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Protecting Unmarried Cohabitants from the Religious Freedom Restoration Act

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PROTECTING UNMARRIED COHABITANTS FROM THE RELIGIOUS FREEDOM RESTORATION ACT

I. INTRODUCTION

Verna Terry and Robert Wilder wanted to move out of the apartment they were sharing with another person.[1] To avoid paying double rent, they gave notice to their landlord that they were leaving before they had actually found other accommodations.[2] With one week remaining before their current lease expired, they found a new apartment which had appliances, was in a nice building, and in a good location.[3] During a phone conversation with Ms. Donahue, the landlady, Ms. Terry asked if the apartment had a garage in which her boyfriend could keep his tools.[4] Ms. Donahue responded that she was old-fashioned and refused to have unmarried couples as tenants.[5]

In fact, Ms. Donahue was a devoutly religious person who believed that intercourse outside of marriage was a sin.[6] She also believed that by renting her apartment to an unmarried couple she would be aiding another in the commission of a sin, which she considered in and of itself to be a sin.[7] Due to Ms. Donahue's refusal to rent, the couple was forced to take additional time

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1. Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32, 33 (Cal. Ct. App. 1991). The facts in other cases in which landlords have refused for religious reasons to rent to unmarried cohabitants are substantially similar to the facts of *Donahue*. Among these cases, the only notable differences are that in two cases, the landlords refused to rent to the unmarried couple after having made an offer of rental. In the first case, the couple falsely represented that they were married. Smith v. Fair Employment & Hous. Comm'n, 30 Cal. Rptr. 2d 395, 397 (Cal. Ct. App. 1994). In the second case, only one person of the couple saw the apartment and agreed to rent it. Cooper v. French, 460 N.W.2d 2, 3 (Minn. 1990). In both cases, the landlords subsequently refused to rent after learning that the couples were unmarried. In a third case, the tenants represented that they were married, and the landlord demanded to see actual proof of the couple's marriage. Jasniowski v. Rushing, No. 94 CH 5546, 2 (Cook County Cir. Ct. Dec. 22, 1994). When the couple did not provide such proof, the landlord refused to rent the apartment. *Id.*

2. *Donahue*, 2 Cal. Rptr. 2d at 33.

3. *Id.*

4. *Id.*

5. *Id.* Mrs. Donahue had previously been a real estate broker in Los Angeles and had been a landlady for 20 years. THOMAS F. COLEMAN, CHAIRPERSON, OFFICE OF THE CITY ATTORNEY, LOS ANGELES CALIFORNIA, CONSUMER TASK FORCE ON MARITAL STATUS DISCRIMINATION, SUPPLEMENT TO THE FINAL REPORT, UNMARRIED ADULTS, A NEW MAJORITY SEEKS CONSUMER PROTECTION 305 (1990) [hereinafter SUPPLEMENT].

6. *Donahue*, 2 Cal. Rptr. 2d at 33 n.1.

7. Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32, 33 n.1 (Cal. Ct. App. 1991).

off of work to continue looking for an apartment.[8] Eventually they found an apartment, but it cost $125 more per month than Ms. Donahue's apartment. Additionally, it was smaller, needed to be cleaned, had neither laundry facilities, a stove, nor a refrigerator, and was on a noisier street.[9] Thousands of other couples[10] encounter this inability to rent housing because some landlords who

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8. *Id.* at 34.

9. *Id.*

10. It is difficult to determine exactly how many unmarried couples are denied housing. With regard to housing rights generally, few people either know that they have rights which protect them from certain forms of housing discrimination or have time to pursue the matter. Telephone Interview with Arthur Eskew, Housing Counselor, Roxbury Multi-Service Center, Roxbury, Mass. (Feb. 20, 1996). Thus, primarily only "sophisticated people" file complaints or those who have the time and patience to withstand lodging a discrimination suit. *Id.* However, knowing the number of unmarried couples there are can help understand the potential magnitude of the problem. In 1990, the Census Bureau indicated that there were 3,042,642 opposite-sex "unmarried partner households" in the United States. BUREAU OF THE CENSUS, U.S. DEP'T OF COM., 1990 CENSUS OF POPULATION, SOCIAL AND ECON. CHARACTERISTICS, UNITED STATES, at tbl.16 (1993) [hereinafter 1990 SOCIAL & ECON. CENSUS]. This means that there are more than six million people who could be arbitrarily denied housing at any time. The Census Bureau defines an "unmarried partner household" as a household "other than a 'married-couple household' that includes a householder and an 'unmarried partner.'" *Id.* at B-15. "An 'unmarried partner' can be of the same sex or of the opposite sex of the householder. An 'unmarried partner' in an 'unmarried-partner household' is an adult who is unrelated to the householder, but shares living quarters and has a close personal relationship with the householder." *Id.* The number of cohabiting couples has increased substantially in recent years, from 523,000 in 1970, to 1.5 million couples in 1980. Rita M. Neuman, Note, *Closing the Door on Cohabitants Under Wisconsin's Open Housing Law*, 1995 WIS. L. REV. 965, 987 n.161 (1995). These figures indicate a 600% increase since 1970. Data available for individual states indicates that in 1990 there were 128,668 "unmarried partner households" in Illinois, 65,779 in Indiana, and 30,239 in Iowa. 1990 SOCIAL & ECON. CENSUS, *supra*, ILLINOIS, at tbl. 21; INDIANA, at tbl. 21; IOWA, at tbl. 21. Because of the increased rate of divorce and the delay of marriage, these numbers are expected to increase. Maureen E. Markey, *The Price of Landlord's "Free" Exercise of Religion: Tenant's Right to Discrimination-Free Housing and Privacy*, 22 FORDHAM URB. L.J. 699, 740-41 (1995).

The landlords in *Attorney General v. Desilets* stated that they had used their ten-year-old policy to deny tenancies to at least ten cohabiting couples. Attorney Gen. v. Desilets, 636 N.E.2d 233, 235 (Mass. 1994). In *Swanner v. Anchorage Equal Rights Commission*, 874 P.2d 274 (Alaska 1994), the Commission brought the action against the landlord on behalf of three pairs of individuals to whom the landlord refused to rent houses. *Id.* at 276. The Fair Housing Councils of Los Angeles reported 62 complaints of marital status discrimination in the city of Los Angeles between 1986 and 1989. SUPPLEMENT, *supra* note 5, at 221. During the fiscal year 1989, 848 complaints of housing discrimination were reported in California. *Id.* Thirty-nine percent of these complaints were due to race, 35% were due to familial status discrimination, and 10% of the complaints were due to marital status discrimination. *Id.* at 226.

The incidence of unmarried cohabitation is not an American phenomenon. The majority of British citizens cohabit before marriage. Gary Jenkins, *Cohabitation and the Local Church*, EPWORTH REV., Sept. 1993, at 47, 47. Over half of couples in Britain live together before marrying, and a survey of Anglican clergy indicated that over 90% of couples in London marrying in the church had lived together before the marriage. *Id.* And as in America, many couples in Britain cohabit without ever marrying. *Id.*

hold particular religious convictions[11] choose not to rent apartments[12] to unmarried couples.[13] According to these landlords' religious beliefs, renting an apartment to an unmarried couple would be facilitating sinful behavior.[14]

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11. While in the example above, the landlords were Catholic, in other cases, the landlords are of different faiths. *Donahue*, 2 Cal. Rptr. at 33 n.1. *See, e.g.*, Smith v. Fair Employment & Hous. Comm'n, 30 Cal. Rptr. 2d 395, 397 (Cal. Ct. App. 1994) (Presbyterian landlord); Cooper v. French, 460 N.W.2d 2, 3 (Minn. 1990) (landlord member of Evangelical Free Church); Jasniowski v. Rushing, No. 94 CH 5546 (Cook County Cir. Ct. Dec. 22, 1994) (Evangelical Christian landlord).

12. A situation in which a landlord charged an unmarried couple an increased amount of rent would be a form of discrimination equivalent to refusing to rent. Teresa Coleman Hunter & Gary L. Fischer, Essay, *Housing: Fair Housing Testing—Uncovering Discriminatory Practices*, 28 CREIGHTON L. REV. 1127, 1128 (1995). However, such a form of discrimination is not likely to occur, given the fact that landlords object to the sinful conduct which unmarried couples engage in on their property, and no cases have indicated that a higher rent would placate the landlords. Additionally, rental under such terms may very well call into question the sincerity of the landlords' religious beliefs. See *infra* note 50 for an explanation of "sincerity."

13. "Unmarried couples," as used in this note, only refers to opposite-sex unmarried couples. There are also cases dealing with cohabitants who are not unmarried heterosexual couples, but who are of the same sex, or are unrelated, who have been refused apartment rental and who have claimed protection under state marital status discrimination prohibition provisions. *See, e.g.*, Neuman, *supra* note 10, at 972-75, 996-99 (discussing County of Dane v. Norman, 497 N.W.2d 714 (Wis. 1993) (regarding a landlord who refused to rent a duplex to three unrelated women in one instance, and to a woman with two children who would be sharing the duplex with another single adult in another instance)).

Additionally, many males and females who choose to cohabit in a "more than platonic sense" while not marrying may do so for financial reasons (i.e. students). Some of these persons are young, but some of them are older, as well. For example, an elderly couple may cohabit because one or both of them may lose pension checks or other forms of income if they remarry. *See, e.g.*, 20 C.F.R. § 404.331(c) (1996) (stating that a divorced spouse does not qualify for the spouse's social security benefits if the former remarries); 20 C.F.R. §404.335(e) (1996) (stating that the widow or widower of a person who was fully insured under the social security program is not eligible for benefits unless he or she is unmarried, or remarried after reaching 60 years old and if other factors are present).

14. *See Smith*, 30 Cal. Rptr. 2d at 397; Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32, 33 n.1 (Cal. Ct. App. 1991). The landlord in *Donahue* stated that her religion teaches that intercourse outside of marriage is a mortal sin, for which the sinner would go to hell unless the sin were forgiven before death. *Id.* at 33 n.1. She also believed that it was sinful to aid another in the commission of a sin. *Id.* While some religious landlords object to fornication, others object to mere cohabitation. *See, e.g., Swanner*, 874 P.2d at 276-77 (concerning a landlord who believed that even a non-sexual living arrangement by roommates of the opposite sex is immoral and sinful because such an arrangement suggests the appearance of immorality); *Desilets*, 636 N.E.2d at 234-35 (involving landlords who had a policy that they would not rent apartments to anyone who engaged in conduct which violated their religious principles; as Roman Catholics, the landlords believed that they should not facilitate sinful conduct, including fornication); *Cooper*, 460 N.W.2d at 3-4 (concerning landlords who stated that they would not have rented to the unmarried couple even if the couple did not have sexual relations on the property because living together constitutes the "appearance of evil"); *Jasniowski*, No. 94 CH 5546 at 1 (involving a landlord who believed that God had made him steward over his business and property, and as such he could not allow his business or property to be used for immoral purposes).

Twenty-one state legislatures and the District of Columbia have begun to address this problem by amending their fair housing legislation to preclude marital status discrimination.[15] As a result, couples living in one of these states[16] can bring a claim against the landlord for discrimination.[17] However, the ability to bring a cause of action does not ensure success. Unmarried couples face problems in court as judges grapple with interpretation of the marital status discrimination statutes and with ambiguous legislative intent.[18] More importantly, another hurdle unmarried couples face is that courts are allowing anti-discrimination statutes to be circumvented by landlords' claims of the free exercise of their religion. Landlords argue that their right to freely exercise their religion, as protected by the First Amendment and more particularly by the Religious Freedom Restoration Act (RFRA),[19] precludes them from complying with such statutes and allows them to discriminate among their tenants based on marital status.

This Note focuses upon the problem that RFRA is enabling landlords to employ their rights of free exercise[20] to justify discrimination against prospective tenants who are unmarried couples, despite legislative efforts to prevent such discrimination.[21] Section II of this Note will explain the evolution of the Supreme Court's analysis of free exercise doctrine and the circumstances which motivated the passage of RFRA.[22] Section III will then discuss how the Supreme Court's recent decisions and ultimately the passage of RFRA have

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15. These states include: Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New York, North Dakota, Oregon, Rhode Island, Vermont, Washington, and Wisconsin. See *infra* note 130 for citations and examples of such statutes. In general, existing fair housing legislation prohibits discrimination based on race, sex, age, handicap or familial status in the sale or rental of housing. *See, e.g., infra* notes 130, 304, 306-07 and statutes cited in note 254.

16. *See supra* note 15.

17. This claim would be grounded in state law. See *infra* note 130 for a representative provision.

18. *See infra* note 130.

19. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994). RFRA is legislation which Congress passed to supplement the constitutional protection of the free exercise of religion. *See infra* notes 88-114 and accompanying text.

20. The right to the free exercise of religion is grounded in the First Amendment's Free Exercise Clause. This provision states that "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ." U.S. CONST. amend. I.

21. Most of these statutes do not explicitly define "marital status" to include unmarried couples. Matthew J. Smith, Comment, *The Wages of Living in Sin: Discrimination in Housing Against Unmarried Couples*, 25 U.C. DAVIS L. REV. 1055, 1074-75 (1992). However, only in Connecticut and Oregon did the legislatures explicitly exclude unmarried couples from inclusion under "marital status." *Id.* Illinois, Maryland, Minnesota and the District of Columbia defined "marital status," but did not include or exclude unmarried couples. *Id.* at 1075-76. The other sixteen states did not define "marital status." *Id.* at 1076.

22. *See infra* notes 28-120 and accompanying text.

strengthened landlords' likelihood of success in arguing that their free exercise of religion is burdened by marital status discrimination laws.[23] Section IV will then argue that prohibiting discrimination in housing based on marital status is not a substantial burden on landlords' free exercise of religion, and additionally, that preventing discrimination is a compelling governmental interest, despite some courts' decisions to the contrary.[24] Section V will recommend that the Fair Housing Act (FHA) be amended to proscribe discrimination against unmarried couples in housing, but explains that such an amendment alone will fail to adequately solve the problem faced by unmarried cohabitants.[25] The reason for this failure is that while laws which prevent discrimination against unmarried couples are not a substantial burden on landlords' exercise of religion, and protecting these tenants' rights to housing is a compelling interest, lower courts are still ruling against unmarried cohabitants. These courts are giving too much deference to RFRA because of their reliance on some of the Supreme Court's free exercise jurisprudence. Section V will also show how existing provisions in the FHA may influence the efficacy of such an amendment.[26] Finally, Section VI will propose two amendments: the first to the federal FHA to prohibit discrimination against unmarried couples in housing; and the second, an amendment to RFRA to prevent landlords from utilizing that Act as a defense to acts of discrimination prohibited by the FHA.[27] This second amendment is necessary to avoid RFRA's imputed effect by evidencing Congress' intent to prohibit marital status discrimination in housing.

II. BACKGROUND OF FREE EXERCISE JURISPRUDENCE AND LEGISLATION

A. Development of the Supreme Court's Free Exercise Jurisprudence

The First Amendment's Free Exercise Clause[28] protects citizens from interference by the government in the exercise of their religious beliefs.[29] The

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23. *See infra* notes 121-51 and accompanying text.

24. *See infra* notes 152-298 and accompanying text.

25. *See infra* notes 299-328 and accompanying text.

26. *See infra* notes 308-24 and accompanying text.

27. *See infra* notes 329-48 and accompanying text.

28. "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ." U.S. CONST. amend. I.

29. RONALD B. FLOWERS, THAT GODLESS COURT?: SUPREME COURT DECISIONS ON CHURCH-STATE RELATIONSHIPS 132 (1994). Employment Div. v. Smith, 494 U.S. 872, 902-03 (1990) (O'Connor, J., concurring). *See, e.g.*, Bowen v. Roy, 476 U.S. 693, 699-700 (1986) ("The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion . . . ."). *See also* THOMAS P. FERGUSON, CATHOLIC AND AMERICAN: THE POLITICAL THEOLOGY OF JOHN COURTNEY MURRAY 95 (1993) (noting that the First Amendment limits the state's power and thus preserves the Church's ability to exercise its authority over the spiritual aspects of society); ROBERT T. MILLER & RONALD B. FLOWERS, TOWARD BENEVOLENT NEUTRALITY: CHURCH,

Supreme Court's exploration of the reach of the Free Exercise Clause of the First Amendment did not truly begin until 1940, when *Cantwell v. Connecticut*[30] was decided. Some cases did reach the Supreme Court before this time, but only rarely, because states were the entities burdening citizens' free exercise rights.[31] Because the Free Exercise Clause did not yet extend to prohibit states' actions, cases claiming violations of the right of free exercise of religion began and failed in state courts.[32] It was not until the Court's decision in *Cantwell*[33] that the Court decided that the reach of the Free Exercise Clause extended to protect infringement of the exercise of religion by the states.[34] The religious claimants whose cases did reach the Supreme Court were not successful, so the "reach" of the Free Exercise Clause was not very broad.[35] In 1963, however, the Free Exercise Clause's limited protection was enlarged by the Court's decision in *Sherbert v. Verner*.[36] Not only was this the first case in which the Court determined that the Free Exercise Clause protected the claimant's exercise of religion,[37] but in this case the Supreme Court set down

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STATE, AND THE SUPREME COURT 4 (3d ed. 1987) ("[The national government was thus denied any power to interfere with the free exercise of religion . . . .").

