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ARTICLES

BALANCING RELIGIOUS LIBERTIES AND ANTIDISCRIMINATION INTERESTS IN THE PUBLIC EMPLOYMENT CONTEXT: THE IMPACT OF *MASTERPIECE CAKESHOP* AND *AMERICAN LEGION*

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INTRODUCTION

At the heart of national debate in recent years is the balance between religious liberty and antidiscrimination interests.[1] The Supreme Court energized the debate in its latest Free Speech and Establishment Clause decisions in *Burwell v. Hobby Lobby Stores, Inc.*,[2] *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[3] and *American Legion v. American Humanist Association*.[4] These decisions pushed the pendulum towards greater protection of religious liberties and opened the door to new context-specific tests for how the Establishment Clause will interact with the broader range of interests protected by the Free Exercise Clause. This is especially significant in the public employment context, where government employers must balance requests for religious freedom accommodations with Establishment Clause concerns.

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1. *See infra* notes 7, 21 and accompanying text.
2. 573 U.S. 682 (2014).
3. 138 S. Ct. 1719 (2018).
4. 139 S. Ct. 2067 (2019).

This Article first explores the historical underpinnings that traditionally marked the line between antidiscrimination and religious interests before the Court's most recent Free Exercise decision. In so doing, this Article argues that where the Court, and society, has landed on this question at any one point in time depends on the paradigm through which it is looking at the issue. The paradigms on both sides of the dichotomy have defining characteristics, both of which are demonstrated in the Court's decisions in *Hobby Lobby* and *Masterpiece*. These cases diverge from the normative approach and embrace the "protection paradigm," which favors greater protection of religious freedom.

Next, this Article details the importance of the protection paradigm operating in the employment context generally, and the public employment context in particular. As to the latter, this Article outlines the concerns of a government employer as they relate to balancing claims for religious liberties with the employer's obligations pursuant to the Establishment Clause. It details the unique context of a governmental entity as both sovereign and employer and argues for the importance of a situation-specific standard in these situations. To put this context in perspective, this Article reviews the Establishment Clause jurisprudence that led to the Supreme Court's most recent decision in *American Legion*. After examining *American Legion* itself, this Article argues that the Court has opened the door to, and indeed indicated its preference for, the development of more context-specific tests. This is especially preferable in the public employment context and in light of the currently prevailing protection paradigm.

Finally, this Article concludes by analyzing different potential methods for trying to balance religious liberty claims with antidiscrimination concerns, and thus Establishment Clause concerns, in public employment. This Article argues for a combination of relevant tests that balances the magnitude and likelihood of third-party harm, substantiality of burden to religious liberty, and availability or prevalence of secular accommodations. This test provides room for factual inquiry and context-specific value judgments, while still allowing a workable framework, the results of which are sufficiently predictable that employers and employees are not left to wonder about the boundaries by which their relationship should be governed.

I. THE CONSTANT FLUX OF RELIGIOUS FREEDOMS: A DICHOTOMY OF PARADIGMS

Religious liberty and freedom are amorphous concepts, both in society at large and in the law.[5] Over the past 230 years, the demarcation between religious exercise and overreach can be likened to a pendulum constantly swinging.[6] Recently, this debate has been labeled in terms of tension between protection for religious freedoms and protection against discrimination.[7] As discussed more fully *infra*, this Article addresses the dichotomy of paradigms that rules the constant swinging of this pendulum. This Article argues that the current paradigm in the Free Exercise context as illustrated by the recent Supreme Court case in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*[8] is one sympathetic to a broad reading of religious liberties that we have not seen in approximately twenty years. To set the scene for a comprehensive look at the legal landscape as it exists post-*Masterpiece*, a brief history of the give and take between greater religious freedoms and lesser—or, put another way, protection of religious freedom versus antidiscrimination interests—is helpful.[9]

A. *The Pendulum Swings*

Prior to the 1960s, the prevailing law regarding religious freedoms and liberties did not include an affirmative accommodation

5. *See* STEVEN D. SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM 9 (2014) (arguing that "understandings of religious freedom have reflected broader, competing interpretations of the American Republic" and that America has in the past "embrac[ed] a commitment to religious freedom while leaving open to contestation the particular conception of that commitment").

6. *See infra* section I.A.

7. *See, e.g.*, NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 1 (2017); Angela C. Carmella, *Catholic Institutions in Court: The Religion Clauses and Political-Legal Compromise*, 120 W. VA. L. REV. 1, 2 (2017) (stating the proper scope of religious freedom is "hotly contested" and that "[t]here are those who argue that a special status for religion violates basic notions of equality or causes harm"). In *Religious Freedom*, Professor Nelson Tebbe argues that "[c]omplex factors are contributing to the perception of conflict between religious freedom and equity law today," including the movement for comprehensive civil rights protections for LGBT persons. TEBBE, *supra*, at 1. Interestingly, however, Professor Tebbe also warns not to "oversimplify the perceived face-off between religious freedom and equality law." *Id.* at 4. This is because, he argues, "[m]any religious traditions place commitments of nondiscrimination at or near the center of their faith. Conversely, civil rights law safeguards believers alongside members of other protected groups." *Id.*

8. 138 S. Ct. 1719.

9. This initial history is focused on Free Exercise jurisprudence; a history of Establishment Clause jurisprudence can be found *infra* section IV.B.1.a.

of religious conscience.[10] That is, free exercise protected a person's beliefs, but not conduct that violated generally applicable laws.[11] Then, for approximately thirty years between 1960 and 1990, the paradigm shifted, giving greater emphasis and deference to religious liberties.[12] If government action imposed a substantial burden on the practice of religion, the government was required to show that the burden served a compelling government interest.[13] The Supreme Court used this standard to ensure that an employee who was fired for refusing to work on the Sabbath was not denied unemployment benefits[14] and that families ascribing to the Amish faith were not forced to comply with state education requirements when their faith called them to educate their children uniquely to Amish values and beliefs.[15]

However, in 1990 the balance shifted back and away from greater protection for religious liberty with the Supreme Court decision in *Employment Division, Department of Human Resources of Oregon v. Smith*.[16] In that case, the Court rejected the balancing

10. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 166–67 (1878) (declining to allow an accommodation from a generally applicable criminal statute to accommodate a religious objection); *see also* SMITH, *supra* note 5, at 73 (laying out the standard accepted view of Free Exercise jurisprudence shifts in paradigm and focus, but ultimately concluding that the "reality" of these shifts is not as clear cut). It is important to note that the brief history contained in this section is simplified to reflect broad themes rather than legal nuance. For a more detailed historical examination of Free Exercise jurisprudence, see Erwin Chemerinsky & Michele Goodwin, *Religion Is Not a Basis for Harming Others: Review Essay of Paul A. Offit's* Bad Faith: When Religious Belief Undermines Modern Medicine, 104 GEO. L.J. 1111, 1116–22 (2016).

11. SMITH, *supra* note 5, at 73 (citing *Reynolds*, 98 U.S. 145).

12. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 234–36 (1972); Sherbert v. Verner, 374 U.S. 398, 410 (1963); *see also* SMITH, *supra* note 5, at 73. *But see* Gary J. Simson, *Permissible Accommodation or Impermissible Endorsement? A Proposed Approach to Religious Exemptions and the Establishment Clause*, 106 KY. L.J. 535, 565 & n.96, 570 n.131 (2018) (stating that the success rate for Free Exercise claims from 1960 to 1990 was well below fifty percent, but acknowledging that those statistics may be misleading as the Court is highly selective in exercising its discretionary review authority and the sample size is small and not necessarily representative of the cases "in the pipeline"); *see also* Chemerinsky & Goodwin, *supra* note 10, at 1117–20 (stating that although the Court applied strict scrutiny in evaluating laws infringing on the free exercise of religion post-*Sherbert*, the Court rarely struck down such laws in the *Sherbert* era).

13. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 693 (2014); *Yoder*, 406 U.S. at 221–29; *Sherbert*, 374 U.S. at 406.

14. *Sherbert*, 374 U.S. at 410; *see also Hobby Lobby*, 573 U.S. at 693.

15. *Yoder*, 406 U.S. at 234–36; *see also Hobby Lobby*, 573 U.S. at 694.

16. 494 U.S. 872 (1990); *see also* SMITH, *supra* note 5, at 73 (concluding that the Court "went from not requiring 'free exercise exemptions' of conscience to requiring them, and then retreated to something like its initial 'no required exemptions' position").

test if the government action at issue was "neutral" and a "generally applicable law."[17] This shift heralded a new era that would last for approximately twenty-five years.[18] In this new era, the government can burden free exercise, even without a compelling government interest, so long as the action at issue is "neutral" towards religion and generally applicable.[19] During its early stages, Congress pushed back by enacting the Religious Freedom Restoration Act ("RFRA"), which sought to recover the pre-*Smith* balance between religious liberties and other antidiscrimination interests.[20] Nevertheless, *Smith* marked a shift reflected in society where more voices began labeling free and open religious practice as an "imposition of faith" on others or a "manifestation of 'discrimination and bigotry.'"[21]

17. *Smith*, 494 U.S. at 881, 884–85.

18. *Compare id.* at 885 (concluding that the government needs no compelling interest to burden religious exercise, if the law at issue is generally applicable), *with Hobby Lobby*, 573 U.S. at 690–91, 694–95, *and* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1734, 1740 (2018) (discussed *infra* sections I.B–II.B).

19. *See Smith*, 494 U.S. at 884–85; City of Boerne v. Flores, 521 U.S. 507, 513, 536 (1997) (reaffirming the Court's ruling in *Smith* and invalidating the Religious Freedom Restoration Act as applied to the states pursuant to the Fourteenth Amendment); *see also Hobby Lobby*, 573 U.S. at 694.

20. Three years after the decision in *Smith*, Congress enacted RFRA finding that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise" and "the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a)(2)–(4) (1994). RFRA prohibits the government from substantially burdening a person's free exercise of religion, even in the face of a rule of general applicability, unless it can demonstrate (1) the burden is in furtherance of a compelling governmental interest and (2) is the least restrictive means of furthering that interest. § 2000bb(b)(1)–(2). Although Congress initially intended RFRA to apply to both the federal government and the states, the Supreme Court held RFRA unconstitutional as applied to the states. *Hobby Lobby*, 573 U.S. at 695; *Boerne*, 521 U.S. at 536. However, some states have passed their own RFRAs. *See State Religious Freedom Restoration Acts*, NAT'L CONF. ST. LEGISLATURES (May 4, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx [https://perma.cc/S36J-CHEE].

While RFRA and Title VII are additional statutory vehicles through which employees and employers will continue to engage in attempting to balance the protection of free exercise of religion and antidiscrimination concerns, they will not be addressed further. This Article is ultimately concerned with the public employment context, wherein the interplay of the First Amendment's Free Exercise and Establishment Clauses have significant implications. This Article recognizes that RFRA and Title VII are appropriate, and in many cases the preferred (and in some courts and certain instances even deemed exclusive as to Title VII) avenues for religious discrimination claims. Even so, these two statutory avenues are not available in all contexts, especially RFRA. Additionally, constitutional analysis informs statutory interpretation and vice-versa, which makes the constitutional paradigm shift discussed herein telling in these statutory contexts as well. *See infra* notes 133–34 and accompanying text.

21. Carmella, *supra* note 7, at 2 (stating that religious involvement in the recent "culture war battles" is considered an "imposition of faith" on others or a "manifestation of 'discrimination and bigotry'") (citing U.S. COMM'N ON CIVIL RIGHTS, PEACEFUL COEXISTENCE:

B. *The Pendulum's Recent Swing Towards Greater Religious Freedom Protection*

Enter the United States Supreme Court decision in *Hobby Lobby*.[22] In *Hobby Lobby*, the sincerely held Christian beliefs of the owners of three closely held, for-profit corporations were at odds with complying with the rules and guidelines of the Department of Health and Human Services ("HHS"), promulgated pursuant to the Patient Protection and Affordable Care Act ("ACA").[23] These business owners had religious objections to abortion and, according to their religious beliefs, certain methods of birth control essentially constituted abortion.[24] Based on that, the business owners believed that providing health-insurance coverage for these methods of contraception was facilitating abortions.[25] To do so, in the sentiments of one group of the business owners, was to "sin against God [for] which [the business owners] are held accountable."[26]

The HHS guidelines required the business owners, however, to provide insurance coverage to their employees for all contraceptive methods approved by the Food and Drug Administration.[27] These included the contraceptive methods to which the business owners objected.[28] Failure to provide coverage resulted in heavy financial penalties.[29]

RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES (2016), http://usccr.gov/pubs/docs/Peaceful-Coexistence-09-07-16.PDF [https://perma.cc/9UFE-4YNE]); s*ee also*, *e.g.*, SMITH, *supra* note 5, at 150–52; TEBBE, *supra* note 7, at 1 ("Expansion of equality law has contributed to a sense among some religious traditionalists that there has been an inversion. They feel they now are the minorities who require protection from an overweening liberal orthodoxy.").

22. *Hobby Lobby*, 573 U.S. 682.

23. *Id.* at 696–704 (the guidelines were actually established through the Health Resources and Services Administration ("HRSA"), an agency of HHS); *see also* 26 U.S.C. § 5000A(f)(2); 42 U.S.C. § 300gg-13(a)(4).

24. *Hobby Lobby*, 573 U.S. at 691.

25. *Id.* at 691.

26. *Id.* at 701 (quoting Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 382 (3d Cir. 2013)).

27. *Id.* at 697. More specifically, the ACA mandates that employers provide insurance coverage for "preventive care and screenings" for women. 42 U.S.C. § 300gg-13(a)(4). HHS, through HRSA's guidelines, interprets this to include all contraceptive methods approved by the Food and Drug Administration. *Women's Preventive Services Guidelines*, HEALTH RESOURCES & SERVS. ADMIN., https://www.hrsa.gov/womens-guidelines/index.html#2 (last modified Dec. 2019) [https://perma.cc/X3GA-LY8N].

28. *Hobby Lobby*, 573 U.S. at 691, 697–98.

