



ARTICLES

State RFRAs and the Workplace

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INTRODUCTION

Before I begin my remarks, I'd like to register my sincere gratitude to the Council on Religious Freedom and the Georgetown Law Forum for organizing and hosting this important conference, and for inviting me here to participate. I'm going to try and leave ample time for questions and discussion, because I really want to benefit from the input of others at this event, many of whom are far better versed on these issues than I am. Indeed, I don't usually feel outclassed at conferences to which I am invited, but I know much less about the law of religion than many people in this room, who are in the trenches, so to speak. As a constitutional thinker, I perceive of myself as a generalist. And on a personal level, I consider myself a person of faith, but not someone who is very religiously demonstrative. In fact, when I was in college and law school, I was more than a bit skeptical of those who were active in their faith. But, people like Alan Brownstein and Mike Paulsen have shown me how faith can enhance, rather than cloud, analytic power. (I think Doug Laycock, who is also here today, has written about a similar evolution.)¹ In any event, it is only in the last decade or so that I have begun to realize how good organized religion can be for individuals, even intellectual ones.

I do not mean to suggest that I've had no interest in the subject of law and religion until now. In law school I remember being intrigued by a seminar on the Religion Clauses taught by Paul Gewirtz on the heels of his oral argument in *Estate of Thornton v. Caldor, Inc.*² And, the Term I clerked for Justice Blackmun, he wrote his famous dissent in *Employment Division v. Smith*³ — the case that in a very real sense brings us here today. At the time *Smith* came down, however, I remember being stunned not so much by the wrongheadedness of Justice Scalia's bottom line (which is something reasonable people can disagree about), but rather how intellectually dishonest it was. Which is why I'm glad for conferences like this one — which presents a forum to candidly explore the benefits of, and the drawbacks of, the Religious

¹ See Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 353-55 (1996).

² 472 U.S. 703 (1985).

³ 494 U.S. 872 (1990).

Freedom Restoration Act ("RFRA") movements across the country.

I'll assume for purposes of my discussion about state RFRA's and employment issues that we're talking about a state RFRA that would look like the Federal RFRA struck down in *City of Boerne v. Flores*⁴ — one that would institute the pre-*Smith* version of free exercise jurisprudence in the spirit of *Sherbert v. Verner*⁵ and *Wisconsin v. Yoder*,⁶ the two cases cited by Federal RFRA.⁷ The generic state RFRA I have in mind would have a "substantial burden" trigger, which would lead to the application of some strict scrutiny test — that a law be the least restrictive means, or narrowly tailored, to accomplish a compelling state interest.

I. THE TITLE VII BACKDROP

Let me start my observations by turning to a big, perhaps dominant question: what will a RFRA add to the existing law concerning protection of religious liberty in the workplace?⁸ The most important baseline law is the federal statute, Title VII,⁹ which prohibits public¹⁰ and private employers alike from discriminating against an individual in the terms and conditions of employment on account of the individual's race, sex, national origin, and religion. Unlike Title VII's race and sex discrimination provisions, the antidiscrimination provision concerning religion expressly requires "reasonable accommodation."¹¹ The employer's duty of

⁴ 521 U.S. 507 (1997).

⁵ 374 U.S. 398 (1963).

⁶ 406 U.S. 205 (1972).

⁷ See 42 U.S.C. § 2000bb (b)(1) (1994).

⁸ I will be focusing on religious freedoms of employees, rather than employers, in the workplace. State RFRA's might, in some circumstances, increase religious freedoms of employers. For example, imagine a state already had in place a law forbidding discrimination on the basis of religion or sex by all employers, and such law did not contain any exemption for religiously motivated employers (assuming no such exemptions are mandated by the Federal Constitution, a big assumption). Enactment of a state RFRA against this backdrop may empower religious employers to engage in certain kinds of discrimination if elimination of such discrimination is not a compelling interest in every setting. This intersection of antidiscrimination laws and RFRA's is the subject of another paper presented at this symposium, by Robert O'Neil. See Robert M. O'Neil, *Religious Freedom and Nondiscrimination: State RFRA Laws Versus Civil Rights*, 32 U.C. DAVIS L. REV. 785 (1999).

⁹ 42 U.S.C. § 2000e-2 (1994).

¹⁰ I suppose there would be some question as to the vitality of Title VII's application to states, if the Supreme Court were to overturn *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Cf. *Printz v. United States*, 521 U.S. 898, 925-33 (1997).

¹¹ See 42 U.S.C. § 2000e(j) (1994). Title VII's disparate impact liability in the racial discrimination context could, I suppose, be characterized as an accommodation requirement in that it could be read to require employers to refrain from using legitimate, but only

reasonable accommodation was incorporated — awkwardly according the Chief Justice Rehnquist¹² — into the statute's definition of religion itself. Specifically, Congress in 1972 added section 701(j) to clarify the meaning of the prohibition on religious discrimination.¹³ According to the added section (which was prompted by a Supreme Court decision effectively rejecting any requirement of accommodation¹⁴),

[t]he term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.¹⁵

That's the key statutory text.