30. 310 U.S. 296 (1940). The Supreme Court began to explore the reach of the Free Exercise Clause before 1940, but its "reach" did not include the protection of the religious adherents' actions. John T. Noonan, Jr., *The End of Free Exercise?*, 42 DEPAUL L. REV. 567, 571 & n.21 (1992).

31. ROBERT T. MILLER & RONALD B. FLOWERS, TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATE, AND THE SUPREME COURT 57-58 (1977)

32. *Id.*

33. 310 U.S. 296 (1940).

34. *Id.* at 303-04; FLOWERS, *supra* note 29, at 57-58. In *Cantwell v. Connecticut*, the Court held that not only was there constitutional protection for the exercise of religion, but that the states were bound by this protection, as well, through the incorporation doctrine of the Fourteenth Amendment. *Cantwell*, 310 U.S. at 303-04. FLOWERS, *supra* note 29, at 23-24 (explaining that the decision in *Cantwell v. Connecticut* broadened the religious liberty of all religious groups because it protected them from governmental prior restraint). Before 1940, three cases were brought by members of the Church of Jesus Christ of Latter-day Saints, all resulting in the Court's rejection of their arguments for religious freedom. Noonan, *supra* note 30, at 571 & n.21. These cases include: Reynolds v. United States, 98 U.S. 145 (1878) (holding that a polygamist was not allowed a free exercise exemption from a law prohibiting polygamy); Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890) (holding that the Free Exercise Clause did not protect the proclamation of the practice of polygamy); and Davis v. Beason, 133 U.S. 333 (1890) (same). *Id.*

35. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 17.6, at 1282 (5th ed. 1995). The only protection granted to the exercise of religion before 1963 was the expression of religious beliefs. *Id.* In 1963, the Court first granted protection to religiously-motivated conduct by its decision in *Sherbert v. Verner*, 374 U.S. 398 (1963). *Id.*

36. 374 U.S. at 398. *See, e.g.*, Stuart G. Parsell, Note, *Revitalization of the Free Exercise of Religion Under State Constitutions: A Response to* Employment Division v. Smith, 68 NOTRE DAME L. REV. 747, 749 (1993).

37. *See infra* note 57 (listing the only cases in which religious claimants have won their cases).

the framework for analysis of the Free Exercise Clause for nearly three decades.[38]

In *Sherbert*, the claimant was discharged by her employer because she would not work on Saturday, which was the Sabbath Day of her faith.[39] She was subsequently denied unemployment compensation because it was determined that she did not have "good cause" to reject the work offered her.[40] The claimant then contended that this denial of benefits was a violation of her right to the free exercise of her religion.[41] The *Sherbert* Court held that the government could only impose a substantial burden[42] on a person's free exercise of religion if it had a "compelling interest" in the action which created the burden and if that action was the least restrictive means to achieve the governmental interest.[43] A "compelling interest" is the strongest interest which the Supreme Court requires the government to show in justification of its action.[44] To have a "compelling interest," the government must demonstrate that "no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible

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38. The analysis under the Free Exercise Clause did not change substantially until 27 years later—in 1990 with *Employment Division v. Smith*, 494 U.S. 872 (1990).

39. *Sherbert*, 374 U.S. at 399.

40. *Id.* at 401.

41. Sherbert v. Verner, 374 U.S. 398, 401 (1963).

42. A "substantial burden" is one which is legally cognizable. Rod M. Fliegel, *Free Exercise Fidelity and the Religious Freedom Restoration Act of 1993: Where We Are, Where We Have Been, and Where We Are Going*, 5 SETON HALL CONST. L.J. 39, 64 (1994). Generally, it is a burden on religion by the state or federal government which is sufficient to trigger free exercise protection. *Id. See infra* notes 159-91 and accompanying text.

43. *Sherbert*, 374 U.S. at 407. To show that the action is the least restrictive means, the government should "demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Id.*

44. Examples of interests which the Supreme Court has found to be "compelling" are indicative of the type of justification which the Court requires. In *United States v. Lee*, 455 U.S. 252, 258, 260 (1982), the Court found that mandatory participation in the social security tax system was a compelling interest due to the comprehensive social benefits which the system provided and that maintaining a sound tax system required mandatory participation. In *Bob Jones University v. United States*, 461 U.S. 574, 580, 604 (1983), the Court held that the government's interest in eradicating racial discrimination in education was compelling and thus justified infringement of petitioners' religious beliefs that the Bible prohibits interracial dating and marriage. The Court also found a compelling interest in *Goldman v. Weinberger*, 475 U.S. 503 (1986). In *Goldman*, the claimant was refused an exemption from the military dress regulations which forbade wearing yarmulkes due to the government's compelling interest in promoting the military's group identity and obedience to authority. *Id.* at 508-10.

limitation.'"[45] Only upon a showing of a compelling interest can something as important as a fundamental right be infringed.[46]

Religious adherents' claims are brought to light by their request that a court grant them an exemption from complying with a law.[47] The adherents argue that the law unconstitutionally burdens their exercise of religion. Exemptions are thus the judicial mechanism by which religious claimants' beliefs are allowed to exempt them from the application of a law.[48] For religious claimants to be granted an exemption[49] from a burdensome law under the *Sherbert* interpretation of free exercise jurisprudence, they must show a religious belief which is sincerely held,[50] the exercise of this religious belief must be substantially burdened,[51] and the government must fail to meet the requirements which justify the imposition of the substantial burden upon the claimants' exercise of religion.[52] If a court grants an exemption, the law remains valid

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45. *Sherbert*, 374 U.S. at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

46. Under the compelling interest test, religious freedom is the rule and governmental interference is the exception. FLOWERS, *supra* note 29, at 129.

47. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972). In *Yoder*, the claimants were Amish parents who sought to be exempt from the state law which required that their children attend high school, contrary to their beliefs which required that they avoid 'worldly' influences. *Id.* at 208-09.

48. NOWAK & ROTUNDA, *supra* note 35, § 17.6, at 1282.

49. A "free exercise exemption" is essentially the equivalent of a "free exercise defense." A "free exercise defense" refers to a person seeking relief from a government requirement. When the defense has succeeded in relieving that person from the requirement, the court grants that person an "exemption." *See* Rebecca A. Wistner, Note, *Cohabitation, Fornication and the Free Exercise of Religion: Landlords Seeking Religious Exemption from Fair Housing Laws*, 46 CASE W. RES. L. REV. 1071, 1071-72 (1996).

50. *Yoder*, 406 U.S. at 215-19; Thomas v. Review Bd., 450 U.S. 707, 713-18 (1981). A reviewing court is limited to determining whether the religious belief which motivates the conduct is sincerely held. *Id.* at 716. The belief is considered to be sincere if the claimant honestly believes that his or her religion requires or forbids the subsequent action. *Id.* Sincerity is a different issue from the validity of a person's religious belief, which the Supreme Court has held is not for judicial examination. United States v. Seeger, 380 U.S. 163, 184 (1965) ("The validity of what [the claimant] believes cannot be questioned. Some theologians . . . might be tempted to question the existence of the [claimant's] 'Supreme Being' or the truth of his concepts. But these are inquiries foreclosed to Government."). *See also* United States v. Ballard, 322 U.S. 78 (1944). In *Ballard*, the claimants proclaimed to have healing powers and solicited money through the mails in return for their healing services. *Id.* at 79. The Court held that the Free Exercise Clause correctly prevented the jury at trial from considering the question of the truth or falsity of the claimants' religious beliefs. *Id.* at 88.

51. See *infra* notes 159-91 and accompanying text for a discussion of "substantial burden."

52. Sherbert v. Verner, 374 U.S. 398, 406-07 (1963). These requirements are a compelling governmental interest and least restrictive means. *Id.*; *Yoder*, 406 U.S. at 214. *See also* Markey, *supra* note 10, at 706; JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES 54 (1995).

as against all other citizens, while the religious claimants are exempt from complying with the law.[53]

The compelling interest test was used by the Supreme Court in its analysis of the Free Exercise Clause for twenty-seven years after the test was first established in *Sherbert v. Verner*.[54] Though the language of the test imposes a very high burden upon the government which would seem to favor the religious claimant, in only five cases has the Court held that the Free Exercise Clause warranted an exemption which protected religious adherents' behavior.[55] This seeming inconsistency between the strict requirements under the test and the infrequency with which the test actually served to protect religiously-motivated conduct prompted the Court to alter its analysis under the Free Exercise Clause.[56]

B. A Change in the Supreme Court's Free Exercise Jurisprudence

After deciding many cases further refining the protection of the Free Exercise Clause,[57] the Supreme Court significantly altered its free exercise jurisprudence in 1990 with its decision in *Employment Division v. Smith*.[58] In *Smith*, two employees of a private drug rehabilitation organization were fired because they ingested a hallucinogenic drug called peyote.[59] The employees'

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53. CHOPER, *supra* note 52, at 54.

54. James J. Musial, *Free Exercise in the 90's: In the Wake of* Employment Div., Dep't of Human Resources v. Smith, 4 TEMP. POL. & CIV. RTS. L. REV. 15, 21 (1994).

55. Markey, *supra* note 10, at 735.

56. *See* Employment Div. v. Smith, 494 U.S. 872, 883-88 (1990).

57. To name just a few, in 1972 the Court held that the right to the free exercise of religion exempted Amish children from the state's public high school education requirement. Wisconsin v. Yoder, 406 U.S. 205 (1972). In three other cases dealing with a similar situation as in *Sherbert v. Verner*, the Court held that those claimants' right to free exercise of religion exempted them from being denied unemployment compensation. Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 718-19 (1981); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987); Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989). These three cases, including *Sherbert v. Verner*, comprise what is sometimes called the "*Sherbert* Quartet." These four cases, in addition to *Wisconsin v. Yoder*, are the only cases in which the religious adherent has prevailed. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1277-81 & nn.57-69 (1994). They all deal with the state's denial of unemployment benefits to employees who were unable to perform employment obligations as a result of their religious beliefs. *Id.* In *United States v. Lee*, 455 U.S. 252 (1982), the Court held that the Free Exercise Clause does *not* exempt the Amish from the payment of social security taxes. *Id.* at 261. And in *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680 (1989), the Court held that denying religious claimants a tax deduction for fixed payments for auditing and training services did not violate their right to free exercise of religion. *Id.* at 700.

58. 494 U.S. 872 (1990).

59. *Id.* at 874.

use of peyote was prohibited by Oregon's controlled substance law, even though its use was important to the employees' practice of their religion.[60] The employees were denied unemployment compensation because they were fired for their religious use of a drug, which was considered work-related misconduct.[61] The employees contended that Oregon's drug law did not apply to them because their use of peyote was religiously motivated.[62] Thus, the employees brought suit claiming that their free exercise of religion had been substantially burdened.[63]

The *Smith* Court held that the test for a free exercise defense was the "incidental effects" test[64] instead of the "compelling interest" test of *Sherbert v. Verner*.[65] According to the *Smith* Court, laws which have an "incidental effect" on a person's exercise of religion do not violate the Free Exercise Clause if they are "neutral" and "generally applicable."[66] To have an "incidental" effect upon the exercise of religion, the object of the law must not be to prohibit the exercise of religion.[67] A law is "neutral" if its purpose is not to "infringe upon or restrict practices because of their religious motivation."[68] In contrast, a law is "generally applicable" if it applies generally to all similarly situated

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60. *Id.* In fact, the two employees' use of peyote was equivalent in its importance to the exercise of their religion as the taking of Communion is to other faiths. *Id.* ("[T]hey ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both are members.").

61. *Id.*

62. *Id.* at 878.

63. *Id.* at 874-77.

64. "[I]f prohibiting the exercise of religion . . . is not the object of the [governmental act] but merely the incidental effect of a generally applicable [law] . . . the First Amendment has not been offended." Employment Div. v. Smith, 494 U.S. 872, 878 (1990).

65. 374 U.S. 398 (1963). "Compelling interest" seems to be the universal parlance for the Supreme Court's test in the free exercise arena, though the requirement of a "compelling interest" is actually a component of the "strict scrutiny" test. *Id.* *See* CHOPER, *supra* note 52, at 54. The other component is that the "least restrictive means" be used or that the law be "narrowly tailored." *Id.* As used in this note and as in nearly all commentary on this topic, the "compelling interest" test denotes the "strict scrutiny" test as a whole.

66. *Smith*, 494 U.S. at 878; Church of the Lukumi Babalu Aye, Inc. v. City of Haileah, 508 U.S. 520, 522 (1993).

67. *Smith*, 494 U.S. at 878.

68. *Lukumi*, 508 U.S. at 523. If a law is enacted "because of" a particular religious practice, instead of "in spite of" a particular religious practice, it is not neutral. *Id.* at 540-41. There are two parts to "neutrality." The first test of the neutrality of a law is whether it is neutral on its face: whether by looking at the text itself or context of the text of the law it can be determined that the purpose of the law was to infringe upon a particular religious group. *Id.* at 534. The final component of neutrality is whether the law is neutral in its application, or if the effect the law has upon various people indicates that the purpose of the law was to infringe upon religious practices. *Id.* at 534-35.

people without targeting any particular religion or religious activity[69] or if it equally regulates secular and religious conduct.[70] If a law is underinclusive with regard to the categories of people it applies to, and these unincluded persons also fall within the parameters of the law's supposed goal, then the law is not generally applicable.[71] The distinction between "neutral" and "generally applicable" may appear unclear at times, but this lack of clarity results because the two concepts are interrelated.[72] In fact, as the Court indicated in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[73] a case decided three years after *Employment Division v. Smith*,[74] the failure to satisfy one of the prongs is a "likely indication" that the other is not satisfied.[75]

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69. Wendy K. Olin, Note, *Constitutional Survival Camp: What Are the Chances That the General Applicability Test Will Make It?*, 68 S. CAL. L. REV. 1029, 1030 (1995); NOWAK & ROTUNDA, supra note 35, § 17.6, at 1280 (explaining that a law is "generally applicable" if it applies to all persons—or to a class of persons which is not defined by religious characteristics—when they act or refrain from acting).

70. Fliegel, *supra* note 42, at 64.

71. *Lukumi*, 508 U.S. at 543.

72. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-32 (1993). A hypothetical may assist in understanding the distinction between the two concepts of "neutrality" and "general applicability." Suppose a legislature proposes a law which forbids the consumption of alcohol at public gatherings where food is not served. Additionally, suppose that the legislative history indicated that the legislature's only purpose in passing such a statute was to alleviate the problem of drunk driving, which it deemed to be more acute when large groups of people were congregated and when there was no consumption of food at the time of the consumption of alcohol. Such a law would appear to prohibit the taking of Communion in church. Examining this hypothetical law for its neutrality would result in a conclusion that it is "neutral," assuming that there was no evidence whatsoever that the legislation had the purpose or effect of targeting the religious use of alcohol. This hypothetical law may not be "generally applicable," however, because there are other categories of persons which the law excludes, which otherwise would seem to fit within the legislature's stated goal. Examples of these other categories would be people who go to bars—who may end up becoming very drunk—where only token amounts of food may be served, which do not significantly counteract the consumption of alcohol; and attendees of social functions where alcohol is served, in addition to hors d'oeuvres, which would impair the driving of many of the guests.

73. 508 U.S. at 520. *Lukumi* involved a city in Florida whose city council passed ordinances which subjected to criminal punishment those who unnecessarily or cruelly killed animals. *Id.* at 526. These ordinances were aimed at members of the Santeria religion who had recently begun to establish a church in the community. *Id.* at 526-27. The Santeria faith practiced animal sacrifice, and this concerned many residents. *Id.* at 525-26. The *Lukumi* Court held that these ordinances were contrary to the Free Exercise Clause under *Employment Division v. Smith*, 494 U.S. 872 (1990), because they were neither neutral nor generally applicable. *Lukumi*, 508 U.S. at 542. As such, to satisfy the Free Exercise Clause, they had to satisfy the compelling interest test and the *Lukumi* Court held that they did not. *Id.* at 546.

74. 494 U.S. at 872.

75. *Lukumi*, 508 U.S. at 531.

The incidental effects test is equivalent in its stringency to the rational basis test,[76] so that neutral and generally applicable laws which burden religion do not have a difficult hurdle to satisfy to be constitutional.[77] The Court reasoned in *Smith*[78] that doing away with the compelling interest test for religion-neutral and generally applicable laws was the only appropriate analysis considering the Court's view of its precedents.[79] The Court determined that to continue to use

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76. The "rational basis test" determines whether there is a rational relationship to a legitimate state interest. Schweiker v. Wilson, 450 U.S. 221 (1981).

77. *Smith*, 494 U.S. at 885-86, 888-89. *See, e.g.*, Markey, *supra* note 10, at 735; Tania Saison, *Restoring Obscurity: The Shortcomings of the Religious Freedom Restoration Act*, 28 COLUM. J.L. & SOC. PROBS. 653, 676 (1995).

78. Scalia, J., delivered the opinion of the Court, in which Rehnquist, C.J., and White, Stevens and Kennedy, J.J., joined. *Smith*, 494 U.S. at 873.