29. *Id.* at 697; *see also id.* at 691 (discussing that for one of the business owners, the penalty would have been approximately $1.3 million per day); *id.* at 720 (stating that the penalties could amount to $475 million, $33 million, or $15 million per year depending on

The Court ultimately held that requiring the business owners to provide this coverage substantially burdened their exercise of religion and was not the least restrictive means of achieving a compelling government interest.[30] This holding was not made pursuant to First Amendment jurisprudence, but rather to the legal framework of RFRA.[31] Although this federal statute is not the focus of this Article, the logical paradigm that is reflected in this decision—and began the shift in balance towards an era of greater protection of religious freedom—is important to understand and apply the Court's later First Amendment jurisprudence in *Masterpiece*.[32] Indeed, that *Hobby Lobby* marked a shift in the balance between the protection of free exercise of religion and other antidiscrimination interests was not lost on scholars.[33]

C. *Introduction to the Paradigms*

A dichotomy of paradigms is responsible for the cyclical nature of which interest, religious freedom or other antidiscrimination, finds favor when directly opposed to the other. These paradigms have been called different things by different scholars.[34] At the risk

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the party at issue).

30. *Id.* at 726–30.

31. *Id.* at 690–91; *supra* note 20; *infra* note 134 and accompanying text.

32. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018); *supra* note 20; *infra* note 134 and accompanying text.

33. *See, e.g.*, Lauren Sudeall Lucas, *The Free Exercise of Religious Identity*, 64 UCLA L. REV. 54, 96–101 (2017) (discussing how the decision in *Hobby Lobby* "tread[ed] a different ground" and that claimants had moved from "trying to . . . carve out a protected space in the individual or personal sphere for the exercise of religious identity" to "the protection of identity as exercised beyond that sphere and with regard to the rights of others"); Christopher C. Lund, *Religious Exemptions*, *Third-Party Harms, and the Establishment Clause*, 91 NOTRE DAME L. REV. 1375, 1376–81 (2016) (discussing the appropriate standard for when religious accommodations are improper in light of third-party harms in the wake of *Hobby Lobby*).

34. *See, e.g.*, SMITH, *supra* note 5, at 86–87 (discussing a "secularist" and a "providentialist" viewpoint); TEBBE, *supra* note 7, at 59–60 (discussing the "classic baseline argument," and how one's "baseline for comparison" affects the outcome to any particular question), *id.* at 170–72 (discussing two "paradigms": one focusing on the disapproval of a religious accommodation, i.e., its impact on a protected group of citizens, and one focusing on the importance of religious freedom of the religiously accommodated); Frederick Mark Gedicks & Rebecca G. Van Tassel, *Of Burdens and Baselines:* Hobby Lobby*'s Puzzling Footnote 37*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 323, 332–33 (Micah Schwartzman et al. eds., 2016) (discussing "negative-liberty" and "positive-liberty" baselines); Lucas, *supra* note 33, at 88 (discussing two types of claims when trying to balance religious liberties and other interests: the "protective" and the "projective"); Lund, *supra* note 33, at 1376–77 (discussing that each "side" to the issues in *Hobby Lobby* had a different "baseline" focusing on either the ACA or the status quo prior to the ACA as the basis for comparison). Although

of oversimplifying what has been shown previously as a complex and longstanding tradeoff between greater and lesser protection of religious freedoms, the analytical framework that elicits decisions favoring religious interests over other interests will be referred to in this Article as the "protection paradigm." On the other hand, the framework that results in a conclusion that religious accommodation interests are subordinate to, or superseded by, other interests will be referred to in this Article as the "subordination paradigm."

The precedent leading up to *Hobby Lobby*, discussed *supra*, illustrates the shifting between, or circular nature of, these two paradigms.[35] Some scholars posit that this is a good thing, that an essential feature of religious freedom in America is that interpretations of the balance between religious freedom and other interests are allowed to differ, evolve, and move between favoritism.[36] Regardless, starting with *Hobby Lobby*, this country began that shift, or circuit, once again towards favoring religious liberties when other interests are at odds.

1. The Protection Paradigm

The protection paradigm is overtly present in the Court's majority opinion in *Hobby Lobby*.[37] A defining facet of this paradigm is not passing judgment on the reasonableness, correctness, or importance of a person's expressed religious beliefs.[38] To this end, the

there are some parallels, not all of these different viewpoints, baselines, and frames of reference align with the particular aspects of the dichotomy of paradigms as I describe them herein.

35. *See also* SMITH, *supra* note 5, at 73–74 (stating the "issue . . . has been debated throughout American history, with no decisive resolution in sight").

36. *See, e.g.*, *id.* at 108. Professor Steven Smith states,

> One family of interpretations favored secular governance. Government should keep clear of religion in its activities, expressions, and purposes—and vice versa. Another family of interpretations, while striving to be inclusively ecumenical and insisting on protection for the free exercise of religion, interpreted the Republic in more providentialist terms. Both types of interpretations have deep and venerable roots in the American political tradition. And the genius of the American settlement was that instead of officially elevating one or the other of those interpretations to the status of constitutional orthodoxy and condemning the other as constitutional heresy, the American approach left the matter open for We the People to reflect on and debate and negotiate on an ongoing basis.

Id. (footnote omitted).

37. 573 U.S. 682 (2014). The Court's opinion was authored by Justice Alito, and joined by Chief Justice Roberts, Justice Scalia, and Justice Thomas. Justice Kennedy also joined in the opinion, but filed a concurring opinion. *Id.* at 687.

38. *See id.* at 723–24; Caroline Mala Corbin, *Government Employee Religion*, 49 ARIZ.

Court takes issue with the principal dissent's argument that providing coverage would not directly "result in the destruction of an embryo."[39] In making this argument, the Court points out that Justice Ginsburg's dissent is actually addressing the question of whether the religious belief at issue is reasonable, which is something "that the federal courts have no business addressing."[40] The result of this facet of the protection paradigm is that those with a sincerely held belief that their religious tenets are at odds with an action or inaction required by a government mandate will not be required to justify those tenets or their moral objection.[41] What they will have to prove, of course, is that their religious belief is sincerely held.[42]

As the Court attempts to illustrate, if a person truly believes that his or her actions—like in *Hobby Lobby* by providing insurance coverage—facilitate the breaking of a religious tenet—as in *Hobby Lobby* by financially supporting destruction of embryos that are seen as lives—then his or her belief system assures them they will suffer consequences.[43] Those taking this position argue that when they stand before their God on the day of judgment, they will be held responsible for any embryo that was destroyed, or in their view, life that was taken, by virtue of the monetary support rendered. As the Court stated, such a belief "implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another."[44] Thus, the protection paradigm results in providing respect and deference not only to underlying religious beliefs regarding tenets of religion, but also regarding what actions or inactions would be violative of

ST. L.J. 1193, 1220–21 & nn.135–36, 138–39 (2017) (first quoting Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 15 (2000); and then quoting Benjamin L. Berger, *Law's Religion: Rendering Culture*, 45 OSGOODE HALL L.J. 277, 309 (2007)) (arguing that government cannot discern an objective religious truth and stating the position of other scholars that "[c]ertain 'zones of conscience' are entitled to legal protection" particularly "to safeguard 'the right of an individual to make choices about his or her spiritual life'").

39. *Hobby Lobby*, 573 U.S. at 723.
40. *Id.* at 723–24.
41. *See id.* at 724–26.
42. *Id.* at 725.
43. *Id.* at 724–26.
44. *Id.* at 724.

those beliefs as they relate to government requirements or prohibitions.[45]

To put it simply, the protection paradigm requires decision makers to ask, if they believed as the religious claimant does, would they want someone to protect them against being forced to take the action at issue? Even on the question of whether for-profit businesses could be considered "persons" pursuant to RFRA, the Court took pains to address the importance of looking at the issues through the eyes of a sincerely held religious believer.[46] To look at the situation otherwise would be to "[a]rrogat[e] the authority to provide a binding national answer to . . . religious and philosophical question[s]" and to tell religious believers "that their beliefs are flawed."[47] Looking at the case through this paradigm, the Court found that it is not for courts to say that "religious beliefs are mistaken or insubstantial."[48] Indeed, as Justice Kennedy states in his concurrence, "Among the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion."[49] In this way, the protection paradigm highlights the burden on religious observers, while diminishing the focus on the effect religious observance has on others.[50]

45. *Id.* at 724–25; *see* Stephanie H. Barclay, *First Amendment "Harms*,*"* 95 IND. L.J. 331, 350 (2020) (critiquing the inverse of this paradigm, namely the "underinclusive" premise of "the third-party harm theory . . . that there is a meaningful category of religious exemptions which do *not* result in cognizable harm to third parties").

46. *Hobby Lobby*, 573 U.S. at 705–06, 726 (stating that not covering closely held for-profit corporations under the definition of "person" would result in a "difficult choice: either give up the right to seek judicial protection of . . . religious liberty or forgo the benefits, available to . . . competitors, of operating as corporations"). Although this particular issue is outside the scope of this Article's focus, the sensitivity to the choices afforded to religious believers even in this context helps illustrate the protection paradigm tends towards decisions in favor of protecting religious liberties.

47. *Id.* at 724.

48. *Id.* at 725. One can easily understand the import of this particular train of logic to this paradigm. Any system of religious viewpoints, grounded in faith and belief rather than empirical evidence in most cases, is severely subject to reasonableness and justification attacks. In a system that values empirical data and well-reasoned logic, like the legal system, religious viewpoints are at a disadvantage.

49. *Id.* at 739 (Kennedy, J., concurring). Justice Kennedy does go on to state, "Yet neither may that same exercise unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling" and points out the need to "reconcile those two priorities." *Id.*

50. *See id.* at 726–32 (majority opinion) (discussing how the burden put on the government or third parties is not sufficient to outweigh the burden on religious exercise).

Another facet of this paradigm is individual inquiry.[51] In the face of the seriousness of religious burdens, justification for intrusion must be specific to the religious exercise of the particular person at issue, not generalizations.[52] That is, the harm caused by the religious exercise of the individual at issue must be considered in and of itself without sweeping generalities about the harm it might cause in other cases.[53]

2. The Subordination Paradigm

Conversely, the subordination paradigm is illustrated in the dissenting opinion in *Hobby Lobby*.[54] The defining facet of this paradigm is the focus on the impact on those who do not ascribe to the particular religious belief at issue.[55] Where the protection paradigm asks the decision maker to observe the situation through the eyes of the religious objector, the subordination paradigm asks the decision maker to observe the situation through the eyes of those who are affected by the religious objector's actions or inactions.[56] This paradigm highlights the disadvantage to the nonreligious third party, while shifting the focus away from the burden to the religious exercise of the person seeking accommodation.[57] The dissent seems to argue that no alternative means for the government

51. *Id.* at 726–27.

52. *Id.*

53. *Id.* at 726–27, 732–33.

54. *See id.* at 739 (Ginsburg, J., dissenting). The dissenting opinion was authored by Justice Ginsburg and joined by Justice Sotomayor. *Id.* Justices Breyer and Kagan joined with the exception of Part III.C.1. *Id.* Part III.C.1 contains the discussion regarding whether for-profit corporations and/or their owners have standing to bring a claim pursuant to RFRA. *Id.* at 750–57.

This paradigm is similar to that called "secular neutrality" or "secularism" by some, and has been seen as essential to a nation of citizens with numerous and varied conceptions of religion, ethics, and the world. *See* SMITH, *supra* note 5, at 83.

55. *See Hobby Lobby*, 573 U.S. at 740 (Ginsburg, J., dissenting) (focusing on "the impact that accommodation may have on third parties who do not share the corporation owners' religious faith"); Lucas, *supra* note 33, at 56–57 (stating that courts are either "hesitant to question the sincerity or validity of religious beliefs . . . [or] concentrate on the nature of the resulting discrimination and its effect on others," and arguing that while "a sphere of personal freedom to define and pursue one's identity" is protected, "it should not be understood to protect identity when projected externally and imposed on others").

56. *See Hobby Lobby*, 573 U.S. at 744 (Ginsburg, J., dissenting); Lucas, *supra* note 33, at 56–57.

57. *See Hobby Lobby*, 573 U.S. at 758 (Ginsburg, J., dissenting) (highlighting language of prior opinions indicating that not every action that has some effect on religious exercise is inherently suspect); *id.* at 765 (stating that a least-restrictive means to achieve the government's objective is not sufficient if it is not "equally effective" as if the religious accommodation was not granted); TEBBE, *supra* note 7, at 16 (relegating harms faced by religious

to achieve its objective is allowable unless the third party claiming harm experiences no inconvenience at all, while the religious observer must not expect to "adhere unreservedly to their religious tenets."[58]

Another facet of the subordination paradigm is that it does not give blind deference to claims of religious objection. Thus, the decision maker can evaluate whether the action or inaction to which there is an objection truly violates the religious tenets at issue, and to what degree, to determine whether there is reasonable support to the religious objector's claim.[59] In *Hobby Lobby*, the dissent characterizes this as whether religion is "substantially" burdened.[60]

The subordination paradigm is marked by skepticism of religious exemptions and questions giving special consideration to religious interests over other interests.[61] For example, the dissent focuses on the idea that an employer checks his or her religious rights at the door, so to speak, when he or she decides to go public

actors to a controversy as a "cost" and feelings of disrespect, but viewing harms faced by nonreligious actors to the controversy as harm to "equal citizenship"); *id.* at 18–19, 22 (characterizing harm to others in light of religious accommodations as "social subordination" but labeling harm to the religious objector as a "burden[] but not [a] demot[ion]" because the laws at issue tend to be neutral as opposed to targeted). Professor Tebbe, in the book cited prior—*Religious Freedom in an Egalitarian Age*—appears to conclude that a private citizen bearing the cost of the effects of another private citizen's religious exercise can be distinguished from a private citizen bearing the cost of the effects of another private citizen's objection to religious exercise. *Id.* This illustrates the conclusion that the subordination paradigm allows adherents to draw, which is that there is a distinction between harms, though private citizens on both sides are bearing a burden that affects, for them, the rights of equal citizenship.

58. *Hobby Lobby*, 573 U.S. at 765–66 (Ginsburg, J., dissenting).

59. *Id.* at 759–60 (reiterating that a court must not question religious beliefs or interpretations of creeds, but then drawing on precedent to conclude that the level of substantiality of whether the belief is truly burdened as a religious matter of fact is within the scope of appropriate judicial authority). There are varying levels to this facet. The one on display in *Hobby Lobby* was a direct questioning of whether the religious tenet was in fact burdened or if the effect was "too attenuated" to truly impact religious tenets. *Id.* at 760. But other iterations of this aspect attempt to distinguish between questioning the religious tenets and application thereof at issue, and the actual tangible secular burden experienced. Simson, *supra* note 12, at 573–74.