So what kind of freedom does this statute really guarantee? First, as to the breadth of the term "all aspects of religious observance and practice, as well as belief," the Equal Employment Opportunity Commission ("EEOC") — the agency charged with administering Title VII — has, in its guidelines, self-consciously drawn on pre-*Smith* free exercise jurisprudence and cases construing military service exemptions under the Selective Service Act.¹⁶ Accordingly, the EEOC has ruled that Title VII protects "sincere and meaningful belief[s] which occup[y] in the life of its possessor a place parallel to that filled by the God of" more traditionally religious persons.¹⁷ Indeed, the EEOC has gone even further and observed that "the Commission will define religious practices to

marginally important, employment criteria that affect different racial groups disparately. On the other hand, the disparate impact theory might simply be understood as a device for uncovering actual discrimination: to the extent that a disparate impact cannot be justified by an important (or job-related, to use the jargon) employer interest, the law presumes the disparate racial impact was the intended goal. In any event, disparate impact theory is not written into the text of Title VII, and so the religious accommodation requirement is textually unique.

¹² See *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 63 n.1 (1986).

¹³ See Pub. L. 92-261, § 701(j), 1972 U.S.C.A.N. (86 Stat. 103) 122 (codified as amended at 42 U.S.C. § 2000e(j)).

¹⁴ See *Dewey v. Reynolds Metal Co.*, 402 U.S. 689 (1971) (affirming by equally divided court Sixth Circuit's decision in case, reported at 429 F.2d 324 (1970)).

¹⁵ 42 U.S.C. § 2000e(j).

¹⁶ See 29 C.F.R. § 1605.1 (1998); EEOC Guidelines on Discrimination Because of Religion, 45 Fed. Reg. 72610, 72611, 72612 (drawing from *United States v. Seeger*, 380 U.S. 163 (1965), and *Welsh v. United States*, 398 U.S. 333 (1970)).

¹⁷ *Welsh v. United States*, 398 U.S. 333, 339 (1970).

include moral or ethical beliefs as to what is right and wrong which are *sincerely held* with the *strength* of traditional religious views."¹⁸ This is so whether or not any religious group espouses such beliefs.

Courts have been somewhat reluctant to embrace the full spirit of these EEOC definitions. Instead, they have eschewed equating ethics with religion. As one representative court put it:

A religious belief [within the meaning of the Act] excludes mere personal preference grounded upon a non-theological basis, such as personal choice deduced from economic or social ideology. Rather, it must consider man's nature or the scheme of his existence as it relates in a theological framework. Furthermore, the belief must have an institutional quality about it¹⁹

Courts have also, perhaps mirroring "substantial burden" decisions under pre-*Smith* free exercise and RFRA, insisted that a plaintiff demonstrate a more than mere ancillary connection between the practice in which she wants to engage and her religious convictions. In one representative case,²⁰ a school teacher left work at the end of her shift on Christmas Eve, despite having been denied permission by her supervisor. The district court held that her reasons for leaving — to decorate her church hall and to prepare her students for their Christmas play — did not qualify as religious observances within the meaning of the Act, so that no inquiry into reasonable accommodation was required.²¹

Let me turn to the all-important issue of the scope and extent of the duty to accommodate once the duty is triggered. Before doing so, I must acknowledge that each case, more so than in most other statutory and constitutional settings, is context specific.

The United States Supreme Court has decided two major cases construing the scope of this duty. In *Trans World Airlines, Inc. v. Hardison*,²² decided in 1977, the plaintiff was discharged because his religious beliefs did not permit him to work on Saturdays. He claimed that by terminating him on these grounds, his employer violated the duty to reasonably accommodate his religious

¹⁸ 29 C.F.R. § 1605.1 (emphasis added).

¹⁹ *Edwards v. School Bd.*, 483 F. Supp. 620, 624 (W.D. Va. 1980), *vacated in part on other grounds*, 658 F.2d 951 (4th Cir. 1981).

²⁰ *See* *Wessling v. Kroger Co.*, 554 F. Supp. 548 (E.D. Mich. 1982).

²¹ *See id.* at 552.

