 n.15.

[62]*See* Ariz. Rev. Stat. Ann. §§ 41-1493–1493.02 (2016) (effective 1999); Ark. Code Ann. §§ 16-123-401–407 (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. §§ 73-401–404 (West 2016) (effective 2000); 775 Ill. Comp. Stat. 35/1–/99 (2016) (effective 1998); Ind. Code §§ 34-13-9-0.7–11 (2016) (effective 2015); Kan. Stat. Ann. §§ 60-5301–5307 (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. §§ 28-22-2–5 (2016) (effective 2000); Okla. Stat. tit. 51, §§ 251–58 (2016) (effective 2000); 71 Pa. Ann. Stat. §§ 2401–2407 (2016) (effective 2002); 42 R.I. Gen. Laws §§ 42-80.1-1–4 (2016) (effective 1993); S.C. Code Ann. §§ 1-32-10–60 (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.

[63]Jennifer Bendery & Michelangelo Signorile, *Everything You Need to Know About the Wave of 100+ Anti-LGBT Bills Pending in States*, HuffPost (Apr. 15, 2016, 4:17 PM), https://www.huffingtonpost.com/entry/lgbt-state-bills-discrimination_us_570ff4f2e4b0060ccda2a7a9.

[64]Eric Yordy, *Clamourous 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), https://wmpolicyreview.scholasticahq.com/article/3106-clamorous-coexistence-the-u-s-commission-on-civil-rights-and-the-internal-battle-between-religion-and-nondiscrimination-laws.

[65]Ala. Code § 26-10D-5 (2017); *see also* Bendix, *supra* note 58.

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 LGBTQ clients.[66] Under a controversial Mississippi law that went into effect in October of 2017, businesses and government officials are permitted to deny services to LGBTQ people if serving them would conflict with a person's sincerely held "religious beliefs or moral convictions."[67] 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."[68] 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 LGBTQ pride parade.[69] Importantly, the Mississippi statute is not limited to the protection of explicitly religious values. Rather, the statute provides that the three protected beliefs may be *either* "religious beliefs or moral convictions."[70]

The tendency in many of the new laws to conflate religious beliefs and secular values creates a heightened potential for complex conflict in the

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[66]*See* Tenn. Code. Ann. § 63-22-302 (2016); 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.

[67]Miss. Code Ann. § 11-62-5 (2016).

[68]*Id.*

[69]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).

[70]Miss. Code Ann. § 11-62-5 (2016).

workplace. First, these laws broaden the scope of *who* may claim this pseudoreligious protection to any who shares 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 broadly 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 laws such as Title VII may include nontraditional religions or even atheism,[71] in religious freedom cases, courts have generally looked 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.[72] 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. In short, these laws are not about protecting religion. They are about elevating and protecting a particular belief with regard to LGBTQ 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. It is unclear whether state law permitting religious-based

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[71]*See, e.g.,* Young v. Sw. Sav. & Loan Ass'n, 509 F.2d 140 (5th Cir. 1975) (applying Title VII to atheist plaintiff forced to attend religious services by her employer).

[72]U. S. 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 "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); Dhooge, *supra* note 57, at 259–60; Mark Strasser, *Free Exercise and the Definition of Religion: Confusion in the Federal Courts*, 53 Hous. L. Rev. 909 (2016).

or "moral conviction"–based discrimination against people on the basis of their gender, sexual orientation, or gender identity will withstand constitutional scrutiny.[73] The Supreme Court ruled in *Bob Jones University v. United States* that freedom of religion did not override certain compelling state interests, including the eradication of racial discrimination in education.[74] In *Hobby Lobby*, it reiterated this conclusion with regard to the application of RFRA to racial discrimination in the workplace.[75]

The Supreme Court also has 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.*, 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.[76] 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 pay cut or a transfer to another location.[77] When the employee sued for violation of the statute granting employees the absolute right to their chosen Sabbath, the employer challenged the constitutionality of the statute in question.[78] Relying on the rule from its decision in *Lemon v. Kurtzman*[79] that the primary effect of a law may not be to advance religion, an eight justice majority ruled that the Connecticut statute did precisely that.[80]

By "arm[ing] observers with an absolute and unqualified right not to work on whatever day they designate as their Sabbath," the Court noted,

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[73]*See supra* Part I.C.

[74]461 U.S. 574, 604 (1983).

[75]Burwell v. Hobby Lobby Stores, Inc., 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, 168–76 (2015).

[76]472 U.S. 703, 706 (1985).

[77]*Id.* at 706.

[78]*Id.* at 707.

[79]403 U.S. 602 (1971).

[80]*Estate of Thornton*, 472 U.S. at 708, 710.

Connecticut "commands that Sabbath religious concerns automatically control over all secular interests at the workplace."[81] The statute did not allow for any consideration of significant burdens that the employer would consequently have to impose on other employees who might, for example, be compelled to work in place of the Sabbath observer.[82] The statute's automatic preference for the Sabbath observer constituted a "primary effect that impermissibly advance[d] a particular religious practice."[83] In so ruling, the Court quoted an earlier decision by Judge Learned Hand: "[t]he 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."[84]

Nearly twenty years later, in *Cutter v. Wilkinson*, the Court reaffirmed that third-party burdens must be considered when applying another religious statute, the Religious Land Use and Institutionalized Persons Act (RLUIPA).[85] The Court also affirmed, to some extent, the principle of avoiding shifting the burden of religious accommodation to third parties in *Hobby Lobby*.[86] 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."[87] 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.[88] Although the Court's factual assumptions were arguably

[81]*Id.* at 709.

[82]*Id.*

[83]*Id.* at 710.

[84]*Id.* (quoting Otten v. Balt. & Ohio R. Co., 205 F.2d 58, 61 (2d Cir. 1953)).

[85]544 U.S. 709, 720 (2005) ("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)).

[86]Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2786–87 (2014) (Kennedy, J., concurring).

[87]*Id.*

[88]Donna Barry et al., *Infographic: The Ripple Effect of the* Hobby Lobby *Decision*, Ctr. for Am. Progress (Sept. 9, 2014, 8:44 AM), https://www.americanprogress.org/issues/religion/news/2014/09/09/96460/infographic-the-ripple-effect-of-the-hobby-lobby-decision/.

