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AN ANTITRUST APPROACH TO CORPORATE FREE EXERCISE CLAIMS

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INTRODUCTION

The scope and contours of religious liberty in the United States have never been entirely clear. Some clarity was interjected in 1990 when the United States Supreme Court attempted to render a definitive interpretation of the Free Exercise Clause.[1] The Court explained that the First Amendment does not grant the faithful an automatic exemption from laws of general applicability,[2] but rather merely enables legislatures to promulgate accommodations within their discretion.[3] The effect of this decision was, in part, short-lived, as it prompted Congress in 1993 to enact the Religious Freedom Restoration Act ("RFRA")—a global exemption from all past and prospective federal legislation—that Americans could assert under appropriate circumstances.[4] Although RFRA complicated the situation, it would be incorrect to accuse the statute of muddying the jurisprudential waters to the state they were in prior to 1990.[5] More accurately, RFRA substituted a broader, legislative approach to religious liberty in place of a narrower, judicial approach to religious liberty.

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[1] *See generally* Emp't Div. v. Smith, 494 U.S. 872 (1990).

[2] *See id.* at 878–80.

[3] *See id.* at 890.

[4] 42 U.S.C. § 2000bb-1 (2012). Although RFRA was not explicitly limited to federal legislation, it was subsequently curtailed by the Supreme Court decision in *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

[5] Robert F. Drinan & Jennifer I. Huffman, *The Religious Freedom Restoration Act: A Legislative History*, 10 J.L. & RELIG., 531, 532–33 (1993).

In 2014, in a development unexpected by many, the Supreme Court held that RFRA's broad religious liberty protections extend not only to private individuals, but to for-profit business corporations as well.[6] This has opened a Pandora's Box of fears, as businesses are subject to a plethora of significant regulation that ordinary individuals are not.

Rising to the top of this list of fears is anxiety over the future of certain equality-based, statutory protections for consumers and employees. More specifically, corporate free exercise rights are often seen as undermining our nation's antidiscrimination laws, as well as regulations designed to ensure ready access to contraception.[7] These concerns deserve to be taken seriously.

What also deserves to be taken seriously are the religious liberty protections contained in RFRA as interpreted by the Supreme Court. At a minimum, RFRA gives rise to a set of statutorily created rights no less valuable, objectively speaking, than those created by our nation's antidiscrimination and contraceptive access laws.[8] Moreover, given the historical interpretation and legislative history of the First Amendment, one would be on solid ground in arguing that RFRA indeed "restored" religious liberty rights as its name suggests, bestowing upon RFRA's protections a weighty constitutional pedigree.[9]

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[6] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759–60 (2014). This was not unexpected by everyone, however. *See, e.g.*, Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 87–88 (2013).

[7] *E.g.*, Leslie C. Griffin, Hobby Lobby*: The Crafty Case That Threatens Women's Rights and Religious Freedom*, 42 HASTINGS CONST. L.Q. 641, 678 (2015); *see* Richard W. Garnett, *Religious Accommodations and – and Among – Civil Rights: Separation, Tolerance, and Accommodation*, 88 S. CAL. L. REV. 493, 501 (2015); Martha Minow, *Should Religious Groups be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781, 786 (2007). In *Masterpiece Cakeshop Ltd. v. Colorado Civ. Rights Comm'n*, the U.S. Supreme Court granted certiorari over the question: "Does the application of Colorado's public accommodations law to compel a cake maker to design and make a cake that violates his sincerely held religious beliefs about same-sex marriage violate the Free Speech or Free Exercise Clauses of the First Amendment?" *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission,* OYEZ, https://www.oyez.org/cases/2017/16-111 (last visited Mar. 21, 2018); *see also,* Craig v. Masterpiece Cakeshop Inc., 370 P.3d 272, 272 (Colo. App. 2015), *cert. den*., 2016 WL 1545027 (Colo. 2016), *cert. granted*, 137 S. Ct. 2290 (U.S. June 26, 2017) (No. 16-111).

[8] Indeed, as Richard Garnett has eloquently argued, religious freedom is not properly juxtaposed against civil rights, but is most appropriately understood as another fundamental civil right itself. *See* Garnett, *supra* note 7, at 497.

[9] *See infra* note 45 and accompanying text.

Unfortunately, few commentators seem genuinely willing to take both sets of rights, those established or restored by RFRA, and those established to advance equality, seriously. Immediately apparent from any review of the literature or commentary on the subject is that two distinct sides have formed, with each possessing little understanding or empathy for the other.[10] This article hopes to buck that trend, proceeding from the perspective that the worthiness of each set of rights demands a solution in which no one set predominates via the marginalization of the other, offering a path forward in which the law endeavors to balance these competing rights, rather than subjugate one set to another. Such a path can be forged from the insights and wisdom of U.S. antitrust law. For antitrust law struggles with a balancing act of its own: that of promoting vigorous competition on the one hand while prohibiting competition that is "unreasonable" or "unfair" on the other.

In a free market economy, businesses are expected, and indeed relied upon, to compete fiercely against one another. Such competition is generally deemed good for consumers and the economy as a whole. This must be distinguished from competition that is deemed "unreasonable," or in some cases "unfair," an antitrust term of art that refers to undertakings that are injurious to consumer welfare in the long run if not in the short run as well. The line between these two concepts, of reasonable and vigorous competition versus unreasonable and injurious competition, can be extremely fine. Indeed, the very same conduct can be deemed reasonable versus unreasonable, or fair versus unfair, depending upon its attendant circumstances. Most significant among these circumstances is the concept of "market power."

Roughly, market power signifies a business firm's ability to control the price of a given good or service, a power usually restricted by the dynamism of competition.[11] Under antitrust law, a firm with market power is subject to certain limitations on its conduct that a firm without market power is not. This is because whether a given course of conduct would be injurious to

[10] There are a number of notable exceptions to this trend. *See, e.g.*, Douglas Laycock, *The Campaign Against Religious Liberty, in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 231 (Micah Schwartzman, Chad Flanders, & Zoe Robinson, eds. 2016).

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

consumer welfare oftentimes turns upon the economic dominance of the actor in question. Thus, a firm lacking market power has a freer hand in competing against its rivals or potential rivals, than does, for example, a monopolist, the paradigmatic firm with market power.

This Article suggests that antitrust law's concept of market power could similarly be employed in balancing the free exercise rights of a corporation or any for-profit business venture against the rights of individuals.[12] When a business enterprise seeks a religious liberty exemption from a rights-granting law, a major factor in assessing its claim should be the degree to which it wields market power in the relevant market. If the business is a monopolist, and, *a fortiori*, wielding tremendous market power, its claim for a free exercise exemption should probably fail. If, conversely, the business is but a minor marketplace participant, wielding little or no market power, its claim for a free exercise exemption, if meritorious, should usually succeed. In practical terms, such an approach to religious liberty would allow corporate free exercise claims to prevail most typically in those situations in which consumers or employees had sufficient alternative choices to obtain the goods, services, or employment in question elsewhere. Under such circumstances, the need for the government to protect the rights of consumers and employees regarding discrimination or contraceptive access is at its nadir. However, when consumers or employees lack sufficient alternative choices, and are beholden to a particular corporation because of that firm's market power, the need for government protection of consumer and employee rights is at its zenith. Here, the equality-based rights of these individuals would typically trump the religious liberty rights of the corporation.[13]

[12] This Article treats interchangeably all business organizations, ranging from the sole proprietor to the business corporation. Indeed, the expression employed, "corporate free exercise," is intended to cover the religious liberty claims of all for-profit enterprises. This decision was made in full recognition that strong arguments could be made in support of differentiating among religious liberty claims brought by sole proprietorships, partnerships, and corporations. *See infra* Part III.D.

[13] Others, most notably Robert Vischer, have previously asserted that in assessing religious liberty exemptions against third-party interests, the law ought to take into account the availability of other firms willing and capable of satisfying such interests. *See* ROBERT VISCHER, CONSCIENCE AND THE COMMON GOOD 4–6, 174–75 (2010). But to my knowledge, neither Dean Vischer nor any other commentator has attempted to ground this assertion upon the insights or principles of antitrust law. Richard Epstein has articulated a theory of antidiscrimination law

This Article shall proceed as follows in fleshing out the proposal set forth above: Part I will trace the development and present the current reach of corporate free exercise rights. Part II will address United States antitrust law, providing first a summary of its background and general operation, and thereafter focusing upon the concept of market power and its role in antitrust jurisprudence. Part III will use the concept of market power to construct a compromise approach to the problem of corporate free exercise rights.

I. CORPORATE FREE EXERCISE

The rise of corporate free exercise rights has served to graft one controversial phenomenon upon another controversial phenomenon. Namely, corporate free exercise rights adjoin the hotly contested issue of corporate constitutional rights to the complicated question of the reach, intent, and meaning of the First Amendment's Free Exercise Clause. This Part will briefly explore each phenomenon and their recent convergence.

A. The Free Exercise Clause

As is well known, the United States was colonized and founded, in no small part, by pilgrims looking for a land on which they could live out their faiths in peace and freedom.[14] Some,

pursuant to which the "antidiscrimination norm" ought only apply to monopolies—especially legal monopolies. *See* RICHARD EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 79–80 (1992). In an essay, he more recently applied his thinking, in passing, to the religious liberty rights of businesses. *See* Richard Epstein, *Freedom of Association and Antidiscrimination Law: An Imperfect Reconciliation*, LIBERTY FORUM (Jan. 2, 2016), http://www.libertylawsite.org/liberty-forum/freedom-of-association-and-antidiscrimination-law-an-imperfect-reconciliation/ [hereinafter Epstein, Freedom of Association]. Although there is much from Professor Epstein's scholarship that bears upon the present article, Professor Epstein does not use antitrust law, or antitrust principles generally, to help flesh out the proper contours of corporate religious liberty. Rather, drawing from natural law, common law, and economic principles, Professor Epstein makes the argument that outside some very narrow exceptions—essentially legal monopolies, as mentioned—modern antidiscrimination law does more harm than good. *See* EPSTEIN, FORBIDDEN GROUNDS, *supra* note 13, at 496–97.

[14] *See, e.g.*, THOMAS A. BAILEY, THE AMERICAN PAGEANT 22–28 (2006); Brett G. Scharffs, *The Autonomy of Church and State*, 2004 BYU L. REV. 1217, 1230 ("The pursuit of religious liberty was one of the most powerful forces driving early settlers to the American continent and remained a powerful force at the time of the founding of the American republic.").

such as Roger Williams in Rhode Island, founded communities with a degree of religious freedom simply unheard of for their time.[15]

It is also well known that in short order, some of the persecuted became persecutors themselves.[16] That is, those fleeing religious persecution in England frequently established settlements in America that, in turn, persecuted religious dissenters almost as vigorously.[17]

Marked by such beginnings, it is perhaps not surprising that the American experiment with religious liberty has long suffered from a certain lack of clarity. The very text in which religious liberty was ultimately enshrined, that of the First Amendment to the United States Constitution, remains subject to vociferous debate over both intent and meaning.[18] The language is not pellucid and the historical record is arguably inconclusive.[19] This spawned a religious liberty jurisprudence from which, as Professor Laurence Tribe remarked in 1988, it seems "impossible to divine a coherent set of principles to explain."[20]

Two clauses of the First Amendment serve to safeguard religious liberty in the United States: the Establishment Clause and the Free Exercise Clause. These laconic clauses are conjoined in the opening words of the Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[21]

The Establishment Clause, at a minimum, prohibits the federal government from designating a particular religion as the country's national faith.[22] Due to the passage of the Fourteenth Amendment, the Supreme Court has held that the Establishment Clause prohibits state governments from adopting particular

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[15] *See* BAILEY, *supra* note 14, at 28.

[16] *Id.* at 26.

[17] *See* Michael P. Farris, *Facing Facts: Only a Constitutional Amendment Can Guarantee Religious Freedom for All*, 21 CARDOZO L. REV. 689, 689 (1999).

[18] *See* Thomas C. Berg, *The Voluntary Principle and Church Autonomy*, *Then And Now*, 2004 BYU L. REV. 1593, 1607–08.

[19] *See* Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 1155–66 (2nd ed. 1988).

[20] *Id.* at 1264. *See also* Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication,* 61 NOTRE DAME L. REV. 311, 315–17 (1986).

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

[22] *See* Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 UTAH L. REV. 489, 564 (2011).

faiths of their own as well.[23] Although the Framers held divergent beliefs regarding religion and its role in society, a consensus seems to have existed among them that prohibition of an established church was essential "to protect the liberty of conscience of religious dissenters from the coercive power of government."[24]

Whereas the Establishment Clause works indirectly to protect religious liberty, the Free Exercise Clause provides direct protection. This portion of the First Amendment precludes the federal government and, after the passage of the Fourteenth Amendment, state governments, from prohibiting the "free exercise" of religion.[25] The contours of what exactly constitutes the "free exercise" of religion have been the subject of considerable speculation and debate.

To some scholars, "free exercise" was adopted for "the prevention and eradication of discrimination against unpopular religions and religionists."[26] Pursuant to this line of thought, the First Amendment does not provide protection against "facially neutral laws passed in the absence of overt religious hostility."[27] What the First Amendment prohibits are laws intended to regulate an individual's religious beliefs *qua* religious beliefs and an individual's religious conduct *qua* religious conduct.

Most scholars, however, read the original intent of the Framers more broadly. As they have explained, religious conscience was sacrosanct to the Framers and the First

[23] *See* Paulsen, *supra* note 20, at 316.

[24] Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 350 (2002). In our own times, many Western nations continue to maintain official, state-sponsored churches, including Norway (Lutheranism), Malta (Catholicism), and Greece (Greek Orthodoxy). *See* David M. Smolin, *Exporting the First Amendment?: Evangelism, Proselytism, and the International Religious Freedom Act*, 31 CUMB. L. REV. 685, 688 (2000-2001). None of these countries are known to be hotbeds of religious persecution. Nevertheless, the First Amendment's Framers can be forgiven for conflating the establishment of religion with the suppression of conscience and religious liberty in light of Europe's history, particularly England's, around the time of America's colonization. *See* J. M. ROBERTS, THE NEW PENGUIN HISTORY OF THE WORLD 552–61 (5th ed. 2007).

[25] *See* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 117 (1992).

[26] *See* Ronald J. Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of* Smith, 102 NW. U. L. REV. 1189, 1259 (2008).

[27] *Id.* at 1273.

Amendment was designed to robustly protect this conscience.[28] Since conscience manifests itself in both thought and deed, these scholars read the First Amendment as protecting religiously motivated conduct even if such conduct was not specifically targeted for circumscription on account of its religious nature.[29] Such protection manifests itself via the "compelling state interest" test.[30] Under this test, religious claimants are entitled to a judicially crafted exemption from any law that substantially burdens their religious conduct unless: (1) the law furthers a compelling state interest and (2) the law's formulation represents the least restrictive means by which the government can further its compelling interest to minimize any burden upon religious exercise.[31]

The intractable debate over the Free Exercise Clause's proper interpretation has been fueled, in no small part, by a historical record and a legislative history that are not entirely clear.[32] Not surprisingly, this, in turn, contributed to a series of Supreme Court cases in which the Court's reading of the Free Exercise Clause was difficult to discern.[33]

As referenced in the introduction, however, the Supreme Court tried to bring clarity to the issue in 1990 with its 5-4 ruling in *Employment Division v. Smith*.[34] In *Smith,* the Court attempted to definitively adopt a narrow approach to interpreting the Free Exercise Clause. The Court held that, outside of a limited set of situations that implicated multiple constitutional freedoms, such as "hybrid" cases, the Free Exercise Clause does not provide protection against laws of general applicability that only infringe upon religious conduct by happenstance.[35] Thus, ordinarily, a law of general applicability is as binding upon an individual whose religious conduct it

[28] *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion,* 103 HARV. L. Rev. 1409, 1449–66 (1990). *See also* Philip Hamburger, *More is Less*, 90 VA. L. REV. 835, 839 (2004).