²² 432 U.S. 63 (1977).

convictions. As every lower court and commentator has agreed, the Supreme Court, in rejecting Hardison's Title VII claim, construed the employer's statutory duty narrowly. In particular, the Court held that (1) neither the employer nor the union is obligated to deviate from an otherwise valid collective bargaining agreement in order to accommodate someone's practices; (2) employers have no obligation to impose undesirable work shift schedules on other employees; and most generally, (3) an employer has no obligation to offer any accommodation, such as accepting substitute workers provided by the plaintiff, that would impose "more than a de minimis cost" on the employer.²³ In this regard — in construing reasonable to mean no more than de minimis — *Hardison* represented a marked departure from lower court precedent interpreting the 1972 provision requiring accommodation.²⁴

A decade later, the Supreme Court revisited, and some would say further diluted, the reasonable accommodation standard in *Ansonia Board of Education v. Philbrook*.²⁵ In that 1986 case, a school district's collective bargaining agreement ("CBA") with the teachers union contained a leave policy that specified allowable leave periods for various purposes. It included three days annual leave for observance of mandatory religious holidays, a few days for attending conferences, etc., and up to three days for "necessary personal business."²⁶ The CBA provided, however, that personal business days could not be used for any activity already covered by more specific leave allotments in the CBA. Teacher Philbrook, who wanted to observe more than three religious holidays a year, initially worked within the CBA framework by scheduling hospital visits, which were allotted in the CBA, on days his religion forbade him from working. Over time, Philbrook objected to this array of choices. He proposed to his employer that he either use personal business leave for his religious observances or that he pay the cost of a substitute and receive full pay and credit for his days of

²³ See *id.* at 79, 81, 84.

²⁴ See 1 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 220, 235 (3d ed. 1996).

The Court in *Hardison* also suggested that an employer can take account of the cumulative effect of providing accommodation to all employees who may assert religious needs — provided the employer can prove such cumulative effect is more than mere speculation — in deciding what is reasonable. See *Hardison*, 432 U.S. at 84-85.

²⁵ 479 U.S. 60 (1986).

²⁶ *Id.* at 64.

observance. The school district denied his request for accommodation, and he brought suit under Title VII. The Second Circuit ruled in his favor, reasoning that the school district had failed to demonstrate that Philbrook's proffered accommodation would create an undue hardship before rejecting it.

The Supreme Court, while not ruling on the ultimate merits of plaintiff's claim, rejected the Second Circuit's reading of the Act, and instead held that the employer is under no duty to accept accommodations — even reasonable ones — proposed by employees. In a characteristically clipped textual analysis, Chief Justice Rehnquist, writing for the Court, held that an employer does not have to demonstrate that an employee's proffered accommodation imposes an undue hardship at all; instead, once an employer has offered a reasonable accommodation, it has met its obligation under the act, and the undue hardship language does not even come into play. Undue hardship is just one way an employer can demonstrate that a particular contemplated accommodation is not reasonable. But there are other ways, says the Court, of acting reasonably, without reference to undue hardship.²⁷ Although the Court was never explicit on this point, the notion is that reasonable accommodation represents a range of options, and once the employer has offered something within that range, he need not take into account preferences of the employee as between reasonable options.

Overall, I would liken the post-*Hardison* duty to reasonably accommodate to something in between mere rationality review and intermediate scrutiny in equal protection law. As in intermediate scrutiny, the defendant will have to document — as opposed to the court hypothesizing — an actual cost of accommodating that goes beyond “setting a precedent of granting exceptions” (which, believe it or not, is often asserted as reason for denying a Title VII plaintiff accommodation). But after the defendant has proven any real cost, the standard resembles minimum rationality review, where there is no comparison of the weight of the interests on both sides of the balance. Unsurprisingly, most litigated decisions reject Title VII accommodation claimants.

The vast majority of lower court cases concerning this issue involve the conflict between the religious practices of Sabbatarians and their work schedules. *Hardison* itself is somewhat

²⁷ See *id.* at 68-69.

representative of these cases, and the overwhelming majority of post-*Hardison* cases come out the same way it did. Before *Hardison*, many courts required employers to allow Sabbatarians to make up lost time on other days during the workweek,²⁸ transfer them to other shifts or other jobs,²⁹ assign other employees to fill their shifts,³⁰ arrange for other employees to trade shifts,³¹ or make deductions from Sabbatarians' pay but penalize them in no other way.³² After *Hardison*, courts — in rejecting religious claimants — much more seriously consider the seniority rights that might be affected by accommodation,³³ the efficiency and simplicity of neutrally-drawn scheduling systems,³⁴ and the potential imposition on other employees' lives.³⁵

None of this is to say employees never win nowadays. If I had to generalize, I would say employers have to make information available to employees so that they can find qualified replacement workers from within the company. Authorizing and facilitating —

²⁸ See, e.g., *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1975).

²⁹ See, e.g., *Claybaugh v. Pacific N.W. Tel. Co.*, 355 F. Supp. 1, 5 (D. Or. 1973); *Shaffield v. Northrop Worldwide Aircraft Serv.*, 373 F. Supp. 937, 945 (M.D. Ala. 1974). *But cf.* *Dixon v. Omaha Pub. Power Dist.*, 385 F. Supp. 1382, 1387 (D. Neb. 1974) (holding that public corporation did not violate Civil Rights Act by transferring employee to lower paying position).