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.[89] However, it is important to note that while expressly carving out race for protection against religious discrimination, the *Hobby Lobby* court made no similar assurances 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.[90] While acknowledging that this concern had been raised by Justice Scalia in *Employment Division, Department of Human Resources of Oregon v. Smith*,[91] the majority pointed out that it had effectively been overridden by Congress in enacting RFRA "[t]he wisdom of Congress' judgment on this matter is not our concern. Our responsibility is to enforce RFRA as written."[92]

II. The Rising Storm: Bringing Religion to Work

The likelihood of encountering conflict over moral and religious belief in the workplace has risen in recent years.[93] In this part, we review recent trends in the workplace that have caused this increasing likelihood of conflict, including the propensity of corporations to openly adopt religious and secular values, increasing attention to religious freedom by the courts and a surge in state legislation related to the protection of religious and moral values.

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[89]134 S. Ct. at 2783.

[90]*Id.* at 2784–85.

[91]*Id.* at 2784 (citing Employment Div. v. Smith, 494 U.S. 872, 888–89 (1990), *superseded by* RFRA, 42 U.S.C. § 2000bb(a)(4) (2012)).

[92]*Id.* at 2785.

[93]*See supra* notes 10–14 and accompanying text.

A. Corporations Increasingly Adopt Religious and Secular Values

Corporations have espoused their own institutional values for decades.[94] However, the old conventional wisdom was that corporations tried to avoid conflicts in order to not be seen as adopting controversial positions with regard to cultural divides.[95] Today, corporations are increasingly deliberate and conscious in taking 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.[96] Corporations have publicly confronted President Trump and his administration on a range of issues from racism to the Deferred Action for Childhood Arrivals program.[97] Many corporations now

[94]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).

[95]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.

[96]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.

[97]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.

espouse certain "liberal"[98] values—including equity and diversity—as an integral part of their corporate mission and culture as well as a distinct value proposition.[99] Corporate officers may also espouse diversity as a personal value and integrate it into leadership.[100]

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 thirty-three percent of Generation X respondents, and thirty-seven percent of Baby Boomer respondents.[101] 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")

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[98]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 coextensive 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.

[99]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).

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

[101]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.

announcing a million dollar donation to the ACLU in the wake of President Trump's first travel ban.[102] Importantly, research suggests companies with higher rates of diversity return higher rates of financial returns.[103]

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.[104] Apple CEO Tim Cook appeared to be expressing a real sense of moral outrage when he said, "[w]e've seen the terror of white supremacy and racist violence before. It's a moral issue—an affront to America. We must all stand against it."[105] A number of large corporations—including well-known fast-food chain Chick-fil-A and clothing company Forever 21—have a significant religious foundation, with some expressing it openly and others adopting a quieter approach.[106] In

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[102]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/#.

[103]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, 12:51 PM), https://www.forbes.com/sites/ruchikatulshyan/2015/01/30/racially-diverse-companies-outperform-industry-norms-by-30/#445745d01132.

[104]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.

[105]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/.

[106]Kate Taylor, *9 American Companies with Extremely Religious Roots*, Bus. Insider (Oct. 7, 2017, 11:37 AM), http://www.businessinsider.com/religious-american-companies-2017-10#in-n-out-4.

particular, Chick-fil-A 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.[107]

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.[108] The Trump administration's 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.[109] 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.[110] The division reportedly received three hundred complaints of religious rights discrimination from health-care workers within its first month of existence.[111]

B. Recent Supreme Court 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

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[107]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.

[108]*HHS Takes Major Action to Protect Conscience Rights and Life*, Dept. of Health & Human Serv. (Jan. 19, 2018), https://www.hhs.gov/about/news/2018/01/19/hhs-takes-major-actions-protect-conscience-rights-and-life.html, (HHS Secretary explaining "[t]oday's [Medicaid regulatory reform represents] promises kept by President Trump and a rollback of policies that had prevented many Americans from practicing their profession and following their conscience at the same time).

[109]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.

[110]*Conscience and Religious Freedom*, U.S. Dep't Health & Hum. Servs., https://www.hhs.gov/conscience/index.html (last visited May 7, 2018).

[111]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.

religious plaintiffs, deciding several recent high-profile cases that have shifted the Court's jurisprudence toward greater religious freedom.[112] In this part, we review some of its most significant recent decisions on religious freedom.

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 because many found such a decision to be deeply flawed, with potentially far-reaching impacts.[113] The majority opinion, written by Justice Alito, held that RFRA afforded "very broad protection for religious liberty"[114] that was intended to "effect a complete separation from First Amendment case law."[115] This protection, the Court held, was "exceptionally demanding" and could only be satisfied by the government showing, on an individual basis, that any substantial

[112]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.

[113]*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 of 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.").

[114]Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2760 (2014).

[115]*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).

burden on religion was the least restrictive means of furthering a compelling government interest.[116] Surprisingly, the Court even suggested that the government might be required to pick up the tab for an accommodation such as purchasing contraceptives for women who were unable to obtain them under their health insurance policies.[117]

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."[118] 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.[119] Moreover, the legacy of *Hobby Lobby* may extend to nonreligious organizations seeking similar accommodations as those granted religious organizations. In *March for Life v. Burwell*,[120] 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 a religious objection to the provision and use of contraceptives, differently than religious organizations.[121]

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[116]*Id*. at 2780.

[117]*Id*. at 2781.

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

[119]*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 antidiscrimination 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 (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).

[120]128 F. Supp. 3d 116 (D.C. Cir. 2015).

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

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.[122] Trinity Lutheran Church sought to apply for state grant money that reimbursed organizations that installed playground surfaces made from recycled tires.[123] 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.[124] 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."[125] 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.[126]

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:

> [t]his 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.[127]

Therefore, the Court is strongly divided on whether the government should accommodate religion or whether the government should adhere to the principles of separation of church and state.

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[122]Trinity Lutheran Church of Columbia v. Comer, 137 S. Ct. 2012, 2037–38 (2017) (Sotomayor, J., dissenting).

[123]*Id.* at 2014.

[124]*Id.* at 2018.

[125]*Id.* at 2024.