79. Employment Div. v. Smith, 494 U.S. 872, 886 n.3 (1990). While many scholars challenge the *Smith* Court's analysis of the issue which was before it and its interpretation of free exercise precedent, the arguments that the Court presented for altering the test for a free exercise exemption are still worth consideration—especially when examining marital status discrimination in housing. The majority in *Smith* had three primary justifications for doing away with the compelling interest test. First, the Court admitted that it had not actually been applying the test in many free exercise claims which came before it. *Id.* at 883-84. The Court believed that it was time that it articulated a test which it actually utilized. *Id.* at 883. In reality, the Court had only applied the compelling interest test on four occasions since its creation in 1963, and three of those concerned state unemployment compensation cases. *Id.* While Justice Scalia said that the Court had purported to use the test in other cases, it had always found the test "satisfied." *Id.* Indeed, the government has prevailed in every free exercise exemption case before the Supreme Court other than the *Sherbert* Quartet and *Yoder*. Markey, *supra* note 10, at 735. Secondly, the Court stated that the compelling interest test was not appropriate for freedom of religion cases because inquiring into the "centrality" of religious beliefs was a prerequisite for the test. *Smith*, 494 U.S. at 886-87. This, Justice Scalia said, was not proper for the judiciary to do, nor was it capable of such a task. *Id.* Such an analysis would be akin to inquiring into the relative importance of speech when applying the strict scrutiny test to free speech claims. *Id.* at 887. However, this is arguably already done. Some forms of speech are considered to be so lacking in social utility that they are barely awarded First Amendment protection. Harry Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 11; Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). Perhaps Justice Scalia was referring to the fact that a majority of the Court has never explicitly admitted that free speech protections are arranged hierarchically. WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW: CASES, COMMENTS, QUESTIONS § 31, at 832 (7th ed. 1991). Nevertheless, doing away with a centrality inquiry is "unworkable" because that would require applying the compelling interest test equally to a minor religious act such as throwing rice at church weddings as well as the much more religious act of actually getting married in a church. *See Smith*, 494 U.S. at 887. The third reason, and the most crucial one here, is that the Court concluded that exempting persons from the application of generally applicable laws for religious reasons would have a disastrous impact upon social order as the courts decided more cases. *Id.* at 885, 888. The majority reasoned that if the courts used the compelling interest test and granted various claimants exemptions, people would claim exemptions from nearly every civic obligation imaginable. *Id.* at 888. As it has been estimated approximately 800 different organized religions have existed during this century, it is not far outside the realm of possibility that at least one of the religion's doctrines might object to nearly every law. *See* CHOPER, *supra* note 52, at 67 n.52 (citing J. Gordon Melton, *Another Look at New Religions*, 527 ANNALS AM. ACAD. POL. & SOC. SCI. 97 (May 1993)).

the higher standard would "make the professed doctrines of religious belief superior to the laws of the land, and in effect permit every citizen to become a law unto himself."[80]

As the analysis under the Free Exercise Clause has changed, so has the likelihood of obtaining an exemption. In contrast to being able to seek an exemption from burdensome laws under the *Sherbert v. Verner*[81] compelling interest framework, a religious claimant would not be able to receive an exemption from a burdensome law after the Court's decision in *Smith*.[82] The *Smith* Court held that the Free Exercise Clause did not require an exemption for a person whose religious beliefs are burdened by laws as long as the laws are facially neutral, generally applicable and rationally related to a legitimate state interest.[83] The Free Exercise Clause now provides no recourse for a claimant whose exercise of religion is burdened if the law meets the requirements of *Smith*. Only if the law is not neutral or generally applicable is the claimant able to avoid the burdensome law, and in such cases, the law is held to be invalid for all purposes rather than the claimant being individually exempt from it.[84]

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80. *Smith*, 494 U.S. at 879. The Court mentioned a host of universally applicable duties, ranging from compulsory military service, to payment of taxes, to health and safety regulations such as manslaughter and child neglect laws, child labor laws, environmental protection laws and minimum wage laws from which people have sought religious exemptions under the compelling interest test. *Id.* at 888-89. The *Smith* decision does, however, provide for three exceptions to its application of the "incidental effects" test. If a future free exercise case would fit within one of these three categories, the government's interest would be subjected to the "compelling interest" test instead of the "incidental effects" test. *Id.* at 878, 881-84. The first exception is for laws which are not neutral and generally applicable, but instead intended to single out religion. *Id.* at 878. The second exception is for cases in which a fundamental right, such as freedom of speech or association, or a parent's right to determine her child's upbringing or religion, is intertwined with the free exercise of religion. *Id.* at 881. This was how the Court distinguished its precedent of denying free exercise exemptions from its holding in *Wisconsin v. Yoder*, in which the claimants were granted an exemption. *Id.* at 881-82. This exception is known as a "hybrid situation." *Id.* at 882. The third exception includes cases with facts similar to *Sherbert v. Verner*, 374 U.S. 398 (1963), which involved denial of unemployment compensation because of religious activity. *Smith*, 874 U.S. at 882-83. The justification for subjecting these cases to the compelling interest test is that the system of unemployment compensation already provides for "individualized governmental assessment of the reasons for the relevant conduct." *Id.* at 884. The Court then distinguished *Smith* from *Sherbert* by stating that the former involved conduct which was prohibited by Oregon's criminal law: the use of drugs. *Id.* at 876.

81. 374 U.S. 398 (1963).

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

83. *Id.* The Court framed Oregon's interest as prohibiting "socially harmful conduct." *Id.* at 885.

84. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). In *Lukumi*, the challenged ordinances were invalidated because they targeted a particular group's religious practices. *Id.* at 547.

Thus, because the drug laws at issue in *Smith* were neutral and generally applicable, the claimants could be denied unemployment compensation for the religious ingestion of peyote.[85]

The Supreme Court's elimination of the compelling interest test from its Free Exercise Clause landscape prompted religious and constitutional scholars to contemplate the implications of such a ruling.[86] They feared that the incidental effects test inadequately protected religiously-motivated actions.[87] These scholars hoped that the Supreme Court would reconsider its *Smith* holding in future cases, but that did not occur. As a result, these scholars have turned to the legislative branch to address their concerns for the protection of religious actions.

C. *Congress' Response to the Supreme Court's Change in Free Exercise Analysis*

The pragmatic effect of *Employment Division v. Smith* was to weaken the constitutional protection of conduct motivated by religion.[88] Before *Smith*, the language of the test guiding the Supreme Court's analysis of the Free Exercise Clause granted the government limited power to infringe upon religious activity.[89] Even though the Court only granted four claimants exemptions after *Sherbert v. Verner*,[90] the phrasing of the test was rigorous.[91] After *Smith*,

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85. Employment Div. v. Smith, 494 U.S. 872, 878, 890 (1990). Alan Ides, *The Text of the Free Exercise Clause as a Measure of* Employment Division v. Smith *and the Religious Freedom Restoration Act*, 51 WASH. & LEE L. REV. 135, 135 (1994). Oregon later created a legislative exemption for the religious ingestion of peyote. *Id.* at 135 n.6 (citing OR. REV. STAT. § 475.992(5) (1991)). Although the *Smith* Court held that the Constitution did not require religious exemptions from neutral and generally applicable laws, the Court encouraged Congress and state legislatures to create exemptions from laws for particular religious activities. *Smith*, 494 U.S. at 890. The Court felt that the risk that minority religions face in not having the political strength to lobby legislatures for statutory exemptions was an "unavoidable consequence" of living in a democratic society with a wide variety of religious beliefs. *Id.*

86. *See generally* Douglas Laycock, *Summary & Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841 (1992).

87. FLOWERS, *supra* note 29, at 133.

88. *See* Markey, *supra* note 10, at 735. This was accomplished by reducing the standard of review for free exercise claims from strict scrutiny to rational basis. *Id.* *See also* Olin, *supra* note 69, at 1046-47 (explaining that a claimant's arguments against burdensome laws are irrelevant if the laws are neutral and generally applicable).

89. FLOWERS, *supra* note 29, at 130.

90. 374 U.S. 398 (1963).

91. NOWAK & ROTUNDA, *supra* note 35, § 17.6, at 1282.

> Although [the] Court['s] . . . test read as if the Supreme Court would give significant protection to religiously motivated actions, the Court ruled . . . against persons seeking a religiously based exemption from any law of general applicability in every area except two:

however, the government was given more latitude to pass laws which impact religious activity.[92] This result shocked and distressed a sizable portion of the public.[93] Congress was also disappointed by what it considered to be the Supreme Court's emasculation of the Free Exercise Clause and the disrespect that *Smith* evidenced for the United States' history of religious freedom and protection.[94] In direct response to *Smith*, and with great support from a wide

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unemployment eligibility requirements and compulsory school attendance for Amish children of high school age.

Id. Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 446-47 ("In other constitutional areas, the compelling state interest test has been an all but insurmountable barrier, 'strict in theory and fatal in fact,' (quoting Gerald Gunther, *The Supreme Court, 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)) but, in pre-*Smith* religious exemption cases, it was 'strict in theory but feeble in fact.'" (quoting Eisgruber & Sager, *supra* note 57, at 1247).

92. FLOWERS, *supra* note 29, at 130. Professor Flowers believes that the courts are best suited to protect minority religious interests against the rule of the majority, yet in *Smith* the Supreme Court abdicated its role—and the role of courts across the country—in protecting minority religions. *Id.* at 132. Flowers echoes the sentiments of Justice O'Connor in her concurrence in *Smith*. Employment Div. v. Smith, 494 U.S. 872, 902-03 (1990). See CHOPER, *supra* note 52, at 56, who similarly argues that legislatures are not adequate sources of protection for individual constitutional rights. Choper bases this conclusion on his beliefs that legislatures can be insensitive, or even hostile, to minority religions; and that legislatures can be unaware of minority religions if they are obscure or poorly organized. *Id.*

93. James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1409 (1992). Members of the media, academia, Congress, and religious groups responded with incredulity, anger and despair. *Id.* For example, the *Los Angeles Times* wrote that the *Smith* decision was "an exercise of 'pure legal adventurism.'" *Id.* An article by Professor and Dean Edward M. Gaffney et al., described *Smith* as a "sweeping disaster for religious liberty." *Id.* And the Congressmember who proposed RFRA said that "[w]ith the stroke of a pen, the Supreme Court has virtually removed religious freedom from the Bill of Rights." *Id.* at 1409-10. Part of the dissatisfaction with *Smith* is due to what some say is its poor craftsmanship. Markey, *supra* note 10, at 727-28. Other critics say that the decision is also an example of "careless, misleading and often downright erroneous use of precedent." *Id.* at 732; *Smith*, 494 U.S. at 900, 903 (O'Connor, J., concurring). *See, e.g.*, Musial, *supra* note 54, at 41-47. Professor Michael W. McConnell is a well-known critic of the *Smith* decision. *Id.* at 41. Some of Professor McConnell's criticisms of *Smith* are that the Court disregarded the text of the Free Exercise Clause, that the *Smith* Court ignored the history of the Clause that would indicate the Clause's favoring of broader free exercise exemptions than that which *Smith* allowed, and that the Court misused precedent. *Id.* at 42-43. See Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990), for a more thorough examination of Professor McConnell's criticisms of the *Smith* decision. *Cf.* William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991) (explaining Mr. Marshall's opinion that even though *Smith* may be neither persuasive, nor well-written, and is indicative of a shallow understanding of free exercise jurisprudence, the Court was right to abandon the compelling interest standard and to question religious exemption analysis).

94. Ryan, *supra* note 93, at 1409-12. *Smith* also caused some state courts' departures from the Supreme Court's free exercise analysis. *See infra* notes 133-37 and accompanying text.

spectrum of the religious community,[95] Congress enacted a statutory reaffirmation of the free exercise analysis that the Supreme Court had used prior to *Smith*.[96] This statute was called the Religious Freedom Restoration Act (RFRA).[97] RFRA reinstated free exercise jurisprudence prior to *Smith* by mandating that government may only substantially burden a person's exercise of religion if it has a compelling interest to justify the burden and if the regulation is the least restrictive means possible to achieve that interest.[98] RFRA does not "overrule" the standard of review that the Supreme Court has established; a claim brought under the Free Exercise Clause is still analyzed according to the

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95. Ryan, *supra* note 93, at 1438. Support for this bill outside the legislature was definitely not lacking. *Id.* In fact, a group called the Coalition for the Free Exercise of Religion was formed explicitly to support the bill. *Id.* More than 35 organizations were part of this group, including the American Civil Liberties Union, American Jewish Congress, General Conference of Seventh-Day Adventists, the Baptist Joint Committee on Public Affairs, and the Native American Rights Fund. *Id.* at 1438 & n.174.

96. Ryan, *supra* note 93, at 1411.

97. Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to bb-4 (1994)). It took three years and several attempts by Congress to pass the bill, but ultimately, the Senate voted for it unanimously and only three members of the House voted against it. President Clinton signed it into law on November 16, 1993, stating that the bill was an example of Congress' "extraordinary" power to "reverse by legislation a decision of the United States Supreme Court." Eisgruber & Sager, *supra* note 91, at 438 (citing *Remarks on Signing the Religious Freedom Restoration Act of 1993*, 29 WEEKLY COMP. PRES. DOC. 2377 (Nov. 16, 1993)).

98. 42 U.S.C. § 2000bb-1(b) (1994). The Act provides in relevant part:

> (a) Findings
>
> 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;
>
> . . .
>
> (4) in *Employment Division v. Smith* 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.

Id. § 2000bb(a) (citations omitted).

> (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) 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.
>
> (c) 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. . . .

Id. § 2000bb-1(a) to (c).

"incidental effects" test of *Smith*.[99] RFRA does, however, create a federal statutory right, coexistent with and independent of the Free Exercise Clause, which mirrors the Supreme Court's analysis prior to *Smith*.[100]

The language of RFRA is indicative of how the Supreme Court's decision in *Smith* was construed by Congress. In the section of RFRA which explains Congress' findings, the language clearly indicates that the action of the Supreme Court motivated the passage of RFRA.[101] The statute states that *Employment Division v. Smith* had the effect of "virtually eliminat[ing]" the obligation of the government to sufficiently justify its burden on religious activity.[102] Furthermore, Congress declared that its goal was to reinstate the compelling interest test as it had been applied in *Sherbert v. Verner*[103] and *Wisconsin v. Yoder*.[104] Finally, contrary to Justice Scalia's reasoning in *Smith*,[105] Congress declared the compelling interest test to be "workable" for free exercise claims.[106]

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99. Fliegel, *supra* note 42, at 94. The separation of powers doctrine prohibits Congress from overruling a Supreme Court decision. *See infra* notes 108-09 and accompanying text.

100. One must view this statutory right with caution, however. As it is statutory, RFRA can be altered or eliminated in the same way that it was created. CHOPER, *supra* note 52, at 58; Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 63-64 (1994).

101. 42 U.S.C. § 2000bb(a)(4) (1994). See *supra* note 98 for the text of this provision.

102. *Id.*

103. 374 U.S. 398 (1963).

104. 42 U.S.C. § 2000bb(b)(1) (1994) (citing Wisconsin v. Yoder, 406 U.S. 205 (1972)). Congress wanted to turn the Supreme Court's jurisprudential clock back one day: to the day before *Smith* was decided. Markey, *supra* note 10, at 737. The goal of RFRA was thus to have the compelling interest test "as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*," applied to free exercise cases. *Id.* (citations omitted). However, achieving this result is more complicated than it sounds. The first reason is that the decisions in *Sherbert* and *Yoder* were the exceptions rather than the rule—the claimants won instead of the government. Eisgruber & Sager, *supra* note 57, at 1307. Also, the legislative history indicates that Congress intended for all of the pre-*Smith* decisional law to be used for free exercise cases under RFRA—not just *Sherbert* and *Yoder*. Markey, *supra* note 10, at 738. The problem with this is that many believe that the pre-*Smith* decisions were "laced with confusion and contradiction." Eisgruber & Sager, *supra* note 57, at 1307. It is admirable that Congress wanted to strengthen the protection of the Free Exercise Clause, but due to the fact that the free exercise decisions were so inconsistent, the pre-*Smith* cases give courts no improved guidance. *Id.* The courts are placed right back into the middle of what is the compelling interest confusion. *Id.* Exemplifying the confusion regarding the use of the compelling interest test, the justices on the *Sherbert* Court were not even sure how to apply the test. Saison, *supra* note 77, at 666-67. In the *Sherbert* opinion, Justice Brennan, writing for the majority, believed that the burden placed on the claimant in *Braunfeld v. Brown* was "less direct," justifying that the claimant was unsuccessful in that case, while the claimant in *Sherbert* was successful. *Sherbert*, 374 U.S. at 408 (citing Braunfield v. Brown, 366 U.S. 599 (1961)). Justice Stewart, in contrast, concluded in his concurring opinion that the burden in *Braunfeld* was more onerous than that in *Sherbert*, though both were sufficiently burdensome for the claimant's free exercise claim to prevail. *Id.*

105. *See supra* note 79.

106. 42 U.S.C. § 2000bb(a)(5) (1994).