³⁰ See, e.g., *Draper*, 527 F.2d at 520 (suggesting that employer could have required co-employee to fill plaintiff's shift).

³¹ See, e.g., *Claybaugh*, 355 F. Supp. at 5.

³² See, e.g., *Riley v. Bendix Corp.*, 464 F.2d 1113, 1115 (5th Cir. 1972) (noting that record did not indicate whether defendant employer even attempted to deduct part of plaintiff's salary to compensate for hours missed); *Ward v. Allegheny Steel Corp.*, 397 F. Supp. 375, 377 (W.D. Pa. 1975) (finding employer unreasonably failed to dock plaintiff's pay for work missed on Sabbath as plaintiff requested).

³³ See, e.g., *Mann v. Frank*, 7 F.3d 1365, 1369 (8th Cir. 1993); *Rohr v. Western Elec. Co., Inc.*, 567 F.2d 829, 830 (8th Cir. 1977); *Turpen v. Missouri-Kansas-Texas R.R. Corp.*, 573 F. Supp. 820, 826, 833 (N.D. Tex. 1983), *aff'd*, 736 F.2d 1022 (5th Cir. 1984).

³⁴ See, e.g., *Beadle v. Hillsborough Sheriff's Dep't*, 29 F.3d 589, 592 (11th Cir. 1994); *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 145-46 & n.2 (5th Cir. 1982); *Murphy v. Edge Mem'l Hosp.*, 550 F. Supp. 1185, 1188-92 (M.D. Ala. 1982).

³⁵ This is perhaps the most important consideration in many cases where courts deny accommodation. See, e.g., *Howard v. Haverty Furniture Cos.*, 615 F.2d 203, 206 (5th Cir. 1980); *cf.* *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710-11 (1985) (construing Establishment Clause to prevent undue disruption of nonreligious fellow employees).

Of course, sometimes the sensibilities of fellow employees will have to give way to the religious accommodation seeker. If, for example, an employee seeks an accommodation to wear religious garb, and a fellow employee objects on the ground that to see religious imagery on the job makes him uncomfortable, his discomfort will not carry the day, unless the workplace setting becomes so imbued with religion that he can bring a "religious harassment" claim. Such harassment claims are cognizable under Title VII, but are beyond the scope of this short Article.

though not initiating — shift swaps seems to involve little costs and is often required by lower courts.⁵⁶

Employees seem to have better success in other areas. Many lower courts seem to require the rescheduling of employment tests and pre-employment inquires to take account of religious observances.⁵⁷ And the granting of exemptions from personal appearance and dress codes often does not impose significant costs on employers. Finally, there are a lot of cases in which employees seek exemption from union membership and/or dues on account of religious convictions, and here too, there have been some successes.⁵⁸

II. WHAT STATE RFRA'S MIGHT ADD TO THE PUBLIC EMPLOYMENT SETTING

All of this brings me to the big question: what would a state RFRA add to this? Well, in the context of public sector state and local employment, probably something nontrivial. I say *probably* because, remarkably, there are very few cases in which a Title VII standard and a RFRA-like standard have both been applied and examined in the workplace setting. For that reason, we don't really know how much stricter strict scrutiny really is in this arena. Perhaps more so than in other areas of RFRA's application, I have to acknowledge a fair bit of uncertainty in the workplace arena, and the costs in which that uncertainty results.

To be sure, the analytic framework of strict scrutiny seems much more protective of the individual employee. "Least restrictive means," "narrow tailoring," and "compelling interest" sounds much more rigorous than "reasonable." And in equal protection law, it usually is. But then the more I teach and write in

⁵⁶ See LINDEMANN & GROSSMAN, *supra* note 24, at 238-39 (explaining that many courts hold employer responsible for enabling shift swaps, but employee bears ultimate responsibility for finding replacements).

⁵⁷ See, e.g., *Minkus v. Metropolitan Sanitary Dist.*, 600 F.2d 80, 84 (7th Cir. 1979) (concluding that employer may have duty to schedule employment examinations on days other than Sabbath).

⁵⁸ See, e.g., *International Ass'n of Machinists Aerospace Workers Lodge 751 v. Boeing Co.*, 833 F.2d 165, 169-70 (9th Cir. 1987) (determining union may not require plaintiff to pay dues if doing so breaches plaintiff's genuinely held religious beliefs); *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403, 406-07 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979) (deciding employer failed to prove exempting employee from dues requirement would create undue hardship); *Grant v. Spellman*, 664 P.2d 1227, 1230 (Wash. 1983) (holding that plaintiff is not required to pay union fees because he proved membership would violate his bona fide religious beliefs).

constitutional law — particularly equal protection — the more I realize that these doctrinal formulations are often just so many words. (My brother Akhil and I often joke that these nuanced formulations are all the fault of the Harvard Law School.) Justice Stevens, it bears noting, if not following, has justified all of his equal protection jurisprudence in terms of ultimate “reasonableness,” rejecting any reliance on multiple tiers or standards of review.