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

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

3. Masterpiece Cakeshop

The Supreme Court had an opportunity to rule broadly on the relative precedence of religious freedom and LGBTQ rights in the 2018 *Masterpiece Cakeshop* decision but did not do so.[128] In that case, a devout Christian baker argued that the Colorado Civil Rights Commission's actions regarding his refusal to create a wedding cake for a same-sex couple violated the baker's free exercise rights.[129] The baker also contended that his First Amendment free speech rights were violated because of the expressive nature of his cake decoration.[130]

The Court ruled in favor of the baker on relatively narrow procedural grounds, finding that the Commission showed an "impermissible hostility toward the sincere religious beliefs that motivated his objection."[131] It noted that the Commission had allowed other bakers to refuse to create cakes with antigay messages, suggesting a disparity in claim resolution that reflected hostility toward the baker's religion.[132] The Court made much of specific comments from members of the Colorado Civil Rights Commission in order to bolster its finding that the baker did not receive the neutral treatment guaranteed by the Free Exercise Clause.[133]

The last sentences of Justice Kennedy's majority opinion underscored the limited nature of the ruling, noting that "the outcome of cases like this in other circumstances must await further elaboration in the courts[.]"[134] Justice Kennedy went on to specify, however, that those courts must resolve those cases "with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."[135]

Because the Court ruled narrowly, the *Masterpiece Cakeshop* ruling provides little general guidance about the proper balance of religious

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[128]Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

[129]*Id*. at 1724.

[130]*Id*. at 1728.

[131]*Id*. at 1729.

[132]*Id*. at 1730.

[133]*Id*. at 1729–31.

[134]*Id*. at 1732.

[135]*Id*.

freedom and LGBTQ rights when they conflict.[136] Its future impact will depend on its interpretation by the lower courts.[137]

C. Recent Lower Court Religious Freedom Rulings

Recent lower court rulings resolving conflicts between asserted religious freedom rights and antidiscrimination statutes suggest an increasing recognition of LGBTQ rights in this context before cases reach the Supreme Court.

1. Harris Funeral Homes

The Sixth Circuit's decision in *Harris* is especially noteworthy for its statements in support of transgender rights. In that case, the Court 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 employee's transgender status.[138] 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.[139] Thomas Rost, a devout Christian and majority owner of R.G. & G.R. Harris Funeral Homes, 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.[140] He did so because he believed that "he 'would [have been] violating God's commands' if he were to permit one of the Funeral Home's biologically-male-born funeral

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[136]Adam Liptak, *In Narrow Decision, Supreme Court Sides with Baker Who Turned Away Gay Couple,* N.Y. Times (June 4, 2018), https://www.nytimes.com/2018/06/04/us/politics/supreme-court-sides-with-baker-who-turned-away-gay-couple.html (emphasizing the narrowness of the decision and noting that both conservatives and liberal groups lauded parts of the opinions); *see also* Andrea Dukakis, *Christians on the Left and Right Debate the Impact of* Masterpiece Cakeshop *Case*, Colorado Public Radio (June 5, 2018) http://www.cpr.org/news/story/christians-across-the-political-divide-debate-the-impact-of-masterpiece-cakeshop-case (noting that liberal and conservative Christians disagree about the impact of the case).

[137]*See infra* Part II.C.2 for a discussion regarding the first decision to interpret *Masterpiece Cakeshop*.

[138]EEOC v. R.G. Harris, 884 F.3d 560, 566–67, 574–75, 599 (6th Cir. 2018).

[139]*Id*. at 585–86.

[140]EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837, 840 (E.D. Mich. 2016), *rev'd sub nom Harris*, 884 F.3d at 560.

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."[141] The EEOC sued the funeral home on Stephens's behalf.[142] The district court held that 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."[143]

On appeal, the Sixth Circuit Court reversed. It held that Title VII's prohibitions on discrimination because of "sex" encompasses discrimination on the basis of transgender or transitioning status.[144] No other circuit court had expressed so clearly before that Title VII extended protection to transgender people who experienced discrimination on the basis of their transgender or transitioning status. 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."[145] 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.[146]

The next question was whether RFRA exempted the funeral home from the Title VII claim.[147] 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."[148] The court found that neither alleged burden was "substantial" for the purposes of RFRA.[149] Drawing on earlier employment discrimination cases, the Sixth

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[141]*Harris*, 201 F. Supp. 3d at 847.

[142]*Id*. at 845–86.

[143]*Id*. at 856.

[144]*Harris*, 884 F.3d at 574–75.

[145]*Id*. at 575.

[146]*Id*.

[147]*Id*. at 581.

[148]*Id*. at 586.

[149]*Id*. at 586–87.

Circuit held that "a religious claimant cannot rely on customers' presumed biases to establish a substantial burden under RFRA."[150] The court also 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."[151] 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 nonprofit organizations objecting to providing contraceptive access.[152] The funeral home's objections, even if sincere, were not determinative of the funeral home's obligations in the face of a potentially contradictory legal mandate.[153] Perhaps the most important part of the court's analysis was its willingness to suggest potential limits to the religious freedom of employers most fully embraced in *Hobby Lobby*. "[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.[154] It noted that "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."[155]

The Court also emphasized the competing governmental interest in protecting people like Stephens from discrimination under Title VII.[156] 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."[157]

The court held 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."[158] Importantly, the court differentiated between compliance with the law, which is generally required, and

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[150]*Id.* at 586.

[151]*Id.* at 587–88.

[152]*Id.*

[153]*Id.* at 589.

[154]*Id.*

[155]*Id.*

[156]*Id.* at 593.

[157]*Id.* at 592.

[158]*Id.*

an active role in causing or substantially contributing to something that violates one's beliefs. In sketching out the limits of religious freedom in this context, the court stated that "tolerating Stephens's understanding of her sex and gender identity is not tantamount to supporting it."[159]

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

2. Brush & Nib Studio

The Arizona Court of Appeals' ruling in *Brush & Nib* is especially notable for two reasons. First, it was the first lower court case to interpret *Masterpiece Cakeshop*, issuing on June 7, 2018, just three days after the Supreme Court's decision. Second, it interpreted *Masterpiece Cakeshop* as supportive of LGBTQ rights in conflict with religious freedom assertions to the contrary. The case concerned a small business, Brush & Nib, which sells wedding-related goods and services and is owned by a pair of devout Christians.[160] The owners sought the ability to refuse same-sex wedding customers and the ability to post a public statement announcing their refusal to create artwork that, inter alia, "promotes any marriage except marriage between one man and one woman."[161] Expecting resistance from the City of Phoenix in light of that city's prohibition against sexual orientation discrimination in places of public accommodation, the owners asked for a preliminary injunction to bar Phoenix from enforcing that law.[162] Phoenix won its summary judgment motion against the owners in

[159]*Id.* at 588.

[160]Brush & Nib Studio, LC v. City of Phx., 418 P.3d 426, 432 (Ariz. Ct. App. 2018).