60. *Hobby Lobby*, 573 U.S. at 758–59 (Ginsburg, J., dissenting) (analyzing substantial burden according to RFRA's standards); *id.* at 760 (discussing how the contraceptive coverage requirement is "too attenuated" to be a substantial burden on a person practicing his or her belief that certain contraceptives are abortion, the engagement in which is violative of that person's religious tenets).

61. *See* TEBBE, *supra* note 7, at 149–50. Here, and elsewhere, Professor Tebbe questions why exempting religious employers should be viewed any different than exempting secular employers who hold similar objections to an antidiscrimination law. *Id.* He argues that if a court would not grant an exception for a nonreligious reason, principles of fairness dictate that it should not do so for a religious reason. *Id.*

with his or her business.[62] Otherwise, the employee is forced to either choose between staying with the employer and bearing the costs of the employer's religious exercise—as in *Hobby Lobby* by not receiving coverage for important health care options—or the economic burden of finding new employment.[63]

Additionally, the paradigm tends to focus not on the individual case, but on broad and generally applicable principles of harm.[64] For example, the dissenting opinion begins by highlighting well-known empirical data and arguments that women's control over reproductive health is necessary for equal participation in the country's economic and social life.[65] It also points out how contraceptives support women's health in general.[66] As such, the discussion did not touch upon the specific contraceptive methods at issue in *Hobby Lobby*, but rather was concerned with keeping the general rule intact without any deviation that might erode the importance of its principle.[67] And most certainly there are reasons for wanting generally applicable rules in the law, not the least of which, as the dissent points out, includes providing easy-to-define guidance in future cases.[68]

3. The Paradigms in Tension

As one might deduce from the prior illustration of the paradigms, underlying both are elements of reasonable argumentation and inability to give credence to the other viewpoint.[69] Or, put in perhaps a more positive way:

62. *See Hobby Lobby*, 573 U.S. at 768–69 (Ginsburg, J., dissenting).

63. *Id.* at 769.

64. *See id.* at 739–40 (focusing not on the individual application of the Court's majority opinion but on the "startling breadth" of the decision insofar as it can be reduced to a general principle that businesses can "opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs").

65. *Id.* at 741.

66. *Id.* at 742–43.

67. *See supra* notes 64–66 and accompanying text; Corbin, *supra* note 38, at 1195 (discussing the competing interest of a county clerk with religious objections to same sex marriage and a same-sex couple's interest in getting a marriage license. As illustrated in that note, even if there is no definable harm to the individual case at hand, because the general rule has been violated, the harm is in the erosion of general antidiscrimination principles.).

68. *Hobby Lobby*, 573 U.S. at 770–71 (Ginsburg, J., dissenting).

69. To that end, each side highlights what will support its viewpoint. That is, the majority opinion highlights the intent and import of RFRA, while the dissenting opinion highlights the import and intent of the ACA. *Id.* at 705–07 (majority opinion), 765–66 (Ginsburg, J., dissenting).

> [B]oth [sides are] right (albeit from the perspectives of different constituencies), and both [are] wrong (because they ignore[] or marginalize[] other-minded constituencies). [For example,] [s]chool prayer is *not* meaningfully neutral: it is inconsistent with the views of, among others, atheists. Neither is a prohibition on school prayer meaningfully neutral, because it rejects the views of citizens who believe on religious grounds that school prayer is desirable or obligatory. Given such a conflict in views, no neutral position is available. There may, of course, be good prudential or constitutional or even philosophical or theological reasons for preferring one or the other position. But we can describe one of the positions as "neutral" only by neglecting to notice those citizens whose deeply held beliefs are thereby rejected.[70]

In essence, underlying both paradigms is the practical reality that in order to respect the other's position, there must be "equal concern and respect," which often would require a change in "internal attitudes, intentions, beliefs, and understandings."[71] With two paradigms as dichotomous as the ones discussed *supra*, such mutual understanding can be elusive at best.[72] Regardless, the shifting between the two paradigms has historic roots that have led to the current position, with the prevalence of the protection paradigm signaled in *Hobby Lobby* and applied to the First Amendment context in *Masterpiece*.

II. APPLICATION OF THE PROTECTION PARADIGM TO FREE EXERCISE JURISPRUDENCE

As *Hobby Lobby* was in the context of RFRA, one might ask what it has to do with First Amendment jurisprudence. This is where the Court's opinion in *Masterpiece*, although not an employment law case, becomes crucial to the discussion.

In *Masterpiece*, the Court grappled with the dichotomy of paradigms as it relates to wedding vendors with religious objections to using their businesses to provide goods and services for same-sex

70. SMITH, *supra* note 5, at 131.

71. *Id.* at 154–55.

72. *See Hobby Lobby*, 573 U.S. at 730 (majority opinion) (holding that HHS's argument "reflects a judgment about the importance of religious liberty" that was not justified by the intent of the law that HHS was operating under); *id.* at 744 (Ginsburg, J., dissenting) (noting that religious beliefs are "personal opinion[s]" that should not be given weight when compared to "the practice of medicine"); *see also* SMITH, *supra* note 5, at 154 (stating that proponents of opposing paradigms often are "inordinately certain of their [own] views" and dismiss "contrary views as the product of ignorance, willful error, or hypocrisy").

weddings.[73] Specifically, in 2012, a Colorado bakery owner informed a same-sex couple that he would not create a cake for their wedding due to his religious opposition to same-sex marriages.[74] The bakery owner was a devout Christian who maintained that he tried to uphold the teachings of Jesus Christ "in all aspects of his life," including his vocation as a baker and shop owner.[75] Because his religious beliefs were that marriage is between one man and one woman, "creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration that is contrary" to his deeply held religious beliefs.[76] He believed that "to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, would have been a personal endorsement and participation in the ceremony and relationship . . . enter[ed] into."[77]

The couple filed a discrimination complaint against the baker and his cakeshop pursuant to a Colorado statute, the Colorado Anti-Discrimination Act ("CADA"), that prohibits discrimination in places of public accommodation.[78] CADA includes sexual orientation among its classes of citizens against which discrimination is prohibited.[79] Ultimately, the Colorado Civil Rights Commission (the "Commission") found in favor of the couple and ordered the baker to sell same-sex couples wedding cakes (if the baker would be selling to heterosexual couples), train staff on CADA, submit quarterly compliance reports documenting denials of service for two years, and submit a statement describing remedial actions taken.[80] In making this decision, the Commission made a number of comments targeted towards the baker's religious justification for his objection.[81] At one point, the Commission stated that "religion

73. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723 (2018).

74. *Id.*

75. *Id.* at 1724.

76. *Id.*

77. *Id.*

78. *Id.* at 1725 (citing COLO. REV. STAT. § 24-34-601(2)(a)).

79. *Id.* CADA claims are first investigated for probable cause by the Colorado Civil Rights Division. *Id.* If the Division finds probable cause, it refers the case to the Civil Rights Commission. *Id.* If a formal hearing is warranted, the claim is heard first by an Administrative Law Judge ("ALJ"). *Id.* The ALJ's decision may be appealed to the full Civil Rights Commission, which will hold a public hearing and deliberative session before voting on the case. *Id.* If the Commission upholds an ALJ's decision finding a violation, it may impose statutorily authorized remedial measures. *Id.*

80. *Id.* at 1726.

81. *Id.* at 1729.

has been used to justify all kinds of discrimination throughout history" and that "it is one of the most despicable pieces of rhetoric that people can use."[82] The Colorado Court of Appeals affirmed the Commission's decision,[83] and the Colorado Supreme Court declined to hear the case.[84]

A. *The Protection Paradigm Prevails*

The Supreme Court granted review, and the majority opinion contains the same indicia of using the protection paradigm as the majority opinion in *Hobby Lobby*.[85] The central characteristic of the protection paradigm is, again, overtly present in this opinion.

Specifically, the Court made quite clear that courts and government decision makers cannot pass judgment on the reasonableness, correctness, or importance of a person's expressed religious beliefs.[86] No government official gets to decide what is "orthodox" in matters of religion and cannot presuppose the illegitimacy of religious practices.[87] The Court went to great lengths to point out the "religious hostility" of the Commission in this case.[88] It found that the Commission's comments implied that "religious beliefs and persons are less than fully welcome in Colorado's business community," "endorsed the view that religious beliefs cannot legitimately

82. *Id.*

83. *See* Mullins v. Masterpiece Cakeshop Inc., 370 P.3d 272 (Colo. App. 2015).

84. *Masterpiece*, 138 S. Ct. at 1726–27.

85. Unlike *Hobby Lobby*, *Masterpiece* was a much more fractured decision. *Compare* Burwell v. Hobby Lobby, Inc., 573 U.S. 682, 690 (2014) (consisting of the opinion and one concurrence), *with Masterpiece*, 138 S. Ct. at 1722 (consisting of the opinion and three concurrences). Although Chief Justice Roberts and Justices Breyer, Alito, and Kagan joined Justice Kennedy's opinion, Justices Kagan, Breyer, Gorsuch, and Alito either wrote or joined in concurring opinions clarifying their positions on the freedom of religion and antidiscrimination concerns balance. *See Masterpiece*, 138 S. Ct. at 1722; *see id.* at 1732–34 (Kagan, J., concurring); *see id.* at 1734–40 (Gorsuch, J., concurring). Justice Thomas concurred in part and in the judgment but wrote separately for this same reason and to address the free speech issue, not relevant here. *See id.* at 1740–48 (Thomas, J., concurring). Justice Ginsburg filed a dissenting opinion, in which Justice Sotomayor joined. *Id.* at 1748 (Ginsburg, J., dissenting).

86. *Masterpiece*, 138 S. Ct. at 1723–24 (majority opinion) (confronting the Colorado Civil Rights Commission's seeming unwillingness to adjudicate the question before it without "religious hostility").

87. *Id.* at 1731 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

88. *Id.* at 1723–24. Interestingly, the rhetoric used by the Commission is the type of "embittered discourse" that Professor Smith warned in 2014 has had a "deleterious effect" on the ability of those who view these issues through dichotomous paradigms to have open and respectful dialogue that leads to a balance between opposing interests. SMITH, *supra* note 5, at 124–26.

be carried into the public sphere," and used "inappropriate and dismissive comments showing [a] lack of due consideration for [the baker's] free exercise rights and the dilemma he faced."[89] The Court stated that some of the more inflammatory comments disparaged religion in two ways, one of which was by "characterizing it as merely rhetorical—something insubstantial and even insincere."[90] In essence, the Court determined that the Commission had failed to look at the situation from the religious objector's point of view, but instead substituted its own judgment and viewpoints.

This can be seen, as the Court points out, by the Commission's failure to treat the baker with the same deference to conscience-based refusal as other similarly situated bakers.[91] Specifically, the Commission allowed conscience-based refusals in the past to other bakers who deemed the requested wording and images "derogatory," "hateful," or "discriminatory."[92] The Commission stated that the baker at issue in *Masterpiece*, however, could not have the message of the cake in question attributable to him, whereas the other bakers were not subject to this type of logic.[93] The fact that the other bakers were willing to sell other products to the client was taken into account, whereas the fact that the baker in *Masterpiece* was willing to sell other types of cakes and desserts to the couple at issue was "irrelevant."[94] Simply put, the Commission did not

89. *Masterpiece*, 138 S. Ct. at 1729.

90. *Id.* The Court was especially direct on this point as the Commission had allowed other bakers to refuse to create cakes with images and words that those bakers deemed morally objectionable; specifically, that the bakers deemed derogatory and conveyed disapproval of same-sex marriage, along with religious text. *Id.* at 1730. Essentially, the Commission allowed conscience-based objections, so long as they were not based on religion. *Id.*

91. *Id.* at 1729; Stephanie Barclay, Opinion, *Supreme Court's Cakeshop Ruling Is Not Narrow—and That's a Good Thing*, HILL (June 6, 2018, 2:00 PM), https://thehill.com/opinion/judiciary/391004-supreme-courts-cakeshop-ruling-is-not-narrow-and-thats-a-good-thing (pointing out one aspect of the Court's opinion that has broad implications is its refusal to allow double standards that disfavor religious individuals while favoring others) [https://perma.cc/QTS9-NHK9].

92. *Masterpiece*, 138 S. Ct. at 1730 (quoting Colo. Dep't of Regulatory Agencies, Jack v. Gateaux, Ltd., Charge No. P20140071X, at 4 (2015); Colo. Dep't of Regulatory Agencies, Jack v. Azucar Bakery, Charge No. P20140069X, at 3 (2015); Colo. Dep't of Regulatory Agencies, Jack v. Le Bakery Sensual, Inc., Charge No. P20140070X, at 3 (2015)).

93. *Id.*

94. *Id.* Professor Smith foreshadowed this very situation when he warned about the inconsistency of decisions when too much emphasis is put on beliefs and motives, especially in a biased fashion. SMITH, *supra* note 5, at 155. "From the perspective," he wrote, "of this concern for beliefs and motives, a governmental act that might be perfectly acceptable if done with a proper secular purpose is unconstitutional if done with (or if perceived as having) an unapproved invidious purpose." *Id.* (citing McCreary Cty. v. ACLU, 545 U.S. 844 (2005)).

view the case by placing itself in the shoes of the baker, but rather viewed his religious objections through a less deferential lens than it viewed objections on other secular bases.[95]

Ensuring that religion is respected in and of itself, regardless of its popularity in modern society, is a hallmark of the protection paradigm, as is the determination that the government does not get to make the determination of reasonableness or offensiveness of religious beliefs.[96] Thus, the Court was reaffirming *Hobby*

95. *Masterpiece*, 138 S. Ct. at 1730–31.

96. Before moving on to other indicia of shifting paradigms favoring protecting religious exercise, it is important to note the implications of the fractured nature of this opinion. *See supra* note 85. That is, without going into laborious detail here, the paradigm set forth in Justice Kagan's concurring opinion is much more in line with the subordination paradigm. *Masterpiece*, 138 S. Ct. at 1732 (Kagan, J., concurring). Justice Gorsuch's concurring opinion, to the contrary, is much more in line with the protection paradigm. *Id*. at 1734 (Gorsuch, J., concurring). Thus, from a paradigm perspective, a view of the *Masterpiece* opinions supports a conclusion that Chief Justice Roberts, and Justices Gorsuch, Alito, and Thomas appear to be inclined to view these cases from the protection paradigm. Justices Kagan, Breyer, Ginsburg, and Sotomayor appear to be inclined to view these cases from the subordination paradigm.