For these reasons, I had hoped to find a lot of cases in which a public sector employee’s Title VII accommodation claim was rejected, but a pre-*Smith* Free Exercise or Federal RFRA claim in the same lawsuit was embraced. Alas, I did not find a single crisp holding to that effect among lower federal courts.³⁹ There were a number of cases in which plaintiffs brought causes of action under both standards, and courts of appeals have observed that the Title VII standard at the very least imposes no *more* of a duty on a public employer than pre-*Smith* Free Exercise and Federal RFRA did. But these observations typically were made en route to upholding a denial of accommodations even under strict scrutiny, which obviated careful analysis of the difference between the two standards.

I was a bit puzzled as to why I didn’t find more lower federal court cases in which both Title VII and pre-*Smith* free exercise claims were brought against public employers. Part of the answer is that, as to claims against federal employers, some courts, remarkably, have held Title VII to be the exclusive remedy for workplace discrimination.⁴⁰ This is all well and good when it comes to race or sex discrimination; indeed, because of the availability of disparate impact theories, Title VII may be more generous to employee-plaintiffs than would be *Bivens v. Six Unknown Agents*⁴¹ causes of action. But for courts to reflexively extend this to the religious accommodation setting, where the Constitution before 1990 gave *more* protection than federal statutes, strikes me as

³⁹ My research of state cases is incomplete.

⁴⁰ See, e.g., *Brown v. General Servs. Admin.*, 425 U.S. 820, 835 (1976) (holding that Title VII is exclusive remedy for federal employment discrimination); *Hagan v. Walker*, No. CIV.A.98-0457, 1998 WL 830641, at *3 (E.D. La. Nov. 30, 1998) (dismissing plaintiff’s Civil Rights Act claim because Title VII provided exclusive remedy). But see, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48 (1974) (determining that Title VII provides supplemental, rather than exclusive, remedy for employment discrimination).

⁴¹ 403 U.S. 388, 397 (1971) (holding that money is available remedy if plaintiff proves violation of federal agent’s constitutional rights).

another example of the judicial carelessness that characterizes much of the religion case law.

In any event, I think examining the record of the Federal RFRA in the workplace may be helpful in seeing how strict scrutiny might be here. Overall, I would characterize the record as mixed at best. By my count, there were three (all federal) court decisions granting preliminary or permanent relief to RFRA plaintiffs in workplace disputes. At least one or two of the three probably would have been a stretch for the plaintiff under Title VII, but it is hard to predict the result with certainty had a more lenient standard been applied.

In *Bessard v. California Community Colleges*,⁴² a federal district judge invalidated, under the RFRA, a requirement that prospective Community College Employees take an oath “to bear true faith and allegiance” and to “support and defend” the United States and California constitutions.⁴³ In evaluating the defendant’s reason for imposing the oath, a concern over loyalty, the court held that devising another oath — one in which the taker would swear allegiance and faith to nothing but merely promise not to act disloyally — would have accomplished the government’s interests without overwhelming expense. One could argue that because drafting an alternative oath is so cheap, and because (according to the court) the alternative oath would have been no less effective, the defendant would, or at least should, have lost even under a Title VII standard.

I am not as sure that can be said for *Rigdon v. Perry*,⁴⁴ in which a federal court invalidated a requirement that federal military chaplains refrain from any lobbying activity. In doing so, the court thoroughly disparaged the government’s arguments that discipline, good order, and a politically disinterested military were seriously furthered by the prohibition. Under a reasonableness standard, however, the fit between means and end need not be very tight at all. It is possible that *Rigdon* is best understood as both a speech and religion case, but it was litigated and decided under RFRA as well as under the speech provisions of the First Amendment.

And in *Rourke v. New York State Department of Correctional Services*,⁴⁵ a correctional officer successfully challenged under the RFRA a

⁴² 867 F. Supp. 1454 (E.D. Cal. 1994).

⁴³ *Id.* at 1456.

⁴⁴ 962 F. Supp. 150 (D.D.C. 1997).

⁴⁵ 915 F. Supp. 525 (N.D.N.Y. 1995).

prison policy proscribing hair longer than one-half inch below the shirt collar. But it is hard to know how rigorous the RFRA standard was in this case, because the prison proffered no reason at all for its policy in the abstract, or the application of the policy to plaintiff, let alone a compelling interest. Even under Title VII, plaintiff might easily have prevailed, because Title VII's standard of review requires the employer to at least document its actual reason for denying an exemption.