[29] *See* Hamburger, *supra* note 28, at 856–57.

[30] *See* George W. Dent, Jr., *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 863, 902 (1988).

[31] *See id.*

[32] *See* McConnell, *supra* note 28, at 1414, 1511–13; *see also* RONALD J. COLOMBO, THE FIRST AMENDMENT AND THE BUSINESS CORPORATION 140–43 (2015).

[33] *See* Tribe, *supra* note 19, at 1168–79, 1193–1201, 1202–04, 1253–75 (discussing the Court's free exercise precedent).

[34] Emp't Div. v. Smith, 494 U.S. 872, 876–879 (1990).

[35] *See id.* at 881–82.

infringes as upon any other individual.[36] Put differently, the Court explicitly rejected the argument that the Free Exercise Clause requires the courts to subject any law that substantially burdens religious conduct to the compelling government interest test.[37] In writing for the Court's majority, Justice Scalia explained:

> The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities . . . . To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.[38]

Consequently, under the First Amendment, laws of general applicability are deemed enforceable if they can be defended via recourse to a "rational basis," a low hurdle to clear, even as applied against individuals whose religious exercise is encroached upon by those laws.[39]

B. The Religious Freedom Restoration Act

An important component of the Supreme Court's holding in *Smith* was its endorsement of legislative accommodations.[40] Although the Court did not interpret the First Amendment as requiring judicially crafted exemptions from laws of general applicability that burden religious conduct, it made clear that the First Amendment certainly permits legislatures and governmental entities to craft such exemptions and accommodations of their own.[41] Taking up this invitation, in a

[36] *See id.* at 882.

[37] *See id.*

[38] *Id.* at 879 (citations omitted).

[39] The Court in *Smith* did not expressly articulate the appropriate test against which laws of general applicability ought to be assessed, but subsequent courts and commentators have interpreted the Court as having applied the rational basis test. *E.g.*, Miller v. Reed, 176 F.3d 1202, 1206 (9th Cir. 1999) ("In *Employment Division v. Smith*, the Court analyzed a free exercise of religion claim under a rational basis test. Under this test, a rationally based, neutral law of general applicability does not violate the right to free exercise of religion even though the law incidentally burdens a particular religious belief or practice.") (citations omitted).

[40] *See Smith*, 494 U.S. at 890.

[41] *See id.*

show of sweeping bipartisanship, Congress passed, and President Clinton signed into law, the Religious Freedom Restoration Act ("RFRA") in 1993.[42]

RFRA's legislative history makes clear that this Act was no typical legislative accommodation. Rather, it was a scathing indictment of the *Smith* decision, which Congress excoriated for misreading both the First Amendment and the Supreme Court's own precedent:

> The Congress finds that—
> (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
> (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
> (3) governments should not substantially burden religious exercise without compelling justification;
> (4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
> (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.[43]

In its operative sections, RFRA spells out the compelling government interest test and its application as follows:

> (a) In general
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
> (b) Exception
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
> (1) is in furtherance of a compelling governmental interest; and
> (2) is the least restrictive means of furthering that compelling governmental interest.

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[42] The House of Representatives passed RFRA unanimously and the Senate passed RFRA by a vote of 97-3. *See* Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores*,* 111 HARV. L. REV. 153, 160 (1997).

[43] 42 U.S.C. § 2000b-1(a) (2012), *quoted in* Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 41 (2013).

> (c) Judicial relief
> A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article [sic] III of the Constitution.[44]

Congress's findings, and the approach it adopted, were well founded. As previously indicated, most scholars had long understood the Free Exercise Clause to protect religious conduct more robustly than did the majority opinion in *Smith*.[45] Further, the Congressional report largely echoed the dissenting opinion of the four justices in *Smith*, who explained:

> This Court over the years painstakingly has developed a consistent and exacting standard to test the constitutionality of a state statute that burdens the free exercise of religion. Such a statute may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means.[46]

Thus, as a result of RFRA, Americans are afforded a broad measure of religious liberty rights, but as a matter of legislative largesse—not out of some clear constitutional imperative. An individual whose exercise of religion is substantially burdened by government may seek an exemption from the government's action, and that exemption is to be granted unless the government can demonstrate a compelling interest pursued via the least restrictive means. This protection is not mandated by the Free Exercise Clause, but rather by Congress as per the requirements of RFRA.

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[44] 42 U.S.C. § 2000bb-1 (2012).

[45] *See supra* notes 28–31 and accompanying text. Part of the confusion inherent in the Court's pre-*Smith* case law was its practice of articulating a standard of "strict scrutiny" with regard to laws that infringed upon religious exercise while applying a standard that, in fact, was not very strict. *See* Abner S. Greene, *Religious Freedom and (Other) Civil Liberties: Is There a Middle Ground?* 9 HARV. L. & POL'Y REV. 161, 176 (2015). Consequently, it has been said that RFRA did not "restore" religious liberty to its pre-*Smith* status quo, but rather implemented a significantly more protective approach. *See id.* at 178 (". . . RFRA did not just restore the kind of weak strict scrutiny that prevailed pre-*Smith*. It ushered in a regime that is more protective of religious freedom . . . .").

[46] *Smith*, 494 U.S. at 907 (Blackmun, J., dissenting), *quoted in* Colombo, *supra* note 43, at 40.

RFRA's constitutionality was eventually challenged, and the legislation was upheld as applied to the federal government and federal law,[47] but struck down as applied to state governments and state laws.[48] This, in turn, prompted several states to pass RFRAs of their own.[49] As of this writing, 20 states have passed such laws, and most are closely modeled on the federal version.[50] When this development is added to the mix, we have a regime in which religious liberty is robustly protected against federal encroachment, but which enjoys no equivalent protection uniformly at the state level.

Recall that even post-*Smith*, however, the Free Exercise Clause continues to protect against the intentional circumscription or regulation of religious belief or behavior on account of its religious nature,[51] and as such state governments are forbidden from engaging in anything of that sort to the same extent as the federal government. But with regard to laws of general applicability, the states are for the most part not restrained by the Free Exercise Clause.[52] The only protections that individuals have against state laws that substantially burden their religious exercise would be those contained in their state constitution or promulgated under state law, including the aforementioned state RFRA statutes.

C. Corporate Assertions of Free Exercise Rights

In retrospect, corporate assertions of free exercise rights were inevitable. The rise of an increasingly aggressive regulatory state, coupled with ever-greater religious diversity among Americans, was bound to generate conflict between the

[47] *See* Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 439 (2006).

[48] *See* City of Boerne v. Flores, 521 U.S. 507, 511, 536 (1997).

[49] *See* National Conference of State Legislatures: State Religious Freedom Restoration Acts, http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx (last visited Mar. 21, 2018).

[50] *See id.*

[51] *See supra* text accompanying notes 27 and 34–35.

[52] The language used here is qualified because of the Supreme Court's recognition of strict scrutiny in the face of "hybrid" cases and in situations where a law recognizes various non-religiously based exemptions but no religiously based exemptions. *See supra* note 35 and accompanying text.

laws of the land and the religious scruples of some segments of the population.[53]

That these conflicts have bubbled over into the realm of business enterprises should, likewise, not be surprising given the nature of modern-day business regulation. As I have explained elsewhere:

> [B]usiness regulation over the past few decades has taken on a more value-laden, and a less specifically economic character. Whereas early twentieth-century business regulation focused on issues such as minimum wage and child labor, late twentieth-century business regulation has addressed issues of civil rights and discrimination. As it opens, the twenty-first century has continued along this trajectory, witnessing demands that employers provide equal benefits to same-sex couples and that employers offer health insurance plans that cover such things as contraceptives, abortifacients, and sterilization. This serves to increase conflict, as the values animating some of this modern regulation and the values driving religiously inspired businesses can diverge in ways that are less likely when dealing with purely economic regulation.[54]

More surprising than the mere assertion of corporate religious liberty claims was the validation of such claims by the Supreme Court in the 2014 case, *Burwell v. Hobby Lobby Stores, Inc*.[55] Before delving into the substance of *Burwell*, however, it is important to discuss why that case's outcome should not have been so wholly unanticipated.

At the risk of indulging in semantics, it ought to be acknowledged that there really is nothing particularly novel or controversial about "corporate religious liberty" *per se*. Charitable organizations, religious institutions, and even churches and congregations are frequently organized as nonprofit corporations, but are corporations nonetheless.[56] That such corporate entities have standing to assert religious liberty claims—first under the Free Exercise Clause and, in more recent times under RFRA—has been firmly established.[57]

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[53] *See* Garnett, *supra* note 7, at 498.

[54] *See* Colombo, *supra* note 43, at 25 (citations omitted).

[55] Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751, 2759–60 (2014).

[56] *See* Bruce B. Jackson, *Secularization by Incorporation: Religious Organizations and Corporate Identity*, 11 FIRST AMEND. L REV. 90, 95 (2012).

[57] *See* Thad Eagles, Note, *Free Exercise, Inc.: A New Framework for Adjudicating Corporate Religious Liberty Claims*, 90 N.Y.U. L. REV. 589, 597–98

Additionally, it has also been firmly established that engagement in for-profit activity does not bar a claimant from asserting his, her, or its religious liberty rights. In *Braunfeld v. Brown*, the Supreme Court recognized the rightful assertion of Free Exercise rights by a group of "merchants" who objected to Sunday closing laws due to the effect that such laws had upon their businesses.[58] Likewise, in *United States v. Lee*, the Court acknowledged that a sole proprietor had standing to challenge the social security tax levied upon his businesses, a farm and carpentry shop, on Free Exercise grounds.[59] Although claimants in these two cases ultimately did not prevail upon their Free Exercise claims, their failure was on the merits.[60] In other words, the Court did not challenge the propriety of claimants' Free Exercise arguments, but rather accepted their propriety and proceeded to review the challenged laws under the requisite standards for adjudicating free exercise claims. Thus in *Braunfeld*, the merchants' claims were unsuccessful because the law in question did not substantially burden religious exercise and could not be more narrowly tailored according to the Court:

> But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.[61]

Similarly, in *Lee*, the Court grappled seriously with the claimant's assertion that the social security tax conflicted with his Amish faith, but reiterated the rule that the state may nevertheless "justify a limitation on religious liberty by showing that it is essential to accomplish an overriding government interest."[62] In rendering its decision, the Court never questioned

(2015) ("The [Supreme] Court . . . held on multiple occasions that government action violated the free exercise and RFRA rights of incorporated churches, and heard challenges from incorporated churches that failed for other reasons. The corporate form *alone*, therefore, could not prohibit religious liberty protection.") (citations omitted); *see also* Colombo, *supra* note 6, at 71.

[58] Braunfeld v. Brown, 366 U.S. 599, 601, 606 (1961).

[59] United States v. Lee, 455 U.S. 252, 254, 256 (1982).

[60] *See Braunfeld*, 366 U.S. at 608–09; *see also Lee*, 455 U.S. at 258–59.

[61] *Braunfeld*, 366 U.S. at 607. As can be seen, some interpretive liberty was taken in the presentation of the Court's holding here, translating "indirect burden" as "insubstantial burden" and "by means which do not impose such a burden" as "narrowly tailored." *Id.*

[62] *Lee*, 455 U.S. at 257.

the appropriateness of applying the Free Exercise Clause to the situation at hand, but rather ruled in favor of the government "[b]ecause the broad public interest in maintaining a sound tax system is of such a high order."[63]

Although both *Braunfeld* and *Lee* were decided before the Supreme Court's 1990 decision in *Employment Division v. Smith*, the cases remain good law. Recall that *Smith* expressly upheld its existing First Amendment precedent, including the earlier cases, *Lee* and *Braunfeld*.[64]

As discussed, following *Smith*, it is RFRA, and not the First Amendment, that provides the lion's share of protection for religious practices that are impeded by federal laws of general applicability.[65] This has led some, including the Department of Justice during the Obama Administration, to take the implausible position that RFRA actually *narrows* the scope of protected religious activity post-*Smith.*[66] The position is implausible in light of RFRA's language and legislative history, recounted earlier.[67] Recall that RFRA was ostensibly passed to "restore" the protections of religious liberty as many understood them to be prior to the *Smith* decision.[68] The only serious debate over RFRA's effect is whether it truly restored the pre-*Smith* state of affairs versus whether it actually bolstered the level of protection afforded to religious exercise in America.[69] Although discerning Congressional intent can oftentimes be difficult, here the record is clear that RFRA was intended to reverse the *Employment Division v. Smith* decision and to provide for or restore a robust approach to free exercise rights.[70]

RFRA's very text similarly evinces a vigorous approach to religious liberty, on par with the Act's legislative intent. Critics to corporate religious liberty argue that RFRA's reference to a "person's exercise of religion" excludes its extension to for-profit

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[63] *Id.* at 260.

[64] *See* Emp't Div. v. Smith, 494 U.S. 872, 879–80 (1990).

[65] *See supra* Part I.B.

[66] *See* Terri R. Day et al., *A Primer on* Hobby Lobby: *For-Profit Corporate Entities' Challenge to the HHS Mandate, Free Exercise Rights, RFRA's Scope, and the Nondelegation Doctrine*, 42 PEPP. L. REV. 55, 74 (2014).

[67] *See supra* Part I.B.

[68] *See* Greene*, supra* note 45 at 178.

[69] *Id.*

[70] *See supra* Part I.B.

corporations.[71] As per the Dictionary Act, however, it is a matter of fundamental statutory interpretation to interpret the word "person" to "include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[72] This would appear to settle the matter, but for the Dictionary Act's admonishment that its definitions do not apply if "the context indicates otherwise."[73]

As would be expected, the opponents of corporate free exercise argue that RFRA's context does not support defining its reference to "person" to encompass for-profit corporations.[74] Both proponents and opponents of corporate free exercise reference Supreme Court precedent in support of their position.[75] This is enabled by the fact that, (1) on the one hand, the Court had permitted "merchants" and other for-profit actors to assert Free Exercise Claims against laws impacting their commercial activity,[76] while (2) on the other hand, the Court had never expressly held that a for-profit corporation could assert such claims.[77]

Further muddying the jurisprudential waters, or, from another perspective, tipping the balance, is the fact that there is near "universal acceptance that RFRA's use of the word 'persons' included nonprofit corporations."[78] This could be interpreted as suggesting the irrelevance of the corporate form to the question of Free Exercise and RFRA religious rights. Put differently, the Free Exercise Clause and, subsequently, RFRA covers all individuals and entities engaged in religious exercise, whether incorporated or unincorporated.

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[71] *See* Day, *supra* note 66, at 73–74.

[72] 1 U.S.C. § 1 (2012).

[73] *Id.*

[74] *See* John Duke, *Religious Freedom and the Little Corporation That Could:* Burwell v. Hobby Lobby Stores, Inc., 34 MISS. C. L. REV. 89, 95 (2015).

[75] *See* Maria Iliadis, *An Easy Pill to Swallow,* 44 U. BALT. L. REV. 341, 354 (2015); Marc A. Greendorfer, *Blurring the Lines Between Churches and Secular Corporations*, 39 DEL. J. CORP. L. 819, 855 (2015).

[76] *See supra* notes 58–63 and accompanying text.

[77] *See* Seema Mohapatra, *Time to Lift the Veil of Inequality in Health-Care Coverage: Using Corporate Law to Defend the Affordable Care Act*, 50 WAKE FOREST L. REV. 137, 149 (2015).

[78] *See* Elizabeth Sepper, *Gendering Corporate Conscience,* 38 HARV. J.L. & GENDER 193, 196 (2015).