RFRA's constitutionality has been challenged since its passage.[107] The principle objection to RFRA's constitutionality is that it seems to be an attempt by Congress to overrule a Supreme Court decision, contrary to the separation of powers doctrine[108] and thus beyond Congress' authority to enforce the Fourteenth Amendment.[109] To date, the consensus among federal courts which have addressed the issue is that RFRA is a constitutional act of

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107. *See generally* Eisgruber & Sager, *supra* note 91 (arguing that RFRA is unconstitutional because it violates principles of religious freedom, exceeds limits of federal authority, and asks the Supreme Court to use a test it has abandoned); Eisgruber & Sager, *supra* note 57 (favoring the interpretation of free exercise protection as protective while disfavoring the privileging interpretation and putting RFRA in the latter category). RFRA's necessity and wisdom is also another fascinating topic. *See generally* Ryan, *supra* note 93; Saison, *supra* note 77; Ides, *supra* note 85; Edward McGlynn Gaffney et al., *An Open Letter to the Religious Community*, FIRST THINGS, Mar. 1991, at 44. Unfortunately, the scope of this note is not broad enough to contain an in-depth discussion of the constitutionality of RFRA, so its constitutionality will be presumed. Similarly, when the constitutionality of RFRA is not directly at issue, courts presume its constitutionality. *See, e.g.*, Abdul-Akbar v. Department of Corrections, 910 F. Supp. 986, 1008 (D. Del. 1995) ("There is a question whether the RFRA is constitutional. However, the court will assume the constitutionality of the RFRA for the sake of this decision.") (citation omitted).

108. *See* Eisgruber & Sager, *supra* note 91, at 441. For another discussion of the conflict between RFRA and the separation of powers doctrine, see Joanne C. Brant, *Taking the Supreme Court at its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5 (1995) (arguing that RFRA violates the separation of powers doctrine because Congress has undermined the most basic power of any branch of government: the power to determine its own limitations).

109. P.F. Flores v. City of Boerne, 73 F.3d 1352, 1361 (5th Cir. 1996) (noting that the concept of Section Five authority and the violation of the doctrine of separation of powers is interrelated: if RFRA violates other constitutional provisions it violates Section Five authority). *See, e.g.*, Eisgruber & Sager, *supra* note 91, at 460-69; Brant, *supra* note 108, at 31.

The constitutional authority for RFRA is Section Five of the 14th Amendment. Rex E. Lee, *The Religious Freedom Restoration Act: Legislative Choice and Judicial Review*, 1993 BYU L. REV. 73, 90. This section gives Congress the power "to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. The exact power that Section Five gives Congress is far from a settled constitutional matter. Lee, *supra*, at 90-91. However, at least the boundaries of the power are generally agreed upon. *Id.* at 91. Section Five definitely does not give Congress authority to overrule any constitutional decision by the Supreme Court, but at a minimum the Section allows Congress to enact what is known as "remedial" legislation, which builds upon and strengthens existing constitutional rights. *Id.* For example, in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), a New York law required persons who had completed the sixth grade in Puerto Rico to complete a literacy test to be allowed to vote. Lee, *supra*, at 92-93. The Voting Rights Act of 1965 prohibited such literacy testing, even though the Supreme Court had previously held in *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959), that literacy tests did not violate the Fourteenth or Fifteenth Amendments. Lee, *supra*, at 93. In *Katzenbach*, the Supreme Court held that the "extra protection"—beyond what the Constitution requires—of the Voting Rights Act was constitutional. *Id.* One explanation for the Court's decision is that it is permissible for Congress to require more, but not less, protection of a constitutional right than the Supreme Court itself. *Id.*

Congressional authority.[110] The district court for the Western District of Texas[111] had declared RFRA unconstitutional, but that decision was reversed by the Fifth Circuit Court of Appeals.[112] Currently, the issue of RFRA's constitutionality is before the Supreme Court in *City of Boerne, Texas v. Flores*.[113] Unless and until the Court rules otherwise, for purposes of this Note, RFRA will be presumed to be constitutional to the extent that it creates a statutory right for those claiming infringement of their free exercise of religion.[114]

The practical effect of RFRA upon free exercise litigation will be to strengthen the religious claimant's argument by triggering the compelling interest test which would rarely have been invoked under *Smith's* interpretation of the Free Exercise Clause.[115] However, the doctrinal effect of RFRA is not

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110. *Flores*, 73 F.3d at 1356; Belgard v. Hawaii, 883 F. Supp. 510, 513 (D. Haw. 1995) (finding that RFRA was a constitutional exercise of Congressional authority); State v. Miller, 538 N.W.2d 573, 577 (Wis. Ct. App. 1995) (same); Sasnett v. Department of Corrections, 891 F. Supp. 1305, 1320 (W.D. Wis. 1995) (same).

111. P.F. Flores v. City of Boerne, 877 F. Supp. 355, 358 (W.D. Tex. 1995) (finding that RFRA was an unconstitutional change of the burden of proof established by *Smith*).

112. *Flores*, 73 F.3d at 1354.

113. Marcia Coyle, *Court Upholds Clinic Zones, Hears Religion Case*, NAT'L L.J., Mar. 3, 1997, at A9. Oral arguments in *City of Boerne vs. Flores*, No. 95-2074, were heard by the Court on Feb. 19, 1997, and the decision is expected by early summer. *Id.* One of the issues before the Court is whether Congress exceeded its power under § 5 of the 14th Amendment in passing RFRA. *Id.*

114. Battles v. Anne Arundel County Bd. of Educ., 904 F. Supp. 471, 476 (D. Md. 1995) ("Rather than view RFRA as overturning the Supreme Court's interpretation of the First Amendment, it is proper to view the Act as creating a separate statutory 'claim or defense to persons whose religious exercise is substantially burdened by the government . . . .'") (citing American Life League, Inc. v. Reno, 47 F.3d 642 (4th Cir.), *cert. denied*, 116 S. Ct. 55 (1995)). When the religious claimant does not challenge the constitutionality of RFRA, courts are hesitant to address the issue. In such a case, courts seem to prefer to assume the constitutionality of the Act for the purposes of deciding the case before it. Abdul-Akbar v. Department of Corrections, 910 F. Supp. 986, 1007 (D. Del. 1995) ("However, the court will assume the constitutionality of the RFRA for the sake of this decision."). *See also Sasnett*, 891 F. Supp. at 1305; *Belgard*, 883 F. Supp. at 510; *Miller*, 538 N.W.2d at 573; Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV. 221.

115. Fliegel, *supra* note 42, at 100 ("[T]here is no question but that RFRA will lead to increased protection for religious liberty."). See *supra* note 80 for an elaboration on the exemptions to the *Smith* analysis which would precipitate a compelling interest analysis. The exceptions which *Smith* provides do not provide for significant application of the compelling interest test. Fliegel, *supra* note 42, at 57. One commentator states that due to the low number of decisions which have invalidated laws under the hybrid exception (the author stated no cases had done so, but since that article, at least *Smith v. Fair Employment & Housing Commission*, 30 Cal. Rptr. 2d 395 (Cal. 1994), was decided in the religious claimant's favor, based on the hybrid exception), the practical significance of protecting more religious claimants under the compelling interest test is reduced. Fiegel, *supra* note 42, at 57. Further, the individualized exemption of the unemployment compensation exception has not been successfully applied to other contexts, limiting the practical

especially clear.[116] RFRA is not expected to provide guidance for consistent decisions nor produce any other theory or test that the courts were not already utilizing prior to the *Smith* decision.[117] As cases involving RFRA-based claims are beginning to be heard by courts across the country, it seems that RFRA is provoking courts to analyze the issues surrounding the compelling interest test with more particularity than before *Smith*,[118] though it is possible that courts may additionally factor congressional motivation behind RFRA into the compelling interest analysis.

As a result of the Supreme Court's decision in *Smith*, a religious adherent seeking a free exercise exemption from a burdensome law would not likely be successful under the federal Free Exercise Clause.[119] One way in which the negative effect of *Smith* has been lessened is that states have begun to maintain the protections of the pre-*Smith* Free Exercise Clause in their own state constitutions.[120] As an additional compensation for *Smith*'s effects, RFRA acts as a statutory reinstatement of the protection that the Court interpreted the Free Exercise Clause to provide before *Smith*. Both methods of supplementing the current interpretation of the Free Exercise Clause are important in their relation to marital status discrimination in housing.

III. EFFECT OF *SMITH* AND RFRA ON MARITAL STATUS DISCRIMINATION

While it is RFRA which is currently creating controversy in the area of unmarried couples' searches for housing, it is important to address the events leading up to the passage of RFRA to interpret how RFRA will likely hinder unmarried couples' access to housing. Initially, the Court's decision in *Smith* affected the way the state courts interpreted their state free exercise clauses. Then, *Smith* prompted Congress to enact RFRA, which strengthens the protection of the right to the free exercise of religion. This in turn appears to strengthen the landlords' arguments that their exercise of religion will prevail against laws prohibiting marital status discrimination in housing.

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significance of that exemption as well. *Id.* at 79.

116. *See* Markey, *supra* note 10, at 738-39. *Cf.* Fliegel, *supra* note 42, at 90-91 (arguing that claims under RFRA will provide a claimant with certainty by allowing him to avoid the Supreme Court's continuing struggle over defining the Free Exercise Clause).

117. See *supra* note 104 for an explanation of why some consider RFRA to be little improvement.

118. *See* Melissa Fishman Cordish, Comment, *A Proposal for the Reconciliation of Free Exercise Rights and Anti-Discrimination Law*, 43 UCLA L. REV. 2113, 2124 (1996).

119. *See infra* notes 121-29 and accompanying text.

120. *See infra* notes 133-37 and accompanying text.

A. Smith*'s Effect on Marital Status Discrimination*

The Supreme Court's decision in *Employment Division v. Smith*[121] allowed the government more latitude under the Free Exercise Clause to enforce laws which burden one's free exercise of religion.[122] All that *Smith* requires for such a burden to be constitutional is that the law be neutral and generally applicable.[123] Laws precluding marital status discrimination in housing are neutral because they are not aimed at impairing the exercise of any particular religion, facially or in their application.[124] Additionally, these laws are generally applicable because they apply equally to all citizens who engage in the sale and rental of property and are not only applicable to a specific religious group;[125] nor are they underinclusive.[126] Since laws which prohibit discrimination based on marital status in housing are neutral and generally applicable, they are constitutional according to *Smith*, regardless of the burden upon the exercise of religion.[127] Thus, landlords' claims that a marital status

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121. 494 U.S. 872 (1990).

122. FLOWERS, *supra* note 29, at 130. See *supra* notes 44-46, 76-77, 81-84 and accompanying text for an explanation of the stringency of the compelling interest test as compared to that of the incidental effects test. *See also* Musial, *supra* note 54, at 18. The philosophies of the justices presently sitting on the Supreme Court indicate that the rationale of the *Smith* decision is not likely to be altered: the *Smith* case was decided by a 5-4 majority, of which all three of the dissenters and Justice White, who joined the majority, have left the Court. Lee, *supra* note 109, at 89-90. Justices Marshall and Brennan have been replaced by Justice Thomas, who agrees with the *Smith* decision and Souter, who sides with the *Smith* dissenters, respectively. *Id.* This results in a 5-2 Court, favoring the *Smith* majority's decision. *Id.* Justices Ginsburg and Breyer have also joined the Court after the *Smith* case was decided. Their views of *Smith* are unclear.

123. *Smith*, 494 U.S. at 886. See *supra* notes 66-75 and accompanying text for an explanation of "neutral" and "generally applicable." This test replaced the stricter compelling interest test from *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

124. The Alaska Supreme Court used this formulation of "neutrality" and reached the same conclusion in *Swanner v. Anchorage Equal Rights Commission*, 874 P.2d 274, 279-80 (Alaska 1994), discussing Anchorage's municipal anti-discrimination code, ANCHORAGE, ALASKA, CODE § 5.20.020 and Alaska's anti-discrimination statute, ALASKA STAT. § 18.80.240. *See also* Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 919 (Cal. 1996).

125. This is the Alaska Supreme Court's formulation of "general applicability," as well as the conclusion the court reached, as expressed in *Swanner*, 874 P.2d at 280 (discussing Anchorage municipal anti-discrimination code, ANCHORAGE, ALASKA, CODE § 5.20.020 and Alaska's anti-discrimination statute, ALASKA STAT. § 18.80.240). *See also* Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 919 (Cal. 1996).

126. *See supra* note 72 and accompanying text.

127. FLOWERS, *supra* note 29, at 130. *See Smith*, 913 P.2d at 919. In *Employment Division v. Smith*, the Court at least implicitly indicated that the Free Exercise Clause tolerates *any* amount of burden upon a religious adherent, as long as the governmental action imposing the burden is neutral and generally applicable. Employment Div. v. Smith, 494 U.S. 872, 885 (1990) ("[T]he sounder approach . . . is to hold . . . [that] [t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct . . . 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development'") (quoting Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)). The *Smith* Court also stated "that

discrimination provision violates their exercise of religion under the Free Exercise Clause of the United States Constitution would fail.[128] As a result, landlords who choose to base their free exercise defenses solely on the federal Constitution would be required to comply with the anti-discrimination statute.[129] With such a prognosis, it is unlikely for a landlord to base his or her defense solely on the Free Exercise Clause of the First Amendment.

If *Smith*'s effect upon the Free Exercise Clause were the current status of free exercise jurisprudence, tenants in every state which recognizes a cause of action for marital status discrimination in housing would win their discrimination claims.[130] However, this is not how the law currently stands. The *Smith*

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the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982)). *See also* Fliegel, *supra* note 42, at 72 (stating that the analysis under the Free Exercise Clause ends if the law is neutral and generally applicable, even if there is a cognizable burden upon free exercise).

128. *Smith*, 913 P.2d at 918 ("The First Amendment does not support [the landlord's] claim."). *Swanner*, 874 P.2d at 280 ("We conclude that enforcing [the statute and ordinance prohibiting marital status discrimination] against Swanner does not violate his right to free exercise of religion under the United States Constitution."); Cooper v. French, 460 N.W.2d 2, 8, 9 (Minn. 1990) (concluding that because the state constitution provides a broader protection of religion than does the federal Constitution, the court will only consider the landlord's arguments under the state constitution even though the landlord also raised the issue under the federal Constitution); Attorney Gen. v. Desilets, 636 N.E.2d 233, 235-36 (Mass. 1994) (same). *See* Fliegel, *supra* note 42, at 94 (stating that, in general, claimants seeking religious exemptions "face the prospect of marginal success under the [Free Exercise Clause of the] Constitution . . . .").

129. *See* Fliegel, *supra* note 42, at 94.

130. A tenant would not be able to bring a cause of action in a state which does not have a provision prohibiting marital status discrimination in housing. Twenty-one states and the District of Columbia have statutes prohibiting housing discrimination based on marital status: ALASKA STAT. § 18.80.240 (1994); CAL. GOV'T CODE § 12955 (West 1992 & Supp. 1997); COLO. REV. STAT. ANN. § 24-34-502(1)(a) (West 1990 & Supp. 1996); CONN. GEN. STAT. ANN. § 46a-64c (West 1995); DEL. CODE ANN. tit. 6, § 4603 (1993); D.C. CODE ANN. § 1-2515 (1981 & Supp. 1996); HAW. REV. STAT. § 515-3 (Supp. 1992); ILL. ANN. STAT. ch. 775, ¶¶ 5/1-103(J), (Q), 5/3-102 (Smith-Hurd 1993 & Supp. 1996); MD. ANN. CODE art. 49B, § 22 (Supp. 1994); MASS. GEN. LAWS ANN. ch 151B, § 4(6)-(7) (West Supp. 1995); MICH. COMP. LAWS ANN. § 37.2502 (Supp. 1995); MINN. STAT. ANN. § 363.03(2) (West Supp. 1995); MONT. CODE ANN. § 49-2-305 (1995); N.H. REV. STAT. ANN. § 354-A: 10 (1995); N.J. STAT. ANN. § 10: 5-12(g)-(h) (West 1993 & Supp. 1996); N.Y. EXEC. LAW § 296(5) (McKinney 1993 & Supp. 1996); N.D. CENT. CODE § 14-02.4-12 (Supp. 1995) ("status with respect to marriage"); OR. REV. STAT. § 659.033 (1995); R.I. GEN. LAWS § 34-37-4 (1995); VT. STAT. ANN. tit. 9, § 4503 (Supp. 1991); WASH. REV. CODE ANN. § 49.60.222 (West Supp. 1995); WIS. STAT. ANN. § 101.22 (West Supp. 1995). Two states give their political subdivisions the authority to prohibit marital staus discrimination in housing, but do not directly prohibit it. NEB. REV. STAT. §18-1724 (1991); VA. CODE ANN. § 15.1-37.3:8 (Michie 1989).

Minnesota's statute is a fairly typical example of these statutes. It is very similar to the federal Fair Housing Act. It states in relevant part:

It is an unfair discriminatory practice:

> (1) For an owner, lessee, sublessee, assignee, or managing agent of, or other person having the right to sell, rent or lease any real property, or any agent of any of these:
> (a) to refuse to sell, rent, or lease or otherwise deny to or withhold from any person or group of persons any real property because of . . . marital status . . . .
> (b) to discriminate against any person or group of persons because of. . . marital status . . . in the terms, conditions or privileges of the sale, rental or lease of any real property or in the furnishing of facilities or services in connection therewith . . . .
> (c) in any transaction involving real property, to print, circulate or post . . . any advertisement or sign, or . . . make any record or inquiry in connection with the prospective purchase, rental, or lease of real property which expresses, directly or indirectly, any limitation, specification, or discrimination as to . . . marital status . . . .

MINN. STAT. ANN. § 363.03(2)(1)(a)-(c) (West 1996).