That being said, not all cases will be treated exactly the same by a particular Justice, of course. The summer of 2020 brought with it a number of cases that support the shift towards a protection paradigm at the United States Supreme Court level, although the individual Justices supporting the majority opinion varied slightly. *See*, *e.g.*, Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020). Though these cases will not be extensively analyzed here, the trend towards the protection paradigm is worth noting.

Even the few cases that seem contradictory to this trend, upon closer inspection, do not necessarily indicate the contrary. For example, at least one decision from Chief Justice Roberts appears to call into question his leanings towards the protection paradigm. *See* S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) (denying relief to religious institutions to enjoin "temporary numerical restrictions on public gatherings" that addressed the spread of the coronavirus). However, *Newsom* involved a request for an injunction, which places a high burden on petitioners to show that their legal rights are "indisputably clear" and is even then only rarely granted in "the most critical and exigent circumstances." *Id.* (quoting Stephen M. Shapiro et al., SUPREME COURT PRACTICE § 17.4, at 17-9 (11th ed. 2019)). Furthermore, little has inspired more widespread fear and caution than the coronavirus pandemic. *See* Ed Yong, *Our Pandemic Summer*, ATLANTIC (Apr. 14, 2020), https://www.theatlantic.com/health/archive/2020/04/pandemic-summer-coronavirus-reopening-back-normal/609940/ [https://perma.cc/X3L9-KP2L]; Jane E. Brody, *Managing Coronavirus Fears*, N.Y. TIMES (Apr. 13, 2020), https://www.nytimes.com/2020/04/13/well/mind/coronavirus-fear-anxiety-health.html [https://perma.cc/HHB6-PGPX]. Thus, this decision is more likely a product of stringent legal standards in the face of an unprecedented health crisis, rather than a deviation from the protection paradigm.

Presuming that Chief Justice Roberts continues to view cases from a protection paradigm, the future of these cases will, thus, come down to Justice Kavanaugh's vote. If the decision in *American Legion* and Justice Kavanaugh's support of a recent concurring opinion on a denial of certiorari is any indication, the protection paradigm may prevail for some time. *See infra* notes 158–81, 184, 192 and accompanying text. Further supporting this conclusion are Justice Kavanaugh's support in *Little Sisters* and *Espinoza* and his dissent from the Court's denial of injunctive relief in *Newsom*, wherein he disagreed with the Court's conclu-

Lobby's analytical paradigm that decision makers need to put themselves in the shoes of the religious believer and ask themselves, if they believed as this person, would their free exercise of religion be restricted or burdened.

Additionally, the Court pointed to the need to have an individualized, fact-intensive, specific-context inquiry.[97] The Court reaffirmed the government's obligations to protect certain classes of citizens in the exercise of their civil rights, such as gay persons, who are at risk of being "treated as social outcasts or as inferior in dignity and worth."[98] Nevertheless, the Court did not lose its focus on individual determination of the case in light of this important principle. Rather, it juxtaposed this necessary consideration with another. That is, that "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."[99] To that end, the Court did not view this as a case from which to derive a general principle about whether a baker could refuse to sell any goods or any cakes for gay weddings in general.[100] Rather, the Court did not discount the baker's view of the case as a specific question of whether use of the baker's artistic skills to make an expressive creation conveyed a message that he could not express consistent with his religious beliefs.[101] In fact, the Court recognized that a decision in favor of the baker by Colorado could have been tenable, with the need to be sufficiently constrained to avoid a serious social stigma on gay persons, again a conclusion that understands the need to be fact specific.[102]

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sion that churches were being treated the same as secular businesses for purposes of relaxing safety guidelines during the coronavirus pandemic. *Little Sisters*, 140 S. Ct. at 2367; *Espinoza*, 140 S. Ct. at 2246; *Newsom*, 140 S. Ct. at 1614 (Kavanaugh, J., dissenting). Indeed, in his dissent, Justice Kavanaugh uses distinctly protectionist language and logic that decries "inexplicably" applying restrictions to one group but exempting another, which "do[es] much to burden religious freedom." Newsom, 140 S. Ct. at 1614–15 (Kavanaugh, J., dissenting) (quoting Roberts v. Neace, 958 F.3d 409, 414 (6th Cir. 2020)).

97. *Masterpiece*, 138 S. Ct. at 1723 (stating that the details of refusal, i.e., refusal to attend the wedding to cut the cake versus refusal to put certain religious words on the cake, might make a difference in the outcome of whether the baker has a valid free exercise claim).

98. *Id.* at 1727.

99. *Id.* (quoting Obergefell v. Hodges, 576 U.S. 644, 679–80 (2015)).

100. *Id.* at 1727–28.

101. *Id.* at 1728 (finding that the baker's dilemma was "particularly understandable," especially in light of the fact that same sex marriage was not recognized in Colorado at the time).

102. *Id.* at 1728–29. Though indicia of the subordination paradigm were reflected in the dissenting and one of the concurring opinions in *Masterpiece*, as this Article focuses on the

B. *The Paradigms in Action: An Illustration*

The battle of the concurring opinions in *Masterpiece* truly reflects the importance of what happens when a paradigm is used to view a case. Both Justice Kagan's and Justice Gorsuch's concurring opinions addressed the issue of whether the Commission could have legitimately accommodated those bakers who refused to provide service to customers based on *nonreligious* moral standards regarding what they found objectionable messaging, without accommodating a baker's objection based on *religious* moral standards regarding what he found objectionable messaging.[103] Justice Kagan's concurring opinion argued that it could. Justice Kagan reasoned that refusing to create a cake that has anti-gay and religious messaging does not discriminate on the basis of religion because declining to create the cake would have happened whether the customer was a religious believer of any denomination or a nonreligious person.[104] Refusing to create a wedding cake for a same-sex marriage ceremony, however, discriminates on the basis of sexual orientation.[105] This is because, using the paradigm through which Justice Kagan views the case, the product at issue for comparison is defined not as a cake of a specific message, but broadly as a "wedding cake" sold to heterosexual couples but not homosexual couples.[106] This is where the paradigm reference is important.

As Justice Gorsuch's concurrence illustrates, using a different paradigm through which to view the case, the product at issue is defined not broadly as any "wedding cake," but specifically as a "same-sex wedding" cake.[107] Viewing the case through this lens, the baker in *Masterpiece* did not discriminate based on the specific customer at issue. It did not matter whether the customer was a homosexual person or a heterosexual person; the baker was not

prevailing paradigm, those parallels will not be addressed here.

103. *Id.* at 1732–40 (Kagan, J., concurring).

104. *Id.* at 1733–34.

105. *Id.*

106. *Id.* at 1733.

107. *Id.* at 1734–40 (Gorsuch, J., concurring). As Justice Gorsuch states in his concurring opinion, "We are told here, however, to apply a sort of Goldilocks rule: describing the cake by its ingredients is *too general*; understanding it as celebrating a same-sex wedding is *too specific*; but regarding it as a generic wedding cake is *just right*." *Id.* at 1738. Where one falls on this sliding scale depends on which paradigm lens one is looking through.

going to create a cake of that specific message regardless of who might be purchasing the cake.[108]

Using the protection paradigm to view Justice Kagan's logic results in a conclusion that if the baker who refused to provide service to the same-sex couple was acting discriminatorily, the other bakers who refused to provide service regarding anti-gay and religious messaging were as well. This is because, as Justice Gorsuch pointed out, cakes that celebrate same-sex weddings will usually be purchased by same-sex couples in the same way that cakes expressing objection to same-sex weddings will usually be purchased by religious customers.[109] As a consequence, the "effect" of these actions is on a protected class of citizens in either case.[110]

This give and take between the two concurring opinions illustrates how the dichotomy of paradigms interacts with the facts of a given case in trying to balance protection of religious liberties with other antidiscrimination interests. Fittingly, the Court presented the question in *Masterpiece* as the "proper reconciliation of at least two principles . . . the authority [of government] to protect the rights and dignity of gay persons [and] the right of all persons to exercise fundamental freedoms under the First Amendment."[111] Ultimately, that balance will be resolved in light of the prevailing paradigm in any particular era.[112]

III. CONSEQUENCES OF THE PROTECTION PARADIGM IN THE FIRST AMENDMENT CONTEXT

Some have argued that the Supreme Court "punted" in *Masterpiece* by refusing to determine the appropriate balance between religious liberties and other antidiscrimination interests.[113] With the

108. *Id.* at 1734–36.

109. *Id.* at 1736.

110. *Id.* at 1735–36.

111. *Id.* at 1723 (majority opinion). Specifically, the Court was addressing the authority of states and their governmental entities to protect such rights under the First Amendment as applied to states through the Fourteenth Amendment. *Id.*

112. Professor Tebbe talks about this phenomenon, albeit to highlight a different principle. TEBBE, *supra* note 7, at 31. He argues that a person's "perspective and purposes influence the way they put together their commitments on questions of constitutional significance." *Id.* Though he argues that decision makers can reflect on their judgments, decisions, and logic in this respect, he does acknowledge that generally "people experience moral problems from a particular viewpoint." *Id.* at 31–32.

113. *See, e.g.*, Thomas C. Berg, Masterpiece Cakeshop*: A* Romer *for Religious Objectors?*,

Court's determination that "[w]hatever the confluence of speech and free exercise principles," the Colorado Civil Rights Commission was so overtly prejudiced against the baker's religious viewpoints that its decision could not stand,[114] the argument goes, there is little to take away from *Masterpiece* that would help determine the future of this balancing question.[115]

The practical implications for religious freedom cases moving forward illustrate that *Masterpiece* is indeed telling, however.[116] The Court's opinion reinforces the expansive *Hobby Lobby* protection paradigm. That this paradigm has been applied in the First Amendment context signals a trend toward the broadening of Free Exercise jurisprudence in a way that has not been seen since the pre-*Smith* era, regardless of the fact that *Smith* has not been formally overruled.[117]

In fact, some scholars had begun to question the "specialness of religion" as it had become "no longer clear that constitutional law should treat religious belief as special."[118] The Court in *Masterpiece*, however, pronounced that government decision makers must take special care to look at religious viewpoints with respect and

in CATO SUPREME COURT REVIEW 2017–2018, at 139–42,148–49 (2018) (calling the *Masterpiece* decision "less dramatic, as the decision put off" the substantive questions dealing with the scope of religious liberty when objecting to actions that implicate antidiscrimination interests on the basis of sexual orientation, but ultimately concluding that the decision might be a precursor to more impactful religious-liberty favorable decisions in the future); Simson, *supra* note 12, at 538 (calling the *Masterpiece* decision "anticlimactic" and stating it did not "hav[e] anything in particular to do with exemption claims").

114. *Masterpiece*, 138 S. Ct. at 1723–24.

115. *See generally supra* note 112.

116. *See* Barclay, *supra* note 91 (stating that the *Masterpiece* decision has broad implications in at least three significant respects). Professor Barclay argues that the Court's decision has three broad implications: it reaffirmed that (1) religious liberties and people must be treated equally, (2) religious hostility is per se unconstitutional, and (3) dignitary harm cannot trump First Amendment rights. *Id.*; *see also* Berg, *supra* note 113, at 140–42 (hypothesizing that the *Masterpiece* decision could be a "prelude to broader protection for religious dissenters whose beliefs clash with sexual orientation nondiscrimination laws").

117. *See* Berg, *supra* note 113, at 151 (stating that the decision in *Masterpiece* creates "seeds for later decisions to expand the rights [the Court] recognized").

118. TEBBE, *supra* note 7, at 4–5. Professor Tebbe is not the only scholar convinced that religious freedom is in jeopardy. *See, e.g.*, SMITH, *supra* note 5, at 11; Lucas, *supra* note 33, at 61 (citing CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 6 (2007)); Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555, 559–60 (1998); Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 639 (2015) (stating that "it is not clear, as others have argued, that religion should be treated as unique or as an anomaly with regard to its treatment under the law, even in light of its specific inclusion in the constitutional text").

understanding, even if to do otherwise is based on the effect it may have on other protected classes.[119] After all, as the Court pointed out, government actors are protecting "against discrimination on the basis of religion as well as sexual orientation."[120] It appeared the Commission forgot this charge when it made a decision that did not start with viewing the situation with an attempt to understand and respect the religious viewpoint at issue.[121] The Court reiterated that the government can have no role in deciding, or even suggesting, that religious objections are legitimate or illegitimate.[122] Justice Gorsuch, concurring in *Masterpiece*, wrote, "Popular religious views are easy enough to defend. It is protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom."[123]

As the protection paradigm may be the prevailing viewpoint on the Court for some time,[124] it is important to understand that it signals a shift in how the Court will view future cases and issues, from public accommodation, to healthcare requirements, to striking the proper balance between religious freedom interests and antidiscrimination interests in the public employment context.[125]

119. Unfortunately, government hostility against religion is not rare. *See* Barclay, *supra* note 91. As Professor Barclay points out, however, the Court's opinion (and this paradigm) essentially makes that type of hostility *per se* unconstitutional. *Id.* That is, the government was not given a chance to justify its hostility, it was simply not tolerated. *Id.*

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

121. *Id.* at 1731 (holding that the Commission's consideration of the baker's case was "based on a negative normative 'evaluation of the particular justification' for his objection and the religious grounds for it").

122. *Id.* Justice Gorsuch's concurring opinion highlights this point and expresses concern that allowing secular commitments to justify accommodation from a generally applicable law, but not religious commitments, indicates a "judgmental dismissal" of sincerely held religious beliefs. *Id.* at 1734 (Gorsuch, J., concurring). But see Justice Kagan's concurrence, asserting that allowing this disparity of treatment would not violate the Free Exercise Clause because the bakers who refused based on secular moral grounds were not discriminating against the requesting customers on the basis of religion. *Id.* at 1733–34 (Kagan, J., concurring).

123. *Id.* at 1737 (Gorsuch, J., concurring).

124. *See supra* note 96; *infra* note 184.