Three published victories are, of course, not very many, especially given that there were six or more published decisions in which employees' RFRA claims were rejected on the merits — including some decisions involving prison employee grooming standards⁴⁶ and others involving police shift assignments.⁴⁷ But, of course, published decisions are a very imperfect measure of a law's impact. Nowhere may that be more true than in the religion setting, where the ultimate goal — accommodation — is itself an idea that sounds in compromise and settlement. And within the realm of all religious accommodation claims, the workplace may be a setting where settlement is *most* likely, because the parties are often stuck in something resembling a bilateral monopoly and they have to learn to get along.

Given all this, my sense (and it is based on logic and intuition more than case authority) is that state RFRA's would give state and local employees a significantly bigger bargaining chip than does Title VII (or state antidiscrimination laws, many of which track Title VII's reasonable accommodation doctrines). Moreover, although I haven't really talked about it, Title VII does have some administrative exhaustion and remedial limitations that might not encumber state RFRA's.⁴⁸ On the other hand, I wouldn't be surprised if, either through the substantial burden or compelling interest provisions of any state RFRA's that are enacted, courts often deferred to state and local employers, especially in the areas of police and fire protection, where marginally increased efficiency may translate into lives.

⁴⁶ See *Blanken v. Ohio Dep't of Rehabilitation & Correction*, 944 F. Supp. 1359, 1366-67 (S.D. Ohio 1996) (holding that Ohio prisons have compelling interest in applying grooming policy requiring short hair to prison employee).

⁴⁷ See *Silk v. City of Chicago*, No. 95-C-0143, 1996 WL 312074, at *21-22 (N.D. Ill. June 7, 1996).

⁴⁸ For a good general description of such requirements, and a good summary of Title VII law more generally, see LINDEMANN & GROSSMAN, *supra* note 24. Their discussion of administrative procedures and limitations begins on page 1205.

III. WHAT STATE RFRA'S MIGHT ADD TO THE PRIVATE EMPLOYMENT SETTING

Outside the public sector employment context, state RFRA's would seem to have lesser impact. I do, however, want to flag one issue that has been raised after enactment of the Federal RFRA. The issue arises when an employer, public or *private*, defends a failure to accommodate under Title VII by pointing to another law with which he must comply. For example, an employer might reject an employee's religiously inspired request for additional days off on the ground that it would violate the collective bargaining agreement that, once ratified, has the force of federal law. (This was one of the defenses in *Hardison* itself, where the Court said compliance with the CBA is one reason why TWA's refusal to accommodate was reasonable.) As another example, consider an employer who refused to allow religiously inspired beards in the workplace because of OSHA regulations. In either example, it is the defendant's desire to avoid noncompliance with another law that justifies the failure to accommodate under Title VII.

The suggestion that was made in the commentary after the Federal RFRA is that whereas before RFRA, this "need to comply" defense by private employers was a clear winner under Title VII, after the RFRA was enacted, the Title VII plaintiff's claim could be defeated *only* if employer compliance with the background regulatory statute is itself required by a compelling interest in this context.⁴⁹ In other words, the RFRA standard of review is applied to the law as to which the employer — including a private employer — claims a need to comply.

I have a few comments about this suggestion. First, I think many federal laws with which private employers claim a need to comply would survive RFRA's strict scrutiny. For example, workplace safety rules, or even collective bargaining agreements, can admit of very few exceptions without their force and worth being significantly undermined. (Now I'm sounding like Justice O'Connor).⁵⁰

Second, while I don't deny the analytic coherence of the invocation of the RFRA standard as a response to an employer's defense, I wonder why the same argument and issue didn't arise

⁴⁹ See Sidney A. Rosenzweig, Comment, *Restoring Religious Freedom to the Workplace: Title VII, RFRA and Religious Accommodation*, 144 U. PENN. L. REV. 2513, 2527 (1996).

⁵⁰ See *Employment Div. v. Smith*, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring).

before *Smith* under the Free Exercise Clause.⁵¹ For a while, I speculated that state action doctrine might explain why the suggestion has been made as to RFRA but was not made as to free exercise, but RFRA would seem to embody the same state action concept as the free exercise doctrine it was designed to replace.⁵² In any event, if the argument had any traction, I wonder why it wasn't pressed before 1990. Perhaps the answer is that the Federal RFRA, by recodifying and affirming the free exercise standard, generated more interest in it.

Third, and in any case, in the context of *state* RFRA — the subject of our conference today — the argument has even less traction. Why? Because the Federal RFRA, if upheld, would have imposed requirements on both federal and state laws that might be defensively invoked by private employers. By contrast, state RFRA — by virtue of the Supremacy Clause — cannot subject federal statutes to strict scrutiny. Thus, the argument could be made only when an employer has invoked compliance with a *state* law as a defense to a Title VII accommodation claim, which happens in a few cases,⁵³ but is not as common as employer reliance on collective bargaining agreements, which are governed by federal law.