Additionally, some municipalities have provisions which prohibit discrimination based on marital status. *See, e.g.*, ANCHORAGE, ALASKA, CODE § 5.20.020; CHICAGO, ILL., ORDINANCE § 5-8-030. Chicago's ordinance is similar to the state statutes. It provides in relevant part:

> It shall be an unfair housing practice and unlawful for any owner . . . managing agent, or any other person . . . having the right to sell, rent, lease or sublease any housing accommodation . . . [t]o refuse to sell, lease or rent, any real estate for residential purposes within the city of Chicago because of the . . . marital status . . . of the proposed buyer or renter.

Id.

Petitioners in Alaska, California, Massachusetts, and Minnesota have raised the issue of whether provisions prohibiting discrimination in housing on the basis of marital status are outweighed by landlords' claims that these provisions infringed upon their free exercise of religion. The supreme courts of California and Alaska have conclusively answered the question, holding that the landlord's free exercise claim did *not* trump the anti-discrimination provisions. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 285 (Alaska 1994) (holding that the protection of unmarried couples' access to housing was a compelling interest); Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 928-32 (Cal. 1996) (holding that a law which forbad landlords from discriminating against unmarried couples did not substantially burden their free exercise of religion). The Massachusetts Supreme Court, however, has held that the state *may* have a compelling interest in preventing marital status discrimination—trumping the landlord's free exercise claim—if the unmarried couple could show that they would in fact have difficulty finding housing because of their marital status. Attorney Gen. v. Desilets, 636 N.E.2d 233, 240 (Mass. 1994). The court remanded the case for a factual determination on this issue. *Id.* at 241, 243. However, the lower court never retried the case.

Concerning the narrower but still crucial issue of whether the term "marital status" in statutes includes and thus protects unmarried cohabitants, the Wisconsin Supreme Court has held that it did *not* because it was the couple's "conduct" which the landlords objected to, not their "status," which the court held was all that the statute protected. County of Dane v. Norman, 497 N.W.2d 714 (Wis. 1993) (involving the "marital status" definitional issue but not the issue of a landlord's free exercise claim). The court in *Cooper v. French*, 460 N.W.2d 2 (Minn. 1990), similarly found that "marital status" did not protect unmarried couples due to Minnesota's public policy against fornication and favoring marriage, and in light of similar statutes which did not protect unmarried couples, thus finding in favor of the landlord. *Id.* at 6-7. In *Mister v. A.R.K. Partnership*, 553 N.E.2d 1152, 1159-60 (Ill. App. Ct. 1990), the Illinois Appellate Court also held that Illinois' "marital status" provision does not protect unmarried cohabitants.

In Alaska, California and Massachusetts, however, this particular argument has been raised by landlords and rejected. These courts have held that "marital status" does include unmarried cohabitants. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 278 (Alaska 1994);

decision triggered two events which affect the success of a tenant who brings a marital status discrimination claim. The first of these is that state courts began to rely on their own state constitutions to protect the free exercise of religion to a level greater than that of the First Amendment.[131] The second event is the passage of RFRA.[132]

The state courts responded to *Smith* by looking to the free exercise clauses in their state constitutions to protect landlords' free exercise of religion when tenants brought claims against discriminatory landlords.[133] Before *Smith*, state courts generally interpreted their state free exercise provisions to afford the same protection as the Free Exercise Clause of the U.S. Constitution in all types of

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Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32, 38 (Cal. Ct. App. 1991); Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 915-18 (Cal. 1996); Attorney Gen. v. Desilets, 636 N.E.2d 233, 235 (Mass. 1994). Once these courts have resolved the definition of "marital status," they proceeded to consider the landlords' free exercise claim.

While a California state assembly member proposed legislation to essentially remove "marital status" as a protected class under California fair housing law after the California Supreme Court decided *Smith*, the legislation did not pass. Cordish, *supra* note 118, at 2115.

131. *See infra* notes 133-37 and accompanying text.

132. *See infra* notes 138-48 and accompanying text.

133. Parsell, *supra* note 36, at 747 (speaking of the fact that, in general—not only with regard to marital status discrimination free exercise situations—states began to look to their own constitutions for alternate protection for free exercise after *Smith*). For example, the Minnesota Supreme Court stated that "[i]n light of the unforeseeable changes in established first amendment law set forth in recent decisions of the United States Supreme Court, justice demands that we analyze the present case in light of the protections found in the Minnesota Constitution." *Cooper*, 460 N.W.2d at 8. A state court is only able to so hold if a landlord has alleged that his or her rights to free exercise of religion are infringed under his or her state constitution's free exercise clause. In all, six states' courts have so far explicitly maintained the compelling interest test. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 280-81 (Alaska 1994); Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 32 (Cal. Ct. App. 1991). Some courts have announced this differing standard in cases other than those dealing with marital status discrimination. *See* Rupert v. City of Portland, 605 A.2d 63 (Me. 1992); Society of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571 (Mass. 1990); State v. Hershberger, 462 N.W.2d 393 (Minn. 1990); First Covenant Church v. Seattle, 840 P.2d 174 (Wash. 1992). *See also* Parsell, *supra* note 36, at 756 & n.51.

Such responses by the state courts are constitutional because state constitutions can supplement the rights granted in the federal constitution by protecting their citizens to a greater extent than that of the federal constitution. *See* Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980) ("Our reasoning in *Lloyd*, however, does not . . . limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."). If the highest state court's decision relies independently on the stronger protections of the state constitution, then the federal courts cannot even reconsider the court's decision because of the adequate and independent state ground doctrine. *See, e.g.*, Michigan v. Long, 463 U.S. 1032, 1041 (1983); Parsell, *supra* note 36, at 754.

cases.[134] After *Smith* changed the standard to the incidental effects test, however, some state courts ceased mirroring the Supreme Court's jurisprudence and instead continued to analyze free exercise claims brought under their state constitution under the compelling interest standard.[135] In states which have already reaffirmed their use of the compelling interest test for their state constitutions' free exercise clauses, and in those which will do so in the future, the tenant who brings a marital status discrimination claim will probably lose. The tenant will lose because, contrary to the position of this Note, state courts are finding that tenants' claims fail to survive strict scrutiny. However, there are two states which use the compelling interest test where a tenant could, in fact, prevail. A tenant may prevail if he or she brought the cause of action in either Alaska or California, because those states' supreme courts have held that unmarried cohabitants' interests amounted to a compelling interest and did not constitute a substantial burden, respectively.[136] These two states are the exception to the rule. Additionally, the tenant may prevail in Oregon and Vermont because the state courts have adopted the "incidental effects" rationale of *Smith*.[137]

B. RFRA's Effect on Marital Status Discrimination

RFRA's importance to the subject of marital status discrimination is that it provides a new weapon for landlords in their attempts to keep unmarried couples

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134. Parsell, *supra* note 36, at 756. Thus, challenges to both state and federal free exercise clauses were analyzed under the compelling interest test. Sometimes the state courts did not find it necessary to resort to the protections of their state constitutions when claimants based their arguments on both the Free Exercise Clause of the U.S. Constitution and the state constitution's free exercise clause, since the state's clause would be essentially duplicative. *Id.* In these cases, the courts rested their decisions on the federal clause alone, without considering the reach of the state clause, even though the state clause would have provided the equivalent protection. *Id.* Thus, when some state courts seek to break away from the Supreme Court's interpretation of free exercise protection, a dearth of case law interpreting the state constitution is often encountered. Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post*-Smith *Jurisprudence*, 1993 BYU L. REV. 275, 298-99.

135. Parsell, *supra* note 36, at 755 n.51; Renee Skinner, *The* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah: *Still Sacrificing Free Exercise*, 46 BAYLOR L. REV. 259, 261-62 (1994) (stating that in addition to turning to state free exercise clauses, state courts have determined that laws are neither neutral nor generally applicable so as to escape the application of *Employment Division v. Smith*).

136. *See supra* note 130.

137. Carmella, *supra* note 134, at 307-09; Tracey Levy, *Rediscovering Rights: State Courts Reconsider the Free Exercise Clause of Their Own Constitutions in the Wake of* Employment Division v. Smith, 67 TEMP. L. REV. 1017, 1035-37, 1047-49 (1994) (evaluating the approaches of Oregon and Vermont and concluding that their constitutions provide no greater protection than the First Amendment). Both Oregon and Vermont have provisions prohibiting marital status discrimination, though Oregon has defined "marital status" to not include unmarried cohabitants. *See supra* notes 21, 130.

out of their apartments.[138] RFRA effectively creates a statutory "Free Exercise Clause" which is as rigorous as the Free Exercise Clause was prior to the Supreme Court's decision in *Smith*.[139] Thus, the passage of RFRA makes landlords' claims more likely to prevail.[140] Landlords now have a statutory means by which to require the government to advance a compelling interest before their defenses can be defeated.[141]

As a result of the state courts' and Congress' attempts to fortify the free exercise protection which the *Smith* decision weakened, the legal bases for landlords' free exercise defenses have essentially tripled.[142] Now landlords may base their defenses upon the Free Exercise Clause, an individual state's free exercise clause[143] or RFRA.[144] As explained previously, landlords are

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138. In states whose courts have interpreted their constitutions' free exercise clauses as providing greater protection than the Free Exercise Clause, RFRA is not truly necessary, though a welcome reinforcement. However, if a state court chooses (or has already chosen) to grant protection under its free exercise clause comparable to that of the Free Exercise Clause, then RFRA would be vital to the success of that landlord's defense to a marital status discrimination claim.

139. Markey, *supra* note 10, at 738.

140. *See* Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909 (Cal. 1996). The California Supreme Court noted that under the holding of *Employment Division v. Smith*, 494 U.S. 872 (1990), the landlord's claim would not succeed. *Smith*, 913 P.2d at 920. However, the landlord argued that under the "hybrid" exception of *Employment Division v. Smith*, the government's law may be subject to the more stringent compelling interest test. *Id.* *See supra* note 79; *infra* note 260. However, the court decided that it did not have to address the "hybrid" issue because RFRA required the compelling interest test anyway. *Smith*, 913 P.2d at 921. *See also* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994). The Alaska Supreme Court explained that RFRA's change of free exercise analysis under the First Amendment to the compelling interest test resulted in a higher burden on the part of the state (and the tenant). *Id.* at 280 n.9. Ultimately, however, the heightened burden required by RFRA was not outcome-determinative because the court found that the state had a compelling interest. *Id.* Even though the tenant won in the *Swanner* case, this outcome is an anomaly because the *Swanner* court is the only one to have found a compelling interest in protecting unmarried couples' access to housing. The fact that RFRA triggers analysis under the compelling interest test indicates that, overall, the Act makes the landlords' defenses more likely to prevail.

141. *See supra* note 98 and accompanying text (explaining that RFRA statutorily mandates the use of the compelling interest test).

142. These bases are listed separately for purposes of discussion. A landlord may, however, choose to use two or even all three of them together, instead of just one. *See, e.g.*, *Swanner*, 874 P.2d at 276 (landlord claimed his right to free exercise of religion was violated under both the United States and Alaska Constitutions).

143. State free exercise clauses have not, of course, just recently been written. Now, however, landlords are looking to the state clauses to find more protection for religion after *Employment Division v. Smith* weakened the First Amendment of the U.S. Constitution, and state courts are providing such protection. *See generally* Parsell, *supra* note 36, at 754-58.

144. Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to bb-4 (1994)). *See supra* notes 98, 138-41 and accompanying text.

unlikely to base their defenses on the Free Exercise Clause.[145] However, landlords are still left with two viable options: their state's free exercise clause or RFRA. For landlords to have a chance of success by basing their defenses on the state's free exercise clause, the test which is used for the state's free exercise clause must be equivalent to the compelling interest test.[146] If this is the case, then landlords could choose to proceed under their state constitutional provision.[147] In such a situation, the state's free exercise clause may be sufficient for the landlord to succeed in her argument that a marital status discrimination in housing provision is a burden on her freedom of religion.[148] However, for landlords to increase the likelihood of succeeding on their free exercise defenses, they would probably proceed under RFRA as well. In the event that the landlords' state has not maintained a standard as exacting as the compelling interest test for the state free exercise clause, the basis for the landlords' free exercise defenses would be RFRA alone.

Whether the landlords' defenses are based on their state's free exercise clause or RFRA, prospective tenants are faced with an uphill battle in order to prevail. State courts addressing this issue have been finding that under either, tenants must satisfy strict scrutiny to keep a free exercise exemption from defeating the purpose of the anti-discrimination law.[149] Currently, only in the state of Alaska, and theoretically in Massachusetts, is this possible.[150] Except for California, the other state court which has considered this issue, Minnesota, has implicitly held that the state's interest in prohibiting marital status

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145. *See* Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65, 105 (1996) ("Instead of bringing a constitutional action under the Free Exercise Clause, one should bring a claim under RFRA."). *See supra* notes 121-29 and accompanying text.

146. If the state does not utilize the compelling interest test, then the state government may permit a lesser showing to justify a burden on the free exercise of religion. In such a situation, the landlord may lose. *See supra* text accompanying note 135. Additionally, there must be a provision prohibiting marital status discrimination in housing. Without such a provision a landlord would have no need to raise the free exercise defense in the first place.

147. Parsell, *supra* note 36, at 755. In fact, one scholar has suggested that an attorney's failure to base a free exercise claim on a state's free exercise clause would amount to malpractice. *See* Laycock, *supra* note 86, at 854.

148. Parsell, *supra* note 36, at 757 (stating that state courts focus on the free exercise protection which the states' constitutional provisions provide because analysis under the First Amendment affords no greater protection of religion).

149. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 280-81 & n.9 (Alaska 1994); Attorney Gen. v. Desilets, 636 N.E.2d 233, 236 & n.5 (Mass. 1994).

150. *See Swanner*, 874 P.2d at 274. See also *Desilets*, 636 N.E.2d at 233 and *supra* note 130 for an explanation of why this is only theoretically possible in Massachusetts.

discrimination cannot satisfy strict scrutiny.[151] Furthermore, there are eighteen states which have provisions prohibiting marital status discrimination in housing whose courts have not addressed the potentially conflicting rights of landlords. The status of unmarried couples' rights to housing remains wholly undetermined in these states. The few and varying state court decisions which have addressed this issue have failed to solve on a nationwide scale the growing conflict between unmarried couples' right to access housing and landlords' rights to the free exercise of their religion.

IV. WHY RFRA SHOULD NOT PROVIDE A DEFENSE TO MARITAL STATUS DISCRIMINATION

While the passage of RFRA poses a new hurdle for opponents of marital status discrimination in housing,[152] it is not insurmountable. Tenants have two possible methods to prevail over landlords' use of RFRA as a defense to the tenants' marital status discrimination claims. The first method is to claim that laws which require landlords to rent to unmarried couples do not impose a substantial burden on the landlords' exercise of religion. As with the Supreme Court's pre-*Smith* Free Exercise Clause jurisprudence, there is no need to proceed to the further analysis required by RFRA if there is no substantial burden.[153] If there is no substantial burden, RFRA is not implicated.[154]

The second method to prevent landlords from succeeding in using RFRA as a statutory defense to marital status discrimination claims is to establish that such laws satisfy RFRA's strict scrutiny analysis. Under this method, RFRA permits a substantial burden to be placed on persons' free exercise of religion if the governmental entity can advance a compelling interest to justify the burden and use the least restrictive means to achieve that interest.[155] Contrary to some lower courts' decisions,[156] prohibiting landlords from discriminating on

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151. Cooper v. French, 460 N.W.2d 2, 9-11 (Minn. 1990) (holding that the state's marital discrimination statute did not protect unmarried couples while also concluding that the substantial burden on the landlord was not supported by a compelling governmental interest). This dicta is indicative of how that court may rule in future cases if the legislature changes the marital discrimination statute to include unmarried cohabitants. *See supra* note 130.

The California Supreme Court has held that tenants do not need to satisfy strict scrutiny because landlords' free exercise rights are not substantially burdened. Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909 (Cal. 1996).

152. *See supra* notes 138-41 and accompanying text.

153. American Life League, Inc. v. Reno, 47 F.3d 642, 654 (4th Cir. 1995). *See also* Fliegel, *supra* note 42, at 65 (stating that "the substantial burden requirement thus represents a fundamental threshold inquiry: absent the requisite burden, no further analysis is necessary").

154. 42 U.S.C. § 2000bb-1(b) (1994) (conditioning the application of the entire subsection on the existence of a "substantial burden"). See *supra* note 98 for the relevant text of RFRA.

155. 42 U.S.C. § 2000bb-1(b) (1994). See *supra* note 98 for the relevant text of RFRA.

156. *See supra* note 130 (listing the cases which have so held).

the basis of marital status is not a substantial burden on the exercise of their religion.[157] However, if the Supreme Court finds that marital status discrimination in housing laws are a substantial burden on the exercise of religion, laws prohibiting such discrimination are still valid because ensuring these prospective tenants' access to housing is a compelling government interest.[158]

A. When RFRA is Not Implicated

1. What Constitutes a Substantial Burden

"Substantial burden" denotes that there is a legally cognizable degree of conflict between law and religion.[159] The actual degree of conflict is important because RFRA is only implicated when "[g]overnment . . . substantially burden[s] a person's exercise of religion . . . ."[160] Since RFRA does not indicate that the Court's analysis of substantial burden was inadequate to protect free exercise interests, it is proper to consider all of the Supreme Court's pre-*Smith* formulations of "substantial burden" in the analysis under RFRA.[161] However, this definition of "substantial burden" provides little guidance if it is not viewed in the context of practical situations.[162] The Supreme Court has to some extent defined "substantial burden" in relation to the religious activity which is claimed to be burdened.[163] For example, the burden

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157. *See infra* notes 192-228 and accompanying text. To date, only one court has held such a prohibition to not constitute a substantial burden. *See* Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 929 (Cal. 1996).