125. The paradigm may manifest itself in various ways, including constitutional jurisprudence, statutory jurisprudence, or issues of practice and procedure. *See supra* notes 20, 96. For example, in listing possible religious exceptions to statutorily protected classifications in the employment discrimination context, the Court recently emphasized statutory methods. Bostock v. Clayton County, 140 S. Ct. 1731, 1747 (2020). *Bostock* is not directly relevant to the focus of this Article, in the sense that the Court did not address the tension between religious freedom claims and antidiscrimination interests. *Id.* at 1754 (emphasizing that because a religious liberty claim was abandoned on appeal, no such claim was be-

IV. APPLICATION IN THE EMPLOYMENT CONTEXT: IN GENERAL AND THE UNIQUE CASE OF PUBLIC EMPLOYMENT

Many religious citizens cannot divorce the practice of their religion from their daily tasks, including their vocations.[126] Those with sincerely held religious beliefs may view their religion as ingrained in their personhood such that their work lives are integral to their religious identities, and therefore central to their religious practice.[127] In the employment context, therefore, the choice might be between a person's religious beliefs and their livelihood.[128] Thus, when free exercise includes the freedom to engage in action or inaction, as well as belief, the implications in the employment context can be quite broad.[129]

fore the Court). Nevertheless, Justice Gorsuch, who authored the majority opinion, did emphasize a "deep[] concern[] with preserving the promise of the free exercise of religion enshrined in our Constitution; [which] guarantee lies at the heart of our pluralistic society." *Id.* Justice Gorsuch then listed the various constitutional and statutory exemptions that could operate to protect religious liberties when and if they come into conflict with the Court's inclusion of sexual orientation and gender identity as protected classifications from employment discrimination pursuant to Title VII. *Id.* Though mentioning the First Amendment only in its limited ministerial exception context, he then expressly referenced RFRA as operating as a kind of "super statute" that could "supersede Title VII's commands in appropriate cases." *Id.* Thus, although *Bostock* does not provide additional judicial direction as it relates to balancing religious liberties and antidiscrimination interests—or in the specific context of First Amendment jurisprudence outside the very limited ministerial exception—this Article would be remiss in not pointing out the brief reference and invitation of the Court to more fully litigate the interplay between religious liberties and antidiscrimination interests in the employment context, specifically through statutory methods.

126. Corbin, *supra* note 38, at 1251 (acknowledging that without standards allowing accommodation for religious free exercise, some "hardworking, devout people" might have to "choose between their faith and public employment" and thus "find themselves precluded from government positions").

127. In early Christendom, for example, religion was not viewed as a separate and "distinct category of life or practice or belief." SMITH, *supra* note 5, at 78. Rather, such divisions can be seen as a "modern invention." *Id.* Even so, modern human resource best practices are moving towards including religious diversity recognition in employment policies. *See* Dori Meinert, *How to Make Holiday Celebrations More Inclusive*, HR MAG. (Oct. 31, 2018), https://www.shrm.org/hr-today/news/hr-magazine/1118/pages/how-to-make-holiday-celebrations-more-inclusive.aspx [https://perma.cc/8WWA-REGG]. Employers are cautioned that "[f]or many employees, their religion helps define them as people" and that employees cannot bring their whole selves to work if they "are worried about hiding an essential element of who they are, such as their deeply held religious beliefs." *Id.*

128. *See* TEBBE, *supra* note 7, at 33–34; *see also* Lucas, *supra* note 33, at 68 (stating "religious identity . . . may be viewed as immutable and thus non-negotiable in the face of possible conflict").

129. The concept that free exercise includes acts as well as beliefs has been implicitly imbedded in Free Exercise jurisprudence by such examples as holding that exercise of religion includes "not only belief and profession but the performance of (or abstention from)" acts. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 877 (1990); *see also* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 710 (2014). Nevertheless, the reach of protected

A. *Implications in the Employment Context in General*

There are any number of scenarios where the balance between protecting religious freedom interests of employees and/or employers will be directly at odds with other antidiscrimination interests in the employment context. For example, employees might face losing their jobs, or other discipline, at religiously affiliated institutions due to using medical methods not supported by the relevant religion or having children without being married.[130] Alternatively, employers may face religious exemption claims for disciplining employees who refuse to abide by antidiscrimination policies, such as using preferred gender pronouns.[131] Or, in the benefits realm, employers may refuse to extend insurance coverage to the same-sex spouse of an employee due to religious objections.[132] Other examples could include an employee who wishes to wear a particular item of religious clothing at work that is against a dress code policy, or an employee who audibly prays during the work day to the discomfort of other employees.

Additionally, the fact that there are statutory mechanisms in place to bring employment discrimination claims does not, in and of itself, render the First Amendment discussion irrelevant.[133] Oftentimes, concerns that shape constitutional claims shape the statutory ones, and vice-versa, as can be seen by the interplay between *Hobby Lobby* and *Masterpiece*.[134] Especially in the context of public

acts has been a matter of debate. *Hobby Lobby*, 573 U.S. at 709–10. The Court in *Hobby Lobby* extended the protected acts to business practices by finding that they "fall comfortably within" the definition of exercise of religion. *Id.* at 710; *see also id.* at 709–10 (focusing on how employment-related decisions can affect to what extent a person can freely exercise religious beliefs). As Justice Kennedy said in his concurrence,

> In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law. For those who choose this course, free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts. Free exercise in this sense implicates more than just freedom of belief. It means, too, the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community.

Id. at 736 (Kennedy, J., concurring) (citations omitted).

130. These examples summarize those utilized by Professor Tebbe in his book, *Religious Freedom*, which were based on facts from actual cases. TEBBE, *supra* note 7, at 143, 241 nn.3–5.

131. *Id.* at 143, 241 n.4.

132. *Id.* at 143–44, 241 n.5.

133. *See* Corbin, *supra* note 38, at 1239; *supra* note 20.

134. *See supra* section I.C & Part II and accompanying text (discussing the interplay between *Hobby Lobby* and *Masterpiece*).

employment, where employers have to be concerned not only with protecting the free exercise of religion, but also with not violating the Establishment Clause, the question of where the Supreme Court strikes the balance is of particular importance.

B. *The Particular Challenge of the Protection Paradigm as Applied to Public Employment*

As an initial matter, due to the statutory mechanisms to bring employment discrimination claims on the basis of religion, religious freedoms are already generally given greater protection in the employment context than other areas of law.[135] It might be tempting, therefore, to conclude that *Masterpiece* does not have a significant impact in the area of employment law in general. In the context of public employment, however, the protection paradigm currently prevailing after *Masterpiece* has the potential for significant impacts. This is because in some contexts, government employee actions are attributable to the government itself.[136] In these cases, the action or inaction pursuant to accommodating employee religious exercise may violate the Establishment Clause,[137] and it is not a novel concept that the two religion clauses are frequently in tension.[138]

135. *See* TEBBE, *supra* note 7, at 144–45; *supra* note 20 (discussing RFRA and Title VII as statutory alternatives to bringing employment discrimination claims).

136. *See* Berry v. Dep't of Soc. Servs., 447 F.3d 642, 645 (9th Cir. 2006) (upholding the discipline of a county social services employee who discussed religion with his clients, displayed religious items in his cubicle, and used a conference room for prayer meetings on the basis that these actions implicated Establishment Clause concerns for the public employer); *see also* Corbin, *supra* note 38, at 1207.

137. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . ."); *see* Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947) (holding that the Establishment Clause applies to the states through the Fourteenth Amendment); *see also* Corbin, *supra* note 38, at 1207. Although the Establishment Clause references "laws," it has been applied to government actions, practices, policies, and involvements. *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 784 (1983) (addressing a state legislature's practice of beginning each session with a prayer); Cty. of Allegheny v. ACLU, 492 U.S. 573, 578–79 (1989) (addressing holiday displays on public property); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2074 (2019) (plurality opinion) (addressing the display and maintenance of, and expenditure of public funds for, a Latin cross on public land). *But see Am. Legion*, 139 S. Ct. at 2095 (Thomas, J., concurring) (stating that the Establishment Clause only applies to duly enacted laws).

138. *See* Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 719–20 (1981) (recognizing the "tension between the two Religious Clauses" but dismissing it as overcome through Supreme Court precedent); *see also* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 230–31 (1963) (Brennan, J., concurring) (discussing the difficulty in defining the "just bounds" between distinguishing the realm of "the business of civil government from

As the Establishment Clause is the mechanism by which our Constitution assures its citizens that the government will not favor one religion over another, or religion over nonreligion—a question of discrimination—the discussion regarding the appropriate balance between protection of religious liberties and antidiscrimination interests is germane to the balance between the Free Exercise and Establishment Clause context.

1. The Establishment Clause Interplay

Striking this balance between the Free Exercise and the Establishment Clauses is not a well-developed area of law in the public employment context.[139] However, there are a number of situations in which the Clauses might come into tension in public employment. For example, a government employee may refuse to perform official duties, violate an employer policy, or need an exemption or specific accommodation for religious observance, all based on otherwise violating religious tenets.[140] Should the government employer approve an accommodation, is it thereby favoring one religion over another or religion over nonreligion in a way that violates the Establishment Clause? Similarly, if one of its employees freely exercises religion during work hours pursuant to an accommodation, will that exercise be attributable to the government in such a way that it is thereby "endorsing" religion? Before delving further into these questions and the unique situation of public employees and employers, a basic overview of relevant Establishment Clause jurisprudence is helpful.

that of religion" and stating "[t]he fact is that the line which separates the secular from the sectarian in American life is elusive" (quoting John Locke, *A Letter Concerning Toleration*, *in* 35 GREAT BOOKS OF THE WESTERN WORLD 1, 2 (Maynard Hutchins ed., 1952)).

139. *See* Corbin, *supra* note 38, at 1195.

140. *See id.* at 1195 nn.1–2, 1203 n.48. Professor Corbin specifically notes the cases of a clerk refusing to issue a marriage license, a city bus driver insisting on wearing a hijab in violation of a dress code, a police officer refusing a post with a gaming commission (due to religious objections to gambling), and a government employee who needs time off for a religious observance. *Id.*

a. Historical Context

Establishment Clause jurisprudence is not as clear or linear as would lend itself to succinct summary here.[141] In its basic characterization, and with at least one significant deviation, Establishment Clause jurisprudence erected a wall of separation between church and state until the early 1960s.[142] This coincided well with the Court's more stringent interpretation of religious liberties pursuant to the Free Exercise Clause during that same timeframe, discussed *supra*.[143] However, with the sympathetic accommodation of religious liberties from 1960 to 1990, the separationist leaning of Establishment Clause jurisprudence was in tension with the Free Exercise jurisprudence.[144] As one scholar noted, the Free Exercise jurisprudence of the 1960s "required the government to extend to religious individuals special consideration for exemptions when they felt burdened by state action."[145] But the Establishment Clause jurisprudence appeared to prohibit government from advancing religion over nonreligion.[146] Thus, Establishment Clause jurisprudence "seemed to prohibit the preferential action demanded by the Court's Free Exercise Clause" jurisprudence.[147]

Starting in 1971, the Court began using multiple tests to determine whether government action violated the Establishment Clause, but never abandoned the underlying separation of church

141. *See Am. Legion*, 139 S. Ct. at 2080 (stating that the Court "grappl[ed]" with Establishment Clause cases for more than twenty years before "ambitiously attempt[ing] to distill from the Court's existing case law a test that would bring order and predictability"); VINCENT PHILLIP MUNOZ, RELIGIOUS LIBERTY AND THE AMERICAN SUPREME COURT: THE ESSENTIAL CASES AND DOCUMENTS 1–5 (2013) (acknowledging that the doctrines adopted by the Supreme Court "have not always been consistent and perhaps not even coherent," but stating that in general Establishment Clause jurisprudence through the early 1960s was strictly separationist but with at least one deviation); SMITH, *supra* note 5, at 113–20 (detailing the complicated and at times irreconcilable history of Establishment Clause jurisprudence).

142. *See Everson*, 330 U.S. at 18; *Schempp*, 374 U.S. at 216; MUNOZ, *supra* note 141, at 2–5. *But see* Zorach v. Clauson, 343 U.S. 306, 313 (1952) (permitting, under the Establishment Clause, public schools to release students during the school day to attend religious activities and stating "[w]e are a religious people whose institutions presuppose a Supreme Being").

143. *Supra* notes 10–11 and accompanying text.

144. *See supra* notes 12–15 and accompanying text; MUNOZ, *supra* note 141, at 7 (stating that the narrowing of free exercise jurisprudence in the 1990s "helped to alleviate a striking tension in the Court's church-state jurisprudence").

145. MUNOZ, *supra* note 141, at 7.

146. *Id.*

147. *Id.*

and state premise.[148] This is not to say that there was not a slight shifting of paradigms, similar to Free Exercise jurisprudence, during this timeframe. For example, the *Lemon* test was critiqued by some on the Court for its "callous indifference" toward religion.[149] Nevertheless, the ultimate premise was separationist.[150]

In 1971, the Court adopted the *Lemon* test to determine whether state action violated the Establishment Clause.[151] Pursuant to this test, government action is not prohibited if it (1) has a secular purpose,[152] (2) does not have the primary effect of either advancing or inhibiting religion, and (3) does not result in excessive government entanglement with religion.[153] However, just two years after the Court adopted the *Lemon* test, it questioned its usefulness and only sporadically employed it thereafter.[154] A later test employed by the Court was the endorsement test, described as an elaboration on the "effect" prong of the *Lemon* test, which prohibited government ac-

148. *See, e.g.*, *infra* notes 151–56; *see also* MUNOZ, *supra* note 141, at 711.

149. Cty. of Allegheny v. ACLU, 492 U.S. 573, 663–64 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

150. MUNOZ, *supra* note 141, at 7–11; *see also* Van Orden v. Perry, 545 U.S. 677, 683–84 (2005) (reaffirming the obligation of the Court to "maintain a division between church and state," while still acknowledging the role religion has played in the nation's history). The failure to waver from the separationist leanings is interesting, as some scholars assert that the Establishment Clause was never meant as anything more than a prohibition on creating a national church, certainly not a decree regarding the separation of church and state as it has come to be known. *See, e.g.*, SMITH, *supra* note 5, at 57–58. Indeed, at least one Supreme Court Justice has similarly expressed doubts regarding the separationist underpinnings of the Establishment Clause. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2095 (2019) (Thomas, J., concurring). Regardless of this disagreement, however, it is clear that though the underpinnings of Establishment Clause precedent are separationist, that does not mean or require complete exclusion of religion in all things government. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 729–30 (2014) (holding that government expenditures may be required to accommodate religion in certain circumstances); Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (finding that "total separation between church and state . . . is not possible in an absolute sense" and that "[s]ome relationship between government and religious organizations is inevitable").

151. *Lemon*, 403 U.S. at 612–13.

