

# NOTES

## RELIGIOUS EXEMPTIONS AND THE VOCATIONAL DIMENSION OF WORK

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*The Supreme Court's 2018 decision in Masterpiece Cakeshop left unresolved a central question running through the so-called wedding-vendor cases: Can the law ever grant religious exemptions to places of public accommodation without severely undermining antidiscrimination laws? The question is a difficult one, and people on both sides of these cases see the stakes as high. For supporters of same-sex marriage, these cases threaten to roll back gains in equality, while for religious opponents of same-sex marriage, these cases attempt to make good on the Court's promise, in Obergefell v. Hodges, that their sincere convictions would be respected. This Note attempts to strike a balance between three values that are in tension in this area: a commitment to antidiscrimination, a respect for conscientious objection, and minimal scrutiny of religious sincerity. It argues, first, that courts should take requests for exemption seriously, since beliefs about moral obligations in one's work conduct—what this Note refers to as the "vocational dimension" of work—have long played a part in many religious traditions. It then advocates closer scrutiny of the manner in which a claimant's work activity operates as an extension of religious beliefs. An individual who seeks an exemption on the grounds that his or her work is governed by religious convictions gives courts an opening to evaluate how sincerely those convictions are held and whether those convictions would be substantially burdened without an exemption. Such scrutiny, this Note argues, enables courts to limit exemptions in a way that protects the fundamental goal of antidiscrimination.*

### INTRODUCTION

Designers, marketers, and engineers are likely familiar with an old adage: "Fast, good, or cheap—pick two."<sup>1</sup> This piece of professional

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1. For an illustration of this adage, sometimes referred to as the "Project Management Triangle," see The Developer Society, Good/Cheap/Fast—Pick Two (and How NGOs Can Play the Triangle Like a Pro), Medium (Apr. 5, 2018), [https://medium.com/@devsociety\\_/](https://medium.com/@devsociety/)

wisdom, usually imagined as an instruction to a potential client, aims to convey the real-world constraints that exist in project management. If you want something fast and cheap, it won't be good; if you want something good and cheap, it won't be fast; and if you want something fast and good, it won't be cheap.

A similar set of constraints is at work in this country's simultaneous commitments to the values of religious liberty and antidiscrimination. The law is largely committed to minimal scrutiny of beliefs: Even when laws require beliefs to be "religious" or "sincerely held," courts and other adjudicating bodies rarely attempt more than a cursory examination of those beliefs for coherence, consistency, or even (in some cases) religiosity.<sup>2</sup> The law is also largely committed to robust principles of antidiscrimination: The Constitution as well as state and federal laws codify a strong aversion to unequal treatment on the basis of characteristics like sex, race, ethnicity, sexual orientation, or creed.<sup>3</sup> And the law is largely committed to what one might call accommodations of conscience: The law respects people's strong desire not to act in contravention of their deepest held moral convictions, allowing them exemptions from various requirements to do so even when these exemptions are inconvenient or costly.<sup>4</sup>

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good-cheap-fast-pick-two-and-how-ngos-can-play-the-triangle-like-a-pro-20d1380884a8 [https://perma.cc/4CM7-JLAA].

2. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014) (noting that when plaintiffs "sincerely believe" their religion forbids certain conduct, "it is not for [the Court] to say that their religious beliefs are mistaken or insubstantial"); *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim."); *United States v. Seeger*, 380 U.S. 163, 165-66 (1965) (concluding that a sincere, nontheistic belief that occupies a place in its holder's life parallel to the place of God meets the statutory test requiring belief "in relation to a Supreme Being"); see also Samuel J. Levine, *Rethinking the Supreme Court's Hands-Off Approach to Questions of Religious Practice and Belief*, 25 *Fordham Urb. L.J.* 85, 86 (1997) (critiquing the Court's "increasing refusal to consider carefully the religious questions central to many cases"). But see *United States v. Quaintance*, 608 F.3d 717, 722-23 (10th Cir. 2010) (affirming a lower-court finding that defendants' claimed religious belief that marijuana was a deity and sacrament was not sincerely held).

3. See, e.g., U.S. Const. amend. XIV (guaranteeing equal protection of the laws); *Fair Housing Act*, 42 U.S.C. § 3604 (2012) (prohibiting discrimination in the sale or rental of housing on the basis of race, color, religion, sex, familial status, or national origin); see also *infra* section I.C (discussing antidiscrimination provisions in state public accommodations laws).

4. See *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 719-20 (1981) (entitling a Jehovah's Witness to unemployment compensation despite his physical ability to perform the job he objected to on religious grounds); *infra* note 17 and accompanying text (citing examples of statutory exemptions based on religious belief or conscientious objection). But see *United States v. Lee*, 455 U.S. 252, 262 (1982) (Stevens, J., concurring in the judgment) (noting that exemptions from Social Security for the Amish would probably be cost effective for the government, with unpaid taxes "more than offset by the elimination of their right to collect benefits").

The difficulty is that, much like the designer whose client demands a product that is at once fast, cheap, and good, when the legal system meets any two of these constraints, it compromises its ability to deliver on the third. Moral convictions often involve judgments that implicate the acts, lifestyles, and beliefs of others. If the law grants people the freedom to act (or not to act) in accordance with any moral code whatsoever, without scrutinizing their religiosity or sincerity, an inevitable consequence is that the goal of protecting people from discrimination will be undermined.<sup>5</sup> The goals of antidiscrimination, meanwhile, are far-reaching, protecting people from differential treatment on a variety of bases in a number of contexts.<sup>6</sup> To realize those goals while granting conscience-based accommodations requires, at a minimum, some scrutiny of beliefs for opportunism or insincerity.<sup>7</sup> Meanwhile, preventing discrimination while declining to scrutinize beliefs may simply require granting no accommodations at all. In short, three worthy goals—minimal scrutiny of religious beliefs, a commitment to antidiscrimination, and accommodating conscience-based objections when possible—are in tension.

This Note takes as its starting point the observation that, under well-established constitutional doctrine, neither the first nor second of these commitments has much room to yield. The possibility of judicial examination of the sincerity of religious beliefs as a means of constraining when or for what they are invoked has vanished for all but the most frivolous of claims.<sup>8</sup> Meanwhile, the commitment to antidiscrimination is fundamental, abiding, and enlarged by views about which

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5. For instance, many people have convictions about participating in conduct that they view as immoral. See *infra* note 108 and accompanying text (discussing the concept of moral complicity). It is not difficult to conceive of moral convictions that might incline a person to discriminate on prohibited bases under a state's antidiscrimination laws—for example, by refusing to rent to an unmarried couple in New York, which prohibits rental discrimination on the basis of marital status. See N.Y. Exec. Law § 296 (McKinney 2018).

6. See, e.g., N.Y. Exec. Law § 296(1)(a) (prohibiting employment discrimination on the basis of “age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim status”).

7. See, e.g., *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 n.5 (1968) (dismissing as “patently frivolous” a restaurant’s claim that the obligation to serve black customers under the Civil Rights Act “contravene[d] the will of God” and interfered with the owners’ free exercise of religion). It is not clear from the opinion whether the Court found the defense frivolous because of the manner in which it was raised, because the Court doubted it was a sincerely held religious belief, or because it was simply too abhorrent to countenance, no matter its sincerity.

8. Even in *Quaintance*, then-Judge Gorsuch did not conclude that *no person* could sincerely adhere to a religious worldview in which marijuana occupied the place of a deity and sacrament. *United States v. Quaintance*, 608 F.3d 717, 722–23 (10th Cir. 2010). The opinion declined to reexamine the district court’s holding on that score, instead affirming on the grounds that there was sufficient evidence the defendants didn’t sincerely adhere to it. *Id.*

characteristics are immutable and worthy of protection.<sup>9</sup> The sacrifice, therefore, tends to be made in the area of the third constraint—that is, in the extent of religious exemptions from state-imposed requirements to act or not to act.<sup>10</sup>

This Note endeavors to show that the cost of that sacrifice to religious people is significant, even if some sacrifice is ultimately necessary to prevent the serious harms that the commitment to antidiscrimination seeks to avoid. Particularly because of the view many religious people take of their work lives as integral to their religious identities—what this Note will refer to as the “vocational dimension” of their work—a societal demand that they either engage in conduct that conflicts with their beliefs or else leave the marketplace exacts a real toll.<sup>11</sup> This Note suggests that this demand also shows a particular disfavor toward religious people, given that it is made in a period of increasing secular expectation that businesses conform their conduct in the marketplace to moral and ethical principles.<sup>12</sup>

The question this Note seeks to answer, then, is whether the American legal system can strike a better balance between its commitments to anti-discrimination, rights of conscience, and minimal scrutiny of beliefs in order to accommodate religious beliefs about work. The question has recently been acutely posed in cases involving religious wedding vendors, who have refused to offer their services to same-sex couples on religious grounds.<sup>13</sup> These cases involve a direct collision between the demands of antidiscrimination and what the vendors claim to be the dictates of their sincerely held religious beliefs.<sup>14</sup> Yet, in the first of these cases to reach the Supreme Court, the Court declined to resolve this clash, leaving it to

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9. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015) (acknowledging that a claim to a same-sex marriage right is founded on petitioners’ “immutable nature”); *id.* at 2603 (recognizing that “new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged”).

10. See James E. Ryan, Note, *Smith* and the Religious Freedom Restoration Act: An Iconoclastic Assessment, 78 Va. L. Rev. 1407, 1459–62 app. B (1992) (collecting, from a ten-year period pre-*Smith*, eighty-five cases in the federal courts of appeals in which the free exercise claim lost and twelve in which it prevailed). “[D]espite the apparent protection afforded claimants by the language of the compelling interest test, courts overwhelmingly sided with the government when applying that test.” *Id.* at 1412; see also *infra* notes 51–56 (discussing the *Smith* decision, which limited the scope of religious exemptions).

11. See *infra* section II.A.2 (discussing religious objections to engaging in certain work conduct).

12. See *infra* note 107 and accompanying text.

13. The cases discussed in this Note are *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015), *rev’d sub nom. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), *cert denied*, 134 S. Ct. 1787 (2014) (*mem.*); and *State v. Arlene’s Flowers, Inc.*, 389 P.3d 543 (Wash. 2017), *vacated*, 138 S. Ct. 2671 (2018).

14. See *infra* section I.C (discussing the wedding-vendor cases in greater detail).

“further elaboration in the courts” to fashion solutions that avoid both “undue disrespect to sincere religious beliefs” and “subjecting gay persons to indignities when they seek goods and services in an open market.”<sup>15</sup> This Note proposes a conceptual framework that can help guide the fashioning of such solutions.

This Note proceeds in three parts. Part I provides a brief history of the doctrine of religious exemption before examining how the arguments for exemptions have recently been framed in the wedding-vendor cases. Part II introduces the concept of vocation and examines its relationship to the free exercise claims in these cases. Part III suggests an approach to religious exemptions under which the law, taking guidance from the concept of vocation, can more closely scrutinize religious beliefs about work conduct.

### I. FREE EXERCISE AND THE WEDDING-VENDOR CASES

Part I provides background on the law governing religious exemptions. This Note defines a religious exemption, following a definition used by Professor Kent Greenawalt, as a “privilege not to comply with ordinary legal requirements based on a criterion that refers to religious belief or practice.”<sup>16</sup> An exemption might be expressly created by statute,<sup>17</sup> or it might be extended by a court’s finding a law invalid as applied to individuals or groups meeting certain criteria.<sup>18</sup> Section I.A briefly reviews the constitutional sources for exemption claims. Section I.B describes the balancing test approach to constitutional exemptions in cases like *Sherbert v. Verner*<sup>19</sup> and *Wisconsin v. Yoder*<sup>20</sup> and its subsequent curtailment in the Supreme Court’s landmark decision in *Employment Division v. Smith*.<sup>21</sup> Section I.C reviews the recent wedding-vendor cases, in which small-business owners have sought exemptions from certain

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15. *Masterpiece Cakeshop*, 138 S. Ct. at 1732.