[161]*Id.*

[162]*Id.*

the superior court.[163] On appeal, the owners argued that the city's anti-discrimination laws unconstitutionally violated their First Amendment free speech and free exercise rights.[164]

In *Brush & Nib*, the court of appeals unanimously ruled in favor of Phoenix on nearly all points. It held that the antidiscrimination law at issue did not compel the appellants to speak in favor of same-sex marriage.[165] Although the law may impact speech incidentally, such as by prohibiting antigay signage in stores, the court noted that the law's main purpose was to regulate conduct and any impact on speech was permissibly incidental.[166] Incidental burdens are permissible when a neutral law advances a substantial government interest such as Phoenix's interest in "discouraging discrimination in places of public accommodation."[167] The court also found that the appellants' creation of custom wedding announcements and invitations was not expressive conduct, in that a general observer would not interpret the provision of such services as indicative of the providers' personal beliefs.[168]

Analyzing the appellants' free exercise claims under the Arizona equivalent of RFRA, the court held that the appellants failed to prove that the antidiscrimination law substantially burdened their religious exercise.[169] They were not penalized for their beliefs, the court noted, but rather for their unequal treatment of same-sex couples.[170] Although business owners may engage in any kind of business they like, they cannot "use their religion as a shield to discriminate against potential customers."[171] The court also held that even if the law had substantially burdened their religious exercise, it would have been constitutional anyway because

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[163] *Id.* at 431.

[164] *Id.* at 432–33.

[165] *Id.* at 435.

[166] *Id.* at 440.

[167] *Id.*

[168] *Id.* at 440–41.

[169] *Id.*

[170] *Id.* at 444.

[171] *Id.*

Phoenix had a compelling interest in preventing discrimination.[172] It did, however, agree with appellants that the antidiscrimination law's prohibition on making protected classes feel "unwelcome, objectionable, unacceptable" and "undesirable" was vague and overbroad.[173]

The court was conscious of the potential for widespread interest in its decision. It acknowledged that the Brush & Nib owners were part of a national wave of litigants who "seek to preserve and define their religious freedoms in the face of ordinances which prohibit places of public accommodation from discriminating based on sexual orientation."[174] In support of its denial of the right to discriminate based on sexual orientation, the court quoted extensively from language in *Masterpiece Cakeshop* underscoring the need to protect LGBTQ rights in commerce, including the observation that while religious objections must be protected, "it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."[175] It also cited *Masterpiece Cakeshop* for the proposition that allowing wedding service vendors to discriminate against gay couples "would result in 'a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services and public accommodations.'"[176]

While the precedential value of *Brush & Nib* is inherently limited as an Arizona Court of Appeals' ruling, both its analysis of the competing rights at issue and its characterization of *Masterpiece Cakeshop* are

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[172]*Id*. at 441.

[173]*Id*. at 442.

[174]*Id*. at 434. Others have noted that a single legal organization, Alliance Defending Freedom, is representing several of the anti-LGBT litigants in these and other recent discrimination cases. *See, e.g.*, Brennan Suen, Masterpiece Cakeshop *Was Just the Beginning. ADF Is Pushing Several Other License-to-Discriminate Cases Through the Courts*, Media Matters (June 8, 2018, 1:32 PM), https://www.mediamatters.org/blog/2018/06/05/Masterpiece-Cakeshop-was-just-the-beginning-ADF-is-pushing-several-other-license-to-discri/220381; Sarah Posner, *The Legal Army Behind* Masterpiece Cakeshop, The Nation (Nov. 28, 2017), https://www.thenation.com/article/the-christian-legal-army-behind-masterpiece-cakeshop/.

[175]*Brush & Nib Studio*, 418 P.3d at 434 (quoting Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n, 138 S. Ct. 1719, 1723–24 (2018)).

[176]*Id*. at 438 (quoting *Masterpiece Cakeshop*, 138 S. Ct. at 1724).

significant to our understanding of how similar conflicts may be resolved in future cases.

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

In this part, we explore more deeply 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 and employee values that were less likely or unable 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. In Part III.A, we describe the factors we suggest courts utilize when addressing cases of religious conflict between employees and employers. In Part III.B, we use these factors to suggest resolutions of the hypothetical conflicts posed in our introduction.

A. Principles for Resolving Competing Values Under RFRA and Title VII

No case has addressed the precise nature of the question we analyze in our hypotheticals: how should a dispute between competing religious interests of employers and employees be resolved? Based on the case law and legal principles discussed, we offer a short list of factors that courts should consider when weighing such a case. While these principles may not provide absolute answers to such claims, taken together, they should help courts resolve these complex conflicts.

1. In RFRA Cases, Courts Should Distinguish Between Active Participation in Activities That Violate an Employer/Employee's Religious Beliefs, and Passive Toleration of Neutral Business Practices That Do Not Require Direct Participation

The first question a court may ask when considering a dispute over religious values in the workplace is whether the employer or employee is being asked to engage *actively* or *passively* in the conduct believed to violate their religious beliefs. 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.[177] Employing a transgender person, the court held, is not a burden on religious practice that would violate RFRA because it is merely "tolerating" rather than actively participating in acts believed to be sinful.[178] Similarly, the *Brush & Nib* court rejected the notion that creating custom wedding invitations constituted an expression of personal approval of same-sex weddings.[179] In both cases, the court characterized compliance with antidiscrimination laws—a neutral business practice—as a passive act of tolerance, rather than an active religious burden.

This active/passive dichotomy reflects the scholarly argument over "complicity" claims in religious freedom cases. Complicity claims distinguish between 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).[180] To distinguish between the two types of claims, one might ask the allegedly injured party, are *you* engaging in the sinful act, or are you *complicit* in a third party's sinful act? Scholars have split as to whether the First Amendment or RFRA should extend to these latter claims.[181] Here, where we are considering competing religious claims, we believe the relevant question is whether either or both of the claimants are seeking protection from a requirement to actively engage in conduct that directly violates their religious freedom or if it is a passive, complicity-based claim.

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[177]EEOC v. Harris, 884 F.3d 560, 588 (6th Cir. 2018).

[178]*Id*.

[179]*Brush & Nib Studio*, 418 P.3d at 438-39.

[180]*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).

[181]*Compare* Nejaime & Siegel, *supra* note 180, 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").