152. At least one scholar has noted that religious exemptions to generally applicable laws would never be allowed under this Establishment Clause standard because government exemptions for purely religious reasons would also violate this prong of having a "secular purpose." Simson, *supra* note 12, at 542–43. Professor Simson goes on to note, however, that such a literal reading of this test would not effectuate the purposes or balance between the two religion clauses because courts would be constitutionally required to protect free exercise on the one hand, but prohibited from ordering relief on the other. *Id.* at 543.

153. *Lemon*, 403 U.S. at 612–13.

154. *Van Orden*, 545 U.S. at 685, 686 nn.4–5 (providing a succinct summary of Court cases that have applied and declined to apply the *Lemon* test).

tion that intends to convey a message of endorsement or disapproval of religion.[155] Another test was the coercion test, which prohibited government actions that (1) coerced anyone to support or participate in any religion or its exercise and (2) granted direct benefits in such a way that established a religion or tended to do so.[156]

Most recently in *American Legion*, five Justices on the Court acknowledged that no one test or standard will work in all instances, and each expressed preference for case-by-case or situation-specific standards.[157]

b. The Court's Decision in *American Legion*

In *American Legion*, the American Humanist Association brought suit against the Maryland-National Capital Park and Planning Commission for the removal, demolition, or alteration of a thirty-two-foot tall Latin cross located on public land and serving as a WWI memorial.[158] In rejecting the argument that the cross violated the Establishment Clause, the Court held that "[t]he passage of time gives rise to a strong presumption of constitutionality" for established, even if religiously expressive, monuments, symbols, or practices based on four considerations.[159] In using these considerations, the Court declined to apply any of the tests previously discussed.[160] Instead, its standard was specifically tailored to

155. *See Am. Legion*, 139 S. Ct. at 2080 (plurality opinion); Lynch v. Donnelly, 465 U.S. 668, 687–94 (1984) (O'Connor, J., concurring). *But see* Caroline Mala Corbin, *Opportunistic Originalism and the Establishment Clause*, 54 WAKE FOREST L. REV. 617, 622, 636–37 (2019) (setting forth the endorsement test of the Court as a stand-alone test).

156. Cty. of Allegheny v. ACLU, 492 U.S. 573, 659–65 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part); *see also* Corbin, *supra* note 155, at 638–40 (discussing the coercion test).

157. *Am. Legion*, 139 S. Ct. at 2082–87, 2089–90 (implicitly rejecting the above tests, at least in the context of religious monuments and displays, by failing to utilize them and instead using a situation-specific standard); *id.* at 2080–81 (stating expressly that the *Lemon* test is unworkable in many instances); *id.* at 2090–91 (Breyer, J., concurring) (stating, in an opinion in which Justice Kagan joined, that "there is no single formula for resolving Establishment Clause challenges"); *id.* at 2094 (Kagan, J., concurring) (stating that, although the Court should still adhere to a standard that involves an examination of purpose and scope, other considerations, like historical context, should be considered on a case-by-case basis).

158. *Id.* at 2077–78. The American Legion intervened in defense of the memorial. *Id.* at 2078.

159. *Id.* at 2085.

160. *See id.*

the context of historical monument cases.[161] Specifically, the Court considered (1) the original purpose for historical monuments, symbols, or practices is not always easy to define; (2) multiple purposes may have existed or came to exist; (3) originally religious purposes can evolve into secular purposes; and (4) when a religious symbol is established with familiarity and historical significance due to the passage of time, its removal may no longer appear neutral but aggressively hostile to religion.[162]

Viewing the case in light of these considerations, the Court determined that maintaining the cross at issue on public land did not violate the Establishment Clause.[163] In coming to this decision, the Court pointed to both the cross's secular and religious value and meaning.[164] Specifically, the Court discussed how the cross, erected in 1925, had "become a prominent community landmark" expressing "the community's grief at the loss of the young men who perished [during WWI], its thanks for their sacrifice, and its dedication to the ideals for which they fought."[165] In addition to this local secular meaning, the Court went to great lengths to discuss how a cross has been adopted in many secular contexts in general, and had thus been transformed from a religious to a secular symbol in many cases.[166] This was particularly true in the WWI memorial context, where a plain Latin cross, such as the one in *American Legion*, had developed into a national symbol of the conflict and the resultant sacrifices.[167]

Nevertheless, despite the Court's seeming attempt to distance the cross from religious meaning, the Court did acknowledge the inherently Christian symbolism and meaning of a cross.[168] It also recited the Christian message clear from the time of the cross's development and erection.[169] Specifically, the Court quoted the fundraising form for the memorial that referenced trust in "God, the

161. *See id.* at 2085–87, 2089–90.

162. *Id.* at 2082–85.

163. *Id.* at 2089.

164. *Id.* at 2074, 2087, 2089.

165. *Id.* at 2074; *see also id.* at 2077 (describing details of the cross monument that additionally indicated its intent and symbol as a memorial of the soldiers lost to the community as a result of WWI); *id.* at 2085–86 (discussing other secular reasons for wishing to preserve the monument at issue such as evolution of purpose and traffic-safety concerns).

166. *Id.* at 2074–75.

167. *Id.* at 2075–76, 2085.

168. *Id.* at 2074 ("The cross came into widespread use as a symbol of Christianity by the fourth century, and it retains that meaning today." (footnote omitted)).

169. *Id.* at 2076–77.

Supreme Ruler of the Universe," how the fallen soldiers' spirits would guide the community in "Godliness," and the motto "One God, One Country, and One Flag."[170] It also noted the numerous religious references at the dedication ceremony, including an invocation by a Catholic priest, the keynote address stating the cross was "symbolic of Calvary," and a benediction by a Baptist pastor.[171] The Court also discussed how religious symbols on a national level even with no secular purpose are acceptable to "acknowledge[] the centrality of faith to those whose lives are commemorated."[172]

In light of this history, including the religious and secular meanings of the cross, the Court found that removal or radical alteration after the cross's establishment in the community for almost a century "would be seen by many not as a neutral act but as the manifestation of 'a hostility toward religion that has no place in . . . Establishment Clause traditions.'"[173] Far from requiring removal of religious symbols when a claim of offense is made, the First Amendment Free Exercise and Establishment Clauses "aim to foster a society in which people of all beliefs can live together harmoniously," and the cross in that case "where it has stood for so many years is fully consistent with that aim."[174] In fact, its removal could be particularly "evocative, disturbing, and [religiously] divisive" in a way that the Establishment Clause actually seeks to avoid.[175]

In making this decision, the Court declined to use the referenced Establishment Clause tests but favored a situation-specific standard.[176] In addition to this implicit abandonment of a set test or tests in favor of situation-specific considerations, five Justices expressly stated that Establishment Clause standards will be situation specific.[177] Specifically, four Justices stated that the *Lemon* test's shortcomings in some cases are insurmountable as it would not allow for aspects of religion in government life that are not violative

170. *Id.*

171. *Id.* at 2077.

172. *Id.* at 2086 (discussing Dr. Martin Luther King, Jr. memorials, and others, that incorporate religious symbols to "honor men and women who have played an important role in the history of our country").

173. *Id.* at 2074 (quoting Van Orden v. Perry, 545 U.S. 677, 704 (2005) (Breyer, J. concurring)).

174. *Id.*

175. *Id.* at 2085.

176. *Supra* notes 157, 160–62 and accompanying text.

177. *Supra* note 157 and accompanying text.

of the Establishment Clause, such as prayers at legislative meetings, references to deities in words of public officials, and "public references to God on coins, decrees, and buildings."[178] These Justices also expressly stated that Establishment Clause standards should "focus[] on the particular issue at hand" as well as looking to history for guidance.[179] In addition to these four, Justice Kagan joined in a concurrence that expressed the view that "there is no single formula for resolving Establishment Clause challenges."[180]

c. Lingering Questions Post-*American Legion*

With a majority of the Justices on the Supreme Court acknowledging that any test employed by Establishment Clause analysis depends on context, and abandoning the idea that any one test will be used by the Court, the question becomes how courts develop workable standards for evaluating Establishment Clause claims in relation to the protection paradigm currently reigning in Free Exercise jurisprudence. But more specifically, how will courts determine Establishment Clause claims in relation to reigning Free Exercise jurisprudence in the public employment context?

2. The Establishment Clause and the Protection Paradigm Interaction in the Public Employment Context

One way to understand how the Free Exercise jurisprudence and the Establishment Clause jurisprudence interact after *Masterpiece* and *American Legion* is to consider first whether the proposed religious exercise, the action or inaction at issue, is protected by the Free Exercise Clause,[181] which currently requires the use of the protection paradigm. If it is, then in theory, no Establishment

178. *Am. Legion*, 139 S. Ct. at 2080 (plurality opinion) (authored by Justice Alito, and joined by Chief Justice Roberts and Justices Breyer and Kavanaugh). The Justices joining this opinion advocated for a "presumption of constitutionality for longstanding monuments, symbols, and practices." *Id.* at 2081–82.

179. *Id.* at 2087.

180. *Id.* at 2090 (Breyer, J., concurring). The concurrence also stated that each case must be determined individually "in light of . . . assuring religious liberty and tolerance for all, avoiding religiously based social conflict, and maintaining that separation of church and state that allows each to flourish in its 'separate spher[e].'" *Id.* at 2090–91 (quoting Van Orden v. Perry, 545 U.S. 677, 698 (Breyer, J., concurring)). Justice Kagan also wrote separately, stating her preference for a purpose and effects inquiry in Establishment Clause jurisprudence in addition to a case-by-case determination of additional appropriate considerations such as historical context. *Id.* at 2094 (Kagan, J., concurring).

181. *See* Simson, *supra* note 12, at 544.

Clause claim can be made as the government has a duty to protect the religious exercise at issue.[182] In trying to protect religious exercise above and beyond what is required by the Free Exercise Clause, the Establishment Clause comes into play, and the government action must be put through an Establishment Clause analysis.[183]

In practice, of course, the line is rarely that clear, with one side making arguments that the Free Exercise Clause protects the desired religious action/inaction at issue—thereby negating the necessity of resorting to the Establishment Clause analysis—and the other making arguments that the religious action/inaction at issue is not protected and violates the Establishment Clause. Add to this that the protection paradigm will allow for potentially more expansive religious freedom of action than has been seen in the last twenty years, and the balance between what is prohibited by the Establishment Clause is even less clear but seemingly more limited.[184]

In the public employment context, however, the government is not just sovereign over the citizens at issue, but also their employer. In this context, the government has different interests at stake than just the institution of laws to carry out the overarching will of the electorate.[185] It is attempting to conduct the day-to-day execution of the public's business, and must have some control over those whom it employs in order to do that in an effective and efficient manner.[186] The Supreme Court has recognized this principle

182. *Id.*

183. *Id.* As the Court has stated, "'[T]here is room for play in the joints' between the Clauses," where government action is not compelled by the Free Exercise Clause or prohibited by the Establishment Clause. Cutter v. Wilkinson, 544 U.S. 709, 719 (2005) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970)).

184. This Article does not go into depth on the evaluation of the dichotomy of paradigms to the Court's jurisprudence in the Establishment Clause context. Suffice it to say, however, that one can see how if a decision maker looks at an Establishment Clause case through the subordination paradigm, the strong preference is for maintaining greater absence of religion from government affairs, and the sliding scale will move towards less accommodation of religious liberties. *See* SMITH, *supra* note 5, at 93–94. The opposite is also true. *See id.* The Court's decision in *American Legion*, notwithstanding its effort to justify its decision by secularizing the symbology of a Christian cross, supports this apparent shift as well, especially in light of the Court using similar rhetoric as in *Masterpiece* to convey a message that religious hostility will not be tolerated in First Amendment jurisprudence. *See Am. Legion*, 139 S. Ct. at 2089–90 (plurality opinion) (discussing how the American Humanist Association's brief "strains" to connect the cross at issue with anti-Semitism and the Ku Klux Klan and calling this strain "disparaging intimations" unsupported by evidence).

185. *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 417 (2006).

186. *See id.* at 418.

in its line of decisions regarding the extent to which public employees retain their free speech rights.[187] The Court has said that citizens entering public employment must "by necessity . . . accept certain limitations" to their freedom because "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services."[188]

In the balance between religious liberties and other antidiscrimination interests, adding this layer of governmental employer authority to the equation inserts a strain against the protection paradigm. To illustrate, consider the situation of an employee taking an action, or refusing to act, because of a religiously held belief, and that action or refusal is in direct tension with other antidiscrimination concerns. For example, consider a police officer who refuses to patrol a clinic during an anti-abortion rally. The refusal of the officer to accept an assignment may potentially disrupt the day-to-day operation of the public's business. Additionally, if the police department were to allow an accommodation, it may open itself up to claims that it is acting contrary to the Establishment Clause by favoring religion over nonreligion pursuant to one or more of the Establishment Clause tests described previously, such as the endorsement standard.

Therefore, the balancing question, and consequently the relevant standard, must take into account these differences in a way that is not acknowledged in a standard Establishment Clause case, and certainly not in the era of the prevailing protection paradigm with its expansive religious liberties scope.

3. The Path Forward: A Workable Standard for Public Employment

The question of how best to balance religious liberties and other antidiscrimination interests is not a new topic of discussion, and many scholars have presented weighing measures, standards, and

187. *Id.* at 418–19.
188. *Id.* at 418.

tests.[189] This section explores and adapts some of those tests for workability in the public employment context.[190]

As an initial matter, if one were to proceed with the question of whether the Free Exercise Clause protects the action at issue, the first inquiry, even after *Masterpiece*, continues to be whether the government employer action, policy, or requirement at issue is neutral and generally applicable.[191] However, the shift in paradigm evident in *Hobby Lobby* and applied to First Amendment jurisprudence in *Masterpiece*—and the recognition by at least five Justices on the Supreme Court that in the Establishment Clause context a balancing test should be situation specific—indicates that it is possible that the "neutral and generally applicable law" inquiry could be altered in the future.[192]

Regardless, this standard is unworkable in the employment law context in light of the fact that most employment law policies, like dress codes and leave-of-absence policies, will by nature be neutral and generally applicable. Thus, the test does not actually answer any question of import, but will always be answer determinative. Additionally, it does not take into account the fact that "employees bringing religious liberty claims are not only citizens for whom the government is their sovereign, but also employees for whom the government is their boss."[193] In some cases, this employment dynamic might suggest a more sympathetic incorporation of an em-

189. *See, e.g.*, *infra* section IV.B.3.a–d.