16. Kent Greenawalt, *The Rule of Law and the Exemption Strategy*, 30 *Cardozo L. Rev.* 1513, 1518 (2009).

17. See, e.g., 50 U.S.C. § 3806(g) (2012) (exempting ordained ministers from combatant training and service); *id.* § 3806(j) (exempting from combatant training and service persons “conscientiously opposed to participation in war in any form” on the basis of religious training and belief). The Colorado statute at issue in *Masterpiece Cakeshop*, discussed *infra* section I.C, also includes a form of religious exemption. See Colo. Rev. Stat. § 24-34-601(1) (2018) (excluding from the definition of “place of public accommodation” any “church, synagogue, mosque, or other place that is principally used for religious purposes”).

18. See, e.g., *Thomas v. Review Bd. of the Ind. Emp’t Sec. Div.*, 450 U.S. 707, 717–18 (1981) (finding an infringement of petitioner’s free exercise right when the state conditioned unemployment benefits on his engaging in conduct proscribed by his religious beliefs).

19. 374 U.S. 398 (1963).

20. 406 U.S. 205 (1972).

21. *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872 (1990).

state antidiscrimination laws that provide protections based on sexual orientation. These cases have simultaneously sought to escape the confines of *Smith* and to test the viability of its “hybrid rights” language by raising free speech claims alongside free exercise claims.<sup>22</sup>

A. *Freedom of Religion in the Constitution*

The primary source of constitutionally based religious exemption claims has been the First Amendment’s Free Exercise Clause.<sup>23</sup> The clause’s text and history inform how the Supreme Court has evaluated such claims. First, with regard to the clause’s history, the primary point to be made is that the original Constitution contained no general “freedom of religion” provision.<sup>24</sup> The Federalists believed that the lack of any grant of power to the federal government to pass laws affecting religion, along with the combined effect of the structure of the government and “multiplicity of religious sects” in the young nation, served as an adequate guarantee against any invasion of religious freedom.<sup>25</sup> But these arguments ultimately yielded to demands for formal assurances:

Perhaps the reason is that [these arguments] did not satisfy the concerns of those . . . who feared not deliberate oppression, but the unintended effects of legislation passed without regard to the religious scruples of small minorities. . . . Because settlements of minorities tend to be concentrated in particular regions, most sects had greater influence at the state level than

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22. See, e.g., *Elane Photography, LLC v. Willock*, 309 P.3d 53, 60 (N.M. 2013) (involving a photographer who raised both compelled speech and free exercise claims after being the subject of discrimination complaints for refusing to photograph a same-sex commitment ceremony).

23. See U.S. Const. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”). However, the Clause is not the only provision in the Constitution aimed at protecting against religious persecution. Article VI provides that “no religious Test shall ever be required” as a qualification for office. *Id.* art. VI, cl. 3. And Articles I, II, and VI provide that, in situations requiring officers to be bound by an oath, an affirmation may be made instead. *Id.* art. I, § 3, cl. 6 (requiring that the Senate, when sitting for the purpose of trying an impeachment, “be on Oath or Affirmation”); *id.* art. II, § 1, cl. 8 (requiring the President to take an “Oath or Affirmation” before entering office); *id.* art. VI, cl. 3 (providing that senators, representatives, members of state legislatures, and all federal and state executive and judicial officers “shall be bound by Oath or Affirmation, to support this Constitution”). With the “oath or affirmation” provisions, the Framers sought to accommodate a number of minority sects who refused to swear oaths for religious reasons. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 *Harv. L. Rev.* 1409, 1475 (1990). Together, these provisions were “designed to prevent restrictions hostile to particular religions and thus to make the government of the United States more religiously inclusive.” *Id.* at 1473–74 (1990). It is worth noting, however, that the “oath or affirmation” provisions are not technically religious exemptions—the provisions made the affirmation alternative available to all people, regardless of religious status. *Id.* at 1475.

24. McConnell, *supra* note 23, at 1473.

25. *Id.* at 1478–79.

in “the great vortex of the whole continent.” The same extended Union that protected minority faiths against oppression would make them more vulnerable to thoughtless general legislation.<sup>26</sup>

Second, with regard to the clause’s text, the version of the First Amendment that was ultimately adopted bars Congress from making any law “prohibiting the free exercise” of religion.<sup>27</sup> The verb “prohibit” replaced the use, in an earlier version, of “prevent.”<sup>28</sup> The significance of the change to “prohibit” is not obvious; Samuel Johnson’s 1755 dictionary includes “to hinder” as one of its synonyms.<sup>29</sup> But in 1988 the Supreme Court gave the term a narrow construction. Calling “prohibit” the “crucial word in the constitutional text,” the Court held that the clause did not require compelling justifications for “incidental effects of government programs” that “make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs.”<sup>30</sup>

The phrase “free exercise of religion” also represents an alternative to, or perhaps a replacement of, a similar phrase, “rights of conscience.”<sup>31</sup> The phrases were used interchangeably in several contexts, although the drafting history provides at least some support for the notion that they had different meanings, since the House version of the

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26. *Id.* at 1479 (footnote omitted) (quoting Editorial, *Philadelphensis II*, *Phila. Indep. Gazetteer*, Nov. 28, 1787, reprinted in 3 *The Complete Anti-Federalist* 107 (Herbert J. Storing ed., 1981)).

27. U.S. Const. amend. I.

28. McConnell, *supra* note 23, at 1483. Both of these verbs invite comparison with yet another verb, “infringe,” which appeared in a parallel phrase in earlier versions of the amendment. *Id.* at 1482 (quoting 1 *Annals of Cong.* 796 (1789) (Joseph Gales ed., 1834) (proposal of Rep. Ames)). Fisher Ames, a Massachusetts Representative in the First Congress, proposed one such formulation, which also introduced the phrase “free exercise of religion”: “Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.” *Id.* (internal quotation marks omitted) (quoting 1 *Annals of Cong.* 796 (Joseph Gales ed., 1834) (proposal of Rep. Ames)).

29. *Id.* at 1486 (internal quotation marks omitted) (quoting Samuel Johnson, *A Dictionary of the English Language* (1755)). Professor Michael McConnell goes on to suggest that the drafters may have “found it less awkward or more euphonious” to use a third verb, “prohibiting,” after using two different verbs, “respecting” and “abridging,” for the Establishment and Free Speech Clauses. *Id.* at 1487. James Madison, writing ten years after the House debate, rejected the suggestion that “respecting” was broader than “abridging”: “[T]he liberty of conscience and the freedom of the press were *equally* and *completely* exempted from all authority whatever of the United States.” *Id.* at 1487–88 (quoting James Madison, Report on the Virginia Resolutions (Jan. 18, 1800), reprinted in 5 *The Founders’ Constitution* 141, 146 (P. Kurland & R. Lerner eds., 1987)). Madison ridiculed a construction of the text that would allow Congress to “*regulate* and even *abridge* the free exercise of religion, provided they do not *prohibit* it.” *Id.* (quoting Madison, *supra*, at 146).

30. *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 451–52 (1988).

31. McConnell, *supra* note 23, at 1482–83.

clause included both.<sup>32</sup> Nonetheless, the final text supports three important conclusions about the scope of the Free Exercise Clause's guarantee: (1) It explicitly protects conduct, not mere belief; (2) it includes institutional religion even in matters not directly involving belief; and (3) it is affirmatively a protection of *religion* as opposed to other nonreligious belief systems.<sup>33</sup>

### B. *The Balancing Test Approach and Its Abandonment in Smith*

Until the 1960s, the Supreme Court by and large upheld generally applicable laws against claims for religious exemptions.<sup>34</sup> But the pattern changed with the Warren Court's decision in *Sherbert v. Verner*.<sup>35</sup> The case involved a Seventh-day Adventist who had been denied unemployment compensation under South Carolina law because she refused to work on Saturday, her Sabbath.<sup>36</sup> Justice Brennan, writing for the majority, found a clear burden on her free exercise right that was not justified by any compelling state interest.<sup>37</sup> In so holding, the Court claimed that it was

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32. *Id.* The proposer of the House version, Fisher Ames, was a “notoriously careful draftsman and meticulous lawyer.” *Id.*

33. *Id.* at 1489–91; see also Chad Flanders, *The Possibility of a Secular First Amendment*, 26 *Quinnipiac L. Rev.* 257, 301 (2008) (arguing that the First Amendment “gives a special place to a particular way of looking at the world, the *religious point of view*, because this way has a special value that other ways do not have” (emphasis added)); Douglas Laycock, *The Remnants of Free Exercise*, 1990 *Sup. Ct. Rev.* 1, 16 (positing that the Founding-era debate on the relationship between religion and government, together with the Constitution's religion clauses, “presuppose that religion is in some way a special human activity, requiring special rules applicable only to it”). But see Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 *U. Chi. L. Rev.* 1245, 1271 (1994) (claiming that textual or historical arguments that the Constitution privileges religion “fail to withstand scrutiny,” and arguing that the religion clauses are better read as protecting religion from discrimination, not privileging religion for exemptions). McConnell, for his part, concludes—on the basis of “limited and on some points mixed” evidence—that an Establishment Clause–based argument against religious exemptions is unsupported, as is the claim that the Free Exercise Clause protected merely belief and not conduct. McConnell, *supra* note 23, at 1511–12. At the same time, however, the evidence does not quite support the claim that the Framers understood the clause to “vest the courts with authority to create exceptions from generally applicable laws on account of religious conscience.” *Id.* at 1512.

34. Note, *The Best of a Bad Lot: Compromise and Hybrid Religious Exemptions*, 123 *Harv. L. Rev.* 1494, 1494 (2010); see also *Reynolds v. United States*, 98 U.S. 145, 167 (1878) (rejecting a Mormon's religious claim to exemption from a law outlawing bigamy on the grounds that permitting it “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”); Richard J. D'Amato, Note, *A “Very Specific” Holding: Analyzing the Effect of Hobby Lobby on Religious Liberty Challenges to Housing Discrimination Laws*, 116 *Colum. L. Rev.* 1063, 1068 n.19 (2016) (collecting cases in which laws were upheld against free exercise challenges).

35. 374 U.S. 398 (1963).

36. *Id.* at 399–400.

37. *Id.* at 406–07.

not respecting the “establishment” of Seventh-day Adventism but rather enforcing the “governmental obligation of neutrality in the face of religious differences” in extending benefits to Sabbatarians that the state already made available to Sunday worshippers.<sup>38</sup>

Nine years later, the Burger Court followed suit with *Wisconsin v. Yoder*, a case involving the application of a state compulsory-school-attendance law to Amish parents.<sup>39</sup> The parents argued that sending their children to school beyond the eighth grade would violate the tenets of their faith.<sup>40</sup> The Court held that the state’s requirement “would gravely endanger if not destroy the free exercise” of the parents’ religious beliefs.<sup>41</sup> *Wisconsin*, it concluded, could not compel the parents to send their children to high school to the age of sixteen; the state had not shown with sufficient particularity “how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption.”<sup>42</sup> The Court also, however, took care to note that the exemption depended in part on its analysis of the centrality of the burdened religious belief to the way of life long sustained by the Amish. It could not “be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some ‘progressive’ or more enlightened process for rearing children.”<sup>43</sup>

The balancing test applied in *Sherbert* and *Yoder*—under which the Court analyzed the extent of the burden on the claimant’s religious beliefs and the seriousness of the state interest animating it—was sharply cut off by *Employment Division v. Smith*.<sup>44</sup> The respondents in *Smith* had lost their jobs as a result of their use of peyote, a plant-derived hallucinogenic drug, for sacramental purposes as members of the Native American Church.<sup>45</sup> The state Employment Division then rejected their applications for employment benefits, on the grounds that their discharge had been a result of work-related “misconduct.”<sup>46</sup> The Oregon Supreme Court initially concluded that the “criminality” of the respondents’ peyote use was “irrelevant to resolution of their constitutional claim.”<sup>47</sup> It reasoned that the justification for the “misconduct” provision in the unemployment scheme—which was aimed at the scheme’s “financial integrity”—was not sufficiently compelling to justify the burden on the

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38. *Id.* at 409; see also *infra* section II.A.2 (discussing *Sherbert* in greater detail).

39. 406 U.S. 205, 207 (1972).

40. *Id.* at 208–09.

41. *Id.* at 219.