Conversely, the Court's past recognition of the Free Exercise Clause's applicability to nonprofit corporations could be read as underscoring the exclusion of for-profit corporations from the Clause's umbrella of protection. This argument borrows from the logic of *inclusio unius est exclusio alterius*—the time-honored maxim that the explicit inclusion of one thing should be interpreted as intending the exclusion of another.[79] In other words, by extending the Free Exercise Clause's protections to nonprofit corporations, and only to nonprofit corporations, the Supreme Court had arguably drawn a line in the sand distinguishing nonprofit corporations from other corporate entities. Consequently, this is purportedly the precedent that RFRA intended to restore. *A fortiori*, RFRA's reference to "persons" does not go beyond the list of entities previously recognized by the Supreme Court as entitled to assert Free Exercise claims.

Inclusio unius, however, is a poor fit for this situation. The maxim applies to the interpretation of contracts[80] and statutes,[81] not to Supreme Court opinions.[82] And for good reason. Unlike the drafter of a contract or piece of legislation, Supreme Court justices are limited by the parties and issues before the Court. Thus, a fairer interpretation of the Court's traditional silence on the issue of for-profit corporations and the Free Exercise Clause would be to simply observe that, heretofore, the Court had not been given an opportunity to squarely address the issue. The Supreme Court explicitly disclaimed any resolution of the above-referenced controversies in *Burwell v. Hobby Lobby*, proffering a

[79] *See* Eric Engle, *Legal Interpretation by Computer: A Survey of Interpretive Rules*, 5 AKRON INTELL. PROP. J. 71, 77 (2011).

[80] *See* Patrick S. Ottinger, *Principles of Contractual Interpretation,* 60 LA. L. REV. 765, 786 (2000).

[81] *See* Patrick O'Leary, Moreau v. Harris County*: The Fifth Circuit Determines That the Fair Labor Standards Act Does Not Prohibit Public Employers From Mandating the Use of Accrued Compensatory Time*, 73 TUL. L. REV. 2171, 2176 (1999).

[82] *Cf.* Jerry Buchmeyer, *Louisiana Law – Legends and Laughs*, 67 TEX. B. J. 815, 816 (2004) ("A case was being argued to a Fifth Circuit Court of Appeals panel that included the legendary John Minor Wisdom. Judge Wisdom asked counsel, a well-known lawyer from Midland, 'Counsel, are you familiar with the maxim *inclusio unius est exclusio alterius*?' Without hesitation, counsel responded sanctimoniously, '*Your Honor, in Midland they speak of little else*.' ").

decision that was intentionally narrower in scope. Upon closer inspection, however, the *Burwell* decision is not as limited as it might superficially appear to be.

In *Burwell*, the Supreme Court consolidated two cases challenging certain regulations promulgated by the Department of Health and Human Services following passage of the Affordable Care Act ("ACA").[83] The regulations in question were those pertaining to the ACA's "contraceptive mandate," pursuant to which "specified employees' group health plans . . . [were] required to provide coverage for the 20 contraceptive methods approved by the Food and Drug Administration, including the 4 that may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus."[84] Claimants considered it immoral, and contrary to their religious beliefs, to facilitate the intentional destruction of a human embryo by providing all of the federally mandated insurance coverage.[85] In greater detail, claimants contended that obedience to the contraceptive mandate would make them complicit in a grave moral evil.[86] Asserting, therefore, that the contraceptive mandate "imposes a substantial burden" on their ability to "conduct business in accordance with their religious beliefs,"[87] the claimants sought an exemption therefrom under either the Free Exercise Clause or RFRA.[88]

The two cases coming before the Supreme Court also gave rise to a circuit split: In *Conestoga Wood Specialties Corp. v. Burwell*, the Third Circuit denied claimant's request for a religious liberty exemption,[89] whereas in *Hobby Lobby Stores, Inc. v. Sebelius*, the Tenth Circuit granted it.[90] In so doing, the Third Circuit held that a for-profit, secular corporation could

[83] *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

[84] *Id.* at 2754.

[85] *See id.* at 2778.

[86] *See* Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2516 (2015).

[87] *Hobby Lobby*, 134 S. Ct. at 2778 (emphasis omitted).

[88] *See id.* at 2755.

[89] *See* Conestoga Wood Specialties Corp. v. Burwell, 724 F.3d 377, 417 (3d Cir. 2013) (reversed *sub nom. Hobby Lobby v. Burwell*, 134 S. Ct. 2751).

[90] *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1191 (10th Cir. 2013) (en banc).

assert neither a Free Exercise Clause nor a RFRA claim,[91] whereas the Tenth Circuit held that a for-profit corporation could assert both a Free Exercise Clause and a RFRA claim.[92]

The Supreme Court ultimately sided with the claimants, granting them the exemption sought, thereby reversing the Third Circuit's holding and affirming the Tenth Circuit's.[93] But whereas the circuit courts ruled upon the Free Exercise and RFRA claims in concert, the Supreme Court did not. The Supreme Court explicitly ruled only upon claimants' RFRA claims, and passed on deciding upon the Free Exercise Clause's applicability.[94] In its own words:

> The contraceptive mandate, as applied to closely held corporations, violates RFRA. Our decision on that statutory question makes it unnecessary to reach the First Amendment claim raised by [claimants].[95]

In order to determine whether RFRA's reference to "person" included for-profit corporations, the Court turned to the Dictionary Act.[96] As discussed, the Dictionary Act explicitly includes for-profit corporations in its definition of "person," and as such the only issue is whether the context of the legislation under examination requires an alternative interpretation of the term.[97] Thus, the Dictionary Act required the Court to assess RFRA's context for evidence of a definition of "person" that would exclude business corporations.

In its assessment of RFRA, the Court made two interrelated observations. First, the Court noted that RFRA should not be read as "merely restor[ing] this Court's pre-*Smith* decisions in ossified form."[98] The Court explained that the results would be "absurd" if RFRA were to be read as "not allow[ing] a plaintiff to raise a RFRA claim unless that plaintiff fell within a category of plaintiffs one of whom had brought a free-exercise claim that this Court entertained in the years before *Smith*."[99]

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[91] *See Conestoga Wood Specialties Corp.*, 724 F.3d at 388.
[92] *See Hobby Lobby Stores Inc.*, 723 F.3d at 1135–37.
[93] *See Hobby Lobby,* 134 S. Ct. at 2751.
[94] *See id.* at 2785.
[95] *Id.*
[96] *See id.* at 2768.
[97] *See supra* notes 72–73 and accompanying text.
[98] *Hobby Lobby*, 134 S. Ct. at 2773.
[99] *Id.*

Second, the Court observed that "Congress enacted RFRA in 1993 to provide very broad protection for religious liberty"—even more protection than that which existed prior to *Smith*.[100] For whereas, according to the Court, a "balancing test" was applied to Free Exercise challenges to laws of general applicability pre-*Smith*, RFRA replaced that test with the much more stringent "least restrictive means" standard.[101]

Taken together, these observations led the Court to conclude that "nothing in RFRA . . . suggests a congressional intent to depart from the Dictionary Act definition."[102] As such, the Court's majority in *Burwell* held that RFRA's protections embraced for-profit corporate claimants.[103]

Although *Burwell* answered the question of corporate religious liberty rights with respect to RFRA (in the affirmative), it left unanswered the question with respect to the First Amendment. By bifurcating the RFRA and Free Exercise Clause analysis, and by eschewing any explicit holding on the latter, the Court failed to provide a clear articulation of the Free Exercise Clause's reach.

Temporarily, at least, this is not particularly problematic. As indicated previously, when it comes to religious liberty claims against federal action, RFRA, and not the First Amendment, does the heavy lifting post-*Smith*.[104] Nevertheless, to the extent that the Free Exercise Clause itself might be implicated in a corporate religious liberty dispute, the First Amendment implications of *Burwell* should not go unnoticed.[105] For although

[100] *Id.* at 2760.

[101] *Id.* at 2760–61. The Court's reference to its pre-*Smith* Free Exercise Clause jurisprudence as having employed a "balancing test" apparently recognizes something that commentators have noted: The Court's purported application of "strict scrutiny" toward government action infringing religious liberty was strict in name only. *See* Greene, *supra* note 45, at 163, 177.

[102] *Hobby Lobby*, 134 S. Ct. at 2768.

[103] *See id.* at 2785.

[104] *See supra* text accompanying note 65.

[105] Although RFRA is inapplicable to state law and state governments, the Free Exercise Clause is not so restricted. As such, state action that would run afoul the narrow protections of the Free Exercise Clause—as understood post-*Smith*—could still potentially be challenged by a business corporation. Whether the corporation would be able to press ahead with its challenge would turn, in part, upon our understanding of the Free Exercise Clause's reach.

Burwell ostensibly left the question of the Free Exercise Clause's applicability to for-profit business corporations unresolved, it nevertheless provided some rather clear guidance.

As mentioned, in its assessment of RFRA's context, the Court found no justification for deviating from the Dictionary Act's definition of "person."[106] This conclusion was made easy by the dual observations that (1) RFRA should not be read as restoring religious liberty precedent pre-*Smith* in an "ossified" form and, moreover, (2) RFRA superimposed a regime of religious liberty even more robust than that which existed prior to *Smith*.[107] A fair amount can be gleaned from this.

Particularly telling is the Court's comment and discussion about an "ossified" Free Exercise jurisprudence.[108] Here the Court makes clear that the "category of plaintiffs" which had previously been recognized as potential Free Exercise Clause claimants is not fixed to those recognized prior to *Smith*, but remains subject to further expansion.[109] Thus, the failure of having previously recognized a for-profit corporate Free Exercise claimant should not preclude the recognition of one in the future. That possibility remains open.

Further, in the Court's review of its precedent, Justice Alito makes the same observations made previously here and elsewhere: the Supreme Court has long recognized the Free Exercise Clause's applicability to unincorporated for-profit businesses, along with its applicability to nonprofit corporations.[110] All of this strongly suggests that, although decided as a matter of statutory, namely, RFRA, rather than constitutional interpretation, *Burwell* reflects a belief on the part of the Court that the Free Exercise Clause does indeed encompass for-profit corporate claimants.

With regard to the point that RFRA superimposed a more robust regime of religious liberty than that which had existed prior to *Smith*,[111] this does not, upon close inspection, affect our analysis of for-profit, corporate Free Exercise standing. For a careful reading of RFRA's text and history reveals that its

[106] *See supra* notes 96–103 and accompanying text.
[107] *Id.*
[108] *Hobby Lobby*, 134 S. Ct. at 2773.
[109] *See id.*
[110] *See id.* at 2769–2773.
[111] *See id*. at 2760.

robustness goes to the strength of its religious liberty protections, not the scope of those protections. The backlash sparked by *Smith* was centered entirely on the Supreme Court's use of the "rational basis test" for laws of general applicability in place of the "compelling government interest" or "least restrictive means" tests.[112] It was not over any question pertaining to who can rightfully claim the protections of the Free Exercise Clause. Thus, *Burwell* should not be read as extending religious liberty protections to for-profit corporations only because of RFRA's enactment. Rather, *Burwell* is best read as reflecting the Court's view that (1) the "free exercise of religion," as that term is understood under RFRA and, apparently, the First Amendment as well, can encompass the conduct of for-profit corporations, and (2) the test to be applied to the alleged infringement of the free exercise of religion by federal laws of general applicability is the compelling government interest or least restrictive means test as set forth in RFRA.

Finally, it should be noted that in *Burwell* the Court indicated a concern over third-party harms flowing from the requested accommodation.[113] For although the Court ruled in favor of granting an accommodation, it arguably did so only after assuring itself that the effect of the accommodation on third parties "would be precisely zero."[114] And this should not be surprising, as "[t]he analysis of free exercise claims has always taken harm to third parties into account."[115] A perennial, unanswered question has been, however, "what counts as harm"?[116] Unfortunately, the Court in *Burwell* did not shed much light on this issue, as it did "not examine the kinds of harm that accommodation of complicity-based conscience claims might inflict," nor did the Court "offer guidance about how principles concerned with third-party harm might apply in future cases."[117] As we shall see, among other things, employing an antitrust

[112] *See* Miller, 176 F.3d at 1206.

[113] *See* Nejaime and Siegel, *supra* note 86, at 2531.

[114] *Id.* (quoting *Hobby Lobby,* 134 S. Ct. at 2760). *See also id.* at 2580 (" 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries' ") (quoting 134 S. Ct. at 2781 n.37).

[115] *See* Michael W. McConnell, *Why Protect Religious Freedom?* 123 YALE L.J. 770, 803 (2013) (internal quotations omitted).

[116] *Id.*

[117] Nejaime and Siegel, *supra* note 86, at 2532.

approach to corporate free exercise exemptions and accommodations would help address these concerns.[118]

II. U.S. ANTITRUST LAW

This article contends that concepts borrowed from U.S. antitrust law can be used to help navigate the turbulent waters of for-profit free-exercise rights. More specifically, this Article suggests that antitrust's focus on market power holds the key to best reconciling the conflicting rights of third parties and religiously expressive for-profit business actors. After briefly setting forth some general background information on U.S. antitrust law, this part will examine the concept of market power.

A. Background

Known as "competition law" in most of the world,[119] U.S. federal antitrust law was brought into being by the Sherman Act in 1890.[120] Before that time, in the United States antitrust law was—like most other fields of law—a matter left to the states.[121] At the state level, its precepts and prohibitions were largely derived from common law rules regarding restraint of trade.[122]

By the late Nineteenth Century, however, it had become clear that the "trusts"[123] were beyond the ability of individual states to regulate.[124] Hence Congress's intervention in 1890.

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[118] Although many courts and commentators have used the terms interchangeably, best practice is to use "exemptions" to refer to judicially crafted relief from laws of general applicability on the basis of religious objection and "accommodations" to refer to relief that is legislatively crafted.

[119] *E.g.*, David J. Gerber, *Europe and the Globalization of Antitrust Law*, 14 CONN. J. INT'L L. 15, 16–23 (1999).

[120] *See* Andrew I. Gavil, *Reconstructing the Jurisdictional Foundation of Antitrust Federalism*, 61 GEO. WASH. L. REV. 657, 667–69 (1993).

[121] *See id.* at 658.

[122] *See id.*

[123] "Trust," within this context, is defined by Black's Law Dictionary as: "An association or organization of persons or corporations having the intention and power, or the tendency, to create a monopoly, control production, interfere with the free course of trade or transportation, or to fix and regulate the supply and price of commodities." Trust, BLACK'S LAW DICTIONARY (6th ed. 1990).

[124] *See* Gavil, *supra* note 120, at 658 ("With the ability to structure and restructure their conduct around states whose laws and law enforcers proved hostile, the trusts could evade attempts at condemnation and remedial restructuring with relative ease at the state level.").

Although the precise contours of the Congressional intent undergirding the Act's passage remain a subject of debate,[125] broad agreement has been reached over a number of essential items. As one commentator explained after surveying Supreme Court antitrust precedent:

> Controversies continue to rage after more than a century of Sherman Act enforcement, but one thing should be settled: "the policy unequivocally laid down by the Act is competition." With the Sherman Act, Congress "sought to establish a regime of competition as the fundamental principle governing commerce in this country." The statutory scheme is to "safeguard consumers by protecting the competitive process." "The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services," and the Act "precludes inquiry into the question whether competition is good or bad" in particular circumstances.[126]

One of the hallmarks of U.S. antitrust law, and particularly the Sherman Act, is its reliance on the judiciary for an articulation of its details. Indeed, it is not hyperbole to say that Congress entrusted to the judiciary a significant role in the setting of antitrust policy itself.[127] Both Section 1 and Section 2 of the Act, which contain its laboring oars, read as follows in their current manifestations:

> Sherman Act, Section 1
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.[128]

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[125] *See* Douglas H. Ginsburg, *Bork's "Legislative Intent" and the Courts*, 79 ANTITRUST L.J. 941, 947–49 (2014).