The active/passive dichotomy may be particularly relevant in the public accommodations sphere. While not directly ruling on the issue of compliance with a public accommodations law, in *Masterpiece Cakeshop*, Justice Kennedy appears to have given credence to the notion that passive compliance with facially neutral statutes may be required over religions objections. He states,

> [w]hile those religious and philosophical objections [to gay marriage] are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.[182]

However, drawing the line between active and passive, and determining where a neutral business practice requires tolerance *or* religious accommodation, is by no means clear cut.

2. Customer Bias Should Not Constitute a "Substantial Burden" Under RFRA

Under Title VII, courts have long held that customer biases cannot justify discrimination or constitute a bona fide occupational qualification.[183] Based on this line of cases, the *Harris* court held as a matter of law that neither real nor perceived customer biases establish a "substantial burden" on a sincere religious expression under RFRA.[184] While acknowledging that Title VII and RFRA require distinct legal analyses, and a court *could* find a business's religious expression to be burdened by a customer bias (such as a desire not to be served by a transvestite funeral employee) under RFRA even where the same behavior might not constitute undue hardship for purposes of Title VII, the court rejected this argument as a matter of law. "Just as [previous decisions] refused to treat discriminatory promotion practices as critical to an employer's business,

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[182]Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n., 138 S. Ct. 1719, 1727 (2018).

[183]*See, e.g.*, Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276 (9th Cir. 1981) (rejecting claim that sex should be a bona fide occupational qualification where defendant's argued that South American clients would not want to work with female executive); Langston-Bradley v. Pizzaco, Inc., 7 F.3d 795, 799 (8th Cir. 1993) (holding that alleged customer preference for clean-shaven deliverymen did not justify policy that had a disparate impact on black men); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971) (holding that customer preference could only be considered if it was essential to the company's ability to perform its primary function or service).

[184]EEOC v. Harris, 884 F.3d 560, 586–87 (6th Cir. 2018) (citing *Diaz*, 442 F.2d at 389).

notwithstanding any evidence to that effect in the record, so too we refuse to treat discriminatory policies as essential to Rost's business—or, by association, his religious exercise."[185] The pure application of this principle would be to reject claims under RFRA that base the "substantial burden" on the claimant's religious exercise to be in compliance with a statute or regulation intended to ensure equal, nondiscriminatory access to goods, services, or a workplace.

An important question for courts to resolve will be whether *discriminatory* actions by an employee that alienate customers and result in financial losses to the business should *also* be rejected as the basis for a finding of undue hardship under Title VII or a substantial burden under RFRA. While this may appear an intriguing argument, it should be dismissed. At the simplest level, financial hardship to a business is generally considered an undue hardship that can relieve an employer from a religious accommodation under Title VII.[186] Moreover, established case law holds that the goal of Title VII is *reducing* discrimination in employment; customer preferences for business that also support this goal, and customer rejection of businesses that do not, should be able to form the basis for an undue hardship claim. In the RFRA context, the Court has suggested that religious freedom may not override Title VII because the government has a compelling interest in "providing an equal opportunity to participate in the workforce" and nondiscrimination statutes are narrowly tailored to achieve this goal.[187] To be clear, however, the Court in *Hobby Lobby* limited this statement to *racial* discrimination.[188] It remains unknown whether the Court would reach a similar conclusion with regard to other forms of discrimination.

3. When Considering Competing Religious Claims, Courts Should Reject Claims for Religious Freedom That Burden Third Parties

Public policy supports both religious freedom and freedom from discrimination. Depending on the facts of the case, in any given scenario

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[185]*Id.* at 587.

[186]*See, e.g.,* TWA v. Hardison, 432 U.S. 63, 84 (1977) (requiring company to pay "more than a *de minimis* cost" to accommodate employee's religious exercise constituted an undue hardship).

[187]Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2783 (2014).

[188]*See id.*

those values may both be compelling and yet may be fundamentally opposed. For example, it may be impossible to square a religious objection to discrimination against LGBTQ people with a religious compulsion to discriminate against them. 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, the court should consider the extent to which religious freedom claims conflict with third-party rights. The principle that third-party harms must be avoided in religious freedom cases is supported by a variety of cases as well as addressed by Justice Kennedy in his concurrence in *Hobby Lobby*.[189]

Allowing discrimination in providing services to the LGBTQ community has a powerful cumulative impact and must be considered a third-party harm. Mary Bonauto points this out with regard to *Masterpiece Cakeshop*, which she argues is about more than a baker's religious freedom.[190] It is "about equal citizenship of gay people, and whether we may engage in the kinds of ordinary transactions others take for granted."[191] 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 compelled, then public-accommodations protections will evaporate," which may harm far more than the LGBTQ community.[192]

Although some might argue there is no harm to the LGBTQ community as long as they are able to get service somewhere, even if from some alternative business, we believe this suggestion simply ignores the harm caused by stigma in the marketplace, a harm that was explicitly recognized and addressed in the *Obergefell* decision outlawing prohibitions on same-sex marriage.[193] As Professor Elizabeth Sepper notes, allowing

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[189]*See supra* Part I.D.2.

[190]Mary Bonauto, *Commercial Products as Speech—When a Cake Is Just a Cake*, SCOTUSblog (Sept. 15, 2017, 10:24 AM), http://www.scotusblog.com/2017/09/symposium-commercial-products-speech-cake-just-cake/.

[191]Brief for Petitioners at 14–16, Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111).

[192]Bonauto, *supra* note 190.

[193]"Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises … 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." Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015).

certain groups to be singled out for different treatment in the marketplace contradicts long-settled goals of antidiscrimination laws.[194] And,

> [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."[195]

Therefore, critics must consider the value of dignity when discussing the costs of discrimination and recognize the third-party harm that results from exposing LGBTQ customers to differential treatment.

B. Applying Principles to Complex Religious Conflicts

The general principles in Part III.A, together with the statutory authority and precedents described in Parts I and II suggest the following resolutions of the hypothetical conflicts described in the Introduction.

1. Scenario 1: Assessing RFRA v. Title VII

In our first scenario, an employee is fired for refusing to serve same-sex couples at a wedding boutique. We imagine the employee then sues under Title VII for the employer's failure to accommodate her religion. Prior to *Hobby Lobby*, the analysis might have ended there. But now, we imagine that the employer holds a *religious* conviction that all customers must be treated equally. So the employer may defend itself by a claim under RFRA that any accommodation of discrimination would substantially burden 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

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[194]Elizabeth Sepper, *Gays in the Moralized Marketplace*, 7 Ala. C.R. & C.L. L. Rev. 129, 131 (2015).

[195]*Id*. at 153–54.