42. *Id.* at 234–36.

43. *Id.* at 235; see also *infra* section II.A.2 (discussing *Yoder* and the Court’s conception of the Amish way of life).

44. *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872 (1990).

45. *Id.* at 874.

46. *Id.*

47. *Id.* at 875.

respondents' religious practices.<sup>48</sup> The U.S. Supreme Court disagreed, concluding that violation of a criminal law that was itself valid under the First Amendment could certainly justify the "lesser burden" of denying unemployment benefits.<sup>49</sup> On remand, the Oregon Supreme Court concluded the criminal prohibition itself violated the Free Exercise Clause.<sup>50</sup>

The U.S. Supreme Court, in an opinion by Justice Scalia, reversed.<sup>51</sup> The Court drew a distinction between laws that ban (or prescribe) certain acts "only when they are engaged in for religious reasons" and laws whose prohibitions (or prescriptions) of religious practice are "merely the incidental effect of a generally applicable and otherwise valid provision."<sup>52</sup> Only the former were constitutionally infirm.<sup>53</sup> The Court did not cut this doctrine from whole cloth; its opinion drew on language from a series of precedents that had upheld laws against free exercise claims for exemptions.<sup>54</sup> But it also had to distinguish precedents like *Sherbert* and *Yoder*. It distinguished *Sherbert* as being limited (more or less) to the field of unemployment compensation and as not involving an exemption from a "generally applicable criminal law."<sup>55</sup> The Court dealt with *Yoder*, on the other hand, by invoking what came to be known as the "hybrid rights" theory: *Yoder* and related precedents involved "not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press."<sup>56</sup>

The backlash to *Smith* was swift and came from at least two quarters. The first was Congress's passage of the Religious Freedom Restoration Act (RFRA), which essentially restored the pre-*Smith* line of cases by requiring a compelling justification for government actions placing a substantial burden on religious exercise.<sup>57</sup> When the Court subsequently held that RFRA exceeded Congress's enforcement powers under the

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48. *Id.*

49. *Emp't Div., Dep't of Human Res. v. Smith*, 485 U.S. 660, 670 (1988).

50. *Smith v. Emp't Div.*, 763 P.2d 146, 148 (Or. 1988), *rev'd*, 494 U.S. 872 (1990).

51. *Smith*, 494 U.S. at 890.

52. *Id.* at 877-78.

53. *Id.* at 878.

54. *Id.* at 879-80. The Court cited, among others, *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment) (noting that free exercise does not excuse 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)"), and *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594 (1940) ("Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."). *Smith*, 494 U.S. at 890-91.

55. *Id.* at 884.

56. *Id.* at 881.

57. See 42 U.S.C. § 2000bb (2012).

Fourteenth Amendment,<sup>58</sup> a number of states passed their own RFRA laws.<sup>59</sup> A second reaction has been sustained criticism of the “hybrid rights” theory, both in the public discussion<sup>60</sup> and in a circuit court split over its application.<sup>61</sup>

Whatever the merits of *Smith*, it currently forecloses many claims for religious exemptions as a matter of constitutional right under the Free Exercise Clause. The recent wedding-vendor cases, among other things, have pressed for a reevaluation of *Smith*.<sup>62</sup> It is to those cases this Note turns next.

### C. *The Wedding-Vendor Cases*

The past few years have witnessed a series of landmark rulings in the religious liberty arena. Since 2012, the Supreme Court has ratified a “ministerial exception” under the First Amendment exempting a church’s selection of ministers from the application of employment discrimination laws;<sup>63</sup> decided that closely held for-profit corporations have the right to assert free exercise claims;<sup>64</sup> and held that churches have a First Amendment right not to be disqualified from the receipt of

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58. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

59. See State Religious Freedom Restoration Acts, Nat’l Conference of State Legislatures (May 4, 2017), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx> [<https://perma.cc/9GLK-MG73>] (listing twenty-one states that have enacted RFRA laws since 1993).

60. See, e.g., Note, *supra* note 34, at 1495 & nn.12–13 (collecting criticisms of *Smith*’s hybrid rights theory as “flawed” and “dishonest”); Eric Segall, Symposium: Disentangling Free Speech and Freedom of Religion in *Masterpiece Cakeshop*, SCOTUSblog (Sept. 13, 2017), <http://www.scotusblog.com/2017/09/symposium-disentangling-free-speech-free-religion-masterpiece-cakeshop> [<https://perma.cc/JK7Q-MMRK>] (urging the Court to use *Masterpiece Cakeshop* to “discard [the] highly criticized and dubious” hybrid rights doctrine).

61. Compare *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1295 (10th Cir. 2004) (employing a “colorable claim” approach to the hybrid rights theory), and *Miller v. Reed*, 176 F.3d 1202, 1204 (9th Cir. 1999) (same), with *Kissinger v. Bd. of Trs.*, 5 F.3d 177, 180 (6th Cir. 1993) (ignoring hybrid claims).

62. Petition for a Writ of Certiorari at 30–32, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2016 WL 3971309 [hereinafter *Masterpiece Cakeshop* Certiorari Petition] (urging the Court to “resolve th[e] conflict” between the state court of appeals and several federal circuits over the proper application of *Smith*).

63. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188–89 (2012) (finding that the application of employment discrimination laws to the relationship between a church and its ministers “interferes with the internal governance of the church,” in violation of the Free Exercise and Establishment Clauses).

64. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014) (holding that the federal RFRA, which requires that substantial burdens on the free exercise of religion be narrowly tailored to meet a compelling government interest, applies to federal regulations restricting the activities of closely held for-profit corporations).

public benefits on the basis of their religious identity.<sup>65</sup> The activity has led one scholar to describe the current state of American religious liberty as one of “flux and uncertainty.”<sup>66</sup> The “basic terms of the American church-state settlement,” once “taken for granted,” are now “up for grabs.”<sup>67</sup>

One of the most bitterly contested disputes in this arena has been over religious accommodations with respect to same-sex marriage. In its 2015 decision in *Obergefell v. Hodges*, the Supreme Court recognized a right to same-sex marriage under the Fourteenth Amendment’s Equal Protection and Due Process Clauses.<sup>68</sup> The wedding-vendor cases discussed below, though already pending at the time of *Obergefell*, seem to have taken on new urgency in the wake of the decision: Supporters of same-sex marriage tend to see them as threats to roll back gains in equality,<sup>69</sup> while religious opponents of same-sex marriage have sought to make good on *Obergefell*’s promise that their sincere convictions would be respected.<sup>70</sup>

The first in the recent line of cases, *Elane Photography, LLC v. Willock*, involved a New Mexico photographer who refused to take pictures of a commitment ceremony between two women, claiming that to do so would

65. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017) (holding that the categorical exclusion from a state grant program of otherwise qualified recipients solely on the basis of their religious character “imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny”).

66. Paul Horwitz, *The Hobby Lobby Moment*, 128 Harv. L. Rev. 154, 154 (2014).

67. *Id.* at 155 (quoting Lawrence Lessig, *The Puzzling Persistence of Bellbottom Theory: What a Constitutional Theory Should Be*, 85 Geo. L.J. 1837, 1837 (1997)). Professor Paul Horwitz, writing before the same-sex marriage decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and before any wedding-vendor case had reached the Supreme Court, regarded the judicial treatment of religious liberty as “relatively stable.” Horwitz, *supra* note 66, at 154. But outside the courts, religious accommodation had come to be a contested issue at the “forefront of public debate.” *Id.* at 155.

68. 135 S. Ct. at 2604.

69. See, e.g., Kyle C. Velte, *All Fall Down: A Comprehensive Approach to Defeating the Religious Right’s Challenges to Antidiscrimination Statutes*, 49 Conn. L. Rev. 1, 4–5 (2016) (characterizing the wedding-vendor cases as part of a larger effort by the “Religious Right” to “stop and reverse [LGBT] civil rights victories”).

70. Justice Kennedy concluded his majority opinion in *Obergefell* with broad dicta about the enduring First Amendment rights of religious people:

[I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.

*Obergefell*, 135 S. Ct. at 2607. Kennedy did not say which First Amendment rights he was invoking, though the passage’s verbs (“continue to advocate,” “teach”) suggest that he had free speech at least as much in mind as free exercise.

send a message conflicting with the photographer's beliefs.<sup>71</sup> The New Mexico Supreme Court found that in doing so the photographer violated the New Mexico Human Rights Act (NMHRA),<sup>72</sup> which prohibits places of public accommodation from discriminating against people based on their sexual orientation.<sup>73</sup> The photographer argued that in refusing to photograph the ceremony she had not discriminated on the basis of sexual orientation.<sup>74</sup> She claimed to object to the "story" the photographs would have conveyed, saying she would have refused to photograph it even if the requesting customers had not been gay (for example, if they were heterosexual actors in a movie) just as she would not have refused to provide other services for gay customers that didn't convey the same "story."<sup>75</sup> The New Mexico Supreme Court rejected this argument as an illegitimate attempt to "distinguish between a protected status and conduct closely correlated with that status."<sup>76</sup>

The photographer had raised both free speech and free exercise claims. The court rejected the free exercise claim under *Smith*: It held that the NMHRA was a neutral law of general applicability that did not "prefer secular conduct over religious conduct or evince any hostility toward religion."<sup>77</sup> The court also rejected the photographer's *Smith*-based "hybrid rights" claim as inadequately briefed, noting that she had devoted only a three-sentence paragraph to it.<sup>78</sup>

The court focused the bulk of its attention on the photographer's free speech claim. The claim, in essence, was that photography was an expressive art form and that, by requiring her to photograph a same-sex marriage, the NMHRA compelled her to express "a positive message about

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71. 309 P.3d 53, 59–60 (N.M. 2013) (noting that the photographer was "personally opposed to same-sex marriage and w[ould] not photograph any image or event that violate[d] her religious beliefs").

72. N.M. Stat. Ann. § 28-1-1 (West 2018).

73. *Elane Photography*, 309 P.3d at 59.

74. *Id.* at 61.

75. *Id.*

76. *Id.* For this conclusion, the New Mexico court relied on the Supreme Court's holding in *Lawrence v. Texas*, 539 U.S. 558 (2003), and a related line of cases. *Elane Photography*, 309 P.3d at 62.

77. *Elane Photography*, 309 P.3d at 75. The court's reference to "hostility to religion" was necessary to distinguish *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, a post-*Smith* case holding that a law could not be neutral if its aim was to "infringe upon or restrict practices because of their religious motivation." 508 U.S. 520, 533 (1993).

78. *Elane Photography*, 309 P.3d at 75. The New Mexico court also expressed substantial skepticism that the "hybrid rights" theory was even workable: "Neither of these [free speech or free exercise] claims is independently viable, and *Elane Photography* offers no analysis to explain why the two claims together should be greater than the sum of their parts." *Id.* at 75–76; see also *supra* note 60 (collecting critiques of the hybrid rights theory).

same-sex marriage” that she did not share.<sup>79</sup> The court, following the Supreme Court’s compelled-speech lines of cases,<sup>80</sup> rejected this claim.<sup>81</sup>

The court offered a number of rationales for its decision. It found that even though the photographer’s services might include artistic or creative work, the fact that she held them out for hire made them subject to regulation just like any other service.<sup>82</sup> It noted that, if she wanted true creative freedom, she could “cease to offer [her] services to the public at large.”<sup>83</sup> With regard to whether she was communicating a message she disapproved of, the court determined that reasonable observers would be unlikely to interpret her photographs as an “endorsement” of the photographed events.<sup>84</sup> The photographer could still express her religious and political beliefs, including with a disclaimer on her website.<sup>85</sup> The court also refused to draw a line between “creative” and other professions, because “[c]ourts cannot be in the business of deciding which businesses are sufficiently artistic to warrant exemptions from antidiscrimination laws.”<sup>86</sup>

The Supreme Court of Washington reached a similar decision in *State v. Arlene’s Flowers, Inc.*, a 2017 case involving a florist who refused to provide her flower-arrangement services for a same-sex wedding.<sup>87</sup> The Court found that her refusal violated the Washington Law Against Discrimination (WLAD), which, like the NMHRA, prohibits discrimination on the basis of sexual orientation.<sup>88</sup> The florist, like the photographer in *Elane Photography*, argued that making a custom floral arrangement—as opposed to selling bulk flowers and raw materials—was tantamount to using her artistic abilities to participate in a same-sex wedding.<sup>89</sup> The court rejected this argument and, quoting the New Mexico Supreme Court, declined to get into the business of “deciding which

79. *Elane Photography*, 309 P.3d at 63.