190. It is beyond the scope of this Article, however, to explain each concept and test in depth and as originally conceived. Adaptions have been freely made in order to further this Article's normative view of appropriate future standards and workability in the public employment contexts. Thus, none of the tests described in this section should be taken as formulated entirely as the original author intended. To examine these tests in depth or for their original construction, the reader is encouraged to examine the original sources as cited herein.

191. Corbin, *supra* note 38, at 1203–04; *see also* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring).

192. *See supra* notes 96, 184; *see also* Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 635 (2019) (Alito, J., joined by Justices Thomas, Gorsuch, and Kavanaugh, concurring in denial of certiorari) (stating that *Smith* had "drastically cut back" on Free Exercise protections and emphasizing that the Court had not been asked to revisit that case in the petition at hand). It is beyond the scope of this Article to address the likelihood of the Court abandoning the "generally applicable" standard here. The balance of this Article focuses not just on what the current status of the law is, but also what it should be. It is in this context that this Article proceeds with its recommendations.

193. Corbin, *supra* note 38, at 1204. In general, this means the government employer should be given greater control to consider what would or would not be disruptive to the working environment. *Id.* at 1233–34.

ployee's religious identity in the workplace, regardless of the neutrality or general applicability of the policy at issue—to the extent it can be accommodated without violating the Establishment Clause.[194] As such, this "neutral and generally applicable" standard, though still prevalent today, is unworkable in the public employment context and should be abandoned as applied to such cases.

Thus, the tests below would apply if or when the courts formally acknowledge the unworkability of the "neutral and generally applicable" rule to sufficiently and appropriately balance religious liberties and anti-establishment concerns in the public employment context, when courts are trying to determine the appropriate balance in the "joints" area between what does not require protection by the Free Exercise Clause but what is also not prohibited by the Establishment Clause,[195] or in the case of non-neutral actions, policies, or requirements.

a. Prior Establishment Clause Jurisprudence—No Endorsement

Of the prior-discussed tests in standard Establishment Clause jurisprudence, the "no endorsement" test has the most significant and difficult implications for government-employee religious accommodation issues.[196] As one scholar has noted, "Rigorously implemented, the no-endorsement doctrine on its face would seem to condemn a great deal of governmental expression that has been practiced and valued in the American political tradition, including the national motto . . . [and] official use of prayer in legislative sessions and presidential inaugurations . . . ."[197] However, others have pointed out that it lends itself to important American principles, such as the government not impairing the citizenship standing of particular religions or no religion by suggesting its favoritism to a particular religion.[198] In the public employee context, this could include non-endorsement of a discriminatory message.[199]

194. *See, e.g.*, *supra* note 127.

195. *See supra* note 183.

196. As indicated above, only those tests that are, in the author's opinion, especially adaptable to the public employment context are discussed in this section. As such, not all the standard Establishment Clause test options are detailed herein.

197. *See* SMITH, *supra* note 5, at 118 (footnote omitted).

198. *See, e.g.*, TEBBE, *supra* note 7, at 99.

199. *Id.* at 170–71.

One way to reconcile this test into a more workable framework for the public employment context would be to further define its parameters.[200] One scholar, Professor Gary Simson, has proposed the following additional definition.[201] First, a decision maker must determine if the burden placed on religious exercise was by the government or a private party.[202] If a private party, the government cannot take any further action to alleviate the burden without "endorsing" religion.[203] If a public employee is complaining that they are unable to freely exercise their religion in their work context, the situation will likely always be due to the government employer's policy, action, or regulation. As such, the first prong on this test will most always be answered affirmatively, and thereby is moot. Next, however, the test inquires into whether the burden on religion is substantial or insubstantial.[204] If insubstantial, and there is a rational basis against providing the exemption, the government cannot provide the exemption without "endorsing" religion.[205] If substantial, and denying the exemption is necessary to serve a compelling state interest, the government cannot provide the exemption without "endorsing" religion.[206]

The most obvious challenge with this test is the idea that a court will sit in judgment on what is a "substantial" versus an "insubstantial" burden on religion. Such a determination seems to be directly at odds with the currently prevailing paradigm.[207] In defending the propriety of a court inquiring into the substantiality of the burden on religion, Professor Simson states that while courts should defer to the religious claimant regarding whether the belief itself qualifies as "religious," it should not defer regarding whether

200. *See* Simson, *supra* note 12, at 545.

201. *Id.* at 549–50.

202. *Id.* at 549.

203. *Id.* at 550.

204. *Id.* at 549–50. Professor Simson goes on to elaborate on what would qualify as substantial, using pre-*Smith* caselaw as a guide. *Id.* at 565–78. Professor Simson advocates striking a balance between too much protection that would stymie the ability of government to effectively regulate and too little protection that would disparately impact minority religions. *Id.* at 572. Even with thirty years of Supreme Court precedent to help strike this balance, it is unclear what concrete standards and weighing measures could be used that are not outcome determinative depending on which paradigm the decision maker subscribes. *See supra* note 107 (discussing Justice Gorsuch's reference in *Masterpiece* to "apply[ing] a sort of Goldilocks rule").

205. Simson, *supra* note 12, at 551–52.

206. *Id.* at 551–53.

207. *Supra* notes 38–42 and accompanying text.

the action or inaction required by the government is a "substantial" burden to that belief.[208]

Professor Simson contends that only in "rare instances" is a claimant forced to choose between complying with the government requirement and suffering personal turmoil of violating one's own religion, or complying with religious tenets and suffering adverse consequences of violating the law, policy, or regulation.[209] Professor Simson supports this argument by making the distinction between suffering adverse consequences as a result of having to *violate* the law to comply with religion tenets, and suffering adverse consequences as a result of simultaneously complying with religious tenets and the relevant law (thereby not violating the law).[210] Taking *Masterpiece* as an example, he distinguishes between questioning whether the refusal to bake wedding cakes for same-sex couples itself violated religious tenets, and questioning whether complying with the law to adhere to this religious tenet caused a substantial burden.[211] Regarding the latter, the questioning involves whether ceasing to bake wedding cakes at all—as the baker could not bake only for opposite sex and not same-sex couples—is a substantial burden.[212] As Professor Simson points out, this can be answered without reference to any element of religion.[213] Rather, it is a matter of economic realities and disadvantage or cost to a business, which could be deemed significant.[214]

208. Simson, *supra* note 12, at 573–74.

209. *Id.* at 574.

210. Professor Simson points to the religious claimants in *Braunfeld v. Brown* to help illustrate this point. *Id.* (citing 366 U.S. 599 (1961)). The issue in that case was a law that required businesses to close on Sundays. *Braunfeld*, 366 U.S. at 600. The claimants were Orthodox Jewish merchants who could not work on Saturdays. *Id.* at 601. Professor Simson argues that they were not faced with the "rare circumstance" choice referenced above because they could simply forgo the income from Saturday and Sunday by changing their lifestyle choices, changing professions, or adapting their business model. Simson, *supra* note 12, at 574. All of these choices appear to be squarely in the situation of choosing to comply with one's religion and suffering adverse consequences due to the law. However, as Professor Simson points out, it is not a "stark choice" between following the law or following one's religious tenets. *Id.* Professor Simson argues it is because the answer to this question—of how much burden is caused by following the law while still adhering to religious tenet—is a sliding scale of burden analysis, that the inquiry does not have anything to do with religious examination. *Id.* at 574–75. And this analysis, he argues, is thus squarely within the province of the courts. *Id.*

211. Simson, *supra* note 12, at 575–78.

212. *Id.* at 577–78.

213. *Id.*

214. *Id.*

b. Adapted Free Speech Test

Another method could be to adopt the public-employee specific test regarding the balance between the need for workplace regulation and the constitutional right of free speech.[215] Specifically, this test would ask three questions: (1) is the religious exercise/objection pursuant to official duties, (2) is the religious exercise/objection on a matter of public concern, and (3) is the religious exercise/objection disruptive to the workplace.[216] If the answer to question one is yes, then the religious exercise/objection is not protected and the employer is free to discipline the employee or reject the accommodation request.[217] The underlying support for this conclusion is that actions taken pursuant to official duties are that of the government agency itself; they do not belong to the individual employee.[218] Thus, in answering this question, one would consider where the religious activity, or refraining from conduct pursuant to religious objection, takes place and whether it is "part and parcel" of an employee's work duties.[219]

If it is not pursuant to official duties, the next question is whether the exercise/objection is "on a matter of public concern."[220] If the answer is yes, the religious exercise/objection is protected and the employer must accommodate it, subject to the final inquiry.[221] If no, it is not protected.[222] In determining whether a matter is of public concern in the speech context, a decision maker could ask whether it relates to any matter of political, social, or

215. Corbin, *supra* note 38, at 1197–98. Professor Corbin specifically states that the goal of her article is not to argue that the public employee speech doctrine should be wholesale adopted in the public employment religious exercise context, but rather that it should be a model for further discussion. *Id.* at 1256.

216. *Id.* at 1198, 1204–05.

217. *Id.* at 1198–1200, 1205.

218. *Id.* at 1199, 1209–10 (arguing that if the religious act or inaction impacts official duties, it becomes state action or inaction that cannot be separated from the government or attributable solely to the individual). *But see* TEBBE, *supra* note 7, at 175–77 (discussing how it may be possible to accommodate both religious freedom concerns and antidiscrimination concerns by distinguishing between the officeholder, the individual, and the office itself). Though Professor Corbin argues that acts that impact official duties become state action, she does suggest that inaction of a public employee that is covered by another employee might be acceptable. Corbin, s*upra* note 38, at 1210. In this way, it appears Professor Corbin may agree with Professor Tebbe that such an accommodation respecting religious liberties while balancing antidiscrimination concerns may be acceptable.

219. Corbin, *supra* note 38, at 1206.

220. *Id.* at 1206, 1215–16.

221. *Id.* at 1200–01.

222. *Id.*

other concern in the community.[223] A decision maker could also ask whether it is "newsworthy," that is, whether it is a subject of general interest and value to the public.[224]

Finally, even if the exercise/objection is on a matter of public concern, the decision maker must inquire into whether the religious exercise/objection is unduly disruptive to the workplace; if it is, then it does not need to be accommodated.[225] During this inquiry, the decision maker would weigh the value of the religious interest against the amount of disruptiveness to the work environment.[226] This is especially important in the context of public employment where not only the government employer, but also the public, has an interest in the efficient provision of public services.[227]

There are a number of issues with this method.[228] First, there may not always be a clear distinction between acting pursuant to official duties and acting as an individual, as there is in the free speech context.[229] This is because religious exercise is so clearly not a government function that one could argue a reasonable observer can distinguish between the employee's accommodated exercise and official government action.[230] However, the employee is still a "representative" of the government during work hours to some extent, opening the government employer to claims of "endorsement" for undisciplined conduct of its employees.[231]

223. *Id.* at 1200.

224. *Id.*

225. *Id.* at 1201–02, 1222–30.

226. *Id.* at 1201. Examples of disruption include interference with supervision of employees, destruction of necessary working relationships, inability to perform job functions, and serious disrepute brought upon the government agency. *Id.* at 1202.

227. *Id.* at 1222.

228. Professor Corbin acknowledges many of the issues, and responds. *Id.* at 1230–48. Specifically, Professor Corbin states, in essence, that the paradigm through which one views an issue will be one of the factors for determining which test one finds appropriate in the public employee context. *See id.* at 1256 (stating that the preferred test will depend, among other things, on "one's view of the distinctiveness of religion").

229. *See supra* note 218.

230. *Id.* Even so, Professor Tebbe warns that this distinction requires that other citizens do not experience a tangible impact, which in his view would mean that the accommodation is essentially invisible to the outside observer. TEBBE, *supra* note 7, at 176. For example, in the case of issuing marriage licenses to same-sex couples, a county deputy clerk who is also religious objector can be relieved from involvement so long as another clerk is available to issue the licenses and such transferring of duties does not place an undue hardship on other colleagues. *Compare id. with* discussion *infra* note 264.

231. *See supra* note 136.

Second, whether religious exercise/objection is a matter of public concern can often be answered by the paradigm through which the decision maker is viewing the scenario. Decision makers who view the world through the protection paradigm might see the public exercise of personal religious convictions of each citizen as contributing to the tapestry of religious freedoms for all, and increasing the diversity in the marketplace of ideas and viewpoints.[232] Others who view the world through the subordination paradigm might see religious convictions as purely personal matters that must be set aside when engaging in the public's business.[233] This standard is not alone in being subject to the whims of the prevailing paradigm. Nevertheless, it makes the standard less ideal for providing consistent and foreseeable resolutions that employers and employees can anticipate and rely upon.

The final prong has much in common with the harm principle test addressed in the following section, and therefore suffers from the same challenges. Those challenges will be discussed in further detail below, but essentially come down to the same issue as the second prong of this test. Namely, it does not lend itself to consistent future application on which employers and employees could rely in navigating their working relationships and decisions.

c. Harm Principle

A much-discussed and popular method of discerning the balance between freedom of religion and other antidiscrimination concerns is the harm principle.[234] This comes in many forms and standards of measurement.[235] For example, two standards of measurement for harm that have been proposed are the materiality standard and the undue hardship standard.[236]

232. *See, e.g.,* Corbin, *supra* note 38, at 1218 & n.117 (citing a case that discusses religious convictions as a matter of social and community concern); Gedicks & Van Tassel, *supra* note 34, at 323.

233. *See* Corbin, *supra* note 38, at 1218–19 & n.121.

234. *See, e.g.,* TEBBE, *supra* note 7, at 51–52; Gedicks & Van Tassell, *supra* note 34, at 337–38; Simson, *supra* note 12, at 542 (arguing that harm is not "a matter of *independent* importance" to a religious exemption analysis but can be indirectly taken into account in the event that harm to a third party undermines the government's ability to achieve its compelling interest objective).

235. *Supra* note 234.

236. TEBBE, *supra* note 7, at 61–62; Gedicks & Van Tassell, *supra* note 34, at 337–38.

One iteration of the materiality standard, adapted from common law torts principles, asks whether protecting the religious exercise at issue would impart a cost of such significance that a private party would factor it into how he or she might respond.[237] Or, put another way, whether the increase in cost to the third party is cognizable, or so miniscule as to not warrant a response.[238] If cognizable to such a degree as to elicit a response, accommodation would not be appropriate.[239]

The undue hardship standard, adapted from employment law, asks whether the protection of the religious exercise at issue would impose more than a de minimis burden on others.[240] If so, accommodation is inappropriate.[241] Under either of these standards, the question is essentially one of degree.