VII on the basis of religion.[196] 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 antidiscrimination 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 accommodation was reasonable, the employer could then argue for protection from the requirement to make the accommodation under RFRA.[197]

a Refusal to serve as a religious accommodation

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."[198] An accommodation not to serve particular customers might permit the employee to find another employee to serve the same-sex couple, to schedule an appointment with an alternative employee, or to ask the customer to return when a different employee is available. Of course, the last of these alternatives would clearly and negatively impact the business, as it would be forced to turn away a customer who may or may not return; the first of these alternatives would provide the least impact, as the customer may not even be aware of the reason they have been referred to a different employee.

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[196]*See, e.g.*, Martin, *supra* note 119, at 14; *see also supra* notes 118–19 and accompanying text.

[197]As previously noted, this defense is likely only available if the government is a party to the case. *See supra* Part I.B–C and accompanying text.

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

The boutique owner is likely to respond that accommodating the employee's religious preferences in this instance would create an undue hardship. Certainly, this would be a fact-based analysis that would focus on the precise nature of the accommodation. But one might imagine that even in the case of the first or second alternative, the public could discover that one of the employees at this boutique refuses to serve same-sex couples, which could lead to a financial impact if same-sex couples start to boycott the boutique.[199] Moreover, the employer might argue that under any of the proposed accommodations the same-sex couple is not receiving the same level of service as other couples who do not have to wait and can be served by any employee. It would be plausible, then, that the employer would find any of these alternatives to be unacceptable, as both an undue hardship to the business and a burden on the employer's religious expression.

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.[200] An undue hardship may include any accommodation that would create more than a *de minimis* cost impact to the employer.[201] The Sixth Circuit Court of Appeals has noted that an employer cannot reasonably accommodate a religious employee by forcing the employee to ask others to do

[199]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, 9:22 AM), 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, 12:00 PM), http://www.latimes.com/business/la-fi-oreilly-social-media-20170420-story.html.

[200]*See*, *e.g.*, Mathis v. Christian Heating & 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 the employer presented no "evidence showing that its business would suffer or be made more difficult" if it did so).

[201]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).

something that the employee considers sinful for all.[202] 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.[203]

In this scenario, whether the boutique owner is able to demonstrate an undue hardship based on cost will depend on several factors. As an initial matter, the owner must assert that providing services to the LGBTQ 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 must assert that refusing to serve LGBTQ 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.

While the *de minimis* standard may appear a low bar for a religious employer to meet,[204] the employer may not be able to rely on a speculative financial harm that might occur if customers chose to boycott the boutique or to reject the employee's request for accommodation without some interactive process. In *Buonanno v. AT&T Broadband,* the court

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[202]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).

[203]*Trans World Airlines*, 432 U.S. 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* EEOC 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* EEOC 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).

[204]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").

found the employer had not engaged sufficiently in an interactive process with an employee who refused to sign the company's diversity pledge where it did not seek to understand the precise nature of the refusal and consider alternative ways to accommodate the employee's beliefs.[205] Although courts have held that employees may not openly disparage gay coworkers or impose their religious beliefs upon others, "this is not to say that accommodating an employee's religious beliefs creates an undue hardship for an employer merely because the employee's coworkers find his conduct irritating or unwelcome."[206] At a minimum, then, the employer may be required under Title VII to seek an accommodation for the employee that could avoid creating a financial impact. For example, other employees could be trained to seamlessly serve same-sex couples if they entered the boutique. Alternatively, the employee could be required to do some initial intake for same-sex couples before turning them over to another employee to serve, so they do not perceive that they had not received equal service. The size of the boutique would be an issue here as well: if there are no other employees to fill in, these accommodations may not be possible.

If the employer seeks to argue that the accommodation creates an undue hardship as a religious matter, a court may find these earlier undue hardship cases inapplicable, as they focused on the imposition of *secular* business practices on religious employees. Here, an avowedly religious employer seeks to impose its religious beliefs on an employee by forcing the employee to serve same-sex couples. As a result, the court's sympathy may lie with the employee; case law suggests employers cannot force employees to attend religious services that violate the employee's religious beliefs,[207] and courts must be cognizant of the power differential between employers and employees in religious disputes between the two and the possibility that the employer could be found to have created a hostile

[205]313 F. Supp. 2d 1069, 1082 (D. Colo. 2004). "[H]ad AT&T gathered more information about Buonanno's concerns before terminating his employment, it may have discovered that … it was possible to relieve that conflict with a reasonable accommodation."

[206]Peterson v. Hewlett-Packard Co., 358 F.3d 599, 606–07 (9th Cir. 2004) (employer could not be required to take down posters that were part of diversity campaign, or to allow employee to post Bible passages on top of posters).

[207]*See* EEOC v. Townley, 859 F.2d 610 (9th Cir. 1988) (employer's requirement that employees attend devotional services violated Title VII).

environment for the employee.[208] Similarly, our religious employer may need to accommodate the competing religious beliefs of its employees.

Thus, although it appears that the stronger case lies with the employer in making a claim for undue hardship, it is also plausible that the employee might prevail if the particular factual scenario does not support a claim of a greater than *de minimis* financial impact on the employer's business based on the specific accommodation requested by the employee.

b Using RFRA as a defense to Title VII

If the employee prevails and the court rejects the undue hardship defense, the employer could raise a claim that RFRA precludes the application of Title VII against it, like the funeral home in *Harris*. Here, the court must consider whether RFRA requires it to deny an accommodation to a religious employee based on the religious beliefs of the employer, a precarious and fraught position for a court to be in.

Here, we suggest the court apply the factors proposed above. First, *is either the employer or the employee being asked to actively engage in conduct that violates their religious beliefs, or are they passively complicit in such conduct*? The boutique could argue that allowing the employee to refuse service to a same-sex couple requires it to *actively* facilitate the kind of discrimination it religiously opposes. Note that the boutique, not the owner, is the entity making the claim for religious protection. While the individual owner may be a passive participant in such a case, the boutique would be actively denying service to a customer vis-à-vis the employee. In contrast, the employee may be complicit in supporting a gay wedding but is not performing the wedding. Selling the accoutrements of a wedding, including a wedding dress, is at least one procedural step away from actively making possible the wedding itself. This principle weighs in favor of the employer.

Second, we note that customer bias cannot form the basis of a claim of undue hardship or a substantial burden on religious expression.

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[208]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).