80. One line of cases establishes the “principle that freedom of speech prohibits the government from telling people what they must say.” *Rumsfeld v. Forum for Acad. & Institutional Rights*, 547 U.S. 47, 61 (2006). For example, in *West Virginia State Board of Education v. Barnette*, the Court held that it was unconstitutional for the state to require students to salute the flag or recite the Pledge of Allegiance. 319 U.S. 624, 642 (1943). The other line of cases prohibits the government from requiring that a private individual “host or accommodate another speaker’s message.” *Rumsfeld*, 547 U.S. at 63.

81. *Elane Photography*, 309 P.3d at 64–65.

82. *Id.* at 66. That the services involved photography was simply a fact owing to the photographer’s “chosen line of business”: “If Annie Leibovitz or Peter Lindbergh worked as public accommodations in New Mexico, they would be subject to the provisions of the NMHRA.” *Id.*

83. *Id.* at 67.

84. *Id.* at 69.

85. *Id.* at 70.

86. *Id.* at 71.

87. 389 P.3d 543 (Wash. 2017), vacated, 138 S. Ct. 2671 (2018).

88. *Id.* at 551 (citing Wash. Rev. Code § 49.60.215 (2011)).

89. *Id.* at 550.

businesses are sufficiently artistic” to deserve an exemption from otherwise applicable antidiscrimination laws.<sup>90</sup> The court also rejected the florist’s argument that the WLAD unconstitutionally burdened her free exercise of religion, finding the law to be neutral and generally applicable within the meaning of *Smith*.<sup>91</sup> In June 2018, the U.S. Supreme Court vacated the Washington court’s decision and remanded the case for reconsideration in light of its holding in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.<sup>92</sup>

*Masterpiece Cakeshop*, the first of the wedding-vendor cases to produce a decision from the Supreme Court, involved a Colorado baker who refused to bake a custom wedding cake for a same-sex wedding.<sup>93</sup> The Colorado Court of Appeals, the highest state court to hear the case, had affirmed a finding by the Colorado Civil Rights Commission that the baker had violated the Colorado Anti-Discrimination Act in refusing services to a gay couple that he otherwise made available to the general public.<sup>94</sup> Like the state courts in *Elane Photography* and *Arlene’s Flowers*, the Colorado Court of Appeals held both that the state public accommodations law did not compel the baker to create speech in support of same-sex marriage and that, as a neutral law of general applicability, the state law survived the baker’s free exercise challenge.<sup>95</sup> The U.S. Supreme Court granted certiorari and, in June 2018, issued an opinion reversing the state court’s decision.<sup>96</sup>

The *Masterpiece Cakeshop* decision did not resolve the fundamental questions raised by the claims that Colorado’s antidiscrimination law violated the free speech and free exercise rights of the baker.<sup>97</sup> Instead, the Court’s decision turned on the “elements of a clear and impermissible hostility toward the [baker’s] sincere religious beliefs” that the Court said had infected the Colorado Civil Rights Commission’s treatment of his case.<sup>98</sup> The opinion left open the possibility of a different outcome in “some future controversy” involving similar facts, as well as the possibility that there “might be in some cases” a “confluence of speech and free

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90. *Id.* at 559 (quoting *Elane Photography*, 309 P.3d at 71).

91. *Id.* at 562.

92. *Arlene’s Flowers, Inc. v. Washington*, 138 S. Ct. 2671, 2671 (2018) (mem.).

93. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1723 (2018).

94. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 282 (Colo. App. 2015), rev’d sub nom. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

95. *Id.* at 283, 288.

96. *Masterpiece Cakeshop*, 138 S. Ct. at 1724.

97. *Id.* (resolving the baker’s claim on the basis of “religious hostility” displayed in state adjudication and leaving open “the outcome of some future controversy involving facts similar to these”).

98. *Id.* at 1729; see also *infra* notes 186–187 and accompanying text (discussing findings of evidence of hostility in *Masterpiece Cakeshop*).

exercise principles” upon which such an outcome would turn.<sup>99</sup> Indeed, the Court went out of its way to signal that a similar set of facts might well involve a viable free speech claim.<sup>100</sup>

But the Court in *Masterpiece Cakeshop* also recognized the severe harm that a too-expansive right of exemption would cause to gay people and to the government’s ability to protect against discrimination. The Court warned of the “community-wide stigma” that could be inflicted if an existing, generally accepted religion-based exemption—excusing clergy members from performing same-sex weddings—were “not confined.”<sup>101</sup> Similarly, the Court warned of the “serious stigma” it would impose on gay people if “all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect [were] allowed to put up signs saying ‘no goods or services will be sold if they will be used for gay marriages.’”<sup>102</sup> The Court did not say how the grant of an exemption might be confined to prevent these harms, instead leaving the “outcome of cases like [*Masterpiece Cakeshop*] in other circumstances” to “further elaboration in the courts.”<sup>103</sup>

The remainder of this Note proposes a framework to guide this further elaboration. Under this framework, courts would view similar claims for exemptions in the light of an existing body of thought and case law regarding religious beliefs about the purpose of work and one’s moral obligations in the workplace. The “vocational perspective” that emerges from these sources, this Note argues, both illuminates the values at stake in claims like those in the wedding-vendor cases and imposes meaningful constraints on the ability of objectors to seek exemptions from antidiscrimination laws.

## II. VOCATION AND FREE EXERCISE

Part II introduces what this Note refers to as the “vocational dimension” of work—the beliefs held by many religious people about the requirements that religion imposes on work conduct and about the ways in which work forms a component of religious identity. Section II.A briefly surveys some of the beliefs about work that religious traditions have adopted before moving on to religious views of work that have arisen in the case law. Section II.B examines the relationship between the vocational concept of work and the recent wedding-vendor cases and argues that the expressive-conduct approach to exemptions raised in

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99. *Masterpiece Cakeshop*, 138 S. Ct. at 1723–24.

100. See *id.* at 1723 (noting that the “free speech aspect of this case,” while “difficult,” “is an instructive example . . . of the proposition that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning”).

101. *Id.* at 1727.

102. *Id.* at 1728–29.

103. *Id.* at 1732.

those cases is both overly broad and fails to capture the true nature of the typical religious objector's exemption claim.

### A. *The Vocational Perspective*

1. *Religious Views of Work.* — For many religious people, the idea that one's conduct at work could be separable from one's religious beliefs is as foreign as the idea of a life with no religious belief at all. Indeed, many belief systems embrace what this Note refers to as the "vocational dimension" of work—a sense that work is a calling through which the faithful fulfill their moral obligations, support their own religious communities, and express their devotion and submission to a higher power.<sup>104</sup> Although U.S. court cases examining work as a faith-based calling have generally involved claimants from the Christian tradition,<sup>105</sup> the concept of a vocational calling can be found in several other religions.<sup>106</sup> The concept of "business ethics" and examples of secular businesses conforming their conduct to moral or ethical principles also suggest that the notion of work serving purposes beyond mere profit is familiar to many.<sup>107</sup>

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104. See, e.g., Brief of Amicus Curiae Agudath Israel of America in Support of Petitioners at 2–3, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4004519 ("Jewish law does not limit itself to religious practices as that term is generally understood, but also governs every aspect of day-to-day life[,] . . . in public and in private, at work, in the street, and at home."); Catechism of the Catholic Church para. 898 (2d ed. 1997) ("It pertains to [lay Catholics] in a special way so to illuminate and order all temporal things with which they are closely associated that these may always be effected and grow according to Christ . . ."); Douglas J. Schuurman, Protestant Vocation Under Assault: Can It Be Salvaged?, 14 Ann. Soc'y Christian Ethics 23, 25 (1994) (discussing the Protestant conception of vocation that "infuses all mundane activities—domestic, economic, political, educational, and cultural—with a *religious significance*").

105. See, e.g., *United States v. Lee*, 455 U.S. 252, 254 (1982) (Old Order Amish); *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 709 (1981) (Jehovah's Witness); *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972) (Old Order Amish). But see *Braunfeld v. Brown*, 366 U.S. 599, 601 (1961) (involving a challenge by Orthodox Jews to a state law forbidding retail operations from being open on Sundays).

106. See, e.g., Five Questions on Interfaith Calling, Collegeville Inst.: Bearings Online (Aug. 4, 2016), <https://collegevilleinstitute.org/bearings/five-questions> [<https://perma.cc/X9WA-VV2Q>] (discussing concepts analogous to the Christian concept of "calling" in Jewish, Islamic, Hindu, Buddhist, Confucian, Daoist, and secular humanist traditions).

107. See, e.g., Robert C. Solomon, Corporate Roles, Personal Virtues: An Aristotelean Approach to Business Ethics, 2 Bus. Ethics Q. 317, 317 (1992) (noting how courses in business ethics have become "well-established . . . in the standard curriculum in philosophy in most departments" as well as "recommended or required in most of the leading business schools in North America"); David Vogel, The Ethical Roots of Business Ethics, 1 Bus. Ethics Q. 101, 107 (1991) ("The debate over the nature of the relationship between ethics and profits remains central to our appraisal of the moral legitimacy of business."). But see Gary R. Weaver et al., Corporate Ethics Practices in the Mid-1990's: An Empirical Study of the Fortune 1000, 18 J. Bus. Ethics 283, 293 (1999) (suggesting that despite widespread adoption of formal ethics policies, American corporations "vary substantially" in the degree to which their practices and personnel actually support those policies). For recent examples of businesses embracing secular ethical commitments, see, e.g., Our Approach,

The “vocational dimension” also has echoes in notions of moral complicity. Some recent scholarship has invoked the concept of complicity as a way of analyzing what is at stake in religious exemptions—whether examining the breadth of the Court’s implicit embrace of broad moral complicity arguments or defending moral complicity as a key ethical concept.<sup>108</sup> As employed in this Note, the concept of vocation includes an element of moral complicity, in the sense that having beliefs about one’s religious obligations in the workplace likely implies having beliefs about the moral implications of one’s conduct. But the vocational concept is broader than a notion of moral complicity, too, insofar as it is typically bound up with the expression of a religious identity. Those concerned about complicity might focus only on the implications of certain kinds of conduct, whereas those with a sense of “vocation” in work might regard their choice of profession and all that they do in it as an ongoing expression of their values.<sup>109</sup>

2. *Vocational Arguments in Religious Exemption Cases.* — Several Supreme Court decisions acknowledge the vocational dimension of work for religious people. *Wisconsin v. Yoder*, for instance, contains a lengthy discussion of the Amish way of life, including Amish views on work.<sup>110</sup> The Amish belief system requires members “to make their living by farming or closely related activities.”<sup>111</sup> The mandatory high-school attendance

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Swell Investing, [https://www.swellinvesting.com/investment\\_approach](https://www.swellinvesting.com/investment_approach) [<https://perma.cc/B2N5-2YSX>] (last visited Sept. 16, 2018) (affirming an investment company’s focus on companies having a “positive impact” in such areas as “clean water and sanitation,” “zero hunger,” and “affordable and clean energy”); Andrew Winston, *The Top 10 Sustainable Business Stories of 2017*, *Harv. Bus. Rev.* (Dec. 22, 2017), <https://hbr.org/2017/12/the-top-10-sustainable-business-stories-of-2017> [<https://perma.cc/46YG-WJTV>] (last updated Dec. 23, 2017) (reviewing ethics-motivated behavior by businesses in 2017, such as “moral stands” by famous CEOs and public corporate support for the Paris climate accord).

108. See, e.g., Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby’s Wake*, 82 *U. Chi. L. Rev.* 1897, 1905 (2015) (discussing *Hobby Lobby’s* broad grant of exemptions “so long as the religious adherent believes himself to be implicated in the conduct that his religion opposes”); Joshua J. Craddock, *Article, The Case for Complicity-Based Religious Accommodations*, 12 *Tenn. J.L. & Pol’y* 233, 234 (2018) (arguing that moral complicity is an “ancient concept in law and ethics” appropriately “embedded throughout the American legal system”).