158. *See infra* notes 233-85 and accompanying text. To date, only one court has held this interest to be compelling. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 283 (Alaska 1994).

159. *See* Fliegel, *supra* note 42, at 65. This definition itself provides little guidance when applying it to a new fact situation. The definition is only useful in light of the cases in which the Supreme Court has determined what is and is not a "legally cognizable degree of conflict." *See supra* note 57.

160. 42 U.S.C. § 2000bb-1(a) (1994). In other words, RFRA is not triggered when the burden is less than "substantial."

161. Goodall v. Stafford County Sch. Bd., 60 F.3d 168, 171 (4th Cir. 1995) ("Since RFRA does not purport to create a new substantial burden test, we may look to pre-RFRA cases in order to assess the burden on the plaintiffs for their RFRA claim."). *Smith*, 913 P.2d at 924 (noting that the legislative history of RFRA indicates that courts look to pre-*Employment Division v. Smith* jurisprudence for guidance in determining "substantial burden"). *See also* 42 U.S.C. § 2000bb(b)(1) (1994) (explaining that Congress' motivation in passing RFRA was to reinstate the compelling interest test, and not stating any intent to alter the substantial burden analysis).

162. *Smith*, 913 P.2d at 924.

163. *See* Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707 (1981). In *Thomas*, the burden on the claimant was the denial of unemployment compensation. *Id.* at 709. The Court considered a "substantial burden" to be "[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of

on the religious activity in *Thomas v. Review Board*[164] was the denial of unemployment benefits. Thus, the *Thomas* Court defined substantial burden as one where "the state conditions receipt of an important benefit upon conduct proscribed by a religious faith . . . thereby putting substantial pressure on an adherent to modify his [or her] behavior . . . ."[165] The application of such a definition of substantial burden to other fact patterns is thus made more difficult because there is not one explicit definition of "substantial burden." In spite of the differences between the varying definitions, three of the Court's formulations of "substantial burden" are useful in analyzing the extent of the burden imposed upon landlords by prohibitions of marital status discrimination. In the first instance, the Court did not find a "substantial burden" unless the government coerces religious adherents into violating their beliefs.[166] Secondly, the Court found that a substantial burden exists when the government forces a religious adherent to choose between abandoning the precepts of the religion or foregoing governmental benefits.[167] In the final instance, the Court did not find a substantial burden when the practice of religion was made more expensive.[168] For the sake of clarity, these three formulations of what the Supreme Court has determined to be "substantial" will be explained prior to presenting the arguments against a finding of substantial burden.[169] In light of these formulations, it is argued that free exercise jurisprudence does not deem prohibiting marital status discrimination to be a substantial burden on landlords' free exercise of religion.

The Supreme Court issued its most recent formulation of "substantial burden" in *Lyng v. Northwest Indian Cemetery Protective Ass'n*.[170] In *Lyng*,

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conduct mandated by religious belief . . . ." *Id.* at 717-18. Thus, the phrasing of what constituted a "substantial burden" was to some extent tailored to the actual burden at issue in the case. The Supreme Court's analysis of the "substantial burden" component of the free exercise analysis has developed gradually through time, until the analysis' "full flowering" in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). Markey, *supra* note 10, at 721 n.111.

164. 450 U.S. 707 (1981).

165. *Id.* at 717-18.

166. *See infra* notes 170-75 and accompanying text.

167. *See infra* notes 176-79 and accompanying text.

168. *See infra* notes 180-91 and accompanying text.

169. *See infra* notes 192-228 and accompanying text.

170. 485 U.S. 439 (1988). In *Lyng*, the Forest Service decided to build a road through a national forest, which was adjacent to a Native American Indian reservation, in order to connect two towns. *Id.* at 442. The Native Americans had historically used the part of the national forest where the road was to be built for their spiritual activities. *Id.* In fact, a commissioned study found that the area was an "indispensable part of Indian religious conceptualization and practice." *Id.* Not only was the particular plot of land important to the Native Americans' religion, but the condition of the land as it existed at that time was important as well. *Id.* at 451. The study indicated that "'successful use of the [area] is dependent upon and facilitated by certain qualities of the physical environment, the most important of which are privacy, silence, and an undisturbed natural setting.'" *Id.* at 442. The Forest Service did not rely too heavily upon the study's determinations and

the Court rejected the Native American petitioners' claims that building a road through their religious sites violated their free exercise of religion.[171] The *Lyng* Court held that a burden on religion can be considered "substantial" only if the governmental action coerced religious adherents into violating their beliefs.[172] The Court further stated that the incidental effects of a governmental action which made the religion more difficult to practice was not a burden sufficient to require the government to show a compelling justification.[173] The *Lyng* Court concluded that the Native Americans' claims did not meet this definition of substantial burden,[174] even though the Court recognized that the building of the road would have "devastating effects" on the practice of their religion.[175]

In the second example of what constitutes a "substantial burden" on the free exercise of religion, the Supreme Court found in *Sherbert v. Verner*[176] that a burden exists when the government forces a religious adherent to choose between abandoning the precepts of the religion or foregoing governmental benefits.[177] The choice that the petitioner in *Sherbert* was faced with was observing her religion which forbade work on her Sabbath and losing unemployment benefits because she was discharged without "good cause" or ignoring her beliefs and therefore be eligible for the benefits.[178] The *Sherbert*

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proceeded with the planning of the road. *Id.* at 443. The Forest Service did, however, try to select a route for the road which was as far removed as possible from the sites used by the Native Americans for their spiritual activities and which avoided archeological sites. *Id.* The Native Americans then brought suit seeking to prevent the building of the road, arguing that the road would interfere with the free exercise of their religion. *Id.*

171. *Id.* at 452.

172. *Id.* at 449. An important factor to the *Lyng* Court seemed to be that the building of the road in question was an exercise of the government's legitimate conduct of its own internal affairs. *Id.* at 451-52. The Court included in this category of "internal affairs" social welfare programs, foreign aid and conservation projects. *Id.* at 452. Thus, it is difficult to say whether the federal government's programs geared toward prohibiting discrimination would be considered "internal affairs" under the *Lyng* Court's definition. If they were not, the outcome may be different than that in *Lyng*.

173. *Id.* at 450-51. The *Lyng* Court did not phrase its holding explicitly in terms of a "substantial burden" or a "compelling interest"; rather, the Court stated that the government was not required to bring forth a compelling justification:

> This does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions.

Id.

174. *Id.* at 447, 452.

175. *Id.* at 451.

176. 374 U.S. 398 (1963).

177. *Id.* at 404 (citing Braunfeld v. Brown, 366 U.S. 599, 607 (1961)) (involving the denial of unemployment benefits because of the plaintiff's refusal to work due to religious reasons).

178. *Id.* at 400-01.

Court held that this indirect financial pressure was enough to constitute a substantial burden.[179]

The Supreme Court's decision in *Braunfeld v. Brown*[180] is the third example of the Supreme Court's analysis of "substantial" burden. The issue in *Braunfeld* was whether the state's recently-passed Sunday closing laws interfered with the exercise of the appellants' religion.[181] The appellants were retail business owners whose religion required them to observe their Sabbath on Saturday and, therefore, not operate their business on that day.[182] To be competitive with other merchants, appellants had been in the practice of selling their goods on Sundays, which did not raise any objections until the passage of the state's Sunday closing law.[183] The choice which the appellants then faced was giving up the tenet of Sabbath observance or being placed at an economic disadvantage as compared to merchants who did not hold the same religious beliefs.[184] Ultimately, the *Braunfeld* Court held that the burden on the appellants was *not* substantial because the government law did not make any religious practice illegal, but only made the practice of appellants' religion more expensive.[185]

The Supreme Court's decision in *Braunfeld* was to a great extent due to the Court's distinction between "direct" and "indirect" burdens.[186] The *Braunfeld* Court reasoned that since the burden on the business owners was indirect it was therefore not substantial.[187] This distinction has since been eliminated by the Supreme Court's decision in *Sherbert v. Verner*.[188] However, *Sherbert* did not explicitly overrule *Braunfeld*.[189] Even though making the practice of religion

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179. *Id.* at 401-02.

180. 366 U.S. 599 (1961).

181. *Id.* at 601-02.

182. *Id.* at 601.

183. *Id.*

184. *Id.* at 601-02.

185. *Id.* at 605.

186. Braunfeld v. Brown, 366 U.S. 599, 607 (1961) ("[I]f the State regulates conduct by enacting a general law within its power . . . the statute is valid despite its indirect burden on religious observance. . . . "). A direct burden is making some religious practice illegal, while an indirect burden is one which only impedes the observance of religion. *Id.* at 606-07.

187. *Id.*

188. 374 U.S. 398, 403-04 (1963)

> In a sense the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation . . . [but g]overnmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Id. *See also* Thomas v. Review Bd., 450 U.S. 707, 718 (1981).

189. Grosz v. City of Miami Beach, Florida, 721 F.2d 729, 737 (11th Cir. 1983) ("*Sherbert* specifically avoids overruling *Braunfeld*, [though] combined with *Thomas* it significantly transforms *Braunfeld*'s direct/indirect distinction.").

more expensive is not a priori insubstantial merely because it is indirect, it still may fail to rise to the level of a substantial burden.[190] Furthermore, many lower courts' decisions reiterate that merely making the practice of religion more expensive is not a substantial burden.[191] In general, these expressions of what the Supreme Court has decided does and does not constitute a substantial burden provide a framework to analyze the degree to which laws requiring landlords to rent to unmarried tenants conflict with the landlords' exercise of religion.

2. The Burden Is Not Substantial

To refute the landlords' argument that the burden imposed on them is substantial as evaluated under one of these formulations, the tenants' strongest arguments are first, that the commercial context in which landlords operate their business lessens the religious significance of the landlords' exercise of religion and justifies compliance with anti-discrimination laws. Second, merely making the practice of religion more expensive is not a substantial burden. For these reasons, the burden upon the exercise of landlords' religion is not substantial, and thus the strict scrutiny standard of RFRA is not triggered.

The first reason that requiring landlords to rent to unmarried couples is not a substantial burden on the exercise of their religion is due to the commercial context in which landlords are exercising their religion. In *United States v. Lee*,[192] the Supreme Court held that the religious adherent's beliefs, which forbade the payment and receipt of social security benefits, did not exempt the adherent from the obligation to pay the required tax.[193] The commercial activity which was before the *Lee* Court was a carpentry business which thus entailed the employer's payment of employees' social security taxes.[194] The

190. Goodall v. Stafford County Sch. Bd., 60 F.3d 168, 171 (4th Cir. 1995) ("It is well established that there is no substantial burden placed on an individual's free exercise of religion where a law or policy merely 'operates so as to make the practice of [the individual's] religious beliefs more expensive.'" (citing *Braunfeld*)).

191. *Id.* *Accord* Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio, 699 F.2d 303, 306-07 (6th Cir. 1983); Healy v. Independent Sch. Dist, No. 3-90 CIV 46, 1991 WL 337534, at *4 (D. Minn. Mar. 5, 1991); Congregation Beth Yitzchok of Rockland, Inc. v. Town of Ramapo, 593 F. Supp. 655, 659 (S.D.N.Y. 1984); Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 926-27 (Cal. 1996).

192. 455 U.S. 252 (1982). The petitioner in *Lee* was a member of the Old Order Amish who employed others to work on his farm and in his carpentry shop. *Id.* at 254. He believed that there is a religiously-based duty to provide for other members of his faith. *Id.* at 254-55. In fact, the Amish believe it sinful to not provide for their own elderly and that these beliefs prohibit any sort of contribution to the federal social security system. *Id.* at 255.

193. *Id.* at 257, 260. The reasoning of the Court seems to be in the context of an analysis of "compelling interest," but much of its reasoning also supports the absence of a substantial burden.

194. *Id.* at 254.

Court reasoned that "[t]o maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good."[195] The Court further reasoned that not every religious adherent can avoid all the burdens which are caused by "exercising every aspect of the right to practice religious beliefs."[196] Additionally, the Court noted that when religious persons voluntarily enter a commercial activity, the religious doctrine which they accept as controlling in their lives cannot be "superimposed on the statutory schemes which are binding on others in that activity."[197]

The reasoning of the Court in *Lee* indicates that the burden on landlords is not substantial. The Court seems to indicate that with regard to commercial activity, it is accepted that there are laws which regulate the behavior of participants in that activity. In the case of a business, for example, employers are prohibited from discriminating in their hiring and firing practices,[198] required to pay the minimum wage,[199] required to pay taxes on behalf of employees,[200] and required to prevent or stop workplace harassment.[201] Renting apartments to individuals is a commercial activity. Similarly, the rental of housing is regulated by anti-discrimination laws.[202] Such laws are enacted in accordance with various public policies and are thus considered to be reasonable. As it is reasonable for persons who set up a business to be required to comply with the laws that regulate their activity, it is also reasonable to require that landlords also obey such laws.

The implications of the *Lyng* formulation of substantial burden are best dealt with in the commercial context. In *Lyng*, a burden was substantial if a person is coerced into violating her beliefs.[203] Landlords in marital status discrimination cases have used the *Lyng* test by arguing that the prohibition against discriminating against unmarried couples and any attendant penalties for noncompliance coerce them to violate their beliefs regarding the sinfulness of unmarried couples' behavior and is thus a substantial burden.[204] This argument, however, should not succeed because it is their voluntary entry into the commercial context which has caused the conflict. Thus, it is not solely the government's "coercion" which instigates the conflict because the landlords

195. *Id.* at 259.
196. *Id.* at 261.
197. *Id.*
198. 42 U.S.C. § 2000e-2(a) (1994).
199. 29 U.S.C. § 206 (1994).
200. 26 U.S.C. §§ 3301-3311 (1994); 26 U.S.C. §§ 3101-3128 (1994).
201. 42 U.S.C. § 2000e-2(a) (1994).
202. 42 U.S.C. §§ 3601-19, 3631 (1994). See *supra* note 130 for cites of relevant state statutes.
203. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 449 (1988).
204. Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 922-24 (Cal. 1996).

themselves have decided to enter the business of renting apartments. This type of a situation is different from that of the employment at issue in the *Sherbert* Quartet.[205] In those cases, the employees were engaged in a less proactive and more "everyday" situation. They were employ*ees*, not employ*ers*.[206]

Furthermore, not only are landlords in these cases exercising their religion in a commercial setting, but they entered that commercial setting voluntarily. In *Wisconsin v. Yoder*,[207] there was no way to avoid the conflict between the parents' wishes to school their children and the state's educational requirement.[208] Simply living in Wisconsin was enough for those petitioners' religion to clash with state law. Similarly, the petitioners in the cases comprising the *Sherbert* Quartet,[209] the second formulation of substantial burden, did not choose to enter an activity which clashed with their religious beliefs. Rather, each was an employee whose employer's requests conflicted with their beliefs. Any of those petitioners could have encountered the same problem in many other jobs. In the case of landlords, however, they chose a less common commercial activity—and for all intents and purposes, started a business—which has laws against refusing to rent to unmarried couples. It is not a burden on their religious practices to refrain from engaging in the business of renting apartments, nor would it be as great a financial burden to engage in another commercial activity as it was to the petitioners in the *Sherbert* Quartet cases.[210] The California Supreme Court recently indicated that the ability of the religious adherent to avoid the burden was one of many factors which the Supreme Court had used prior to *Employment Division v. Smith* to determine the existence of a substantial burden.[211] This possibility of avoidance was one of the factors by which the California court determined that a landlord was not substantially burdened by the law prohibiting discrimination against unmarried cohabitants.[212]

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205. See *supra* note 57 for cites to the cases of the *Sherbert* Quartet and their facts.

206. While the landlords may not employ others per se, they still took on the responsibility of initiating an enterprise, rather than looking for another person's enterprise for which to work for a wage.

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

208. *Id.* at 218. The law which Wisconsin enacted compelled all students to attend secondary school under threat of criminal sanction. *Id.*

209. See *supra* note 57 for an explanation of the *Sherbert* Quartet.

210. *See* Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 925 (Cal. 1996).

211. *See id.* "The proposition that a burden on religion is not substantial if one can avoid it without violating one's religious beliefs is not of itself . . . [a] test for identifying substantial burden"; however, it is a factor to consider and it is one which finds support in cases prior to *Employment Division v. Smith*, 494 U.S. 872 (1990). *Smith*, 913 P.2d at 925.

212. *Smith*, 913 P.2d at 926-27.