[126] *See* Gregory J. Werden, *Competition, Consumer Welfare, & the Sherman Act*, 9 SEDONA CONF. J. 87, 87 (2008) (internal citations omitted).

[127] *See* David F. Shores, *Antitrust Decisions and Legislative Intent*, 66 MO. L. REV. 725, 740 (2001); Daniel J. Gifford, *The Jurisprudence of Antitrust,* 48 SMU L. REV. 1677, 1678–80 (1995).

[128] 15 U.S.C. § 1 (2012).

> Sherman Act, Section 2
> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.[129]

Congress left it to the courts to define the critical terms "restraint of trade" and "monopolize" as used in Sections 1 and 2 of the Act,[130] thereby inviting an evolving, judicially crafted approach to federal antitrust law. Accepting the invitation, the courts adopted an approach pursuant to which the Sherman Act was essentially deemed to prohibit "unreasonable" business practices—unreasonable restraints of trade under Section 1, and unreasonably exclusionary conduct under Section 2.[131]

That said, Congress did not completely depend upon the judiciary to effectuate its vision of antitrust policy,[132] especially after the Supreme Court's 1911 decisions in *Standard Oil Co. of New Jersey v. United States* and *United States v. American Tobacco Co.*[133] Members of Congress were of the opinion that the Sherman Act needed to be strengthened in light of the Supreme Court's interpretation of it in those two landmark cases.[134] This ultimately led to the passage of the Clayton Act and the Federal Trade Commission Act in 1914.[135] Although the legislative histories of these acts are "lengthy, complex, and at time cacophonous," it can confidently be said that these acts sought to strengthen the Sherman Act by providing clearer protections for

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[129] 15 U.S.C. § 2 (2012).

[130] *See* Robert Pitofsky, *The Political Content of Antirust,* 127 U. PA. L. REV. 1051, 1060 (1979).

[131] *See* Thomas A. Lambert, *The Roberts Court and the Limits of Antitrust*, 52 B.C. L. REV. 871, 875–76 (2011).

[132] *See* Thomas J. Horton, *Fixing Merger Litigation "Fixes": Reforming the Litigation of Proposed Merger Remedies Under Section 7 of the Clayton Act*, 55 S.D. L. REV. 165, 187 (2010).

[133] *See id.*

[134] *See id.*

[135] *See id*. at 189.

consumers and small firms against the "unfair use" of monopoly power.[136] Of most relevance to our inquiry is section 5 of the Federal Trade Commission Act, which reads in full as follows:

> F.T.C. Act, Section 5
> Unfair methods of competition in or affecting commerce, and unfair or deceptive practices in or affecting commerce, are hereby declared unlawful.[137]

The most critical feature of the FTC Act is its creation of the Federal Trade Commission, a new federal agency empowered with authority to "administer" federal antitrust law.[138] The operative language of Section 5, set forth above, has, over time, "been held coterminous with the Sherman and Clayton Acts."[139] As Richard Posner has explained:

> It used to be thought that "unfair methods of competition" swept further than the practices forbidden by the Sherman and Clayton Acts, and you find this point repeated occasionally even today, but it is no longer tenable. The Sherman and Clayton Acts have been interpreted so broadly that they no longer contain gaps that a broad interpretation of Section 5 of the FTC Act might be needed to fill. There are business torts, such as disparagement and trademark infringement, that do not rise to the level of antitrust violations yet distort competition and are "unfair" (indeed trademark law is often referred to as "unfair competition" law), but I have not heard it suggested that the existing remedies for these practices are inadequate.[140]

Whereas the Sherman Act already effectively prohibited unfair methods of competition—using its bar on unreasonable conduct—the Sherman Act "does not become effective until a

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[136] *Id.* at 187.

[137] 15 U.S.C. § 45(a)(1) (2012).

[138] *See* Horton, *supra* note 132, at 188; *see also* F.M. Scherer, *Sunlight and Sunset at the Federal Trade Commission*, 42 ADMIN. L. REV. 461, 467 (1990) (identifying as "the most important" feature of the FTC Act as the creation of an agency with "the power of preventing in their conception and in their beginning some of [the] unfair processes in competition which have been the chief courses of monopoly") (*quoting* 51 CONG. REC. 14,941 (1914)).

[139] WILLIAM HOLMES AND MELISSA MANGIARACINA, ANTITRUST LAW HANDBOOK § 7:2 (2015).

[140] Richard A. Posner, *The Federal Trade Commission: A Retrospective*, 72 ANTITRUST L.J. 761, 766 (2005). *But see* Thomas Dahdouh, *Section 5, the FTC and its Critics: Just Who Are the Radicals Here?,* 20 No. 2 COMPETITION: J. ANTI. & UNFAIR COMP. L. SEC. ST. B. CAL. 1, 7 (2011).

monopoly is full grown."[141] By contrast, Section 5 of the FTC Act, coupled with the creation of the FTC, " 'is aimed to nip those practices in the bud' in order to protect competitors from unfair methods of competition before a monopoly has been achieved or is dangerously close to being achieved."[142]

B. The Tensions of Antitrust

As explained by Philip Areeda and Herbert Hovenkemp:

> the principle objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively while yet permitting them to take advantage of every available economy that comes from . . . efficiencies.[143]

This apparently straight-forward objective is fraught with significant tensions and difficulties. First, is competition and the maximization of consumer welfare best measured by the total number of marketplace participants (competitors), or rather by efficiencies of scale achieved via size, integration, and/or inter-firm cooperation?[144] And, in our efforts to protect competition, ought the law protect competitors from one another?[145] With regard to this latter point, the Supreme Court in *Brown Shoe* explicitly recognized the tension and difficulties involved:

> It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.[146]

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[141] William Kolasky, *George Rublee and the Origins of the Federal Trade Commission*, 26 ANTITRUST 106, 109 (2011) (*quoting* 51 CONG. REC. 12,146 (1914)).

[142] *Id.* (*quoting* 51 CONG. REC. 12,146 (1914)).

[143] PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 100a, 4 (3d ed. 2006).

[144] *See* Reza Dibadj, *Saving Antitrust,* 75 U. COLO. L. REV. 745, 814–15 (2004).

[145] *See id.*

[146] Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962), *quoted in* Dibadj, *supra* note 144, at 816.

Indeed, since the Sherman Act's passage, the Supreme Court has identified a number of goals undergirding U.S. antitrust law, not all of which appear consistent with one another.[147] Over the years, the Court has described Congress's intent behind the Sherman Act in various ways, some of which could be viewed as in tension with others:

- to prevent the concentration of markets through acquisitions, and "perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other";
- to protect firms' "right of freedom to trade";
- to promote consumer welfare, allocative efficiency, and price competition;
- to "protect the public from the failure of the market";
- to preserve economic freedom and the freedom for each business "to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster";
- to condemn practices that "completely shut[] out competitors, not only from trade in which they are already engaged, but from the opportunities to build up trade in any community where these great and powerful combinations are operating under this system and practice";
- to "secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraint of trade"; and
- to "be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."[148]

[147] *See* Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 560–62 (2012).

[148] *Id.* (quoting various Supreme Court precedents) (citations omitted). *See also id.* at 559–60 (*quoting* RICHARD HOFSTRADTER, *What Happened to the Antitrust Movement?*, *in* THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 188, 199–200 (Vintage 2008)) (reading three sets of goals into the overall objective of antitrust law: "(1) economic (competition maximizes "economic efficiency"), (2) political (antitrust principles 'intended to block private accumulations of power and protect democratic government'), and (3) social and moral (competitive process was 'disciplinary machinery' for character development)").

Tremendous debate continues to rage over how best to define, effectuate, and navigate antitrust law's thorny mission, and, predictably, different sides in the debate are championed by different schools of economic and social thought.[149] Even within the federal government, the two agencies entrusted with enforcement of U.S. antitrust laws, the Federal Trade Commission and the Department of Justice, have not always agreed upon the best paths to take.[150]

Perhaps inevitably, therefore, outside of certain conduct circumscribed as *per se* unlawful,[151] the Supreme Court's modern approach to antitrust cases typically reflects a careful balancing of interests.[152] Indeed, this has been so pronounced that some have criticized the Court's approach as "ad hoc," to the detriment of establishing of a "coherent antitrust jurisprudence."[153]

C. The Rule of Reason

Arguably, nothing characterizes the judiciary's careful, balancing approach to its antitrust jurisprudence more than "the rule of reason." As explained by the Supreme Court in 1911 in construing the Sherman Act:

> Thus not specifying, but indubitably contemplating and requiring a standard, it follows that it was intended that the *standard of reason* which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided.[154]

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[149] *See generally* Eliot G. Disner, *Antitrust Law: The Chicago School Meets the Real World*, 25 L.A. LAW. 14, 14 (2002); Kenneth G. Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?* 125 U. PA. L. REV. 1191, 1191 (1977).

[150] *See* Kelly Everett, *Trust Issues: Will President Barack Obama Reconcile the Tenuous Relationship Between Antitrust Enforcement Agencies?*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 727, 747–49 (2009).

[151] *See infra* text accompanying notes 158–160.

[152] Areeda & Hovenkamp, *supra* note 143, ¶305d at 72; *See* E. Thomas Sullivan, *The Economic Jurisprudence of the Burger Court's Antitrust Policy: The First Thirteen Years*, 58 NOTRE DAME L. REV. 1, 55–56 (1982).

[153] Sullivan, *supra* note 152, at 56.

[154] Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 60 (1911) (emphasis added).

In subsequent cases, the Court would flesh out what exactly this "standard of reason" consisted of.[155] Its first full articulation was set forth by Justice Brandeis seven years later in *Chicago Board of Trade v. United States*[156] as follows:

> But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.[157]

Critically, the "Rule of Reason" demands a case-by-case, fact-based, contextual inquiry regarding the conduct at issue to determine whether it violates the Sherman Act's prohibition on "unreasonable" restraints of trade.[158] This careful, arduous approach is necessary given the particularly challenging balancing act entrusted to antitrust law.

Over time, however, with increased experience in applying the Sherman Act, the Supreme Court has become comfortable with promulgating certain "*per se*" rules as exceptions to the Rule of Reason.[159] Pursuant to this development, certain undertakings are deemed always violative of the Sherman Act, regardless of their circumstances, because of their inherently

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[155] *See* Edward D. Cavanagh, *The Rule of Reason Re-Examined*, 67 BUS. LAW. 435, 440 (2012).

[156] *See generally* Chicago Bd. of Trade v. United States, 246 U.S. 231, 231 (1918).

[157] *Id.* at 238, *quoted in* Cavanagh, *supra* note 155, at 441.

[158] *See* Cavanagh, *supra* note 155, at 440, 443–44.

[159] *See id.* at 443–44.

"predictable and . . . anticompetitive" nature.[160] Conduct identified as constituting *per se* violations of the Sherman Act includes price fixing among competitors, group boycotts, and tying arrangements.[161]

D. Market Power

As indicated, an alleged restraint of trade that is not circumscribed as a *per se* violation of the Sherman Act is analyzed under the Rule of Reason.[162] In conducting this analysis, "[o]ne of the most important factors . . . is whether the defendant possesses 'market power' in the 'relevant market' where the alleged conduct occurred."[163] Indeed, market power is so important that commentators routinely refer to it as "the focal point of antitrust law."[164]

Initially, antitrust law viewed market power as synonymous with "bigness"—a firm's absolute size as measured by assets, sales, or employees.[165] Over time, this perspective gave way to the concept of "relative size": a firm's "share of the industry in which it operates."[166] Judge Easterbrook provides us with the current, most evolved definition of market power, and explains its significance too, as follows:

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[160] State Oil Co. v. Khan, 522 U.S. 3, 10 (1997), *quoted in* Cavanagh, *supra* note 155, at 444 n.82.

[161] *See* Thomas G. Krattenmaker, Commentary, *Per Se Violations in Antitrust Law: Confusing Offenses with Defenses*, 77 GEO. L.J. 165, 166 (1988).

[162] *See supra* notes 158–161.

[163] Benjamin J. Larson, *Antitrust For All: A Primer for the Non-Antitrust Practitioner*, 43 COLO. LAW. 19, 20 (Oct. 2014).

[164] Michael S. Jacobs, *Market Power Through Imperfect Information: The Staggering Implications of* Eastman Kodak Co. v. Image Technical Services *and a Modest Proposal for Limiting Them*, 52 MD. L. REV. 336, 339 (1993); *see also* AREEDA & HOVENKAMP, *supra* note 143, ¶104b at 85–86 ("Gradually the 'rule of reason' used to determine whether to enforce contracts in restraint of trade came to focus on the defendants' position in the market."). *But see* Mark R. Patterson, *The Market Power Requirement in Antitrust Rule of Reason Cases: A Rhetorical History*, 37 SAN DIEGO L. REV. 1, 45 (2000) ("The requirement that an antitrust plaintiff show market power in rule of reason cases has an uninspiring history and unconvincing justifications. Such a requirement has never been adopted by the Supreme Court, and is currently imposed by only the Seventh and Forth Circuits.").

[165] *See* Barak Orbach & Grace Campbell Rebling, *The Antitrust Curse of Bigness*, 85 S. CAL. L. REV. 605, 607, 633 (2012).

[166] *Id.* at 607–08.

> Market power is the ability to raise price significantly without losing so many sales that the increase is unprofitable. Most firms have a little power, because their products are not perfectly interchangeable with the goods of others. But few firms have substantial power over price. Firms that lack power cannot injure competition no matter how hard they try. They may injure a few consumers, or a few rivals, or themselves . . . by selecting "anticompetitive" tactics. When the firms lack market power, though, they cannot persist in deleterious practices. Rival firms will offer the consumers better deals. Rivals' better offers will stamp out bad practices faster than the judicial process can. For these and other reasons many lower courts have held that proof of market power is an indispensable first step in any case under the Rule of Reason. The Supreme Court has established a market power hurdle in tying cases, despite the nominally per se character of the tying offense, on the same ground offered here: if the defendant lacks market power, other firms can offer the customer a better deal, and there is no need for judicial intervention.[167]

Easterbrook's definition of market power, "the ability to raise price significantly without losing so many sales that the increase is unprofitable,"[168] enjoys the familiar benefits of his economic expertise. And it is indeed the standard definition of market power used in antitrust.[169] But a simpler approach has traditionally been employed: that of equating market power with market share.[170] Generally, the traditional approach works fine, for a firm with a very large market share typically enjoys tremendous market power.[171] However, certain factors can indeed complicate matters, such that "[h]igh market share may overstate true market power, while low market share may understate state it."[172] Fortunately, for our purposes, the exacting precision of an economist such as Judge Easterbook is not necessary. What is essential is recognition of the fact that certain firms do in fact possess market power while other firms do not. Those firms that do can be generally identified by the predominance of their market share, and/or their ability to

[167] Frank H. Easterbook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 20 (1984).
[168] *Id.*
[169] Orbach & Rebling, *supra* note 165, at 636.
[170] *See* Jacobs, *supra* note 164, at 341–42.
[171] *See id.* at 343.
[172] *Id.* at 342.

impose their will upon the marketplace. Or, as the Supreme Court put it, a firm with market power has "the power 'to force a purchaser to do something that he would not do in a competitive market.' "[173] Indeed, the Court's definition enjoys a facet of additional accuracy in that control over price need not be the focus of the antitrust inquiry, as "price could be substituted for output, product quality, product variety, or other product dimensions."[174]

Power cannot exist in a vacuum. Consequently, a critical component of the market power analysis is establishing the "relevant product and geographic market."[175] In other words, over what products does a firm in question exercise power, and where? The only seller of light bulbs in a small, remote Alaskan town may very well have tremendous market power in that town over light bulbs, but will have no power to effect consumers in Seattle, Tokyo, or Vienna.