109. For instance, the Bruderhof, a Christian movement whose communities own property in common, has adopted a statement of faith under which the “whole of life in church community must be a sacrament, a living symbol that illustrates God’s calling for humankind.” *The Bruderhof, Foundations of Our Faith & Calling* 63 (2014). The Bruderhof include work in this conception:

Work must be indivisible from prayer, prayer indivisible from work. Our work is thus a form of worship, since our faith and daily life are inseparable, forming a single whole. Even the most mundane task, if done as for Christ in a spirit of love and dedication, can be consecrated to God as an act of prayer. To pray in words but not deeds is hypocrisy.

*Id.* at 67.

110. 406 U.S. at 209–13.

111. *Id.* at 210.

at issue in the case would take Amish children out of their communities “during the crucial and formative adolescent period of life,” when they “must acquire Amish attitudes favoring manual work and self-reliance” and “must learn to enjoy physical labor.”<sup>112</sup> The Court was alert to the impossibility of separating these attitudes about work from the Amish religious identity: The Amish hold a “fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence.”<sup>113</sup> And the Amish believe that higher education, with its emphasis on “intellectual and scientific accomplishments, self-distinction, competitiveness, [and] worldly success,” tended to “develop values they reject as influences that alienate man from God.”<sup>114</sup> The Court concluded that the “traditional way of life of the Amish” was a matter of “deep religious conviction, shared by an organized group, and intimately related to daily living.”<sup>115</sup>

A belief about work was also at issue in *Sherbert v. Verner*, a case involving a state unemployment-compensation law that effectively required a Seventh-day Adventist to work on Saturday, her Sabbath.<sup>116</sup> South Carolina withheld unemployment benefits from citizens who failed to accept suitable work “without good cause.”<sup>117</sup> The state Employment Security Commission concluded that Sherbert’s refusal to work on Saturdays, which prevented her obtaining work in local textile mills, brought her within the terms of this provision.<sup>118</sup> The state supreme court affirmed, over Sherbert’s claim that the statute abridged her right to the free exercise of her religion.<sup>119</sup> In reversing, the U.S. Supreme Court concluded that the statute forced Sherbert “to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.”<sup>120</sup>

To the extent the belief at issue in *Sherbert* is one “about work,” it is so in a much simpler sense than in *Yoder*. The *Sherbert* opinion contains

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112. Id. at 211.

113. Id. at 210.

114. Id. at 211–12.

115. Id. at 216. The Court recognized that what constituted a “religious” belief was a “most delicate question” but nonetheless concluded it was one properly within the Court’s sphere. Id. at 215. As the Court put it, evaluating the Amish parents’ claims under the Religion Clauses required the Court to “determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent.” Id. Indeed, the Court was obliged to make this determination, because allowing people to claim exemptions on the basis of mere personal, nonreligious preferences would threaten the “very concept of ordered liberty.” Id. at 215–16.

116. 374 U.S. 398, 399–401 (1963).

117. Id. at 401.

118. Id.

119. Id.

120. Id. at 404.

scant references to the nature of the appellant's belief; in a footnote, the Court notes that no question of Sherbert's sincerity had been raised and that there was not "any doubt that the prohibition against Saturday labor [was] a basic tenet of the Seventh-day Adventist creed."<sup>121</sup> Perhaps this was because the Justices could assume familiarity with the concept of a Sabbath or "day of rest" on which work was prohibited.<sup>122</sup> But it is also the case that the relationship between the belief and the work-related conduct required by South Carolina was much more straightforward. Whereas in *Yoder* the Court felt compelled to explain how mandatory schooling until the age of sixteen conflicted with the Amish way of life—and, further, to explain how that way of life was "inseparabl[y]" religious<sup>123</sup>—in *Sherbert* the relationship was simple. A tenet of Sherbert's faith was that work was prohibited on Saturdays; whatever the relationship of that belief to the rest of her faith, a requirement to work on Saturdays plainly demanded that she violate a religious belief.<sup>124</sup>

*Thomas v. Review Board of the Indiana Employment Security Division*,<sup>125</sup> another case involving a state unemployment-compensation scheme, presented much more closely the question of how to accommodate a religious belief about work *conduct*—not simply whether or not one could work on a certain day, but what kinds of conduct one could and could not engage in on the basis of one's religious beliefs. The claimant, a Jehovah's Witness, worked in a roll foundry, fabricating sheet steel for a variety of uses.<sup>126</sup> A year into his job, the foundry closed, and the company transferred him to a department that made turrets for military tanks.<sup>127</sup> Concluding that he could not engage in the direct fabrication of weapons "without violating the principles of his religion," and after having unsuccessfully asked to be laid off, he quit.<sup>128</sup> The state Review Board denied his application for unemployment benefits, and the Indiana Supreme Court affirmed, characterizing Thomas's objection as a

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121. *Id.* at 399 n.1.

122. See *id.* at 406 (noting that South Carolina law contained an express provision protecting Sunday worshippers from being required to work during Sunday operations authorized at textile plants in times of "national emergency").

123. See *supra* note 115.

124. Justice Douglas, in his concurrence, seemed to treat Sherbert's belief as on par with other religious "scruples" of virtually any sort whatsoever, including Muslims' observations of daily prayer, Sikhs' carrying of swords, Jehovah's Witnesses' pamphleteering, Quakers' unwillingness to swear oaths, and Buddhists' vegetarianism. See *Sherbert*, 374 U.S. at 411 (Douglas, J., concurring). For Douglas, then, perhaps the *Yoder* Court's extended discussion of the Amish way of life is unnecessary. But cf. *Wisconsin v. Yoder*, 406 U.S. 205, 243 (1972) (Douglas, J., dissenting in part) (arguing that the majority should have taken into account the individual beliefs of the children, and not just the parents, in its decision).

125. 450 U.S. 707 (1981).

126. *Id.* at 710.

127. *Id.*

128. *Id.*

“personal philosophical choice rather than a religious choice” that did not rise to the level of a free exercise claim.<sup>129</sup>

The U.S. Supreme Court, in reversing, found *Sherbert* to be controlling.<sup>130</sup> But the *Thomas* Court also had to confront two wrinkles not present in the prior case: inconsistencies among Jehovah’s Witnesses as to the permissibility of the conduct to which Thomas objected<sup>131</sup> and perceived inconsistencies within Thomas’s own testimony about his beliefs.<sup>132</sup> The Court addressed these complications with rather expansive dicta about the judicial function in relation to religious claimants. The claimant felt he could manufacture steel that might wind up being used for the production of weapons but “drew a line” at directly working on weapons themselves; and, the Court said, “it is not for us to say that the line he drew was an unreasonable one.”<sup>133</sup> Nor was it the judiciary’s business to “dissect religious beliefs” simply because the claimant was “struggling” to discern his moral obligations or because he failed to articulate his beliefs “with the clarity and precision that a more sophisticated person might employ.”<sup>134</sup> With regard to “[i]ntrafaith differences” over permissible conduct, courts must also exhibit restraint—“the judicial process is singularly ill equipped to resolve such differences,” and “[c]ourts are not arbiters of scriptural interpretation.”<sup>135</sup>

A much more recent case involving the integration of religious beliefs with work was the Court’s landmark decision in *Burwell v. Hobby Lobby Stores, Inc.*<sup>136</sup> The case involved challenges by for-profit corporations to a Department of Health and Human Services (HHS) mandate to provide insurance coverage for contraceptive methods that the plaintiffs

129. *Thomas v. Review Bd. of the Ind. Emp’t Sec. Div.*, 391 N.E.2d 1127, 1131 (Ind. 1979), rev’d, 450 U.S. 707 (1981).

130. *Thomas*, 450 U.S. at 717–18 (“Here, as in *Sherbert*, the employee was put to a choice between fidelity to religious belief or cessation of work; the coercive impact on Thomas is indistinguishable from *Sherbert* . . .”).

131. The Indiana Supreme Court opinion took note of a fellow Jehovah’s Witness who “didn’t find anything wrong with working” on the turret line. *Thomas*, 391 N.E.2d at 1128.

132. The Indiana Supreme Court quoted an exchange from Thomas’s benefits hearing in which Thomas sought to articulate why he found directly working on armaments production to be against his religious scruples yet would have found fabricating steel for a company that solely supplied weapons producers to be permissible. *Id.* at 1131–32. The court appeared to have this testimony in mind when it concluded that the “basis of claimant’s belief is unclear” and described his convictions as “personal beliefs which can somehow be described as religious beliefs.” *Id.* at 1133–34.

133. *Thomas*, 450 U.S. at 715.

134. *Id.*

135. *Id.* at 715–16. The Court did, however, imagine the possibility of an “asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause.” *Id.* at 715. How precisely a court would make that determination within the limits just prescribed on the judicial function is far from clear.

136. 134 S. Ct. 2751 (2014).

viewed as abortifacients.<sup>137</sup> The owners claimed that compliance would require them to facilitate abortions, putting them in conflict with their religious beliefs.<sup>138</sup> The decision, which held that the mandate violated the owners' free exercise rights under the federal RFRA,<sup>139</sup> involved an extended discussion of facts about the claimants' religious beliefs about work. As Justice Alito characterized it, the Court refused to conclude that Congress, in passing RFRA, intended to "discriminate . . . against men and women who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs."<sup>140</sup>

The notion that one's religious beliefs might require one to run a company a certain way seems straightforward enough, but a close look at the *Hobby Lobby* record reveals that such beliefs can take at least two forms. The Hahns, owners of one of the corporations, a Pennsylvania woodworking business, were members of the Mennonite Church, a Christian denomination that opposes abortion.<sup>141</sup> But beyond their beliefs about the morality of abortion itself, they also held beliefs about their business obligations—in their view, they had to "run their business 'in accordance with their religious beliefs and moral principles.'"<sup>142</sup> It also went against the owners' convictions "to be involved in the termination of human life' after conception"; they believed it was "immoral and sinful for [them] to intentionally participate in, pay for, facilitate, or otherwise support" the contraceptives the HHS mandate would have required them to provide.<sup>143</sup> In other words, at issue were not only religious beliefs about abortion but also beliefs about complicity that the owners described in religiously inflected language.

The Green family, the owners of the Hobby Lobby arts-and-crafts store chain, made similar representations about their work-related religious obligations.<sup>144</sup> In Hobby Lobby's statement of purpose, the Greens committed to "operat[e] the company in a manner consistent with Biblical principles."<sup>145</sup> The Court's opinion gives several examples of the ways in which the Greens sought to meet this commitment: The company

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137. *Id.* at 2759.

138. *Id.*

139. *Id.* (citing 42 U.S.C. § 2000bb (2012)).

140. *Id.*

141. *Id.* at 2764.

142. *Id.* (quoting *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 402 (E.D. Pa.), *rev'd*, 724 F.3d 377 (3d Cir. 2013), *rev'd sub nom.* *Hobby Lobby*, 134 S. Ct. 2751).

143. *Id.* at 2765 (alteration in original) (quoting *Conestoga Wood Specialties*, 724 F.3d at 382 & n.5).

144. See *id.* at 2765–66. The owners also operated an affiliated Christian bookstore chain that challenged the contraceptive mandate along with Hobby Lobby. *Id.* at 2765.