In *Swanner v. Anchorage Equal Rights Commission*,[213] a case which involved the free exercise right of landlords as against the rights of unmarried cohabitants to housing, the Alaska Supreme Court came to a similar conclusion about the relation of the voluntariness of the action to the burden. The landlord in *Swanner* argued that the burden placed upon him was that he was forced to choose between ignoring his religious beliefs or giving up his livelihood of the property-rental business.[214] The Alaska Supreme Court, however, rejected the landlord's argument by noting that the landlord entered the property-rental business completely voluntarily and in full knowledge that it was an area covered by anti-discrimination laws with which he was obligated to comply.[215] Ultimately, the *Swanner* court held that religious activity engaged within the context of voluntary commercial activity was not deserving of the same protection under free exercise doctrine as purely religious activity.[216] The

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213. 874 P.2d 274 (Alaska 1994).

214. *Id.* at 283.

215. *Id.*; Cooper v. French, 460 N.W.2d 2, 15 (Minn. 1990) (Popovich, C.J., dissenting).

216. *Swanner*, 874 P.2d at 283. Examining the landlord's activity in light of its commercial nature allows judges to distance themselves from the socially-charged battle between tenants' housing rights and landlords' free exercise of religion. Kelly D. Eckel, *Legitimate Limitation of a Landlord's Rights—A New Dawn for Unmarried Cohabitants*, 68 TEMP. L. REV. 811, 818, 840 (1995). Thus, courts are able to create a more objective framework within which to analyze the competing interests. *Id.* at 840.

Despite *Thomas v. Review Board's* proper conclusion that the Supreme Court must refrain from passing judgment on the centrality or appropriateness of religious adherents' beliefs, it is difficult to get away from at least some consideration of the centrality of the burdened religious observance to the believer's faith. *See* Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio, 699 F.2d 303, 306 (6th Cir. 1983) (While "[r]eligious observances in the form of beliefs are absolutely protected from governmental infringement . . . [, p]ractices flowing from the religious beliefs merit protection when they are shown to be integrally related to the underlying beliefs." (citing Cantwell v. Connecticut, 310 U.S. 296, 303 (1940))).

In *Lakewood*, a congregation of Jehovah's Witnesses sought to build a church in an area of a community in which such buildings were not allowed under the zoning ordinances. *Lakewood*, 699 F.2d at 304-05. The petitioners argued that their free exercise of religion was burdened by the zoning ordinances. *Id.* at 305. The court, however, analyzed the religious observance in this case as being the construction of a church building. *Id.* at 306. The court reasoned that there was no evidence that this "observance" was a "fundamental tenet" or a "cardinal principle" of its faith. *Id.* at 307. The court held that the zoning restriction imposed only an indirect financial burden because there were still areas in the community where building churches was possible, even if they were more expensive. *Id.* The *Lakewood* court found that "[n]o pressure [was] placed on the congregation to abandon its beliefs and observances." *Id.*

Whether the burden on free exercise is substantial depends on what the religious belief actually involves. One of the underlying beliefs which is driving the conflict between religious landlords and tenants is that fornication is sinful. *See supra* note 14. Prohibition of marital status discrimination does not cause landlords to personally violate their beliefs by committing the act which the landlords consider sinful. Rather, there is another layer of sinful conduct which landlords argue that marital status discrimination laws force them to commit—the facilitation of sin. *See supra* note 14. Since Christian teachings advocate that Christians be morally responsible in the use of their property, renting an apartment to people who are engaging in sinful conduct is arguably a sin. Telephone

dissent in *Cooper v. French*,[217] a case from the Minnesota Supreme Court, echoed the conclusions of the *Lee* and *Swanner* courts and added that the Free Exercise Clause does not "bestow upon the individual an absolute right to require others in the marketplace to adopt those values as a precondition to doing business with him or her."[218]

The tenants' second argument that laws preventing a landlord from discriminating against unmarried couples are not a substantial burden finds its support in the Supreme Court's decision in *Braunfeld v. Brown*.[219] The *Braunfeld* Court held that making the practice of religion more expensive is not

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Interview with Rev. Doug Mayer, former Director-Chaplain, St. Teresa of Avila Catholic Student Center (Feb. 20, 1996). Nonetheless, this facilitation of sin has two components. The first is the refusal to engage in the rental transaction with unmarried cohabitants because they presumably engage in premarital sex. One commentator makes the argument that the presumption, without actual knowledge, of the occurrence of sexual intercourse between unmarried couples and landlords' not seeking to avoid renting to single or married tenants who engage in sinful sexual activity makes the landlords' exercise of religion inconsistent. *See* Markey, *supra* note 10, at 823-24. However, the religious beliefs of those who do not believe in premarital intercourse and common sense permit landlords this seeming inconsistency. Telephone Interview with Sister Marilyn Ring, Associate Campus Chaplain, Augustana College Campus Ministries (Feb. 8, 1996). It cannot be denied that this action is motivated by religion. Mayer, *supra*. The *Swanner* court did not disagree that the refusal to rent apartments in this type of situation is sufficiently religious to satisfy the court's constitutional test. *Swanner*, 874 P.2d at 282.

The second action is that of renting the apartment itself. No landlord has yet argued that renting apartments is a religious duty. The court in *Swanner* addressed that argument and rejected it, though the court's opinion does not indicate that the landlord actually made that contention. *Id.* at 283. The court in *Jasniowski v. Rushing*, 94 CH 5546 (Cook County Cir. Ct. Dec. 22, 1994), similarly noted that the landlord in that case had made no showing of a religious belief which required him to rent apartments to others. *Id.* at 10. If renting apartments is not religiously motivated, then the argument that the landlords' free exercise of religion is burdened is more attenuated, both under free exercise jurisprudence and under RFRA. While First Amendment jurisprudence protects the exercise of religion even when the conduct is not considered to be a "religious ritual," (Attorney Gen. v. Desilets, 636 N.E.2d 233, 237 (Mass. 1994)), if the conduct is not concerning the exercise of religion, then it is not protected under constitutional free exercise jurisprudence. Thomas v. Review Bd., 450 U.S. 707, 713 (1981) ("Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion.") Furthermore, the legislative history of RFRA indicates that RFRA is only intended to protect action which is motivated by religion. Douglas Laycock, *RFRA, Congress and the Ratchet*, 56 MONT. L. REV. 145, 151 (1995). Nonetheless, the argument that renting apartments is not mandated by religion has failed overall.

217. 460 N.W.2d 2, 11 (1990) (Popovich, C.J., dissenting).

218. *Id.* at 15 (Popovich, C.J., dissenting).

> Appellant is free, in his private life, to not associate with anyone whom he feels has the "appearance of evil," but when someone voluntarily enters the public marketplace he may encounter laws that are inconsistent with his religious beliefs. . . . [S]uch a burden is greatly lessened because it occurred only when [the landlord] voluntarily entered into the rental marketplace. . . .

Id.

219. Braunfeld v. Brown, 366 U.S. 599 (1961).

a substantial burden on the exercise of religion.[220] In the case of marital status discrimination in housing, laws which prohibit landlords from discriminating against potential tenants because they are unmarried couples increase the costs that these landlords face in two ways. One manner in which the practice of their religion is made more expensive is that if landlords ignore the anti-discriminatory law and continue to refuse to rent to unmarried couples, they will incur fines.[221] The other manner which increases expenses for landlords is that they may chose to avoid renting their apartments to unmarried couples and thus not earn income from their rental business[222] or may have to expend money to create a new source of income.[223]

The added expense which was deemed insubstantial in *Braunfeld* is very similar to the second form of landlords' added expense. In *Braunfeld,* the merchants were faced with a choice of a competitive economic disadvantage by not working on Saturdays, or engaging in some other occupation which did not pose such problems.[224] The Court reasoned that the Sunday closing law was not burdensome because it merely regulated a secular activity, and may not even have affected all of the followers of the religion.[225] Similarly, landlords are engaged in the secular activity of renting apartments. Marital status discrimination laws are, the tenants would argue, merely a means to regulate this secular activity.[226] Moreover, if the possibility of the merchants in *Braunfeld* being effectively forced to abandon their chosen occupation due to their religion's mandates is not a substantial burden, then the same difficult choice which faces landlords is similarly not substantial.[227]

This Note does not intend to deny that laws preventing landlords from discriminating against unmarried couples, or punishing them for doing so, is not a burden upon the exercise of the landlords' religion. However, the fact that these laws are burdensome does not result in the conclusion that they are a

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220. *Id.* at 605.

221. In *Donahue*, the landlord was ordered to pay to the tenants damages of $1023 for the couple's lost income while they looked for alternative housing, $75 per month for increased cost in rent until the tenants found housing comparably priced to that which Ms. Donahue had, and $6000 to both prospective tenants for emotional injuries. Donahue v. Fair Employ. & Hous. Comm'n, 2 Cal. Rptr. 2d 32, 34 (Cal. Ct. App. 1991). In *French*, the landlord was ordered to pay the potential tenant $368.50 in compensatory damages and $400 in damages for mental anguish and suffering. Cooper v. French, 460 N.W.2d 2, 3 (Minn. 1990). The landlord was also required to pay a civil penalty of $300 to the state. *Id.*

222. The landlord in *Swanner v. Anchorage Equal Rights Commission* made this argument. 874 P.2d 274, 279 (Alaska 1994).

223. Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 926 (Cal. 1996).

224. *Braunfeld*, 366 U.S. at 606.

225. Braunfeld v. Brown, 366 U.S. 599, 605-06 (1961).

226. *Smith*, 913 P.2d at 923.

227. *See id.*

substantial burden. By failing to constitute a substantial burden, these laws cannot be evaded by employing RFRA as a defense against discrimination claims.[228] In the alternative, however, that the burden imposed upon landlords was determined to be substantial by the Supreme Court, marital status discrimination laws would be subject to the strict scrutiny analysis under RFRA and would survive. If courts were to follow this analysis, tenants would win their claims. However, not all courts are reaching this conclusion. Courts are inappropriately extending the legitimate protections which RFRA provides to landlords who discriminate against unmarried couples.

B. Satisfying the Requirements of RFRA

Avoiding the application of RFRA[229] is only one method of dealing with the fact that the passage of RFRA has likely reinforced landlords' free exercise defenses.[230] There is also a second method to avoid RFRA's imputed effect on unmarried couples' access to housing. This method entails satisfying the requirements of RFRA, which allows the free exercise of religion to be substantially burdened if the burden is justified by a compelling state interest and accomplished by the least restrictive means.[231] Although only the Alaska Supreme Court has determined that protecting unmarried couples' equal access to housing is a compelling interest,[232] there are valid reasons that such an interest is compelling.

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228. *See* Fliegel, *supra* note 42, at 61; 42 U.S.C. § 2000bb-1(a) (1994); *see also supra* text accompanying note 160.

229. 42 U.S.C. §§ 2000bb to bb-4 (1994). See *supra* text accompanying notes 152-54 for an explanation of how to avoid the application of RFRA.

230. Landlords' defenses are reinforced because RFRA has statutorily supplemented the protection of the Free Exercise Clause. *See supra* notes 115, 138-41 and accompanying text.

231. 42 U.S.C. § 2000bb-1(b) (1994).

232. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994). Justice Thomas wrote a dissenting opinion which accompanied the Court's denial of certiorari in *Swanner*. Swanner v. Anchorage Equal Rights Comm'n, 115 S. Ct. 460 (1994). Justice Thomas noted that state courts are having difficulty applying the *Sherbert-Yoder* test to the issue of marital status discrimination. *Id.* at 462. Thomas also doubted that Alaska had a compelling interest in preventing discrimination according to marital status. *Id.* at 461. He placed a great deal of emphasis upon other areas of federal and Alaskan law which sanction discrimination based on marital status. *Id.* It must be noted, however, that opinions accompanying denial of certiorari do not have the same precedential value as opinions on the merits. Teague v. Lane, 489 U.S. 288, 296 (1989). The purpose of such opinions is limited to making the view of the particular Justice(s) known, for better or worse. Singleton v. Commissioner of Internal Revenue, 439 U.S. 940, 944-45 (1978) (opinion of Mr. Justice Stevens respecting the denial of the petition for writ of certiorari) (stating that opinions dissenting from the denial of certiorari are "totally unnecessary," are merely dicta, and can even be counterproductive because they are unanswered).

1. Compelling Governmental Interest

Several arguments justify why preventing landlords from denying unmarried cohabitants equal access to housing is a compelling interest.[233] These arguments include: first, that the eradication of discrimination based on arbitrary factors is very important to society in the area of housing, which is a universal human necessity;[234] second, allowing landlords a free exercise defense would impose their religious beliefs upon third parties; third, allowing religious defenses to trump civil rights legislation such as the Fair Housing Act threatens the protection of all anti-discrimination laws;[235] and finally, society's interest in requiring compliance with anti-discrimination laws is greater in the commercial context.[236]

The most important reason that prohibiting landlords from interfering with unmarried couples' access to housing is a compelling interest is that housing is a basic human need.[237] All people need shelter. Moreover, unmarried cohabitants have a right to the "full choice of available housing accommodations enjoyed by others in the rental market."[238] Understandably, how the government interest is expressed plays an important part in determining whether the interest is compelling.[239] For example, the Massachusetts Supreme Court in *Attorney General v. Desilets* framed the interest as "the elimination of

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233. *See* Eckel, *supra* note 216, at 840-45; Markey, *supra* note 10, at 771, 787-95; *Swanner*, 874 P.2d at 282-84 (holding that denying housing to unmarried couples is an independent social evil which the state has an "interest of the highest order" in preventing); Attorney General v. Desilets, 636 N.E.2d 233 (Mass. 1994) (holding that there would be a compelling state interest if upon remand, it were determined that findings showed that allowing such landlords to discriminate based on marital status would have an actual effect upon unmarried tenants' acquisition of housing).

234. Markey, *supra* note 10, at 787-88, 793.

235. While the landlords' religious defense has not yet actually trumped the FHA because currently the FHA does not prohibit marital status discrimination, the landlords' religious defenses have trumped one state's fair housing laws, and likely a second. *See* Attorney Gen. v. Desilets, 636 N.E.2d 233 (Mass. 1994); Cooper v. French, 460 N.W.2d 2 (Minn. 1990). *See also supra* note 130.

236. *See* Eckel, *supra* note 216, at 845.

237. Markey, *supra* note 10, at 793; *Cooper*, 460 N.W.2d at 16 (Popovich, C.J., dissenting).

238. Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909 (Cal. 1996).

239. *See* Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting).

> This case is no more about "a fundamental right to engage in homosexual sodomy," as the Court purports to declare . . . than *Stanley v. Georgia* . . . was about a fundamental right to watch obscene movies, or *Katz v. United States* . . . was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about . . . "the right to be let alone."

Id. (citations omitted); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 283 (Alaska 1994). *See also* Markey, *supra* note 10, at 788-89 (stating that defining the state's interest broadly would make it easy to show that the interest is compelling; while defining the interest narrowly would make the state "utterly unable to show the importance of such an interest").

discrimination in housing against an unmarried man and an unmarried woman who have a sexual relationship and wish to rent accommodations . . . ."[240] This is not the most accurate way to express the interest involved. Instead, the appropriate expression of the interest is to provide "discrimination-free access to housing."[241] Only this latter expression of the interest takes into consideration the importance of equal access to housing for all people. The Supreme Court has clearly indicated that eradicating invidious discrimination is a compelling interest.[242]

Furthermore, the factors which may justify a distinction between married couples and unmarried couples in other areas of the law are not present in the issue of housing.[243] Some courts have reasoned that states validly distinguish unmarried persons from married persons in other areas of law because society has historically accorded certain benefits only to persons who were married.[244] Examples of such benefits under state law include the marital communication privilege, the ability to collect tort damages for loss of consortium, intestate

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240. *Desilets*, 636 N.E.2d at 238. Another argument against this phrasing of the governmental interest is that some landlords have rejected male and female friends as tenants. Thus, landlords seem to assume the presence of a sexual relationship between any male-female pair of prospective tenants. Does the state have a compelling interest in ensuring the access to housing for a pair of friends who are not engaging in any immoral conduct with each other?

241. Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32, 49 (Cal. Ct. App. 1991) (Grignon, J., dissenting). Similarly, the dissent in *Cooper v. French* stated the interest as "[p]roviding equal access to housing in Minnesota by eliminating pernicious discrimination, including marital status discrimination. . . ." Cooper v. French, 460 N.W.2d 2, 16 (Minn. 1990) (Popovich, C.J., dissenting).

242. Roberts v. United States Jaycees, 468 U.S. 609, 626 (1984) (finding that the state had a compelling interest in eliminating discrimination based on gender); Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (finding that there was a compelling interest in eliminating discrimination in education according to race).

See Wistner, *supra* note 49, at 1097 (noting that the differences between race and gender discrimination and that of marital status discrimination ultimately do not prevent finding a compelling interest in eradicating discrimination in housing).

243. Malgorzata K. Laskowska, Comment, *"No Sinners Under My Roof": Can California Landlords Refuse to Rent to Unmarried Couples by Claiming a Religious Freedom of Exercise Exemption from a Statute Which Prohibits Marital Status Discrimination?*, 36 SANTA CLARA L. REV. 219, 249 (1995); Wistner, *supra* note 49, at 1102 ("These differences show that the state does not have a compelling interest in treating unmarried couples the same as married couples at all times. However, it does not mean that there is not a compelling interest in the area of eradicating discrimination in housing.").