Economists utilize the concept of "elasticity" to help define the relevant product market for antitrust purposes.[176] High elasticity in the demand of a product indicates the willingness of consumers to forgo its purchase in preference to a substitute should the product's price rise significantly.[177] Low elasticity, conversely, suggests the opposite: the willingness of consumers to pay significantly higher prices for a given product rather than abandoning it for a substitute.[178]

With regard to elasticity, it should be acknowledged that for many products there exists a core group of consumers with very strong preferences for those particular products. Preferences so strong that even a significant increase in a particular product's

[173] Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 464 (1992) (quoting Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 14 (1984)), *quoted in* Matt Koehler, Comment, *The Importance of Correctly Identifying the Consumer for an Antitrust Relevant Market Analysis*, 67 UMKC L. REV. 521, 525 (1999).

[174] Orbach & Rebling, *supra* note 165, at 636. It should be noted that as with so much of antitrust, even the definition of market power is heavily laden with policy considerations, such that a leading antitrust treatise observed: "How much market power is excessive enough to warrant intervention under the antitrust laws is largely a question of legal policy, not economic fact." AREEDA & HOVENKAMP, *supra* note 143, ¶ 502, at 112.

[175] *See* Koehler, *supra* note 173.

[176] *See id.* at 525–26.

[177] *See id.* at 533–34.

[178] *See id.*

price will not affect this core group's purchasing patterns.[179] Most courts will not consider this to be evidence of price inelasticity.[180] Rather, "[m]ost courts implicitly insist that a market be 'substantial' in scope by ignoring smaller ones."[181]

For geographic markets, the definition employed is "the geographic area to which consumers can practically turn for alternative sources of the product and in which [the firm] face[s] competition."[182] Put differently, "where else can the customer go" for the product in question—and would a reasonable customer go there.[183]

As with market power itself, the intricacies of market definition are not essential for the purposes of this article. What is necessary is simple comprehension of the fact that market power must be understood as a contextualized phenomenon: it exists in a defined area and over a defined good or service.

As Judge Easterbrook explains further in the excerpt provided above, a firm's market power matters because it is only through market power that a firm can inflict competitive harm.[184] This is why a "firm with market power is held to a higher standard of business conduct than one without it."[185] A firm with little or no market power is unlikely to harm anyone. Should it raise its prices to supracompetitive levels, or fail to stock items that are in demand, its customers—and potential customers—would ordinarily have ready recourse to the firm's competitors. Consider, on the other hand, a firm wielding market power, such as the archetypical example of a monopolist. Such a firm can dictate, to a very large degree, the prices that will be charged for certain goods along with the goods' availability in a given market. Only at tremendous inconvenience could the firm's customers shop elsewhere; they are essentially beholden to the firm's prices, products, and policies.

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[179] *See* AREEDA & HOVENKAMP, *supra* note 143, ¶ 530e, at 241.

[180] *See id.*

[181] *Id.*

[182] Morgenstern v. Wilson, 29 F.3d 1291, 1296 (8th Cir. 1994), *quoted in* Koehler, *supra* note 173, at 529.

[183] Koehler, *supra* note 173, at 532. This is another oversimplification, as "[c]ustomer convenience and preference can narrow the geographic scope of a market even in the absence of substantial transportation costs." AREEDA & HOVENKAMP, *supra* note 143, ¶ 553, at 360.

[184] *See* Easterbrook, *supra* note 167 and accompanying text.

[185] *See* Jacobs, *supra* note 164.

Antitrust's focus on harm to consumers and competition led one leading treatise's author to note: "Antitrust is best served if it . . . ignore[s] intent and focus[es] on conduct, market structure, or other objective considerations."[186]

E. Reasonable versus Unreasonable Competition

In its efforts to protect consumers and competition from harm, one of the tasks incumbent upon antitrust law is that of distinguishing between "reasonable" versus "unreasonable" competition—or, within the context of the FTC Act—between "fair" versus "unfair" competition.[187] This difficult tight-rope act puts on clearest display the usefulness of antitrust law's recourse to market power in its assessment of harm and violations of the law.

The Supreme Court addressed this difficulty in *Spectrum Sports, Inc. v. McQuillan*.[188] For the purpose of U.S. antitrust law "is not to protect business from the working of the market; it is to protect the public from the failure of the market."[189] The Court elaborated:

> The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself . . . . Thus, this Court and other courts have been careful to avoid constructions of [the Sherman Act] which might chill competition, rather than foster it. It is sometimes difficult to distinguish robust competition from conduct with long-term anticompetitive effects . . . .[190]

This difficulty is compounded by the fact that even the phrase "unfair methods of competition," appearing in section 5 of the Federal Trade Act was left undefined by Congress.[191]

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[186] AREEDA & HOVENKAMP, *supra* note 143, ¶ 113, at 144.

[187] The difference between assessing whether conduct is "reasonable" versus "unreasonable" on the one hand and assessing whether conduct is "fair" versus "unfair" on the other, although interesting, need not detain us here. For our purposes, given that our focus is on general antitrust principles—and not careful, specific applications of antitrust law in the context of antitrust problems—this difference is not material.

[188] *See generally* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 447 (1993).

[189] *Id.* at 458.

[190] *Id.* at 458–59; *see also* Int'l Travel Arrangers, Inc. v. W. Airlines, Inc., 623 F.2d 1255, 1267 (8th Cir. 1980).

[191] FTC v. Gratz, 253 U.S. 421, 427 (1920).

Not surprisingly, a fierce debate persists over what, exactly, terms such as "fair" and "unfair," "reasonable" and "unreasonable" refer to.[192] Some read these terms in their ordinary sense, as conveying a sense of moral rectitude or indecency.[193] Others read these terms through economic lenses, as shorthand for conduct injurious to "consumers' welfare and allocative efficiency."[194]

From this language's inception, however, it was understood that "whether competition is fair or unfair depends in a peculiar degree upon the circumstances of the particular case."[195] This, in turn, apparently contributed to the language's ambiguity and the lack of a precise articulation of offensive—that is, "unfair" or "unreasonable"—practices, for "it would be impossible through legislation to define the many ways in which a large company might engage in unfair competition without at the same time strait-jacketing other, smaller businesses that might use the very same methods to compete against those larger firms."[196]

A critical factor in distinguishing conduct that is "fair" or "reasonable" versus that which is deemed "unfair" or "unreasonable"—and, consequently, violative of federal antitrust law—is the market power of the actor.[197] As discussed previously, a firm without market power simply cannot or is highly unlikely to inflict harm upon consumers or competition as could a firm with market power.[198] Consequently, for all practical purposes, the possession of market power has been baked into the very definition of what constitutes unfair or unreasonable competition. As a result, "it has been accepted in antitrust law that 'Davids can engage in many kinds of conduct in the marketplace that are forbidden to Goliaths.' "[199]

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[192] *See* Thomas J. Horton, *Fairness and Antitrust Reconsidered: An Evolutionary Perspective*, 44 MCGEORGE L. REV. 823, 827–51 (2013); Lambert, *supra* note 131, at 875.

[193] *See* Horton, *supra* note 192, at 835–51.

[194] Fishman v. Estate of Wirtz, 807 F.2d 520, 567 (7th Cir. 1986) (Easterbrook, J., dissenting).

[195] *See* Kolasky, *supra* note 141, 108 (quoting Editorial, *The Judiciary Committee's Blunder*, 59 HARPER'S WKLY, 121, Aug. 8, 1914).

[196] *Id.*

[197] *See* Int'l Travel Arrangers, Inc. v. W. Airlines, Inc., 623 F.2d 1255, 1267 (8th Cir. 1980); Havoco of Am., Ltd. v. Shell Oil Co., 626 F.2d 549, 556 (7th Cir. 1980).

[198] *See supra* Part II.D.

[199] *Int'l Travel Arrangers, Inc.*, 623 F.2d at 1267 (quoting Purex Corp. v. Proctor & Gamble Co., 596 F.2d 881, 885 (9th Cir. 1979)).

An example of how this has played out is furnished by the U.S. Supreme Court decision in *FTC v. Texaco*.[200] At issue in *FTC v. Texaco* was, among other things, whether respondent Texaco's practice of inducing its service station dealers "to purchase Goodrich tires, batteries, and accessories . . . in return for a commission paid by Goodrich to Texaco[]" constituted " . . . an unfair method of competition."[201] In finding a violation of Section 5 of the FTC Act, the Court made a point to observe that "Texaco holds dominant economic power over its dealers . . . ," a finding of fact that no party to the case disputed.[202] As the Court explained, "[i]t is against the background of this dominant economic power . . . that the sales-commission arrangement must be viewed."[203] Although not stated explicitly, it is rather clear from the opinion that had Texaco not enjoyed such economic dominance over its service station dealers there probably would not have been a violation of Section 5 in that case.

In *CBS v. FTC*, the Seventh Circuit was even clearer than the Supreme Court in underscoring the importance of market power in assessing the unfairness of conduct in question.[204] At issue in *CBS v. FTC* was the licensing practice of CBS's subsidiary, Columbia Record Club ("Columbia").[205] Columbia sold phonographic records by mail via catalog, and would include the offerings of small record company manufacturers only if those companies agreed not to sell any of their records to another record club.[206] The FTC asserted that this practice constituted an unfair method of competition in violation of Section 5 of the FTC Act.[207]

In assessing the FTC's case against CBS, the Seventh Circuit explained the importance of determining, as a threshold matter, Columbia's market power.[208] "To determine whether the exclusive licensing provision is an unfair method of competition under Section 5 of the Federal Trade Commission Act," the Court wrote, "the relevant market within which to measure the effect

[200] *See generally* 393 U.S. 223, 223 (1968).
[201] *Id.* at 224.
[202] *Id.* at 226.
[203] *Id.* at 227.
[204] *See generally* 414 F.2d 974, 974 (1969).
[205] *See id.* at 976.
[206] *See id.*
[207] *See id* at 975.
[208] *See id.* at 978.

on competition must be defined."[209] Having defined the relevant market as "the record club market," the Court then proceeded to examine the market's structure.[210] This is essential because dominance over a market that is fluid, or that lacks significant barriers to entry, gives merely the illusion of market power.[211] Given changes in the record industry between the time that the FTC filed its complaint against CBS in 1962 and the date of the FTC's opinion in 1967, the Seventh Circuit concluded that additional hearings were necessary and as such remanded the case.[212] Thus, whether or not Columbia's conduct was deemed "unfair" in violation of Section 5 of the FTC Act turned, in large part, upon Columbia's market power. Put differently, the conduct itself could not be considered unfair absent an inquiry into Columbia's market power.[213]

III. APPLICATION OF MARKET POWER CONSIDERATIONS TO CORPORATE ASSERTIONS OF RELIGIOUS LIBERTY

The proper scope of religious liberty exemptions remains a hotly debated, divisive issue. In 2015, the drama played out in Indiana, when a proposed Religious Freedom Restoration Act in that state touched off a firestorm of controversy.[214] The drama repeated itself in 2016, in Georgia and Mississippi, when similar bills passed the legislatures of those states.[215] In each situation,

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[209] *Id.*

[210] *See id.* at 981.

[211] *See* AREEDA & HOVENKAMP, *supra* note 143, ¶ 500, at 89–90.

[212] *See CBS*, 414 F.2d at 981–82.

[213] It should be noted that reference to market power is not a unique characteristic of U.S. federal antitrust law, but can be seen in the antitrust law of other nations as well. *E.g.*, GABRIEL MOENS ET AL., COMMERCIAL LAW OF THE EUROPEAN UNION 199-200, § 6.105-6.110 (2010) (discussing "abuse of a dominant position" under European Union law). It must also be remembered, however, that despite its critical relevance to antitrust analysis, the possession of market power *per se,* without more, does not constitute a violation of U.S. antitrust law. *See* Pac. Bell Tel. Co. v. LinkLine Comm., Inc., 555 U.S. 438, 447–48 (2009).

[214] *See* Tony Cook and Brian Eason, *Gov. Mike Pence signs RFRA fix,* INDYSTAR (April 2, 2015, 8:08 PM EDT), http://www.indystar.com/story/news/politics/2015/04/01/indiana-rfra-deal-sets-limited-protections-for-lgbt/70766920/.

[215] *See* Alan Blinder and Richard Perez-Pena, *Georgia Governor Rejects Bill Shielding Critics of Gay Marriage,* NY TIMES (March 28, 2016), http://www.nytimes.com/2016/03/29/us/georgia-governor-rejects-bill-shielding-critics-of-gay-marriage.html?_r=0; Eliott C. McLaughlin, *Mississippi passes religious freedom bill that LGBT groups call discriminatory,* CNN (April 6, 2016, 6:54 AM), http://www.cnn.com/2016/04/05/us/mississippi-governor-signs-religious-freedom-bill/index.html.

the battle lines drawn were similar: on one side were those seeking to protect those individuals whose consciences precluded them from complying with certain laws, and on the other, those seeking to vigorously enforce those same laws—laws ostensibly designed to grant and protect the rights of certain individuals.[216] These issues are felt most acutely when the religious exemptions in question are asserted by a corporate claimant. For in corporate and other business claimant cases, third-party harms are both more frequently presented and typically more serious in nature. An individual seeking a religious liberty exemption from a state's controlled substance abuse laws simply does not ordinarily impinge upon the rights and privileges of his or her fellow Americans the same way a business entity seeking a religious liberty exemption from a state's antidiscrimination laws does.[217]

Concrete examples of such claims implicating third-party interests abound. Previously discussed were cases stemming from the "contraceptive mandate" regulations issued pursuant to the ACA.[218] These regulations forced companies to provide health insurance coverage that subsidized products and practices—more specifically, artificial birth control, including abortifacient hormonal contraception—in contravention of the religiously inspired principles upon which certain companies were founded and pursuant to which they operated.[219] The federal government, in promulgating these regulations, ostensibly did so out of its understanding of what's best for women's health.[220]

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[216] *See, e.g.*, Steve Sanders, *RFRAs and Reasonableness*, 91 IND. L.J. 243, 248–49 (2016).

[217] *See* Nejaime and Siegel, *supra* note 86. This is because modern corporate free exercise claims have been typically asserted against legislation and regulations designed to protect third parties, and predicated upon the argument that obedience to such laws would constitute illicit complicity with moral wrongdoing. *See supra* text accompanying note 86. For a discussion of a traditional approach to the question of moral complicity with wrongdoing (referred to as "cooperation with evil"), *see* Ronald J. Colombo, *Cooperation With Securities Fraud*, 61 ALA. L. REV. 61, 89–97 (2009).

[218] *See supra* text accompanying notes 83–88.

[219] *See id.*

[220] Madison Park, *Birth Control Should be Fully Covered Under Health Plans, Report Says*, CNN (July 19, 2011), http://www.cnn.com/2011/HEALTH/07/19/birth. control.iom/ (cited in Genna Fasullo, *Circumventing the Affordable Care Act Contraceptive Mandate*, 16 T.M. COOLEY J. PRAC. & CLINICAL L. 55, 55 n.1 (2013)).

Prior to the ACA, similar issues arose with regard to health care professionals who opposed, for reasons of religious conscience, fulfilling certain prescriptions or participating in certain procedures.[221] A typical case would be that of a pharmacist objecting to the dispensing of emergency contraceptives, which are viewed by many as abortifacient.[222] These cases were usually brought by individual pharmacists, but there is no reason why they could not be brought by a pharmacy itself, as some have been.[223]

Another, more recent set of examples, stems from the advent of same-sex marriage in the United States, and its interplay with antidiscrimination laws, especially in the aftermath of *Obergefell v. Hodges.*[224] In *Obergefell*, the Supreme Court held that the Fourteenth Amendment to the U.S. Constitution gives rise to "[t]he right of same-sex couples to marry."[225] In one fell swoop, *Obergefell* not only swept away laws that had recognized marriage as solely between a man and woman, but also effectively made opposition to same-sex marriage subject to state antidiscrimination laws. The consequences of this have been profound.