145. *Id.* at 2766 (internal quotation marks omitted) (quoting Verified Complaint at 10, *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012) (No. CIV-12-1000-HE), 2012 WL 4009450).

closed on Sundays, refused to “engage in profitable transactions that facilitate or promote alcohol use,” made contributions to Christian missionaries and ministries, and took out proselytizing newspaper ads.<sup>146</sup> The Greens, like the Hahns, believed that “it would violate their religion to facilitate access to contraceptive drugs or devices that operate after” the moment of conception.<sup>147</sup>

*Hobby Lobby* presented the question of whether RFRA’s free exercise protections should be extended to cover closely held for-profit corporations.<sup>148</sup> In concluding that it should, the majority opinion noted that a corporation “is simply a form of organization used by human beings to achieve desired ends.”<sup>149</sup> The purpose of extending rights to corporations, the Court said, was to protect the rights of the “humans who own and control” them.<sup>150</sup> The Court thus rejected the finding by the Third Circuit that corporations don’t exercise religion as “beside the point”—companies “cannot do anything at all” except through the actions of the people who “own, run, and are employed by them.”<sup>151</sup>

What role do the facts about the claimants’ business operations, and their apparent conformity with the owners’ beliefs, play in the analysis? As other cases have suggested, such facts *could* bear on the question of whether the beliefs asserted as the basis for the exemption are sincere.<sup>152</sup> But the sincerity of the religious beliefs at issue in *Hobby Lobby* was not disputed, and the majority’s only discussion of sincerity was a dismissal of HHS’s concern that extending RFRA to for-profit corporations might raise difficulties when it came to determining the sincere beliefs of a corporation.<sup>153</sup> Instead, the description of the claimants’ belief-based business conduct seems aimed at a separate purpose: to establish that even for-profit corporations can have the purpose of exercising religious values. The dissent suggested that for-profit corporations do not deserve the same protections as religious nonprofits, on the grounds that the former “use labor to make a profit, rather than to perpetuate . . . religious

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146. *Id.*

147. *Id.*

148. *Id.* at 2759.

149. *Id.* at 2768.

150. *Id.*

151. *Id.*

152. The *Hobby Lobby* opinion acknowledged, in passing, the Tenth Circuit’s decision in *United States v. Quaintance*, which rejected a claim for an exemption based on a belief in marijuana as a deity and sacrament. 608 F.3d 717, 719 (10th Cir. 2010). The Court in *Hobby Lobby* invoked the decision as support for the idea that a corporation’s “pretextual assertion of a religious belief” would not warrant RFRA protection. *Hobby Lobby*, 134 S. Ct. at 2774 n.28. Needless to say, the apparent agreement about when the invocation of religion is “pretextual” does not resolve the question of what level of corporate conformity to belief-based restraints would be sufficient to establish corporate sincerity.

153. *Hobby Lobby*, 134 S. Ct. at 2774.

value[s].”<sup>154</sup> In a footnote rejecting this argument, the majority put the claimants’ business record to work; according to Justice Alito, the companies’ activities showed that the dissent’s claim was “factually untrue.”<sup>155</sup>

### B. *Vocation and Expressive Conduct*

For vendors who seek to order their business conduct according to the dictates of their religious beliefs—that is, vendors who take a “vocational” approach to their work—the “expressive conduct” line of argument<sup>156</sup> as grounds for an exemption is an awkward fit at best. This is apparent, for instance, in the Colorado Court of Appeals decision in *Craig v. Masterpiece Cakeshop*, in which the court concluded that any “message celebrating same-sex marriage” that might be conveyed by the claimant’s baking of a wedding cake would be “more likely to be attributed to the customer than to” the cake shop.<sup>157</sup> Even if that is true, it is as irrelevant to the moral significance of the baker’s conduct as the fact that any “endorsement” of war implicit in the manufacture of turrets was more likely in *Thomas* to be attributed to the steel company than to the Jehovah’s Witness employee. The sticking point for the worker is participation in conduct he deems to “violate [his] religion,”<sup>158</sup> whether or not it is seen, heard, or understood by others.

A separate line of argument would seek recognition of a right to organize one’s work conduct according to the dictates of religion, regardless of the work’s expressive qualities. Such an argument was also advanced in the wedding-vendor cases. In *Masterpiece Cakeshop*, for instance, the Colorado Court of Appeals also considered, and rejected, the cake shop’s claim that the state antidiscrimination law “unconstitutionally infringe[d] on its right to the free exercise of religion.”<sup>159</sup> The court analyzed the claim in terms of *Smith*, concluding that the antidiscrimination law was a neutral law of general applicability and therefore not subject to strict scrutiny.<sup>160</sup> But, as applied by the court, the *Smith* framework required virtually no attention to the claimant’s beliefs about the extent to which the shop’s activities expressed his own religious values.<sup>161</sup>

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154. *Id.* at 2797 (Ginsburg, J., dissenting) (quoting *Gilardi v. U.S. Dep’t of Health & Human Servs.*, 733 F.3d 1208, 1242 (D.C. Cir. 2013), vacated, 134 S. Ct. 2902 (2014)).

155. *Id.* at 2770 n.23 (majority opinion).

156. See *supra* notes 71–90 and accompanying text (discussing free speech arguments in wedding-vendor cases).

157. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 286 (Colo. App. 2015), *rev’d sub nom. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

158. *Hobby Lobby*, 134 S. Ct. at 2766.

159. *Masterpiece Cakeshop*, 370 P.3d at 288.

160. *Id.* at 292.

161. This may have been in part because the cake shop did not argue that it belonged to the category of entities “principally used for religious purposes,” which were specifically

After the Supreme Court's grant of certiorari in *Masterpiece Cakeshop*, however, a number of amici raised a more explicit vocational argument in their briefs. The C12 Group, a network of Christian CEOs and business owners, along with other amici, urged the Court to recognize that many businesses "intimately reflect and are motivated by their [owners'] beliefs and values," manifesting a "view of work and vocation as a religious calling [that] follows millenia of religious teaching across many faiths."<sup>162</sup> Another brief argued that "[f]ree exercise of religion . . . extends to those in secular vocations in for-profit business as well as those in vocational ministry" and collected teachings across faiths that secular vocations "are callings to integrate work and witness."<sup>163</sup> Some commentators also invoked a version of this argument, focusing on the ways in which the Colorado antidiscrimination law might require participation in conduct with an inherently religious dimension.<sup>164</sup>

But there are multiple problems with this approach. For one, *Smith* foreclosed the possibility of a constitutional free exercise right to exemptions from neutral, generally applicable laws, regardless of one's beliefs about the religious significance of one's daily, secular activities.<sup>165</sup> Even

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exempted under the state antidiscrimination law. *Id.* at 291 (internal quotation marks omitted) (quoting Colo. Rev. Stat. § 24-34-601(1) (2018)). The closest the court came to analyzing the religious beliefs guiding the shop's work conduct was thus to characterize what conduct *wasn't* involved: The shop "does not contend that its bakery is primarily used for religious purposes," and the antidiscrimination law "does not compel Masterpiece to support or endorse any particular views." *Id.*

162. Brief of Amici Curiae C12 Group et al. in Support of Petitioners at 4, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4005656.

163. Brief of Amici Curiae Ethics & Religious Liberty Commission of the Southern Baptist Convention et al. in Support of Petitioners at 7–11, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4005657. As examples, the brief cites biblical exhortations to Christian laborers to do "[w]hatever" work they do "for the Lord rather than for men," *id.* at 9 (quoting Colossians 3:23); Islamic teaching about "weav[ing] . . . everyday activities and their beliefs into a single cloth of religious devotion," *id.* at 9–10 (quoting Five Pillars of Islam, Oxford Islamic Info. Centre (Mar. 13, 2013), <http://www.islaminfouk.com/five-pillars-of-islam.html> [<https://perma.cc/CV3R-A26R>]); and Jewish "'mitzvot,' or commandments, which . . . govern virtually all aspects of the believer's life, personal and commercial," *id.* at 10–11.

164. See, e.g., Helen Alvare, Symposium: As a Matter of Marriage Law, Wedding Cake Is Expressive Conduct, SCOTUSblog (Sept. 13, 2017), <http://www.scotusblog.com/2017/09/symposium-matter-marriage-law-wedding-cake-expressive-conduct> [<https://perma.cc/UT9D-3ELK>] (arguing that marriage is an "inherently expressive event" from which the baker "must be permitted to withhold participation," whether or not his conduct is understood as a personal endorsement of same-sex marriage); Mithun Mansinghani, Symposium: *Masterpiece Cakeshop* and Compelled Participation in Religious Ceremonies, SCOTUSblog (Sept. 12, 2017), <http://www.scotusblog.com/2017/09/symposium-masterpiece-cakeshop-compelled-participation-religious-ceremonies> [<https://perma.cc/J25W-GZ53>] (suggesting that Colorado law forces the baker "to participate in a religious activity," based on the "historically" religious nature of wedding ceremonies and the baker's belief that "weddings are religious exercises").

165. See *supra* section I.B (discussing *Smith* and its effect on exemption jurisprudence).

setting aside *Smith*, however, this form of “vocational” argument faces another problem: It seems to admit no meaningful boundary. If the test for an exemption is the mere presence of a belief that one’s work conduct and religious identity are inseparably “integrated,” believers could simply write workplace laws for themselves—their beliefs about workplace conduct would be “superimposed on the statutory schemes which are binding on others.”<sup>166</sup> And, as the respondents in *Masterpiece Cakeshop* argued, the “wide variety” of religious beliefs about what kinds of conduct are sinful would seem to invite claims for exemptions from antidiscrimination laws in every sphere.<sup>167</sup>

### III. VOCATION AND THE SCOPE OF EXEMPTIONS

Part III of this Note proposes that the legal system should take account of the vocational dimension of many religious people’s work and that it can do so without seriously undermining the important goal of antidiscrimination. First, I advocate viewing exemptions as a form of protection of religious identity. I then suggest an approach under which courts can and should scrutinize religious beliefs about work in a manner that limits the scope of religious exemptions. This scrutiny can take two forms. One involves a closer look at the integration of the conduct at issue into the claimant’s “way of life.” The other involves a closer consideration of the grounds on which the claimant believes the conduct violates his or her religious beliefs.

#### A. *Exemptions as Protection of Religious Identities*

For many religious people, a vocational conception of work closely correlates work conduct with religious identity.<sup>168</sup> For the petitioner whose

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166. *United States v. Lee*, 455 U.S. 252, 261 (1982). *Lee* involved an Amish farmer and carpenter who sought an exemption from paying Social Security taxes for his Amish employees, on the grounds that participation in the national Social Security system violated the Amish belief that members had an obligation “to provide for their own elderly and needy.” *Id.* at 255. Congress had made an exemption available to self-employed individuals, but the Court refused to extend a constitutional exemption to the claimant employer, in part because the “tax system could not function” if every member of a religious denomination were able to challenge it based on the use of tax payments in a way that violated her religious beliefs. *Id.* at 260. In a footnote, the Court hinted at the possibility of a partial workaround for Amish objectors, who could theoretically receive social security benefits and then “pass them along to an Amish fund having parallel objectives.” *Id.* at 261 n.12. But the Court refrained from “speculat[ing] whether this would ease or mitigate the perceived sin of participation.” *Id.*

167. Brief in Opposition at 25, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2016 WL 7011418 (“Landlords could refuse to rent to interracial couples, employers could refuse to hire women or pay them less than men, and a bus line could refuse to drive women to work . . . . All civil rights laws would be vulnerable to such claims where the discrimination was motivated by religion.”).

168. See *supra* note 104 and accompanying text.

unemployment claim was at issue in *Sherbert v. Verner*, the religious requirement to refrain from working on her Sabbath was a key part of her identity as a Seventh-day Adventist.<sup>169</sup> A state-imposed obligation to do otherwise would have, in effect, demanded that she give up a portion of that identity. Similarly, for the Old Order Amish who sought an exemption in *Yoder*, the formative years of adolescence marked a critical period in their children's absorption of Amish values regarding manual labor and life in the church community.<sup>170</sup> As the *Yoder* Court recognized, a state requirement to attend public schools during those years threatened to force the Amish to give up their distinctive identity—to “abandon belief and be assimilated into society at large.”<sup>171</sup>

There are good reasons for seeing the wedding-vendor cases, too, as involving religious identity in this sense. For example, Jack Phillips, the owner of the bakery in *Masterpiece Cakeshop*, describes himself as a “Christian who strives to honor God in all aspects of his life, including his art.”<sup>172</sup> Phillips claims to have “integrated his faith into his work”; he closes his shop on Sundays, helps his employees with personal needs outside of work, and declines to make cakes “celebrating events or ideas that violate his beliefs,” including Halloween, “anti-American or anti-family themes, atheism, racism, or indecency.”<sup>173</sup> These are real commitments, in the sense that they purport to place constraints on Phillips's work conduct that he can be shown to have obeyed or disregarded. If Phillips repeatedly reneged on these commitments, at some point an outside observer would surely conclude that Phillips had renounced his claim to being a Christian baker—at least in the sense that Phillips himself defined that identity. His claim to “striv[e] to honor God in all aspects of his life” would ring hollow. This is not to say that some other person could not have a different account of what it means to be a Christian baker. But for someone like Phillips, the manner in which he conducts his work life is critically a part of how he expresses his religious identity. And for such a person, each compromise on the commitments that express that identity serves partially to erode it.<sup>174</sup>

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169. See *supra* section II.A.2 (discussing *Sherbert*).