⁵¹ See Rosenzweig, *supra* note 49, at 2532 (“The combination of a free-exercise claim with a Title VII claim had seldom been attempted before RFRA.”) In fact, I could not find a single case in which the free exercise clause (or RFRA, for that matter) was used to ratchet up the level of scrutiny applied to a law when an employer asserted compliance with that law as a defense to a Title VII religious accommodation claim.

⁵² One other possibility focuses on congressional intent. We might phrase the bottom-line question in these terms: Would Congress *want* Title VII religious accommodation plaintiffs to be able to invoke strict scrutiny when employers reject accommodation out of a felt need to comply with some other federal regulation? Perhaps it is easier to answer this congressional intent question in the affirmative after the Federal RFRA, in which Congress has affirmatively chosen to subject its own laws to strict scrutiny. Before RFRA, strict scrutiny was in the picture to be sure, but only by virtue of a constitutional free exercise backdrop that Congress was aware of when it enacted Title VII, but which Congress did not affirmatively embrace.

This argument based on congressional intent does jibe with much language in *Hardison* itself, where the Court found that the collective bargaining agreement trumped the plaintiff's Title VII accommodation claim in large part because — according to the Court — Congress in Title VII did not upset the collective bargaining scheme. Perhaps in enacting RFRA, Congress could be said to have done just that. One problem with this approach, however, is pretty strong legislative history surrounding RFRA that it was not intended to “affect[] religious accommodation under Title VII.” S. Rep. No. 111, 103d Cong., 1st Sess. 13 (1993), *reprinted in* 1993 U.S.C.A.A.N. 1982, 1903. Of course, legislative history may not be important to everyone.

⁵³ See, e.g., *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1384 (9th Cir. 1984) (noting that defendant employer established that it would risk violating California's Occupational Safety and Health Administration standards if required to accommodate plaintiff's religious needs).

IV. POTENTIAL CONFLICTS BETWEEN STATE RFRAS AND FEDERAL LAW

Having identified what state RFRAs might add to existing laws, let me flag a few ways in which state RFRAs might conflict with existing laws as well. The most important potential conflict is one Erwin Chemerinsky is going to talk about more generally later⁵⁴ — the Establishment Clause. I don't want to encroach on his turf, but let me say that the Establishment Clause concern that may apply generically to state RFRAs may be heightened in the employment setting. This in turn may cause courts to construe the accommodation requirement in the workplace a little more gingerly than in some other contexts. Why do I say that? Primarily because a lot — if not most — of the hotly-contested accommodations in the workplace seem to involve zero-sum games among employees. One employee's accommodation causes another's inconvenience if not hardship. Couple that with the fact that employees — both those seeking accommodation and those who may bear the burden of it — view employment as one of the most important domains in their lives, and the stakes become high all the way around. To put the point in Establishment Clause doctrinal terms, feelings of favoritism and coercion run high in the workplace.

I think all of this was recognized in *Estate of Thornton v. Caldor, Inc.*,⁵⁵ the only Supreme Court case in which any of the Justices discusses the permissibility of Title VII's religious accommodation requirement under the Establishment Clause. In *Caldor*, Chief Justice Burger wrote for a Court which invalidated on establishment grounds a Connecticut statute that gave Sabbatarians an absolute right to a day off to celebrate their Sabbath. In doing so, Chief Justice Burger repeatedly stressed the burdens imposed on other employees by the absolute preference. What he found most troublesome about the act was that

the State has thus decreed that those who observe a Sabbath any day of the week as a matter of religious conviction must be relieved of the duty to work on that day, *no matter what burden or inconvenience this imposes on the employer or fellow workers*. . . . [T]here

⁵⁴ See Erwin Chemerinsky, *Do State Religious Freedom Restoration Acts Violate the Establishment Clause or Separation of Powers?*, 32 U.C. DAVIS L. REV. 645 (1999).

⁵⁵ 472 U.S. 703 (1985).

is no exception under the statute [to govern situations when] . . . the employer's compliance would require the imposition of significant burdens on other employees required to work in place of the Sabbath observers.⁵⁶

Justice O'Connor's concurrence addressed the permissibility of Title VII's accommodation provision. She made clear that she would uphold this provision because, unlike the Connecticut law, it covers all religious practices and not just Sabbath observance, and because it calls for only reasonable accommodation. For her, the fact that Title VII's standard itself seems to take into account the concerns of nonreligious employees seemed important.⁵⁷

And lower court Title VII and Federal RFRA cases also recognize the problems that arise when fellow employees bear the brunt of accommodation. I think it is not surprising that, for the most part — though this is not always true⁵⁸ — the accommodations that prevail are those which may cost the employer some money, but do not significantly impose on any identifiable coworker. As an aside, I can't help but think of the zero-sum nature of other accommodations — like those involving conscientious objectors. In that context, the person who bears the brunt of the accommodation may sacrifice more than watching college football on a Saturday, and yet we permit, if not require, the accommodation there. But perhaps the law feels differently about statistical lives whose identities are unknown than about fellow employees who have names, faces, and lawyers.