For in many jurisdictions prior to *Obergefell*, although marriage was not extended to same-sex couples, homosexual individuals otherwise enjoyed the same familiar antidiscrimination benefits that protected Americans against discrimination on the basis of race, color, or creed.[226] This

[221] *See* Kent Greenawalt, *Objections in Conscience to Medical Procedures: Does Religion Make a Difference?*, 2006 U. ILL. L. REV. 799, 818–19 (2006); Francis J. Manion, *Protecting Conscience Through Litigation: Lessons Learned in the Land of Blagojevich*, 24 REGENT U. L. REV. 369, 395–96 (2012).

[222] *See* Manion, *supra* note 221. As for whether emergency contraception is indeed abortifacient, *compare* Mathew Lu, *Abortiofacients, Emergency Contraception, and Terminating Pregnancy*, THE WITHERSPOON INSTITUTE: PUBLIC DISCOURSE (April 4, 2014), http://www.thepublicdiscourse.com/2014/04/12973/, *with* OFFICE OF POPULATION RESEARCH, PRINCETON UNIVERSITY, *Answers to Frequently Asked Questions About . . . How Emergency Contraception Works,* THE EMERGENCY CONTRACEPTION WEBSITE (last visited Mar. 25, 2018), http://ec.princeton.edu/questions/ecabt.html.

[223] *E.g.*, Stormans, Inc. v. Selecky, 586 F.3d 1109, 1109 (9th Cir. 2009).

[224] *See generally* Obergefell v. Hodges, 135 S. Ct. 2584, 2584 (2015).

[225] *Id.* at 2602.

[226] Such states would have included Hawaii (banning discrimination on the basis of sexual orientation in employment and public accommodations, *see* HAW. REV. STAT. § 378-2 and HAW. REV. STAT. § 489-2, but also not recognizing same-sex marriage until 2013, *see* H.B. 2312, 17th Leg. (Haw. 1994) (precluding same-sex

limited the conflict between religious individuals and antidiscrimination laws.[227] Indeed, state-based RFRA claims prior to *Obergefell*, as a whole, were "exceedingly rare,"[228] and conflict with antidiscrimination laws was only "occasional."[229]

With regard to RFRA-based challenges to antidiscrimination laws, it should not come as much as a surprise that such challenges were relatively rare before *Obergefell*. For although there are very clear, longstanding religious traditions regarding the nature and definition of marriage, none of these traditions—of which I am aware—counsel in favor of discriminating *carte blanche* against individuals *qua* individuals.[230] Put differently,

marriage), HAW. REV. STAT. § 572-1 (recognizing same-sex marriage)); Nevada (banning discrimination on the basis of sexual orientation in employment, *see* Assemb. B. 311, 1999 Leg. (Nev. 1999), but also not recognizing same-sex marriage until 2014, *see* NEV. CONST. Art. I, § 21 (precluding same-sex marriage), Latta v. Otter, 771 F.3d 456, 464–65 (9th Cir. 2014) (requiring recognition of same-sex marriage)); Oregon (banning discrimination on the basis of sexual orientation in housing, employment, and public accommodations; *see* OR. REV. STAT. § 659A.030, but also not recognizing same-sex marriage until 2014; *see* OR. CONST. Art. XV, § 5a (precluding same-sex marriage), Geiger v. Kitzhaber, 994 F. Supp. 2d 1128, 1132–33 (D. Or. 2014) (requiring recognition of same-sex marriage)); and Wisconsin (banning discrimination on the basis of sexual orientation, *see* WIS. STAT. § 111.36 (1993), but also not recognizing same-sex marriage until 2014, *see* WIS. CONST. Art. 13, § 13 (precluding same-sex marriage), Baskin v. Bogan, 766 F.3d 648, 672 (7th Cir. 2014) (requiring recognition of same-sex marriage)).

[227] The conflict nevertheless still existed. *See* Melissa Fishman Cordish, Comment, *A Proposal for the Reconciliation of Free Exercise Rights and Anti-Discrimination Law*, 43 UCLA L. REV. 2113, 2116–17 (1996).

[228] Christopher C. Lund, *Religious Liberty After Gonzales*: *A Look at State RFRAs*, 55 S.D. L. REV. 466, 467 (2010).

[229] Thomas C. Berg, *Religious Liberty in America and the End of the Century*, 16 J.L. & RELIG. 187, 209 (2001).

[230] The Catechism of the Catholic Church provides an excellent example of this, by simultaneously denouncing both homosexual activity and discrimination against homosexual individuals:

> 2357 Homosexuality refers to relations between men or between women who experience an exclusive or predominant sexual attraction toward persons of the same sex. It has taken a great variety of forms through the centuries and in different cultures. Its psychological genesis remains largely unexplained. Basing itself on Sacred Scripture, which presents homosexual acts as acts of grave depravity, tradition has always declared that "homosexual acts are intrinsically disordered." They are contrary to the natural law. They close the sexual act to the gift of life. They do not proceed from a genuine affective and sexual complementarity. Under no circumstances can they be approved.
>
> 2358 The number of men and women who have deep-seated homosexual tendencies is not negligible. This inclination, which is objectively disordered, constitutes for most of them a trial. They must be accepted with

although many religions have a lot to say about marriage and sexual ethics, none, to my knowledge, address less weighty questions such as to whom may I sell a car, or whom may I permit to use my laundromat? Thus, a devoutly religious individual could typically remain fully faithful to his or her understanding of marriage without ever running afoul of laws protecting individuals from discrimination on account of their sexual orientation.[231]

Post-*Obergefell*, however, religious opposition to same-sex marriage and discrimination against homosexual individuals has been legally conflated. This gives rise to a serious predicament for many of those who might be called upon to provide goods and services for a same-sex wedding ceremony or celebration. Consequently, photographers, florists, and bakers have made headlines for refusing to violate their religious consciences in order to comply with local antidiscrimination laws.[232]

Perhaps no case illustrates this transformed landscape better than the plight of Barronelle Stutzman, owner of Arlene's Flowers.[233] For ten years, she served, without incident, Rob Ingersoll, one of her customers. According to Ms. Stutzman, they

> respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided. These persons are called to fulfill God's will in their lives and, if they are Christians, to unite to the sacrifice of the Lord's Cross the difficulties they may encounter from their condition.

CATECHISM OF THE CATHOLIC CHURCH ¶¶ 2357, 2538 (1994).

[231] One flashpoint, even pre-*Obergefell*, concerned landlords, some of whom refused to lease apartments to unmarried couples. *See* Cordish, *supra* note 227, at 2113–14.

[232] *See* Elizabeth Sepper, *Doctoring Discrimination in the Same-Sex Marriage Debates*, 89 IND. L.J. 703, 711 (2014). It should be noted that even before *Obergefell*, however, some disputes between wedding vendors and same-sex couples still occurred, for even in states where same-sex marriage was not legal, same-sex couples did celebrate their unions and in doing so called upon service providers who had religious objections to these celebrations. *See* Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 621 (2015).

[233] Barronelle Stutzman, *Why a Friend Is Suing Me: The Arlene's Flowers Story*, SEATTLE TIMES (Nov. 9, 2015), http://www.seattletimes.com/opinion/why-a-good-friend-is-suing-me-the-arlenes-flowers-story [http://perma.cc/BU5V-ZS42] (*cited in* Sherif Girgis, *Nervous Victors, Illiberal Measures: A Response to Douglas Nejaime and Reva Siegal,* 125 YALE L.J. FORUM 399, 412 n.65 (2016); Washington v. Arlene's Flowers, 389 P.3d 543, 568 (Wash. 2017) (en banc) (holding that Stutzman's refusal to provide flowers for same-sex wedding constituted unlawful, unexcused discrimination on the basis of sexual orientation in violation of Washington law).

"hit it off" due to their shared "artist's eye."[234] Although Mr. Ingersoll "was in a relationship with a man," and Ms. Stutzman "was a Christian," that "never clouded the friendship for either [of them] or threatened [their] shared creativity."[235]

But then Mr. Ingersoll asked Ms. Stutzman to "design something special to celebrate his upcoming wedding" to his male partner.[236] This she could not, in good conscience, do, for reasons that she explains well in her own words:

> If all he'd asked for were prearranged flowers, I'd gladly have provided them. If the celebration were for his partner's birthday, I'd have been delighted to pour my best into the challenge. But as a Christian, weddings have a particular significance.
>
> Marriage does celebrate two people's love for one another, but its sacred meaning goes far beyond that. Surely without intending to do so, Rob was asking me to choose between my affection for him and my commitment to Christ. As deeply fond as I am of Rob, my relationship with Jesus is everything to me. Without Christ, I can do nothing.[237]

Ms. Stutzman proceeded to suggest "three other nearby florists" who she "knew would do an excellent job for this celebration."[238] She was promptly sued for discrimination. As Ms. Stutzman explained, "[t]his case is not about refusing service on the basis of sexual orientation or dislike for another person who is preciously created in God's image. I sold flowers to Rob for years. I helped him find someone else to design his wedding arrangements. I count him as a friend."[239] Rather, it was about obedience to one's religiously informed conscience.[240]

Opponents to religious liberty exemptions oftentimes characterize the proponents of such exemptions as little more than bigots.[241] Ms. Stutzman's case belies that.[242] Indeed,

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[234] Stutzman, *supra* note 233.

[235] *Id.*

[236] *Id.*

[237] *Id.*

[238] *Id.*

[239] *Id.*

[240] *See id.*

[241] *E.g.*, Editorial, *In Indiana, Using Religion as a Cover for Bigotry*, N.Y. TIMES (Mar. 31, 2015), http://www.nytimes.com/2015/03/31/opinion/in-indiana-using-religion-as-a-cover-for-bigotry.html (*cited in* Koppelman, *supra* note 232, at 653 n.163); Shannon Gilreath and Ashley Ward, *Same-Sex Marriage, Religious Accomodation, and the Race Analogy*, 41 VT. L. REV. 237, 246 (2016) ("[T]he

perhaps the most well-known conscientious objection in all of history to recognizing a particular marriage was that of St. Thomas More, who famously died "the King's good servant but God's first."[243] That is, he died maintaining his opposition to the King's second marriage without harboring any recorded animus whatsoever against King Henry VIII himself.[244]

It is important to call to mind examples such as Ms. Stutzman's to underscore the point that principled opposition to same-sex marriage, or abortion, or contraception—to take other frequent examples—can exist without any animus toward those individuals for whom antidiscrimination or access laws are designed to protect.[245] This is necessary to justify the compromise set forth below. Few, myself included, wish to broker a compromise between laws safeguarding civil rights and health care access on the one hand and the purveyors of bigotry

argument that anti-gay discrimination is somehow qualitatively different from anti-black discrimination is bunk. It is a convenient smoke screen enabling bigots to mask their true animus.").

[242] Also belying such an ignorant mischaracterization of all who would dare seek an exemption from the equal access / antidiscrimination laws as applied to contraception and same sex marriage would be St. John Paul II's "Theology of the Body." *See* JOHN PAUL II, MAN AND WOMAN HE CREATED THEM: A THEOLOGY OF THE BODY (Michael Waldenstein, ed. & trans. 2006). This Article posits that no fair minded person could, in good faith, ascribe bigotry to this work, which painstakingly proffers an understanding of sex and marriage that precludes contraception and other "illicit practices against generation." *See id.* at 362–364, 628–639. John Paul II's writings do not address the issue of religious liberty exemptions. Nor do his writings directly address the philosophical issue of whether one's sale of artificial birth control, abortifacients, or goods and services for use in a same-sex wedding ceremony constitute what's referred to as illicit "cooperation" in the conduct of their purchasers. *See, e.g.*, 1 KARL H. PESCHKE, CHRISTIAN ETHICS 320 (1986). Indeed, within John Paul II's Catholic tradition, it's not entirely clear that an exemption would be needed in all such situations. *See* Robert T. Miller, *The Shopkeeper's Dilemma and Cooperation with Evil*, THE WITHERSPOON INSTITUTE: PUBLIC DISCOURSE (Mar. 5, 2015), http://www.thepublicdiscourse.com/2015/03/14423. But John Paul II's writings do make clear that the beliefs motivating religious liberty exemption claims from the laws referenced above can very well be predicated upon reason and serious philosophical principles—not simply, inevitably, or necessarily bigotry and animus.

[243] R. MARIUS, THOMAS MORE, A BIOGRAPHY 513–14 (1985), *quoted in* Stephen M. Deitsch, *Thomas More: A Fine Lawyer and a Fine Man*, 17 DCBA Brief 12 (2004).

[244] *See* PETER ACKROYD, THE LIFE OF THOMAS MORE 403 (1998) (On the morning of his execution, Thomas More remarked that "I have always been much bounden to the king's highness for the benefits and honours that he hath still from time to time most bountifully heaped upon me . . . . I will not fail earnestly to pray for his grace, both here and also in another world").

[245] *See* MARIUS, *supra* note 243.

on the other, based upon some pretextual recourse to religious liberty. But certainly many who assert religiously based objections to these laws do so in good faith, devoid of ill-will or bad intent, giving lie to the widespread (mis)characterization of such objectors.

Consequently, the issue of religious exemptions from laws protecting third parties presents us with a very real clash of important values. Or, perhaps more accurately, the imperfect realization of *one* value: that of securing full citizenship to all members of our society, especially to those who are members of minority groups or otherwise vulnerable. Like a Rorschach test, the previous sentence perhaps calls to mind different classes of people depending upon the reader.[246] To some, homosexuals, same-sex couples, and women are those vulnerable members of our society who require the law's protections. But to other readers, those individuals who continue to adhere to certain traditional religious views of marriage and sexual norms, against the clear trajectory of modern opinion, constitute a vulnerable minority.[247]

Moreover, "people who decide that they do not want to trade with or hire certain people" on such grounds "are making a decision that has more than just external costs."[248] For they themselves "bear a large part of the costs . . . for their decisions will surely limit their own opportunities for advancement and success, even as it leaves others free to pursue alternate opportunities."[249] Despite its persistence, therefore, we ought not forget that market-place discrimination ordinarily imposes real costs upon the discriminator as well as upon the victim of discrimination.[250] Consequently, there are "natural curbs" against such economically inefficient behavior.[251]

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[246] *See* Erik Luna, *The .22 Caliber Rorschach Test*, 39 HOUS. L. REV. 53, 54 (2002) (discussing the Rorschach ink-blot test).

[247] *See* Sanders, *supra* note 217, at 246–47 (2016). This has led Richard Epstein to remark "In these settings, the utter inability to understand who is coercing whom reveals the great danger of a kind of law that forces the unwilling to yield to its commands when all they want is to be free to practice their own faith." *See* Epstein, Freedom of Association, *supra* note 13.

[248] *See* EPSTEIN, FORBIDDEN GROUNDS, *supra* note 13, at 41–42 (citing Gary S. Becker, *The Economics of Discrimination*, ch. 3 (2nd ed., 1971).

[249] *Id.*at 42.

[250] *Id.*

[251] *Id.* There is, perhaps, no more paradigmatic example of widespread discrimination against a particular, vulnerable group than that of the American

But not all contexts are identical. In some towns or regions, the economic and material harms of discrimination may fall more heavily upon one party versus another. In other words, which group should more properly be characterized as "minority" or more "vulnerable" perhaps turns best upon the venue or situation in question. And that serves as a fitting segue to our advertence to antitrust law.