However, as noted in Part III.A, this principle should not apply in a case in which the customer "bias" (i.e., a potential boycott by same-sex couples) is in keeping with the purposes of Title VII. That is to say, this principle applies to cases where the bias lies in a manner that Title VII seeks to redress. That is not the case here. Third, and most compellingly, we ask whether the accommodation of either religious belief would result in harm to third parties. In this instance, the employer's religion aligns with antidiscrimination laws and seeks to protect third parties from harm, whereas the employee's religious preference would harm customers. Thus, based on our application of the principles described above, we suggest that the employer should prevail on its RFRA claim and not be required to accommodate the religious employee.

It is worth noting that the employer would be less likely to prevail if it had only moral, but not religious, objections to discriminating against the LGBTQ community. Although RFRA allows for a broad interpretation of religious exercise,[209] we are unaware of any case in which it has been interpreted to support beliefs that are expressly nonreligious. 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.[210] One potential consequence of this analysis is discussed further in Part IV.

2. 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. Recall that, as described in Part I, Tennessee's law allows counselors and

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[209]Burwell v. Hobby Lobby Stores, Inc., 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'").

[210]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).

therapists to refuse treatment to clients when the clients' goals or behaviors would violate a "sincerely held" principle.[211] Many observers have assumed that the Tennessee law would allow counselors to reject clients within the LGBTQ community, whether the counselor's "sincerely held principles" are religious or irreligious in nature.[212]

As in Scenario 1, we might first engage in an application of Title VII's religious accommodation requirement. In this case, the employee would be more likely to prevail if the employee's objection was religiously based and patients could be seamlessly transferred to another therapist without financially harming the business. Moreover, in Tennessee, the employee's conduct would be consistent with the policy expressed in recently adopted law.[213] Therefore, the plaintiff might also be able to make a strong argument that firing an employee for exercising the right expressed in the statute would be wrongful discharge based on public policy. "In Tennessee an employee-at-will generally may not be discharged for attempting to exercise a statutory or constitutional right, or for any other reason which violates a clear public policy which is evidenced by an unambiguous constitutional, statutory, or regulatory provision."[214]

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[211]Tenn. Code Ann. § 63-22-302 (2016).

[212]*See* Fang, *supra* notes 4, 66.

[213]Tennessee law provides, "[n]o counselor or therapist providing counseling or therapy services shall be required to counsel or serve a client as to goals, outcomes, or behaviors that conflict with the sincerely held principles of the counselor or therapist…" *See* Tenn. Code. Ann. § 63-22-302(a) (2016).

[214]Stein v. Davidson Hotel Co., 945 S.W.2d 714, 717 (Tenn. 1997). *See also* John E. Lippl, *Predicting the Success of Wrongful Discharge-Public Policy Actions: In Tennessee and Beyond*, 58 Tenn. L. Rev. 393, 402–03 (1991) ("[s]tatutes and regulations … are the most fertile source of public policy…. Classifications of this source, from strongest to weakest, are as follows: A statute designed to protect the employee that provides an express remedy for its violation; any statute from which a remedy for the employee may be implied"). While subsection (b) of the law also provides, "(b) [t]he refusal to provide counseling or therapy services as described in subsection (a) shall not be the basis for: (1) [a] civil cause of action; or (2) [c]riminal prosecution" this provision is arguably intended to protect the *counselor or therapist* from being sued, rather than an employer from being sued for a wrongful discharge claim. Tenn. Code. Ann. § 63-22-302(b) (2016). Adding to the complexity here is the fact that the Tennessee RFRA law is drawn more broadly than the federal RFRA, and does not require that the government be a party to the case, thus allowing the possibility for private suits. *See* Johnson v. Levy, 2010 WL 119288, at *7 (Ct. App. Tenn. Jan. 14, 2010) (not reported in S.W.3d) ("the Tennessee General Assembly intended to provide greater protection of religious freedom than that afforded by the federal RFRA").

With regard to the application of Title VII, the employer could then seek to defend itself under RFRA. However, the state law wrongful discharge claim would remain, and federal RFRA does not apply to state law claims.[215] Tennessee does have a *state* RFRA law, which is in fact broader than the federal RFRA law and may apply to claims between private parties.[216] To prevail, the employer would then have to show that the state RFRA claim prevails over the wrongful discharge claims.

This complicated 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, and the reason we argue in our first factor that courts applying RFRA should distinguish between active and passive/complicity-based claims. By extending religious freedom to complicity claims in which the individual himself is not engaging in a sinful act but 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, including third parties that may be harmed by that application, *with the full protection of the government*.

Previous cases applying these new state 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, and when such an event occurs, how the courts will handle the thorny issues that are raised.[217]

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[215]Dhooge, *supra* note 57, at 262.

[216]*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).

[217]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*, 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

As a final note, if there were no Tennessee RFRA, the employer would be left to argue that the application of the wrongful discharge claim (and by extension, the Tennessee counseling law) violates its religious freedom under the First Amendment, because federal RFRA does not apply to state laws.[218] In such a case, *Smith* dictates that a generally applicable statute that burdens an individual's religious expression should be evaluated under a rational basis review. While the popular conception of constitutional rights may be that religious liberty should trump statutory rights,[219] the reality is that the courts have enforced a variety of civil rights laws over religious objections, particularly where those laws protect the rights of third parties.[220] 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 LGBTQ 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 LGBTQ individuals. This suggests that it would be more likely to be upheld, leaving the employer with little ability to protect its religious convictions.

3. Scenario 3: Moral Convictions Square Off Against Religious Convictions

In our final hypothetical, a religious employer who wants to serve LGBTQ customers squares off against an employee who believes that serving those customers is sinful. Here, however, the employee is not

law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it." 517 U.S. 620, 635 (1996). Unlike the law at issue in *Romer*, however, the Tennessee law does not mention the LGBTQ community specifically. This makes its constitutionality less clear than state laws that specifically permit discrimination against gay, lesbian and transgender people.

[218]Dhooge, *supra* note 57, at 262.

[219]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, 9:30 PM), https://www.nationalreview.com/2018/01/nyt-gets-religious-liberty-wrong/.

[220]*See supra* Part I.D.2.

refusing to serve but to wear a T-shirt proclaiming support for gay marriage. This scenario involves likely free speech as well as free exercise claims. 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 a moral belief supersede an expressly religious belief? As explained below, the employee would be likely to win a wrongful termination claim against the employer.

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.'"[221] Even so, morality is not always the equivalent of religion and "beliefs are not protected merely because they are strongly held."[222] 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 philosophies, as well as mere personal preferences, are not 'religious' beliefs protected by Title VII."[223] 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 necessarily 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. However, it is unlikely that a court would insist on a relatively narrow reading of "religion" given the nationwide trend toward expansive interpretations, described in Part II above.