170. See *supra* section II.A.2 (discussing *Yoder*).

171. *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972).

172. *Masterpiece Cakeshop* Certiorari Petition, *supra* note 62, at 4.

173. *Id.* at 4–5.

174. In a similar vein, Professor Amy Sepinwall has written about the “dislocation from the self” that occurs when one is obligated to participate in conduct one opposes: “[B]eing told that one has overly grand ideas about his professional identity or his personal agency can be painful, because these ideas constitute one's sense of self in important ways.” Sepinwall, *supra* note 108, at 1958; see also Douglas Laycock, *The Wedding-Vendor Cases*, 41 *Harv. J.L. & Pub. Pol'y* 49, 65 (2018) [hereinafter Laycock, *Wedding-Vendor Cases*] (“[T]he conscientious objector who is denied exemption does not get to live his own life by his own values. He is forced to repeatedly violate conscience or to abandon his occupation and profession.”).

Recognition of religious identity is not the end of the inquiry, however. Courts have long acknowledged that living in a pluralistic society governed by law requires some measure of assimilation of that society's values.<sup>175</sup> There is, of course, a long-standing tradition in the United States of celebrating a right to dissent from prevailing viewpoints and norms.<sup>176</sup> But an underlying premise of the Court's free exercise jurisprudence is that, at some point, a person's freedom to act according to the dictates of her religion must yield—otherwise, we will wind up living in a “system in which each conscience is a law unto itself.”<sup>177</sup>

Nonetheless, it is right to treat religion as the kind of characteristic around which the state should take extra care when it acts. It is for good reason that antidiscrimination laws, including the laws at issue in the wedding-vendor cases, have included religion among the protected characteristics on the basis of which discrimination is forbidden.<sup>178</sup> Religion, strictly speaking, is “not an immutable characteristic”:<sup>179</sup> People convert, moderate, or intensify their beliefs, or come to adopt a creed despite having been born into no religion at all. Yet the “Constitution treats classifications drawn on religious grounds as equally offensive” as those drawn on the basis of characteristics like national origin and race.<sup>180</sup> From the perspective of the believer, religion is often seen not as

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175. See, e.g., *Mozert v. Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058, 1064 (6th Cir. 1987) (rejecting the free exercise claim of parents objecting to public-school reading materials, when the “only way to avoid conflict with the plaintiffs’ beliefs in these sensitive areas would be to eliminate all references” to certain subjects); Nomi Maya Stolzenberg, “He Drew a Circle that Shut Me Out”: Assimilation, Indoctrination, and the Paradox of a Liberal Education, 106 *Harv. L. Rev.* 581, 637 (1993) (suggesting that what distinguished the *Mozert* parents from the parents in *Yoder* was the former’s “participation in general society,” which “estopped” the [*Mozert*] plaintiffs from objecting to assimilation”). Meanwhile, refusals to assimilate that swing too far in the opposite direction—demanding society’s values conform to one’s religious precepts—risk violating the Establishment Clause. See *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968) (“[T]he First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma.”).

176. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 141 (1989) (Brennan, J., dissenting) (“We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else’s unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncracies.”); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972) (describing activities forbidden by a local ordinance, such as loafing, wandering, and strolling, as “unwritten amenities” that have “dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness”).

177. *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 890 (1990).

178. See *Colo. Rev. Stat. § 24-34-601(2)(a)* (2018) (including “creed” as one of the bases on which places of public accommodation are prohibited from denying “the full and equal enjoyment” of goods and services); *N.M. Stat. Ann. § 28-1-7(F)* (West 2018) (including “religion” in a similar list of bases).

179. *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 618 (4th Cir. 2017), vacated as moot, 138 S. Ct. 353 (2017).

180. *Id.*

an optional disposition but as an affirmation of nonnegotiable truths.<sup>181</sup> As one court simply put it, religion is the kind of trait “a person should not be forced to change.”<sup>182</sup>

Moreover, the Court’s pronouncements in *Smith* notwithstanding, there are reasons to think the democratic process alone is insufficient to protect religion.<sup>183</sup> Some scholars have recently argued that religion is structurally excluded from aspects of the political process and is viewed with disfavor in the private sector.<sup>184</sup> Indeed, the very fact of a religious person’s seeking an exemption for a religious practice in the courts reflects an inability to achieve an accommodation by political means.<sup>185</sup> The *Masterpiece Cakeshop* case itself turned on the presence of antireligion bias in the proceedings before the Colorado Civil Rights Commission,

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181. See, e.g., The Bruderhof, *supra* note 109, §§ 1–3 (articulating a statement of faith that includes commitments to “obey [Jesus’s] commandments,” follow the Bible as the “authoritative witness to the living Word of God,” and “affirm the apostolic rule of faith” as stated in early Christian creeds); see also Kent Greenawalt, Religion as a Concept in Constitutional Law, 72 Calif. L. Rev. 753, 767 (1984) (seeking to define “religion” by reference to characteristics of “undisputably religious” examples, such as having a “comprehensive view of the world and human purposes” and exhibiting a “particular perspective on moral obligations derived from a moral code or a conception of God’s nature”).

182. Startzell v. City of Philadelphia, No. Civ.A. 05-05287, 2006 WL 1479809, at \*6 n.9 (E.D. Pa. May 26, 2006).

183. See Laycock, Wedding-Vendor Cases, *supra* note 174, at 59–60 (“Judicial enforcement of minority rights is uneven and sometimes inconsistent, in religion cases as with other civil liberties, but it is more reliable than legislative protection and the only hope for protection in many cases.”). But see Emp’t Div., Dep’t of Human Res. v. Smith, 494 U.S. 872, 890 (1990) (“Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. . . . [A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.”).

184. See Ronald J. Colombo, The Naked Private Square, 51 Hous. L. Rev. 1, 10–12 (2013) (identifying a current consensus “eschewing religion in the workplace”); Philip Hamburger, Exclusion and Equality: How Exclusion from the Political Process Renders Religious Liberty Unequal, 90 Notre Dame L. Rev. 1919, 1920 (2015) (arguing that administrative lawmaking and § 501(c)(3) of the Internal Revenue Code exclude religious Americans from the processes that produce laws). But see Kathleen M. Sullivan, Religion and Liberal Democracy, 59 U. Chi. L. Rev. 195, 195–96 (1992) (arguing that “any picture of rampant secularization” is “difficult to square with numerous indicators of religion’s lively role in contemporary American social and political life”).

185. However, this argument raises the possibility of religion functioning as a trump card, which can be played whenever a person or group loses a political battle. Democratic governance, by definition, involves some subordination of minority to majority preferences, and some have argued that recent free exercise cases merely represent a last-ditch effort to salvage claims that were fought, and lost, in the political arena. See, e.g., Kyle C. Velte, Why the Religious Right Can’t Have Its (Straight Wedding) Cake and Eat It Too: Breaking the Preservation-Through-Transformation Dynamic in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 36 Law & Ineq. 67, 70 (2018) (arguing that cases like *Masterpiece Cakeshop* represent a “second bite” at arguments defeated in recent civil rights victories).

which comprises seven politically appointed members.<sup>186</sup> Among the pieces of evidence of hostility to religion that the Court identified were a commissioner's description, during an on-the-record proceeding, of religious faith as "one of the most despicable pieces of rhetoric people can use" and the commission's apparent endorsement of the "view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain."<sup>187</sup>

Acknowledging the vocational dimension of work, this Note suggests, means acknowledging that, for many, religious belief dictates a way of life—a set of precepts that governs conduct both at home and in the public sphere, which one can abandon only at the peril of abandoning a piece of one's religious identity. The law should strive to achieve basic protection of that identity, consistent with the "synergy between the two protections" of the Due Process and Equal Protection Clauses of the Fourteenth Amendment that the Court recognized in *Obergefell v. Hodges*.<sup>188</sup> That is not to say that religious identity should trump antidiscrimination laws in every instance, or even in most cases. It is simply to say that, when faced with a claim that a religious believer cannot comply with a law without violating a deeply held belief, we should begin by regarding the claim as arising from the "personal choices central to individual dignity and autonomy" that the Fourteenth Amendment protects.<sup>189</sup>

None of the foregoing should conclusively answer the question of whether to grant an exemption in a particular circumstance. The equal protection and liberty interests are introduced here as a reminder of what *may* be at stake for certain religious believers in certain contexts, with the aim of prompting reflection on whether accommodations can be granted without undue harm to other interests. In some contexts, the failure to accommodate religious objectors may amount to a failure to protect fundamental interests of liberty and autonomy enshrined in the

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186. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1725, 1729 (2018).

187. *Id.* at 1729.

188. 135 S. Ct. 2584, 2603 (2015).

189. *Id.* at 2597. The *Obergefell* majority also wrote that among the fundamental liberties protected by the Fourteenth Amendment are "most of the rights enumerated in the Bill of Rights." *Id.* Freedom of religion is among these, see *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968), but that does not foreclose the possibility of further elaboration and understanding of that freedom in light of "new insight[s]" gleaned from the progress of history, see *Obergefell*, 135 S. Ct. at 2598. It may well be that, with the Court's recognition of a right to same-sex marriage, as with its recognition of a right to abortion, see *Roe v. Wade*, 410 U.S. 113, 154–55 (1973), the desire of certain religious believers not to engage in conduct they deem immoral has become urgent when it had previously been taken for granted. That does not mean the desire must necessarily be satisfied with an exemption; among the remaining difficulties is discerning a sincere religious belief from an opportunistic political trump card. See *supra* note 185. At any rate, the recognition that a fundamental freedom is at stake is only the beginning of the inquiry. See *infra* section III.B.

Constitution.<sup>190</sup> A legislature *might* view a law requiring doctors to perform abortions as essential to ensuring the availability of abortion services in a given community. But if the effect of the law is to drive doctors with sincere religious objections out of the practice of medicine, without materially increasing the availability of abortion services, the legislature could be fairly accused of inflicting needless harm on religious identities.<sup>191</sup> The subject of the next section is whether such a harm can be prevented in the context of antidiscrimination laws without, as Justice Breyer put it during oral argument in *Masterpiece Cakeshop*, “undermin[ing] every civil rights law” the country has adopted.<sup>192</sup>

### B. *Vocation as a Vehicle for Scrutiny of Belief*

A common argument against granting exemptions to antidiscrimination laws is that they raise the specter of the total evisceration of decades of civil rights protections.<sup>193</sup> The reluctance of courts to second guess an individual’s religious beliefs leads naturally to fears that courts will be unable to draw meaningful boundaries on the scope of religious exemptions. This section proposes two ways in which the concept of vocation can facilitate the drawing of those boundaries. First, it can help courts and legislatures evaluate the extent of the burden that compliance with certain laws imposes on particular believers. Second, it can help sort sincere objectors from those who might invoke a claim to an exemption in bad faith.

1. *Evaluating the Extent of the Burden.* — Consideration of the vocational dimension of work can help a court assess the extent of the burden imposed on religious practice by a legal requirement to engage in certain conduct.<sup>194</sup> Courts need not take every claimed burden on religious

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190. See *supra* note 189.

191. In fact, refusing to provide abortions on moral or religious grounds is a “well-established right of physicians” in nearly every state. Sepinwall, *supra* note 108, at 1948 & n.196 (collecting relevant laws and cases).