A. In Theory

Tasked with the unenviable responsibility of protecting competition generally by curtailing certain forms of competition individually, antitrust law lights the way forward. With over a century of case law under its belt, antitrust law has learned to address the tension inherent in its mandate by recognizing the critical importance of context.[252] For in the light of context, conduct that can be deemed reasonable or fair for one firm can be deemed unreasonable or unfair when undertaken by another. Further, even conduct engaged in by the very same firm could be deemed reasonable versus unreasonable depending upon the time, place, and circumstances of its engagement.

For, as we have seen, "context" here means, primarily, market power.[253] When a firm lacks market power its ability to compete unfairly, and to harm consumers, is significantly impeded. In the absence of market power, consumers, venders, suppliers, and actors throughout the marketplace ordinarily have alternatives to which they can turn in the face of a firm's

South during the Jim Crow era. This causes many to question the efficacy of the market's "natural curbs" against discrimination. Richard Epstein offers an interesting counter-interpretation of this example:

> The history of failure in the South is not a history of the failure of individual character or individual will. It is not a history of the failure of markets . . . . To the contrary, the lessons from our history of civil rights all stem from two sources: first, the abnegation of the principles of limited government, that is, government restricted to those areas where it is required, such as taxation and law enforcement; and second, the massive state legislative regulation of private markets that was left unchecked by passive judicial action.

Id. at 94. Epstein proceeds to point out that the notorious Supreme Court decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896), which centered upon a Louisiana statute (the "Separate Car Act") requiring racial segregation on railways, suggests that the state's private railways "were—or, more likely, had become—unwilling to practice racial discrimination." *Id.* at 102.

[252] *See supra* Part II.D.

[253] *See id.*

misconduct. Conversely, a firm in possession of market power may be able to impose its will upon consumers and other marketplace participants to their detriment.

Although antitrust law is not analogous to antidiscrimination law, or to the law of religious liberty, its focus on market power is nevertheless a helpful tool for addressing the dilemma of corporate free exercise exemptions. For, as with antitrust, a firm's market power could be used as a proxy to gauge how harmful to third-party interests that firm's misconduct could be in the context of religious liberty exemptions. In the realm of religious liberty exemptions, the "misconduct" referred to is that behavior that violates a law of general applicability designed to protect or further some third-party interest. A firm with marginal market share is simply not in a position to inflict the same degree of harm that a firm with dominant market share is.

Harkening back to some of the real-life examples identified above, consider the question of access to birth control, or the procurement of a wedding cake: a business lacking any appreciable market power will simply not be able to frustrate public policy objectives the way a business with sizeable market power could. A family-owned drugstore in Manhattan, or a bakery in Jersey City, regardless of how restrictive its policies might be, will simply not be able to prevent someone from obtaining contraceptives or catering services. As such, granting religious liberty exemptions to such drugstores or bakeries should not be viewed as overly problematic. Moreover, in balancing the harms that would accrue to the parties involved, granting the exemption in such circumstances seems to be the fairest approach.

We have previously addressed the important values that a robust approach to religious liberty protects.[254] Bluntly put, a modern, civilized society generally avoids forcing its members to choose between God and Caesar. History and philosophy strongly attest to such a careful approach—both of which were well understood by the men and women who founded the United States.[255] This suggests that, for reasons both normative and

[254] *See supra* Part I.A.

[255] *See id.*

practical, we find a way to accommodate the religious convictions and consciences of our fellow Americans to the widest extent reasonably possible.

Of course, laws designed to ensure access to goods and services, be they antidiscrimination laws or certain health care regulations, also serve valuable and important purposes. Primarily, they serve to ensure said access or to "ameliorat[e] economic inequality."[256] But they also serve to recognize, foster, and protect, at the behest of the state, the equal dignity of the individuals on whose behalf they have been promulgated.[257] In light of these dual objectives, how could a religious accommodation ever be justified? For even if the firm seeking an objection lacks market power, its very ability to decline its goods or services to a protected third party implicates this secondary purpose of the law in question, that regarding equal dignity.

The justification lies in recognizing, as has been suggested previously, the intractable, zero-sum game at play when it comes to the question of dignity. There is no way around this facet of the dilemma: either the dignity of the religious claimant will be infringed upon, or that of the protected third party. In such situations, the state should not "take sides" and value the dignity of one group of citizens over another.[258] The state ought not to, through its weight and coercive power, prioritize these groups as first class versus second class, subjugating the dignity interests of one to the dignity interests of the other.[259] Instead, in such

[256] Koppelman, *supra* note 232, at 627.

[257] *See* Nejaime and Siegel, *supra* note 86, at 2574–78; Neil S. Siegel & Reva B. Siegel, *Contraception as a Sex Equality Right*, 124 YALE L.J. FORUM 349, 349–50 (2015).

[258] *Cf. See* EPSTEIN, FORBIDDEN GROUNDS, *supra* note 13*,* at 498 (there is no easy way "to trade off symbol against symbol, or different symbolic views of the same legal rules against one another. Given the limits of our knowledge . . . the best way to take into account the full range of symbols, good and bad, noble and vain, is for the legal system to ignore them all.").

[259] *See also id.* at 497 ("The problem of social governance . . . requires that we make peace not with our friends but with our enemies, and this can be done only if we show some respect for their preferences even when we detest them."). Although the government ought not to prioritize one class of claimants against the other here, a strong argument could be made that the free exercise/religious liberty claimants are entitled to prioritization. For a truly neutral state of affairs would be one in which the government prescinds from interfering with private ordering. It is only because of government's interference, in the form of civil rights legislation for example, that the conflict between rights even arises. Absent the government's involvement, all parties, both buyers and sellers, employers and employees, would be

situations, the law should proceed by examining other, more practical and objective factors at play. A review of these factors helps elucidate the benefits of pursuing an approach to corporate free exercise exemptions predicated upon market power.[260]

Let's consider the repercussions of a regime that grants, versus one that denies, a religious liberty exemption on the basis of market power. To facilitate matters, let's take a concrete example: the case of a family-owned pharmacy that, on account of the family's religious beliefs, does not sell artificial birth control. The pharmacy seeks an exemption from a state law mandating that all pharmacies within its jurisdiction stock and supply certain forms of artificial birth control.

With regard to the dignity question, recognition of a religious exemption for objecting pharmacies effectuates a policy of state neutrality. By mandating, generally, the widespread availability of artificial contraception, the state cannot be accused of failing to respect the equality or dignity of women and their choices.[261] And by coupling this legislation with an exemption for religiously based conscientious objection, the law would be countenancing a narrow exception that could not fairly be said to swallow the rule. But the exemption, though narrow, would broadcast the same affirming message to religious individuals that the general legislation broadcast to the state's birth-control using population: that their concerns are valid and that they have a right to live out their lives in conformity with their values. Expressed in mathematical language, these "dignity" concerns appear to cancel each other out.[262] Since effectuation of these principles is a

free to exercise their consciences as best seen fit. As such, religious liberty exemptions merely return the situation to its state of affairs *ex ante*, prior to the time in which the government decided to interfere with private ordering via its legal circumscription of prejudice, protection, and / or preference.

[260] *Cf.* Thomas C. Berg, *What Same-Sex Marriage and Religious Liberty Claims Have in Common*, 5 NW J.L. & Soc. Pol'y 206, 212–26 (2010).

[261] At least to those who believe that the dignity and equality of women is a function of the availability of artificial birth control. *See* Seigel and Seigel, *supra* note 257, at 349–50.

[262] *But see* Nejaime and Siegel, *supra* note 86, at 2580 (asserting that an accommodation that would inflict *either* a "material or dignitary harm" to a protected third-party would implicate a compelling government interest) (emphasis added).

matter of abstraction, this conclusion would be the same regardless of whether the pharmacy possessed or lacked market power.[263]

Although market power could arguably impact our assessment of dignitary harm—by helping us to assess how widespread and common denials of service might be—its presence or absence plays a particularly important role with respect to our analysis of the material harm that an exemption may inflict or prevent. Put differently, market power helps us assess the practical ability of parties to conduct themselves in accordance with their principles and values in light of a potential religious liberty exemption from a law of general applicability. If a pharmacy lacks market power—meaning that it has multiple nearby competitors—granting an exemption to a law requiring pharmacies to stock and dispense artificial birth control pills and devices would allow the pharmacy to remain true to its principles without denying the protected third-parties the practical value of the law—namely, ready access to artificial contraception.[264] As

[263] That said, some commentators call into question the weight of dignitary harms that are rare or unusual in nature. As Andy Koppelman has written, "[t]he sense of insult and dehumanization" that accompanies a refusal of service "depends in part on systemic effects that go beyond the particular transaction. An insult that is unusual loses much of its sting." *See* Koppelman, *supra* note 232, at 645. This suggests that, contrary to my inclination, market power is not irrelevant to the "dignity harm" analysis. Moreover, other scholars have pointed out that, in the free speech context at least, "the Supreme Court has consistently held that a government's desire to protect people from emotional harm . . . does not constitute a compelling government interest." *See* Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV 1595, 1624 (2018). Indeed, as these scholars have pointed out: "it is difficult to imagine more excruciating humiliation, degradation, or emotional harm than that endured by the father who saw Westboro Baptist Church picketers with signs stating 'God Hates Fags,' 'You're Going to Hell,' and 'God Hates You' at the funeral of his son," yet that has been upheld as protected First Amendment activity. *Id.* This serves to underscore the propriety of focusing on the *access* to goods and services objective of antidiscrimination law when challenged on First Amendment Free Exercise grounds as applied to certain religious minorities.

[264] It must be recognized that the possibility exists for material harm to be inflicted by religious liberty exemptions or accommodations even in a market in which no single firm wields market power. For a situation could arise where all or most firms in a competitive market refuse to provide a particular good or service in question to the detriment of a protected third-party interest. Were this situation the result of intentional coordination among the firms, antitrust law again would furnish us with an answer. Under antitrust law, it is unlawful for a group of firms with market power to do that which a single firm with market power could not do. *See supra* text accompanying note 128 ("Every contract, combination in the form of

Richard Epstein has noted, "the critical question for [a person's] welfare is not which opportunities are lost but which are retained."[265]

Conversely, denying the exemption in such circumstances provides little practical benefit to the law's beneficiaries because, as stated, multiple other pharmacies exist that would readily supply the products in question, but would have the devastating effect of precluding the pharmacy from operating in accordance with the religious principles upon which it was founded. In practical terms, this would probably put the pharmacy out of business. As one commentator explained, using a different example:

> Denials of service do affect gay couples by causing them disturbance, hurt, and offense. While acknowledging that harm, one must also acknowledge, I think, that the harm to the objector from legal sanctions is greater and more concrete. In most cases, the offended couple can go to the next entry in the phone book or the Google result. The individual or organization held liable for discrimination, by contrast, must either violate the tenets of her (its) faith or else exit the social service, profession, or livelihood in which she (it) has invested time, effort, and money. One simply has not given the religious dissenter's interest significant weight if one finds that offense or disturbance from messages of disapproval are sufficient to override it. . . . "[A]ctual people should not be harmed for the sake of symbolic gestures."[266]

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trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."). Analogously, a religious liberty exemption should be denied to any firm in a group of firms that (1) collectively possess market power and (2) conspire to deny a particular product or service to a protected third-party population.

But what if this apparent conspiracy is instead the result of separate, individual, non-coordinated decisions? What if the firms and their managers simply adhere to a similar set of values and beliefs, and as such conduct themselves similarly without any collaboration between or among them?

No obvious answers present themselves. But based upon the principle, articulated previously, that a religious exemption should not cause material, objective harm to a third-party interest, *see supra* text accompanying note 268, it would stand to reason that the exemption should not be recognized in such cases for at least one of these companies.

[265] *See* EPSTEIN, FORBIDDEN GROUNDS, *supra* note 13, at 30.

[266] Berg, *supra* note 260, at 229 (pointing out that many of the proponents and opponents of religious liberty exemptions to laws protecting third parties predicate their arguments upon similar principles: (1) the importance of conduct fundamental to identity, (2) the right to live out one's life publicly in civil society, and (3) the claimed virtuousness, or objective value, of the rights they seek to protect). *See also*

However, if the pharmacy in question possesses market power—meaning that it has few nearby competitors—granting an exemption to the law would seriously undermine the access to contraception that the law was designed to secure. This, in turn, would infringe upon the practical, versus solely the expressive, value of the law. Consequently, these circumstances give rise to a relatively stronger argument against recognizing an exemption.

One could nevertheless fairly question the wisdom of denying an exemption, even under these circumstances. For if, as posited, obedience to the law would require the pharmacy to violate certain core religious values, would not the denial of an exemption simply lead to the pharmacy's closure? How would that promote greater access to contraception? And how does that appropriately safeguard the religious liberty interests of the pharmacy?

As with all compromises, a certain level of messiness undeniably abounds. It must be admitted that, by insisting upon compliance with the law in situations where a company possesses market power, this approach runs the risk of simply driving such companies out of business. But without getting too far afield, economics would suggest that the same community that supported this particular pharmacy would probably be able to support a replacement.[267] In other words, it stands to reason that there is indeed a market for a pharmacy in the community in question, and the departure of one should lead to the arrival of another.

With regard to the question of religious liberty, it bears recognizing that as with all rights, an outer boundary must be drawn somewhere. It would seem to be a reasonably fair—and perhaps to some, a generously fair—place to draw such a boundary where a putative exemption from a law of general applicability would do actual, material harm to a protected third-party interest. Indeed, such a parameter is largely in keeping

Epstein, Freedom of Association, *supra* note 13 ("The plea of personal anguish . . . from not being served carries no more weight in this context than it does in any other: get over it, tell your friends not to patronize the store, or write an angry letter to the local newspaper . . . . [But] the ultimatum to either perform services against conscience or go out of business causes anguish to those whose options in the business world are starkly limited by an intolerant majority . . . .").

[267] *See* Epstein, Freedom of Association, *supra* note 13.

with the American religious liberty as traditionally understood by some of its most ardent advocates.[268]

Douglas Laycock reached a similar conclusion in a compromise he suggested to the issue of religious exemptions from laws that protect third-party interests. In his typically balanced, even-handed fashion, Professor Laycock wrote:

> The first step [to a solution] for the religious side would be to focus on protecting its own liberty, and to give up on regulating other people's liberty. That is, the religious side would have to stop seeking legal restrictions on other people's sex lives and other people's relationships. . . .
>
> [T]he advocates of sexual liberty and marriage equality would have to agree . . . that it is far more important to protect their own liberty than to restrict the liberty of religious conservatives. They would agree not to demand that religious individuals or institutions assist or facilitate practices they consider immoral, except—and this is an important exception—where the goods or services requested are not available from another reasonably convenient provider. Of course same-sex couples should have a right to marry, and to as big a wedding as they choose, and women should have a right to contraception, but apart from local monopolies, they have no real need to obtain those things from religious believers with deep moral objections. A corollary of this solution is that Catholic hospitals should not seek, and should not be permitted, to acquire local monopolies over women's health care. Those who seek to live by their own values should avoid acquiring monopolies that block that same possibility for others.[269]

B. In Practice

Implementation of an antitrust-inspired approach to corporate free exercise exemptions could be accomplished via a number of ways. This Part sketches out the three most probable.

1. Regulatory

Much of the law that regulates businesses is administrative in nature. Indeed, the contraceptive mandate that precipitated the *Hobby Lobby* case was exactly that: a Health and Human

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[268] *See supra* note 115 and accompanying text.

[269] Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 878–79 (2014).

Services regulation.[270] Prior to promulgating their regulations, administrative agencies are ordinarily required to circulate their proposals for notice and comment.[271] Properly conducted, this circulation should bring to light many—hopefully most—potential problems that the proposed regulation would present to certain individuals on account of their religious beliefs and/or practices. In response to this information, administrative agencies would be well-advised to craft religious exemptions to effectuate the principles outlined above. Namely, generous exemptions for firms and businesses to the extent that they lack market power. This is completely within their power under the First Amendment, as explicitly recognized by the Supreme Court in *Employment Division v. Smith*.[272]

2. Legislative

Administrative agencies are beholden to their enabling legislation, and ordinarily tasked with the enforcement of certain laws passed by the legislatures of their jurisdictions. As such, legislatures, both state and federal, could be more cognizant of potential conflicts between the law and religiously grounded businesses, and build religious exemptions, along the lines set forth in this article, into any newly proposed legislation.