There is a second potential conflict between state RFRA's and federal law, and although I ultimately don't think it amounts to a whole lot, let me mention it here. In *Ka Nam Kuan v. City of Chicago*,⁵⁹ a federal district court recognized a Title VII religious discrimination claim on the part of an employee who bore some of the burden of the employer's accommodation of other workers' religious practices. The so-called "reverse religious discrimination" claim arose from the fact that plaintiff had to work more overtime and accept more undesirable shifts because the City had granted

⁵⁶ *Id.* at 708-10 (emphasis added).

⁵⁷ *See id.* at 711-12 (O'Connor, J. concurring).

⁵⁸ *Cf. Opuku-Boateng v. California*, 95 F.3d 1461, 1470 (9th Cir. 1996) (holding that district court determination that proposed shift trading would discriminate against co-workers was clear error).

⁵⁹ 563 F. Supp. 255 (N.D. Ill. 1983).

more paid religious holiday leave to certain non-Protestant employees than to him. Denying the City's motion to dismiss, the court ruled that to the extent the City had borne more than a de minimis cost to accommodate a religious belief — that is to say, gone beyond what Title VII under *Hardison* requires — then the City “in effect discriminates against its other employees on the basis of their religious beliefs.”⁶⁰ The court stopped shy of ruling in plaintiff's favor, because the question whether the City had accommodated its religious employees more than Title VII required was an unresolved factual one.

The court's reading of Title VII here strikes me as strained. The text of Title VII does not prohibit discrimination “on account of religion” per se. Its clear text prohibits discrimination against somebody because of that person's religion. In the *Ka Nam Kuan* case, the most that can be said on plaintiff's behalf is that the City acted on the basis of the religion of others, but not on the basis of plaintiff's religion. In the same vein, there are cases holding that when a supervisor discharges an employee because the supervisor's religious beliefs conflict with the employee's secularly-motivated conduct — e.g., same sex relationships — no Title VII discrimination claim is stated.⁶¹

If I am wrong here and if the reasoning in *Ka Nam Kuan* were to be embraced, then Title VII's “reasonable accommodation” standard may be both a ceiling as well as a floor, and act to preempt state RFRA's to the extent that they mandate more accommodation than Title VII requires in such a way as to burden other state or local government employees. As I said, however, I think this is unlikely to be pursued.

CONCLUSION

Let me close, if I might, with an observation that is less legal than political.⁶² As I thought about the different standards built into

⁶⁰ *Id.* at 258.

⁶¹ See, e.g., *McCroory v. Rapides Reg'l Med. Ctr.*, 635 F. Supp. 975, 979 (W.D. La.) *aff'd mem.*, 801 F.2d 396 (5th Cir. 1986).

⁶² Speaking of politics, I should note that there has been some activity on Capitol Hill to amend Title VII's reasonable accommodation requirement effectively to replace the *Hardison* de minimis test with something more protective of religious employees. See *Workplace Religious Freedom Act of 1997*, S. 92, 105th Cong. (1997); S. 1124, 105th Cong. (1997); H.R. 2948, 105th Cong. (1997). None of these bills passed through committee assignment. The likelihood of legislation being passed and signed into law is, of course, hard to predict.

Title VII and RFRA, I thought about the political and rhetorical difficulties in advocating for anything beyond the “reasonable accommodation” that current law already guarantees. I could just imagine opponents pointing out that in the employment setting, RFRA backers seek accommodations that, as a matter of federal law, impose “undue hardships.” In thinking about this, I was reminded of Justice Stevens’s opinion in a Fourth Amendment qualified immunity case — *Anderson v. Creighton*⁶³ — in which he argued that qualified immunity could never insulate an official who had, as a matter of substantive law, violated the Fourth Amendment, because no one could “reasonably” conduct a search that is by constitutional definition “unreasonable.” My thoughts now are similar to my thoughts concerning Stevens’s unpersuasive argument. Terms like “reasonable,” and “undue” and “compelling” are just legal buzzwords and can mean different things in different contexts. What if, for example, Congress in Title VII had not used the term “reasonable accommodation,” but rather used the term “de minimis,” as the Supreme Court did construing the statute? Arguing in favor of accommodations that go beyond de minimis sounds better than supporting ones that go beyond what is “reasonable” and impose undue hardships. The ultimate question, of course, is how much weight, on the balance, religious convictions should have, and the idea that they don’t currently have enough in the workplace is, I think, politically as well as legally plausible to say the least.

⁶³ 483 U.S. 635, 659 (1987) (Stevens, J., dissenting).