192. Transcript of Oral Argument at 18, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 6025739.

193. See, e.g., Brief for Respondents Charlie Craig and David Mullins at 2–3, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4838415 (arguing that a First Amendment–based exemption from antidiscrimination laws would permit businesses to refuse service to Jewish, African American, female, and interfaith customers); Vanita Gupta, *Discrimination Is Not a Fundamental American Value*, SCOTUSblog (Sept. 12, 2017), <http://www.scotusblog.com/2017/09/symposium-discrimination-not-fundamental-american-value> [https://perma.cc/5YAT-KTNU] (warning of a “slippery slope” leading from an exemption for a baker from providing cake for same-sex weddings to refusals of service to divorcees, children born out of wedlock, and interracial couples); see also *supra* text accompanying note 192.

194. Under *Smith*, a court facing a claim for a religious exemption will often not inquire into the extent of the burden imposed on the claimant’s free exercise—as long as the requirement arises from a neutral, generally applicable law, there is no need to balance the state’s interest against the claimant’s. *Emp’t Div., Dep’t of Human Res. v. Smith*,

practice at face value; even if they decline to question the view that certain conduct is immoral, they are still competent to examine the extent to which a particular legal requirement implicates a person in such conduct.<sup>195</sup> And in the case of business conduct in particular, an inquiry into the extent to which a person's business represents a vocation or calling can help the court evaluate the extent of the burden imposed.

To perform this inquiry, courts should ask a series of questions regarding the course of business conduct giving rise to the objection. What is the business's ownership structure? Does the business have a mission statement or other statement of purpose? Does the business's activity actually facilitate its stated ends? Would the conduct the business objects to require a change in the means and mode of its customary provision of products or services? How intimately would the business owner be required to participate in conduct to which she religiously objects?<sup>196</sup> None of these questions is decisive. Each seeks to draw out characteristics tending to show how closely tied the business is to the religious identity of its owner (or owners). The closeness of that "tie," in turn, will help courts measure the degree of burden on the owner's (or owners') religious practice.

So, for instance, the fact that a business is a sole proprietorship might make it more plausible that the business is a vehicle for the religious practice of its owner, whereas the fact that it is publicly traded might

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494 U.S. 872, 879 (1990). Nonetheless, the burden inquiry discussed here remains relevant to the free exercise analysis. An inquiry into burdens may affect the analysis of a law's neutrality. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (holding that an animal sacrifice ordinance that "functions . . . to suppress Santeria religious worship" is not a neutral, generally applicable law). And in states with RFRA laws, a court will be required to make findings regarding whether the law substantially burdens religious practice. See *supra* notes 57–59 and accompanying text.

195. Sepinwall distinguishes between "moral" and "relational" deference. Moral deference involves taking at face value an objector's claim that her religion deems a particular act or practice to be morally impermissible; courts, Sepinwall suggests, should "generally refrain from declaring these convictions true or false." Sepinwall, *supra* note 108, at 1927. Relational deference involves accepting an objector's claim about when she becomes complicit in the conduct she deems immoral. For this sort of claim, Sepinwall proposes a "rough rule of thumb" under which courts should reject "assertions of supposed causal connections that have never been documented and for which there is uniform contradictory evidence." *Id.* at 1934–36.

196. Professor Kent Greenawalt has suggested, with regard to the question of exemptions related to same-sex marriage, that an inquiry into one's degree of participation can and should be used to distinguish among the potential claims for exemption. See Kent Greenawalt, *Exemptions: Necessary, Justified, or Misguided?* 170–71 (2016) (arguing that a professional photographer who photographs a wedding is "involved in a way that is not insignificant," while the level of participation in the "much more marginal" act of providing a cake "is best viewed as too remote to be protected against").

make it less so.<sup>197</sup> The adoption of a mission statement or other statement of purpose might provide a meaningful signal to the court of the degree to which, in the view of the owner or owners, the business functions as an extension of religious practice.<sup>198</sup> The degree to which the business's routine activities actually facilitate its stated purposes, while perhaps not always readily discernible by a court, will frequently be relevant to the question of whether the business actually serves to fulfill a "calling." If, for example, a business purported to serve a religiously motivated purpose of promoting pride in manual labor, but none of its employees performed manual work of any kind, a court would be well within its competence to conclude the business did not actually exist to further the exercise of the stated religious belief.

The question regarding the means and mode of the business's customary provision of goods and services may likewise be informative about the extent of the burden imposed. Imagine, for instance, a religiously motivated wedding planning company that offers packages of services—readings, inspirational quotes, program designs, traditional vows, and the like. Customers can pick and choose among the various options, but all the materials contain language and imagery that is highly gendered, as well as inflected with religious terminology. A legal requirement that the company provide wedding materials that reflect the genders of a same-sex couple might require an alteration of the means and mode of the company's usual services in a way that is relevant to the burden inquiry.

The primary objective of this Note is to determine whether some forms of religious objection to conduct otherwise required by antidiscrimination laws can be accommodated without severely undermining the important ends served by those laws. How, then, does the vocation-based inquiry into the burden on certain businesses function to limit the scope of such accommodations? It does so, first, by narrowing the range of businesses that will be burdened to a degree sufficient to claim the benefit of an exemption. A business for which the answers to the above-mentioned questions reveal a significant burden is likely to be relatively rare.<sup>199</sup> Such a business will be one that chooses its activities with the express purpose of facilitating a religiously motivated mission—and has

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197. Cf. Laycock, *Wedding-Vendor Cases*, supra note 174, at 63 (arguing for exemptions in wedding-vendor cases for "very small businesses where the owner will be personally involved in providing any services," but not "large and impersonal businesses").

198. See supra notes 149–155 and accompanying text (discussing how facts about businesses' religiously motivated purposes informed the Court's analysis in *Hobby Lobby*).

199. See, e.g., Brief of Amici Curiae Law & Economics Scholars in Support of Petitioners at 4–5, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4118065 (arguing that businesses seeking an exemption from certain market conduct on religious grounds are "at the periphery of market behavior" and are "isolated and outnumbered").

therefore drawn limits on its own conduct despite market incentives to do otherwise.<sup>200</sup> And second, the vocation-based inquiry narrows the range of conduct that can be the basis for an exemption, even for such businesses, by requiring that the conduct involve some kind of interference with the primary purpose of the business's activities.

2. *Sincerity of Belief.* — The vocational concept can help courts draw appropriate boundaries on the accommodation project in another way. Believers who see their work as a vocation can generally be expected to reflect their belief system across the range of their work conduct.<sup>201</sup> When a court examines a religious person seeking a work-related exemption for “sincerity,” therefore, they will be looking for evidence of what the religious person *does*, not what the person *believes* (or says she believes). Courts perform a version of this inquiry already.<sup>202</sup> The point here is to recognize that such evidence will also impose meaningful constraints on which claimants will get an exemption. It is one thing to sincerely believe some type of conduct is wrong; it is another to conform all of one's work conduct to an entire belief system or moral code. Evidence tending to show that an individual views her work as a vocation or calling will also tend to sort sincere objectors from those whose attempt to claim an exemption is merely opportunistic.

There are, however, potential objections to the use of sincerity as a sorting function. The first is the observation that sincerity, on its own, might not serve any meaningful sorting function in the antidiscrimination context. After all, people can be sincerely racist or sincerely homophobic; if a court is simply asking whether such beliefs are sincere, it might seem that the answer to that question will not reveal anything useful about which exemptions should be granted and which denied.<sup>203</sup> But the key to the sincerity inquiry as applied to business activity is that it

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200. See *id.* at 17–18 (noting the substantial costs faced by businesses that decline to engage in certain conduct on religious grounds, including lost sales and lost accounts with other individuals and businesses who do not wish to be associated with those businesses' religious beliefs).

201. See, e.g., *United States v. Quaintance*, 608 F.3d 717, 723 (10th Cir. 2010) (noting that the fact that defendants purchased cocaine alongside marijuana and consumed it for recreational purposes tended to “undermine[.]” though not foreclose” the defendants' assertion that they used marijuana for religious purposes (alteration in original) (quoting *United States v. Quaintance*, 471 F. Supp. 2d 1153, 1174 (D.N.M. 2006))).

202. See *supra* section II.A.2 (discussing the Supreme Court's assessment of religious precepts adhered to by businesses in *Hobby Lobby*).

203. For instance, in *Newman v. Piggie Park Enterprises*, it seems doubtful that the restaurant owner's purported beliefs regarding the serving of black customers were *insincere*. As the lower court decision reflected, the owner claimed that his “religious beliefs compel him to oppose any integration of the races whatsoever.” *Newman v. Piggie Park Enters.*, 256 F. Supp. 941, 944 (D.S.C. 1966), *rev'd*, 377 F.2d 433 (4th Cir. 1967), *aff'd*, 390 U.S. 400 (1968). Even if the Supreme Court, in dismissing this claim as “patently frivolous,” *Newman*, 390 U.S. at 402 n.5, doubted that the owner's racial views were sincerely “religious,” there was probably little question that they were sincerely held.

is also an inquiry into beliefs *about constraints on conduct*. And an inquiry about the sincerity of *those* beliefs (that is, beliefs that one's work activity is constrained by certain moral obligations) can be informative. If a person's work conduct reflects no religiously motivated constraints whatsoever, except for the purported objection to the behavior that forms the basis of the claim for an exemption, that would tend to show that the claim is merely opportunistic rather than an extension of sincerely held moral obligations.<sup>204</sup>

The second potential objection is that the sincerity inquiry as stated might privilege people with more cohesive or far-ranging belief systems over individualistic or idiosyncratic forms of belief.<sup>205</sup> For instance, a person belonging to an organized religion will likely have "more to show" in the way of sincerely held constraints on conduct than a person with a handful of idiosyncratic (but no less sincere) beliefs.<sup>206</sup>

The answer to this objection is that such a privilege is both unavoidable and not ultimately a real problem. Under RFRA laws, as under the Court's free exercise jurisprudence pre-*Smith*, the search for a justification for a religious exemption is a search for a substantial burden on religious practice.<sup>207</sup> The larger the space religion occupies in the life of a person seeking an exemption, the more significant the burden is going to be. It is thus necessarily the case that someone with one or two isolated beliefs, even if those beliefs can be classified as religious, will often not have a strong claim of a substantial burden by default.

Balancing the goals of antidiscrimination and religious freedom will require compromise. Like the design product that cannot simultaneously be good, fast, and cheap, the legal system cannot achieve complete religious freedom at the same time it provides total protection from discrimination and avoids scrutinizing individuals' moral convictions. The approach this Note advocates—granting accommodations when

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204. Again, it might be objected that the problem to be guarded against is not opportunism so much as beliefs that are either so idiosyncratic or abhorrent, at least in relation to the norms set down in law, that the legal system cannot reasonably accommodate them. However, under the proposal advanced here, an exemption should not automatically issue on a finding that a law substantially burdens a sincere religious belief. Under state and federal RFRA laws, as under the pre-*Smith* balancing test, a substantial burden can be justified by a compelling government interest. See *supra* note 57 and accompanying text.

205. See, e.g., *supra* notes 131–132 (discussing a religious objector who struggled to articulate why he felt morally unable to work on the production of armaments but morally able to produce steel that would be used in armaments, and the divergence of his beliefs from those of another member of his religion).

206. See, e.g., *The Bruderhof*, *supra* note 109 (exemplifying a thoroughly articulated set of beliefs published by an organized religious community).

207. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014) (determining whether an HHS contraceptive coverage provision "substantially burden[s]" the exercise of religion" (alteration in original) (quoting 42 U.S.C. § 2000bb-1(a) (2012))).

necessary to protect religious identity, but using the concept of work as vocation to scrutinize the beliefs for which accommodation is sought—endeavors to strike the best balance between these competing goals.

#### CONCLUSION

This Note has sought to show that, because of the vocational view many religious people have regarding their work, requirements that people engage in work conduct that violates deeply held religious beliefs place real burdens on religious identity. This same view of work, however, can enable courts and legislatures to accommodate religious beliefs without creating runaway exceptions to the law's necessary commitment to antidiscrimination. In the end, this Note's proposal is not radical: Courts and legislatures can strike a better balance between competing commitments to religious liberty and antidiscrimination by closely considering what, exactly, lies at the core of a religious objection to certain work conduct. In the relatively rare event in which compliance with a legal requirement strikes at the core of a religious person's identity, a tolerant society will at least strive to achieve some form of accommodation.