To the extent that RFRA and state-RFRAs are yielding unsatisfactory results, Congress and state legislatures could also consider amending these statutes. Such amendments, with respect to business entities, could both strengthen the protections afforded to religiously grounded businesses, while at the same time limiting their applicability only to those businesses that lack market power. Given that *Burwell v. Hobby Lobby* was a decision interpreting RFRA, and not the First Amendment *per se*, such an undertaking could effectively calibrate the *Hobby Lobby* decision as best deemed fit.

3. Judicial

Political will may not exist to propose new RFRAs or amend old RFRAs. Further, administrative agencies may lack the energy or resources to take into account all of the potential

[270] *See supra* text accompanying notes 83–84.

[271] *See* Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1, 5 (2011).

[272] *See supra* text accompanying note 41.

religious liberty implications of the regulations they promulgate. Consequently, if all else fails, the judiciary could readily effectuate the principles outlined in this article in their rendering of RFRA and state-RFRAs—and even the First Amendment to the extent applicable.

In all the cases appropriately brought under RFRA, as well as practically all the cases brought under state RFRAs, and in a narrow band of cases brought under the First Amendment itself,[273] the government is put to the burden of demonstrating a "compelling government interest" in order to prevail in denying the sought-after exemption.[274] In assessing whether this burden has been met, with regard to corporate claimants, courts could consider the market power of said claimants. In other words, courts could factor into their analysis the degree to which a corporate claimant wields market power. The greater a claimant's market power, the more compelling the government's interest as to that claimant if the law is one concerning access or antidiscrimination.[275]

C. Additional Considerations

This article has illustrated a path forward in very broad strokes. The initial decision to lump together all for-profit business entities under the phrase "corporate free exercise" is, admittedly, subject to challenge. There are significant differences that characterize sole proprietorships, partnerships, and business corporations—differences that could very well impact the strength or the availability of free exercise claims. I freely recognize this, and welcome further scholarship delineating the religious liberty claims of these entities. Nevertheless, the relevancy of this article's argument persists: in commercial contexts, where a claimant's free exercise claim would impose costs on another party, market power ought to factor into the exemption analysis.

Additional fine-tuning would also be welcome with respect to the nature of the parties upon whom an exemption's costs would fall. More specifically, a distinction could fairly be made between

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[273] *See supra* notes 35–37.

[274] *See* Julian Ellis & David M. Hyams, *RFRA: Circuits Spit on "Compelling Government Interest"*, 34 AM. BANKR. INST. J. 36, 37 (2015).

[275] Of course, laws regarding public health or safety, or similar matters, should be enforced across the board regardless of a firm's market power.

customers and employees. Differences between these two disparate groups might suggest a different approach with regard to free exercise exemptions impacting their particular rights and privileges. But again, this article's central argument still applies, or at least could be applied, to free exercise claims a ffecting both of these groups.

Finally, distinctions could be made among the contexts within which corporate free exercise exemptions might be sought. One important distinction would be between the "access" cases and the "discrimination" cases. By "access cases" this article refers to the contraceptive access situation, and analogous situations, where a pharmacist or pharmacy refuses to fulfill prescriptions for contraception, or where an employer refuses to comply with the "contraceptive mandate" of the ACA.[276] Assuming that this refusal is applied to both male and female forms of contraception, it doesn't implicate gender discrimination *per se*, but rather access to a particular good or service.[277] As such, the "dignitary" harms implicated in other contexts are at their nadir in this situation.[278] All things being equal, this would militate in favor of granting the free exercise exemption sought.

Moreover, it should be noted that although this article has focused on the "compelling government interest" prong of the free exercise exemption issue, an important second prong applies as well: that the government utilize the means least restrictive to an infringement upon religious liberty in pursuing its objective.[279] Given that the government's predominant objective in the access context is simply access to a particular good or service, there are certainly ways in which the government can provide such access without commandeering the cooperation of

[276] *See supra* notes 83–84.

[277] Oftentimes such refusals are limited to contraception that is arguably abortifacient in nature. As only women can conceive, such refusals admittedly blur the line between the "contraceptive access" category and gender discrimination. Although many have asserted that to be "anti-abortion" is to be "anti-woman," the profound divisions that persist over the question of abortion, including divisions that cut across gender lines, suggest that such an assertion is at best a grossly inaccurate oversimplification of the issue. *E.g.*, Thomas C. Berg, *Pro-Life Progressivism and the Fourth Option in American Public Life*, 2 U. ST. THOMAS L.J. 235, 237 (2005) (highlighting "pro-life feminists" such as Susan B. Anthony, Elizabeth Cady Stanton, and the organization "Feminists for Life of America, which describes itself as 'pro-woman, pro-life' ").

[278] *See supra* notes 257–260 and accompanying text.

[279] *See supra* text accompanying note 44.

those individuals and companies religiously opposed to this. Indeed, this was one of the factors that defeated the Obama Administration's arguments against recognition of an exemption to the contraceptive mandate in *Hobby Lobby*.[280] It would seem, therefore, that within this particular context, a business's religious liberty exemption claim would be strong even if it wielded significant market power.

The other category of exemptions is those pertaining to antidiscrimination laws. Here too, others have attempted to further categorize these situations. Many have argued that there is a principled distinction between discriminating against a person's status, for example his or her sexual orientation, versus prescinding from any involvement in that person's conduct—such as his or her marriage celebration.[281] Others have posited that when it comes to discrimination, "race is different."[282] Each of these tempting distinctions is saddled with serious shortcomings, but neither is devoid of merit. Contrary to what some contend, these distinctions, even if not wholly persuasive, are indeed rational and worthy of serious consideration. They may serve as non-dispositive yet influential factors bearing upon the path forward.

Most people can appreciate the difference between refusing to serve someone because of who they are and refusing to support or contribute to, in some way, another's decisions or actions. The latter ground of refusal resonates as more reasonable, and, moreover, more legitimately the subject of a proper religious exemption. This argument has a distinguished pedigree, dating back to at least St. Augustine, who wrote "cum dilectione hominum et odio vitiorum," which has been roughly translated as "love the sinner but hate the sin."[283] Consider whether Ms. Stutzman would have violated Washington's antidiscrimination ordinance had she refused to sell a celebratory floral arrangement to a heterosexual individual whose expressed intention was to give the flowers to a same-sex couple on their

[280] *See* 134 S. Ct. at 2781–82.

[281] *See* JOHN PAUL II, *supra* note 241. This argument has, admittedly, not met with much success in the courts. *E.g.*, Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 281 (Colo. App. 2015).

[282] *See* John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. REV. 787, 837–42 (2014).

[283] *Cum dilectione hominum et odio vitiorum*, OXFORD DICTIONARY OF QUOTATIONS 37 (4th ed. 1992).

wedding day. If this would not constitute a violation, the law would seem to countenance St, Augustine's aforementioned distinction. If, on the other hand, this would constitute a violation, the law would seem to be punishing individuals for their beliefs *per se*—as in the hypothetical, the refusal is made to an individual who does not fall within a protected class.

But two difficulties interpose themselves. First, the status-conduct distinction, if pushed too hard, tends to break down—especially with regard to the context of same-sex marriage. The line between not serving an individual because of his or her sexual orientation (status), versus his or her spousal choice (conduct), is, admittedly, a thin one.

Second, there is also the problem of suggesting that certain objections are "properly" religious, such as those pertaining to conduct, and that some are not, such as those pertaining to status. Although this may comport with the understanding of religion shared by most, the entire point of religious liberty exemptions is to protect those whose religious beliefs are not within the mainstream.

These shortcomings notwithstanding, the distinction between status and conduct ought not be completely abandoned. Sophistry must be avoided. The recognition of religious exemptions, both in the judicial crafting thereof, but especially when they are created as an accommodation via legislative or regulatory action, is all about line-drawing. It is not wrongful to employ rules of thumb, as rough as they may be, as factors to be considered. In short, it is not unprincipled, in recognizing an exemption, to weigh differently an exemption that would sanction discrimination obviously predicated upon status alone versus an exemption that can more fairly be ascribed as pertaining to conduct.

A similar line of reasoning justifies the "race is different" distinction. Slavery, the Civil War, three constitutional amendments, and state-enforced segregation all combine to attest to a uniquely problematic history of racial discrimination that is, arguably, different in kind than all other forms of discrimination in America. As such, it would not be indefensible, in crafting religious exemptions to antidiscrimination laws, to treat antidiscrimination laws relating to race differently from those relating to other characteristics.

Finally, it should not be denied that, today at least, the controversy over LGBT antidiscrimination laws, when applied to the context of marriage, implicates religious conscience to a degree that other antidiscrimination laws do not. Indeed, exceedingly few individuals today advance religious arguments to justify most other forms of discrimination, whereas large numbers of individuals do indeed advance religious arguments in opposition to marriage arrangements other than one man, one woman.

Of course, apparently genuine religious arguments have been historically raised to justify all sorts of discriminatory atrocities, ranging from slavery to the Jim Crow laws.[284] As someone with more than a passing familiarity with the Bible, and who believes that some interpretations thereof are objectively strong while others are objectively weak, I admittedly have difficulty understanding how some have used the Bible to justify racism, and how those justifications could be deemed credible by anyone. For example, the "dangers of miscegenation" purportedly received support from Genesis, where "the serpent was in fact a metaphor for a 'pre-Adamite . . . negro gardener' who had tempted and, presumably, penetrated Eve."[285] Really? To somehow equate that interpretation to, for example, the biblical exegesis and philosophical thought of Pope Benedict XVI on marriage[286] is, I suggest, ludicrous. Put differently, just because someone says the Bible says something, doesn't make it so.

In response, many would be quick to suggest that in years to come, religious arguments concerning marriage will appear as frivolous and pretextual in retrospect as do the religious objections to desegregation or miscegenation in our own time. Indeed, there are those who assert that the religious arguments against same-sex marriage are frivolous and pretextual already.[287] But that is, of course, not a foregone conclusion. Moreover, it is certainly not the situation today.

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[284] *See generally* William N. Eskridge Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 678–79 (2011).

[285] Gilreath & Ward, *supra* note 241, at 262–63.

[286] *See generally* BENEDICT XVI, ADDRESS OF HIS HOLINESS BENEDICT XVI ON THE OCCASION OF CHRISTMAS GREETINGS TO THE ROMAN CURIA (2012).

[287] *See* Gilreath & Ward, *supra* note 241, at 258–67.

On the one hand, none of this matters. For, as mentioned previously, religious liberty exemptions are necessary precisely when one's religious beliefs are idiosyncratic and lack sufficient public support to be otherwise protected. On the other hand, however, it's not sensible to turn a blind eye to the realities of our current situation.

Whatever the past has held, and whatever the future may hold, in our own time a critical mass of people, otherwise devoid of any hint of malice or homophobia, have stepped forward and voiced serious objection to same-sex marriage—an objection so deep that, as merchants and businesspeople, they refuse to provide goods or services to same-sex wedding celebrations. Although there are those who would demonize these fellow citizens, for reasons already addressed such demonization is both unfair and ignorant.[288] In short, there is a qualitative difference between the 21st century racist and the 21st century opponent to same-sex marriage. It is likely that this difference does not hold with regard to every individual in each of these two camps. But as the example of Barronelle Stutzman makes clear, this difference certainly holds for some.[289] Courts, legislatures, and administrative agencies should not ignore the reality of this phenomenon in its evaluation of religious liberty exemption claims. Indeed, the phenomenon of persistent opposition to involvement in same-sex weddings by individuals of apparent good will and otherwise devoid of prejudice should rightfully be considered as an important factor in evaluating the promulgation of exemptions in the context of antidiscrimination laws as applied to same-sex weddings.

CONCLUSION

This article posits a way of utilizing the insights of antitrust law to help resolve the seemingly intractable dilemma of corporate religious liberty exemptions.

Admittedly, it's not intractable to everyone. To some, corporate religious liberty rights ought to be coextensive with individual religious liberty rights.[290] To others, as marketplace

[288] *See supra* text accompanying notes 233–245; *see also supra* note 242.

[289] *See supra* text accompanying notes 233–245.

[290] *See* Mark Rienzi, *God and the Profits: Is there Religious Liberty for Moneymakers?* 21 GEO. MASON L. REV. 59, 116 (2013).

participants, businesses and companies are held to standards that differ from that of individuals, making them justly subject to laws and regulations that private persons are not.[291]

But to others still, and perhaps the smallest category of commentators of all, some middle path must be forged: a path respectful of both the genuine religious liberty concerns that undergird corporate religious liberty and of protecting those rights and privileges that society has deemed worthy of protection. With this contribution, I lend my voice and reasoning to this category of commentators. In a society that truly cherishes the pluralism and diversity that it purports to, a simple one-size-fits-all approach that bulldozes all in its way is inappropriate and unjustifiable.

Unfortunately, the will to find some common ground in this area seems to be lessoning. In his rightly acclaimed book "Reclaiming Hope," Michael Wear, director of Barack Obama's faith efforts and staff member of the Obama Administration's Office of Faith-Based and Neighborhood Partnerships, observed how, from his vantage point, the appetite for compromise and a genuine embrace of diversity had diminished over the course of four short years.[292] Comparing Obama's 2009 inauguration versus his 2013 inauguration, Wear commented:

> In 2009, our diversity demanded we accept that there will be voices we disagree with in public places. In 2013, diversity required us to expel dissent . . . . In 2009, we had true pluralism and the big American tent. In 2012, at the Democratic convention, we had a pretense of inclusion and magnanimity for political gain. In 2013, with our last four years in hand and the "weight of history on our side" that pretense went out the window.[293]

Such an attitude does not bode well for those whose beliefs fail to garner the support of governing majorities.

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[291] *See* James M. Oleske, Jr., *The Public Meaning of RFRA versus Legislators' Understanding of RLPA: A Response to Professor Laycock*, 67 VAND. L. REV. EN BANC 125, 131–34 (2014).

[292] MICHAEL R. WEAR, RECLAIMING HOPE: LESSONS LEARNED IN THE OBAMA WHITE HOUSE ABOUT THE FUTURE OF FAITH IN AMERICA 187–188 (2017).

[293] *Id.* at 188. Wear contrasted these attitudes to those of years earlier still: "When George W. Bush was campaigning for a federal marriage amendment, he did not campaign to revoke the tax status of the Episcopal Church [which had condoned same-sex marriage] because its views on marriage were 'fundamentally un-American.' " *Id*. at 223.

Sun Tzu famously warned against driving one's opponent into a corner,[294] and the government's unnecessarily heavy-handed approach to pushing a particular social agenda over the last several years may be doing exactly that.[295] Although this may ultimately break the backs of mere bigots, it is unlikely to coerce into submission those individuals whose opposition arises from genuine religious conscience. For genuine religious conscience is the stuff of which martyrs are made—not to mention civil unrest and, historically, armed conflict. America's Founding Fathers were well aware of this, and recognized the practical as well as the moral imperative to protect religious conscious to the widest degree possible. As in so many matters, we would do well to heed their wisdom and avoid forcing sincere religious believers to choose between their livelihoods and obedience to the law.

[294] *See* SUN TZU, THE ART OF WAR 120–21 (Lionel Giles trans., Luzac & Co. 1910) (5th c. B.C.).

[295] *See* Oleske, Jr., *supra* note 291, at 131–32; *see generally* Eskridge Jr., *supra* note 284, at 657, 678–79, 719–20.