Although one could argue that allowing the employee to wear a different shirt may make the LGBTQ customers served by that employee feel

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[221] *Questions and Answers: Religious Discrimination in the Workplace*, U.S. Equal Emp. Opportunity Comm'n, https://www.eeoc.gov//policy/docs/qanda_religion.html (last visited May 8, 2018).

[222] *Id.*

[223] *Id.*

less welcome, it would not result in a denial of, or even likely a delay of, customer service. It probably would not rise to the level of harm necessary for a violation of public accommodation laws, especially given the employee's competing interests. Interestingly, the employee probably would not have a converse right to wear a shirt that says "Gay Marriage Is a Sin" if prohibited by the state's public accommodation laws. In *Brush & Nib*, the court noted that a legal prohibition on posting antigay signage in a store was a permissible restriction on speech because it was incidental to advancing the substantial government interest in "discouraging discrimination in places of public accommodation."[224]

The employee, then, would be likely to win on his Title VII claim of religious discrimination in light of the EEOC's broad interpretation of "religion." It would be extremely difficult for the employer to overcome this by recourse to RFRA. If the employer in this scenario made out a claim under RFRA that enforcing Title VII substantially burdened its religious exercise, it would probably lose because it could not demonstrate that enforcing Title VII in this way creates a substantial burden. Allowing the employee to wear a different shirt that omits the explicit message could not be seen as an undue burden on the employer because it would represent a *de minimis* additional financial cost. In addition, as noted in the first principle above, only active promotion of a religiously objectionable practice will amount to a substantial burden on religion. Allowing the employee to wear a different T-shirt would not amount to an active participation in a practice that violates the employer's faith. Following *Harris*, a court would likely characterize granting this permission as mere tolerance of the employee's different belief, a comparatively passive practice which does not qualify as a substantial burden on religious exercise. Overall, the employee in this scenario would win the right to challenge an employment practice that conflicts with his anti-LGBTQ–equality beliefs.

IV. Belief v. Belief: Outcomes and Implications

The current messy landscape with regard to religious freedom in the workplace has created an environment that is ripe for conflict. As demonstrated by our three scenarios, conflicting religious beliefs of employers and employees could result in (1) a religious employer

[224]Brush & Nib. Studio, LC v. City of Phx., 418 P.3d 426, 440 (Ariz. Ct. App. 2018).

successfully applying RFRA to overcome religious accommodations required under Title VII; (2) a direct conflict between religious employer and employee under state law, resulting in a court being forced to support the rights of *either* religious employer or employee, but unable to do both; and (3) a religious employer being unable to protect its convictions regarding diversity against an employee's convictions regarding a desire not to serve LGBTQ people. The outcome of these disputes turns on the precise nature of the accommodation requested by a religious employee, the presence of state religious freedom laws, and the application of a set of principles that may or may not be adopted by courts. Notably, the protection for the employer in Scenarios 1 and 2 may turn on the application of RFRA, an outcome that is only possible for an employer who holds diversity and tolerance as a religious value. In Scenario 3, however, RFRA will not support the prodiversity employer.

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.[225] 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.[226] States with laws seeking to protect certain religious

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[225]*Cf.* Phil Wahba, *Corporate America Comes out Swinging Against "Religious Freedom" Laws,* Fortune (Mar. 31, 2015), http://fortune.com/2015/03/31/corporate-america-religious-freedom/.

[226]*Businesses Follow "Public's Will" in Denouncing "Religious Freedom" Laws*, Nat'l Pub. Radio (Apr. 6, 2016, 4:35 PM), 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, 1:52 PM), https://www.nbcnews.com/feature/nbc-out/anti-lgbtq-bills-are-failing-state-legislatures-n866791.

or moral values over religious values of diversity and equity, may find an increasingly—and perhaps even visibly—segregated marketplace.[227] In a time of increasing polarization, businesses are likely to continue to 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 LGBTQ individual have the right to be free from public accommodation discrimination in California but not Tennessee? 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? These are not simple questions. Religious freedom, while a bedrock principle of the United States, has always been limited by what courts determine to be privileged government interests,[228] and the boundaries of those limits have been hotly disputed—and subject to change. Although 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

[227]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/.

[228]*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").

schooling for their children.[229] In the Civil Rights Era, federal judicial decisions settled hard-fought battles over religious beliefs regarding interracial marriage and racial discrimination.[230] 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.[231]

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.[232] 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.[233] 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

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[229]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/.

[230]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. C. R.-C.L. L. Rev. 99 (2015).

[231]*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, 626–28 (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).

[232]U.S. Const. amend. XIV, § 1.

[233]*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 (2017).

"reasoned judgment," and limited by national "history and tradition."[234] In *Obergefell v. Hodges*, 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."[235]

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.[236] Under these precedents, the Court might well conclude that laws purporting to limit the services available to LGBTQ 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 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.[237]

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."[238] While debate on this issue is permissible, the Court explained, it is impermissible under the

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[234]Gerstmann, *supra* note 233.

[235]135 S. Ct. 2584, 2602 (2015).

[236]*Id.*

[237]*Id.*

[238]*Id.* at 2607.

Constitution to make same-sex marriage illegal.[239] 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.

Thus, *Obergefell* 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 LGBTQ 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 and marketplace free from discrimination stack up against the right to religious freedom? In the future, how will we resolve hypotheticals like those posed in this article?

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,[240] these conceptual frameworks offer a defensible legal resolution to complex and 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

[239]*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/.

[240]*See supra* notes 180–81 and accompanying text; *see also* Lauren Sudeall Lucas, *The Free Exercise of Religious Identity*, 64 UCLA L. Rev. 54, 115 (2017) (distinguishing between protective and projective religious identity, and arguing that, "[w]hen 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").

resolving competing claims for religious freedom in the workplace. Yet, the heart of this article is not simply the identification of a new theoretical or conceptual framework. While this work is important, conceptual legal frameworks alone will not 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 II and illustrated by the conflict scenarios in Part III. 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.[241]

The challenge of a democratic, multicultural, 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.[242] We are

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[241]Alexis de Tocqueville, Democracy in America (last visited May 12, 2018), http://xroads.virginia.edu/~hyper/detoc/ch1_02.htm.

[242]*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/.

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 article 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.

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.[243] 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: 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.

[243]Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015).