The challenge with allowing the idea of "harm to another" to rule the outcome of these issues is that practically anything can be deemed "harm" and thus justify governmental regulation in a disturbingly wide breadth of contexts.[242] As Professor Steven D. Smith states in his book, *The Rise and Decline of American Religious Freedom*, it is "wildly implausible" to conclude that any "religious faiths and practices inflict no 'harm' on others."[243] Religious beliefs and practices take a normative stance on persons and behaviors in society that many find unpalatable and offensive.[244] Therefore, whether decisions rooted in protected religious liberties cause "harm to others is rarely, if ever, a distinguishing feature," which would obviate its usefulness as a weighing measure.[245] Indeed, Professor Nelson Tebbe, though advocating for the undue

237. TEBBE, *supra* note 7, at 61.

238. *See* Gedicks & Van Tassell, *supra* note 34, at 337–38.

239. TEBBE, *supra* note 7, at 61.

240. *Id.* at 62–63.

241. *Id.* at 63.

242. SMITH, *supra* note 5, at 43–44 (stating, not unlike proponents of the harm principle, that harm could include "not only bodily injury and economic loss but also psychic injury—including feelings of subordination or alienation or indignation").

243. *Id.* at 44.

244. *See id.* at 44 & nn.152–54.

245. Simson, *supra* note 12, at 542. Professor Simson argues,

> The important question for constitutional purposes is not whether an exemption causes harm to others or whether the harm to others takes more specific or general form. Instead, it is the extent to which such harm detracts from the government's ability to effectuate the law's objective(s), and that question is properly answered without giving special weight to . . . harm to others.

Id.

hardship standard, recognizes that the standard "seems harsh because it appears to require courts to deny all but the most innocuous claims by religious actors."[246]

Furthermore, whether harm to a third party is substantial or de minimis can depend entirely on the prevailing paradigm, or the paradigm of the particular decision maker.[247] In this way, the harm principle as a stand-alone test suffers from the same challenges as the second and third prong of the Free Exercise test. That is, it does not allow for consistent and reliable precedent upon which employers and employees can rely in defining the proper scope of their employment relationship, including religious accommodations.

d. The Combination Test

A final option for a workable standard in the public employment context weighs four factors: (1) the magnitude of the third-party harm, (2) the likelihood of the third-party harm, (3) the religious interest at stake, and (4) exemptions made for nonreligious reasons.[248] The second factor would require the decision maker to consider whether the harm is likely to occur and spread out enough that while the aggregate cost may be troubling, the cost to any one individual is not.[249]

The third component to this four-factor test inquires into the seriousness of the religious interest at issue.[250] This third prong is problematic in light of the Court's reaffirming that judgments on the seriousness, justifiability, or centrality of a claimed religious interest are an inappropriate inquiry.[251] However, if the third component to this four-factor test was modified to include instead an

246. TEBBE, *supra* note 7, at 64. Professor Tebbe goes on to say, however, that courts have mostly applied the standard in sensible ways. *Id.* This conclusion may also be a question of which paradigm or "baseline for comparison" with which one is viewing the issue. *Id.* at 59–60.

247. *See, e.g.*, Gedicks & Van Tassel, *supra* note 34, at 331, 340 (stating that the Court in *Hobby Lobby*, in a footnote, departed from set third-party harm principles in favor of an analysis that is "insignificant and implausible" and was a "casual dismissal of third-party burdens"); *id.* at 340 ("As with all line-drawing rules, materiality can present difficult issues at the margin—how to distinguish between a slight (immaterial) third-party burden and a heavier (material) one."); Barclay, *supra* note 45, at 348 (stating that "there is no such consensus" on what constitutes harm, "only a plurality of views of what harm is").

248. Lund, *supra* note 33, at 1377–81.

249. *Id.* at 1378.

250. *Id.* at 1379.

251. *See supra* notes 38–42 and accompanying text.

inquiry into whether the burden on religion was substantial or insubstantial, as articulated in the modified "no endorsement" test, discussed *supra* section IV.B.3.a, this component could be useful and neutrally administered.

Finally, the fourth inquiry focuses on what secular exemptions to the government action, policy, law, or regulation at issue exist.[252] The more exemptions there are for nonreligious reasons, the more understandable and justifiable a religious exemption becomes and the more it is protected from an Establishment Clause challenge.[253]

The challenge with the first component, harm to others, is laid out prior and will not be readdressed here. Suffice it to say that the most difficult component of this standard will be the unpredictability of a decision maker's determination of what constitutes sufficient "harm" to overcome the religious freedom at stake. This may not provide direction if it simply results in the majority paradigm being able to control the outcome due to its baseline frame of reference. Nevertheless, balancing harm with the likelihood of harm both in the aggregate and individually is helpful in this regard. Also, the fact that this test takes into account not just harm, but balances it with other factors as well, aids with the workability of this standard.[254]

Additionally, as Professor Christopher C. Lund argues, balancing the religious interest at issue may be inevitable in order to come up with a workable harm standard.[255] Even so, it does still lend itself to the cyclical nature of the prevailing paradigm norms.[256] A way to temper this is to keep in mind that the balancing of these interests requires an underlying consideration about the justification itself for burdening religious liberties.[257]

That is, the Establishment Clause itself sets up a system that essentially already disadvantages protecting religious freedoms.[258] Government is allowed to apportion burdens all the time, except

252. Lund, *supra* note 33, at 1381.

253. *Id.*

254. *See* Barclay, *supra* note 45, at 349–50 (arguing that harm is "a necessary but not sufficient condition" and that it should be taken into account along with other factors such as the net gain for society and mitigation alternatives).

255. Lund, *supra* note 33, at 1381.

256. *See supra* notes 5–21 and accompanying text.

257. Lund, *supra* note 33, at 1382–83.

258. *Id.*

when the burden is caused by the exercise of religious freedom.[259] Thus, as Professor Lund states, the Establishment Clause allows the government to care about any secular interest to any degree and impose any kind of third-party harm in pursuit of that secular interest, but it "cannot . . . care about free exercise in the same way."[260] Because the system relegates religious liberties to such a disadvantage before the balancing even begins, such "powerfully distinctive treatment should require an equally powerful set of justifications."[261] That is, when weighing these factors, the decision maker should immediately be looking for strong justification that would prohibit free exercise accommodation, for only a strong justification should be allowed to counterbalance a liberty already at a disadvantage.[262] And, at least in the prevailing paradigm, dignitary harm would not be enough to overcome an interest in protecting religious liberties.[263]

4. The Case for a Modified Combination Test: An Illustration

As between all the tests described, the combination test discussed previously with a modification discussed here, would be the most workable in the public employment context. This test would require an employer, an employee assessing a claim, or an after-the-fact decision maker to weigh (1) the magnitude of the third-party harm, (2) the likelihood of the third-party harm, (3) the substantiality of the burden on the person requesting religious accommodation if such were not granted, and (4) exemptions made for nonreligious reasons. The modification from the original combination test would substitute the third "seriousness of the religious freedom asserted" inquiry, an inquiry that is diametrically opposed to current Court jurisprudence and subject to the whims of the prevailing paradigm, with an inquiry into whether complying with the

259. *Id.* at 1382.

260. *Id.* at 1383.

261. *Id.* Professor Lund argues, "It is tempting to say that constitutional rights are fine as long as they impose no harm on others. It is tempting, but it cannot survive scrutiny. Constitutional rights always involve some degree of harm to others. And our willingness to tolerate that harm depends heavily on context." *Id.* at 1384.

262. *See id.* at 1382–83.

263. *See* Barclay, *supra* note 91 (stating that *Masterpiece* indicates a commitment to not allowing feelings of hurt, embarrassment, or insult to overcome First Amendment rights including free exercise of religion). As Professor Barclay points out, a rule allowing dignitary harm to trump First Amendment religious liberties "would allow the government to stamp out just about any religious belief that is politically unpopular." *Id.*

government requirement in a way that still adheres to religious tenets results in a substantial burden. This modification is taken from the endorsement test modification discussed *supra* section IV.B.3.a.

Public employers and employees can use this test when determining whether a religious exercise in furtherance of a sincerely held religious belief can, or should, result in a departure from a policy or practice, or require some other form of accommodation, without violating the Establishment Clause. As an illustration, this Article examines the test below in the context of a Catholic police officer who has a religious objection to abortion. When she is assigned the patrol of a planned anti-abortion rally at a local clinic, which may require ensuring that patients can get to the clinic unhindered, she refuses on the basis that she cannot facilitate abortions.

The first prong of the test would require a determination of the magnitude of third-party harm. This will require an extensive factual inquiry. For example, is there another officer available to take that patrol who does not have the same objections? If there is, does switching the patrols cause a burden on the other officer in terms of time on duty, desirability of assignments, or otherwise? Is the available officer "same in kind" as the replaced officer (i.e., same years of experience, same rank, etc.)? At issue in these questions, essentially, is an inquiry into whether the religious accommodation would cause a loss of services.[264] If so, the magnitude of harm would be significant. Also at issue is a question asked in the Free Speech Test context: whether the religious accommodation would significantly disrupt the workplace. Thus, this prong effectively merges employment-specific and public-services-specific elements.

264. *See* TEBBE, *supra* note 7, at 168. Professor Tebbe also argues that considerations should go beyond actual loss of services to whether those affected will suffer "dignitary harm" regardless of whether they obtain the services at issue. *Id.* at 169. Take for example, the situation where a city clerk refuses to issue marriage license to same sex couples, so as an accommodation this clerk does not have to issue them because other clerks will. *Id.* Dignitary harm could arise if a same-sex couple is delayed in getting their license if the reason for the delay, finding a willing clerk, is obvious. *Id.* Additionally, in this same example, even if the same-sex couple is not delayed, they might still be "impermissibly differentiated by an official's refusal" thereby indicating dignitary harm regardless of whether the couple is aware of the harm. *Id.* Professor Tebbe, perhaps anticipating a de minimis harms argument, asserts that this dignitary harm rises above the level of "hurt feelings" because it "effects a change in the legal relationship between government and members of the political community." *Id.*

The second prong inquires into the likelihood of the harm, both individually and in the aggregate. In this example, if the accommodation would result in loss of services, say if no officer was available to take the patrol, the harm caused when there is loss of services might not only be to the party affected (the clinic and its patients), but could undermine public confidence in the neutrality of government itself.[265] This could be detrimental in certain contexts, including police and protection services.[266] Thus, a consideration of the harm not only of the individuals affected, but to society as a whole if applicable, is particularly germane in the public employment context.

The next prong is an inquiry into whether complying with the government requirement while still adhering to religious tenets would result in a substantial burden. In this case, should the officer not be accommodated, she could choose to forgo the assignment, thus adhering to religious tenets, and suffer the consequences of that decision. This could include discipline, up to and including termination, or other adverse employment actions. Loss of the ability to earn a living due to religious exercise is a high burden.[267] However, discipline short of termination may not be substantial or substantial enough in light of the third-party harms.

The final inquiry is what secular accommodations exist. For example, if it is not unusual for patrols to be traded to accommodate medical needs, parenting needs, or other needs, the police department would have much less support for refusing an accommodation, and an accommodation would be less likely to trigger Establishment Clause concerns.[268]

265. *See* Corbin, *supra* note 38, at 1227–28.

266. *Id.*; *see also*, *e.g.*, David Kladney & Amy Royce, *Face It, We've Lost the Public's Trust*, CHI. TRIB. (Dec. 3, 2015), https://www.chicagotribune.com/opinion/commentary/ct-misconduct-police-prosecutors-justice-trust-perspec-1204-20151203-story.html (detailing suspicious police uses of force, shootings, hiding of evidence, and other indicia of disparate treatment that results in a loss of the public's trust) [https://perma.cc/YPF6-GK2D]. However, Professor Corbin also notes that not all government services and agencies are created equal on this score. Corbin, *supra* note 38, at 1228. Losing public trust in police services is not the same as losing public trust for a government office that does not rely on the public's cooperation to function. *Id.* at 1228–29.

267. Sherbert v. Verner, 374 U.S. 398, 403–04 (1963) (holding that having to choose between abiding by one's religious beliefs and accepting work "puts the same kind of burden upon the free exercise of religion as would a fine imposed against" an employee for his or her worship).

268. This inquiry is in line with the Court's emphasis in *Hobby Lobby* regarding accommodations made to other bakers on secular grounds, but not the baker refusing to make a wedding cake for a same-sex wedding celebration.

In the case where a loss of services would result, the discipline of the objecting officer was loss in pay for the day in question, and accommodations for shift assignment transfers were only sparingly granted in other contexts, it is unlikely that the balance would be in favor of the religious freedom interest at issue and an accommodation would be an inappropriate establishment of religion due to clear preference being shown to the religious interest at issue. However, where no loss of services would result, and the damage of not accommodating would be the employee's termination, even where secular accommodations were sparse, and certainly if they were prevalent, the weight of the balance would be in favor of allowing accommodation as such justifiably does not prefer religion over other religions or nonreligion. As the previous discussion illustrates, although the balancing is entirely fact dependent, it provides a workable framework within which to analyze a particular situation while still allowing some room for value judgments. Because it takes into account a number of factors, however, the test has a more predictable nature than a pure "harm" test. Due to the workability of this standard in the public employment context in balancing Free Exercise Clause and Establishment Clause interests, which often will be the balance between religious liberties and other antidiscrimination interests, decision makers would be well-served to adopt it as a sufficient measure for future decisions.

CONCLUSION

The balance between religious freedom and antidiscrimination interests has recently moved towards greater protection for religious liberties. This protection paradigm appears to have a foothold in the Court that is unlikely to change in the near future. This development, along with the Court's recent pronouncement that situation-specific tests should be utilized for Establishment Clause jurisprudence, signals the need for a context-specific test for requests for religious accommodations in the public employment context. A test that balances the magnitude and likelihood of third-party harm, substantiality of burden to the religious objector if not accommodated, and availability or prevalence of secular accommodations provides a workable standard. This test allows for factual inquiry and context-specific value judgments, while still providing a workable framework and sufficiently predictable results. As

such, it provides a useful tool for public employers, public employees, and courts alike to determine the appropriate balance between religious liberties and antidiscrimination interests in the public employment context post-*Masterpiece Cake* and *American Legion*.