244. *Donahue*, 2 Cal. Rptr. 2d at 44-45 (listing several instances of California law where there is a "disfavored legal status of cohabitation without marriage": suits for loss of consortium, unemployment compensation, conjugal prison visits, wrongful death actions, no marital communication privilege); Smith v. Fair Employment & Hous. Comm'n, 30 Cal. Rptr. 2d 395, 405 (Cal. Ct. App. 1994) (same); Cooper v. French, 460 N.W.2d 2, 6 (Minn. 1990) (indicating that Minnesota's seldom-used fornication statute signifies disfavor of unmarried couples).

succession and coverage on health insurance policies.[245] The court in *Swanner v. Anchorage Equal Rights Commission*,[246] however, properly rejected this approach and distinguished an unmarried partner's interest in housing from that in other areas of law.[247] The *Swanner* court accomplished this by reasoning that in other areas of law, an unmarried partner stood to gain—almost always financially—by claiming to be romantically involved,[248] while in the situation of housing, an unmarried couple only hoped to be treated equally in spite of being romantically involved.[249] Further, the *Swanner* court noted that due to the possibility of fraudulently obtaining benefits, and the difficulty of determining whose bonds were genuine enough to be entitled to these benefits, it was permissible to require a marriage license in these other situations.[250]

Even though the Supreme Court has held that there is no constitutional right to housing,[251] the Court has similarly held that there is no constitutional right to education.[252] However, the fact that our highest Court has determined that certain interests are not constitutionally protected does not prevent Congress and state legislatures from recognizing how vital these interests are to citizens and enacting laws to protect these interests.[253] For example, seventeen state legislatures have enacted laws indicating their public policy in providing equality

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245. *Donahue*, 2 Cal. Rptr.2d at 44-45 (citations omitted); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994) (Moore, C.J., dissenting).

246. 874 P.2d 274 (Alaska 1994).

247. *Id.* at 283.

248. *Id.* And thus to prevent a multitude of people claiming benefits from the government by reason of their "bond" to another, states are justified in requiring the "genuine bond" of marriage. *Id.*

249. *Id.* Additionally, the *Swanner* court stated that the Alaska state government had a compelling interest in preventing discrimination in housing against unmarried cohabitants because such discrimination "degrades individuals, affronts human dignity, and limits one's opportunities. . . ." *Id.* at 283.

250. *Id.*

251. Lindsey v. Normet, 405 U.S. 56 (1972). "The Constitution has not federalized the substantive law of landlord-tenant relations. . . ." *Id.* at 68. "We do not denigrate the importance of decent, safe and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. . . . Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions." *Id.* at 74.

252. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 2 (1973) ("Though education is one of the most important services performed by the State, it is not within the limited category of rights recognized by this Court as guaranteed by the Constitution.").

253. Otto J. Hetzel, *A Perspective on Legal Issues in Housing Discrimination*, *in* ISSUES IN HOUSING DISCRIMINATION: A CONSULTATION/HEARING OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 115, 123 (1985). Examples of this are fair housing laws, namely: 42 U.S.C. §§ 3601-19, 3631 (1994) and Title VII, which forbids discrimination in employment: 42 U.S.C. § 2000e-2(a) (1994). *See supra* note 109 (explaining how Congress can create statutory rights which exceed the protections granted in the Constitution). Such a federal decision will affect states by making them unable to protect civil rights which may differ from federal law. Cordish, *supra* note 118, at 2128.

in housing, and that marital status discrimination is an impediment to this policy.[254] New York's fair housing law reflects the vital interest people have in equal access to housing by declaring that:

> the failure to provide such equal opportunity, whether because of discrimination . . . or inadequate . . . housing . . . not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants.[255]

Housing is so essential to all persons that it is one situation where the government's interest should be defined broadly to ensure that all have equal access to housing.[256]

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254. These statutes are to be distinguished from those discussed earlier. *See supra* note 130 and accompanying text. These statutes do not merely prohibit discrimination based on marital status, but they indicate a purpose for prohibiting such discrimination. The statutes can generally be divided into two types: those that merely state that marital status discrimination is against that state's public policy, and those that are more emphatic concerning the right to housing and what impact marital discrimination has upon that right. California's statute is an example of the former category, and states that "the practice of discrimination because of . . . marital status . . . in housing accommodations is declared to be against public policy." CAL. GOV'T CODE § 12920 (West 1992 & Supp. 1997). Similarly, Michigan's statute declares: "[t]he opportunity to obtain . . . housing . . . without discrimination because of . . . marital status as prohibited by this act, is recognized and declared to be a civil right." MICH. COMP. LAWS ANN. § 37.2101 (West Supp. 1995). New York's statute is an example of the latter category, stating that:

> [t]he legislature hereby finds and declares that the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity, whether because of discrimination . . . or inadequate . . . housing . . . not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants.

N.Y. EXEC. LAW § 290 (McKinney 1993).

The remaining statutes are: ALASKA STAT. §§ 18.80.200 & 18.80.210 (1994); DEL. CODE ANN. tit. 6, § 4601 (1993); HAW. REV. STAT. § 368-1 (Supp. 1992); ME. REV. STAT. ANN. tit. 5, § 4552 (1989); MD. ANN. CODE art. 49B, § 19 (1994); NEV. REV. STAT. ANN. § 598B.020 (Michie 1986); N.H. REV. STAT. ANN. § 354-A: 8 (1995); N.J. STAT. ANN. § 10: 5-3 (West Supp. 1995); N.D. CENT. CODE § 14-02.4-01 (Supp. 1995) ("status with regard to marriage"); OR. REV. STAT. § 659.020(1) (1995) (stating public policy against marital status discrimination generally, not specifically in housing); R.I. GEN. LAWS § 34-37-1 (1995); VA. CODE ANN. § 2.1-715 (Michie 1995); WASH. REV. CODE ANN. § 49.60.010 (West Supp. 1995); WIS. STAT. ANN. § 101.22 (West Supp. 1995).

255. N.Y. EXEC. LAW § 290 (McKinney 1982).

256. Markey, *supra* note 10, at 36-37.

Tenants' second argument that prohibiting landlords from discriminating against unmarried cohabitants is a compelling governmental interest is that in this situation, unlike those in which religious claimants have prevailed, the rights and interests of third parties are unfairly affected by the landlord's religious preferences. In the Supreme Court's unemployment cases, such as *Sherbert v. Verner*,[257] it is the religious claimant who experiences the primary effect of the government's law.[258] In contrast, the belief at issue in marital status discrimination cases does not purely affect the religious adherent; rather, third parties—who are outside the faith—are significantly impacted as well.[259] The plurality in the recent California Supreme Court case, *Smith v. Fair Employment & Housing Commission*,[260] echoed this argument. That court found that "to permit [the landlord] to discriminate would sacrifice the rights of her prospective tenants to have equal access to public accommodations and their legal and dignity interests in freedom from discrimination based on personal characteristics."[261] In the Supreme Court's unemployment cases, there was no similar impact upon third parties.[262] While there was an arguable effect upon the employers in those cases in that they had to pay unemployment benefits to employees who quit, the severity and directness of impact upon the third party is not comparable.[263] Thus, because the landlords' religiously-motivated action imposes the landlords' beliefs on prospective tenants, this situation is different than that of the unemployment compensation in *Sherbert*.

Landlords may also analogize to their situation by arguing that third parties were affected in another Supreme Court case, *Wisconsin v. Yoder*—a case in which the religious adherents prevailed.[264] These third parties were the Amish

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257. 374 U.S. 398 (1963). See *supra* note 57 for citations to the other unemployment compensation cases.

258. Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 925 (Cal. 1996).

259. *Id.*; Markey, *supra* note 10, at 831 n.550.

260. 913 P.2d 909 (Cal. 1996). In *Smith*, the landlady, Ms. Smith owned four rental units. *Id.* at 912. Due to Ms. Smith's religious beliefs, she opposed sex outside of marriage. *Id.* So many unmarried couples had called her over the years seeking to rent apartments that she began to tell prospective tenants that she preferred renting to married couples. *Id.* One day the complainants went together to see the landlady's apartments, the respondent told them she preferred renting to married couples, and complainants falsely represented that they were married. *Id.* at 913. The complainants signed a lease and paid a security deposit, and then upon respondent's later questioning, informed her that they were not married. *Id.* The respondent replied that she would not rent to them, and she returned their security deposit. *Id.* The complainants brought suit, alleging that respondent violated the California fair housing provision. *Id.* The Fair Employment & Housing Commission decided in favor of the complainants and ordered Smith to cease discriminating according to marital status, to post in her building the provisions of California's fair housing act and the outcome of the instant case. *Id.* at 914.

261. *Id.* at 925.

262. *Id.*

263. *Id.*

264. 406 U.S. 205 (1972).

children whose educational fate was decided in that case. *Yoder*, however, can be distinguished from landlords and apartment rental to unmarried cohabitants.[265] In the former, the third parties were members of the faith who arguably shared similar beliefs. In the latter, the third parties are not members of the same faith and do not necessarily share the same beliefs. Additionally, in *Yoder* a parental relationship existed between the petitioners and the "third parties."[266] While the dissent in *Yoder* raised the issue of the possible conflict between parental and children's rights in religious training and upbringing,[267] the majority stated that that issue was not before the Court, and that as such, it did not wish to contradict the Court's precedent in that area of the law.[268] No such comparable relationship exists between landlords and tenants. These two factors are sufficient to allow the effect upon third parties in *Yoder* while prohibiting the effect upon third parties in the situation of unmarried couples.

A third argument that preventing landlords' RFRA-based religious defenses from impeding unmarried couples' access to housing is a compelling interest is that if the landlords' arguments were to succeed, many other anti-discrimination laws may be threatened.[269] This argument was raised in a district court case from Hawaii, *Abordo v. Hawaii*.[270] In that case, the plaintiff argued that "RFRA impermissibly strengthens the right to free exercise of religion at the expense of other rights."[271] The plaintiff enumerated several laws which RFRA threatened: age discrimination laws, laws protecting access to abortion clinics, fair housing laws and a school district's policy prohibiting weapons from being carried on campus.[272] Unfortunately, the *Abordo* court rejected the plaintiff's argument.[273] The court reasoned that merely listing situations in

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265. *See* Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 928 (Cal. 1996).

266. *Yoder*, 406 U.S. at 231 (while stating that the Court did not reach nor decide the issue, in dicta, the Court stated that "[r]ecognition of the claim of the State in such a proceeding would, of course, call into question traditional concepts of parental control over the religious upbringing and education of their minor children recognized in this Court's past decisions").

267. *Yoder*, 406 U.S. at 241-42 (Douglas, J., dissenting).

268. *Id.* at 230-32.

269. Eckel, *supra* note 216, at 844 (noting that specifically, laws proscribing race and sexual orientation discrimination could also be subject to religious objections).

270. 902 F. Supp 1220, 1233 (D. Haw. 1995). In *Abordo*, the plaintiff was an inmate at a correctional facility. *Id.* at 1222-23. He filed a § 1983 action when prison officials cut his long hair despite his objections. *Id.* at 1223. Plaintiff filed suit, claiming, inter alia, his rights under RFRA were violated. *Id.* Plaintiff argued that his religion was the reason his hair was long, specifically, that according to the plaintiff's religion, long hair symbolizes manhood and personal spiritual strength to the Native Americans; his hair was used as a sacrifice to render answered prayers and that long hair is Christ-like. *Id.* at 2225. The District Court held that it was reasonable for the Magistrate below to find that the plaintiff's rights may have been violated and denied the defendants' motion for summary judgment on this issue. *Id.*

271. *Id.* at 1233.

272. *Id.*

273. *Id.*

which RFRA may "abrogate or dilute other rights" does not constitute a successful facial challenge of RFRA.[274] Other commentators, however, have not dismissed the danger which RFRA, and the exemptions which the strict scrutiny test provide, poses to anti-discrimination laws.[275] In our efforts to accommodate the religious beliefs of our citizens, we should not forget that eradicating discrimination is, as a general proposition, a compelling governmental interest.[276] These commentators note that the deference which is granted to religious beliefs and the various sorts of religious beliefs which could be claimed to be burdened would threaten the anti-discrimination gains for which so many have fought.[277] Justice Scalia recognized this danger as well in *Employment Division v. Smith*.[278] In the *Smith* majority opinion, Justice Scalia explained that the judiciary was not capable of judging the merits of a multitude of religious claimants seeking exemption from laws because they conflicted with their religious beliefs.[279] Because of the difficult and sensitive

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274. *Id.*

275. Eckel, *supra* note 216, at 844; Markey, *supra* note 10, at 809; Laskowska, *supra* note 243, at 234.

276. Markey, *supra* note 10, at 793.

277. Eckel, *supra* note 216, at 844; Markey, *supra* note 10, at 809; Laskowska, *supra* note 243, at 234. An examination of a hypothetical scenario may help demonstrate the state's compelling interest in prohibiting marital status discrimination in housing. Suppose a landlord's religion forbids interracial dating or marriage. Such a religious tenet is not out of the range of possibility. For instance, in *Bob Jones Univeristy v. United States*, 461 U.S. 574 (1983), the sponsors of the University genuinely believed that the Bible forbade interracial dating and marriage. *Id.* at 580. If a married interracial couple were to approach that landlord to rent an apartment, the landlord may refuse to rent to that couple, based on his religious beliefs. The landlord's interest in that situation would be to protect his right to exercise his religion as he sees fit. Unfortunately, the landlord is seeking to practice his belief not only in a commercial situation, but also in a way which disadvantages others in their search for housing. The answer to this hypothetical seems clear: society should not allow the landlord to effectuate his beliefs in this manner. There is no acceptable reason that the landlord should discriminate against these potential tenants because of their race. The situation in this hypothetical is analogous to the situation of marital status discrimination.

Opponents of this conclusion may argue that there is a horrible legacy of American racial discrimination which allows the interest in preventing discrimination to trump the exercise of religion in this hypothetical. However, in spite of this, it must be recognized that through time the groups which are disadvantaged, yet should be protected, change. Not allowing for this change forces society to remain stagnant. As the dissent in *Cooper v. French* stated:

> It may be difficult for some individuals to recognize invidious discrimination, but one must not lose sight of the continuing fight of minorities to be protected from a "probable majority" point of view. It was not long ago that blacks and women were widely viewed as second-class citizens. Discrimination [today] usually comes in less obvious forms—such as against single parents, those with AIDS, homosexuals, the elderly, and those living together—but no less invidious forms.

Cooper v. French, 460 N.W.2d 2, 17 (Minn. 1990) (Popovich, C.J., dissenting).

278. 494 U.S. 872, 885 (1990).

279. *Id.*

nature of this problem, it is understandable that courts may defer to persons' religious views. If exemptions from anti-discrimination laws are easily obtained, the laws will no longer be effective.[280]

The context in which religious landlords are conducting their exercise of religion is a fourth reason that preventing marital status discrimination in housing is a compelling interest. When a vendor offers goods or services to the general public, instead of to a limited section of society, the state's interest in ensuring that those goods or services are distributed in a manner which does not violate its laws becomes greater.[281] When goods are offered to the general public, there is an expectation that the vender intends to sell to all members of the public, not just a select few. Entering the public marketplace also subjects the vendor to the regulations that a government places upon such sales.[282] In contrast, if a religious landlord only offers her apartments to those within her religious community, society's expectation of discrimination-free access to housing is not as great as when the same landlord offers her apartments to the general public.[283] It is the choice of religious landlords to expose their beliefs to the heavily-regulated commercial activity of the housing rental market.[284]

Thus, the government's interest in providing unmarried cohabitants with equal access to housing is compelling for several reasons. Housing is something that all people need. Secondly, the landlord voluntarily chose to enter a commercial activity which is regulated by anti-discrimination laws. Furthermore, the economic situation of some tenants may not permit living separately. Nor is there a reason to question the motivation of an unmarried person's interest in housing merely because that person is cohabiting with another person of the opposite sex, while there may be legitimate reasons to scrutinize an unmarried person's interest in seeking other benefits.[285] Finally, there is the "slippery slope" of allowing religious defenses to anti-discrimination laws. Is it truly possible to enunciate a principled theory to justify these

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280. Laskowska, *supra* note 243, at 251.

281. Eckel, *supra* note 216, at 845. *See* Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 928 (Cal. 1996) ("To say that [the prospective tenants] may rent elsewhere is also to deny them the right to be treated equally by commercial enterprises; this dignity interest is impaired by even one landlord's refusal to rent, whether or not the prospective tenants eventually find housing elsewhere.").

282. United States v. Lee, 455 U.S. 252, 261 (1982) (holding that religious persons who voluntarily enter into commercial activity are not able to avoid statutes, because of their own religious beliefs, which regulate others in that activity).

283. Eckel, *supra* note 216, at 845.

284. Laskowska, *supra* note 243, at 250. *See* Cordish, *supra* note 118, at 2136-37 (explaining Professor Bruce Bagni's three concentric circle approach to government regulation of religious organization activities).

285. *See supra* notes 243-50 and accompanying text.

defenses trumping some anti-discrimination laws but not others? If it is not, then we should not try to line-draw arbitrarily. Yet, determining that the government's interest in protecting unmarried cohabitants' access to housing is compelling is only the first part of RFRA's strict scrutiny test.

2. Least Restrictive Means

Once a compelling interest has been shown, RFRA's final requirement is that the governmental action use the "least restrictive means" to serve that interest.[286] Laws are considered to use the least restrictive means when they are directed only to the actions which the legislatures have determined impede the state's goal.[287] In the situation of unmarried couples, the governmental interest is to prevent unmarried cohabitants from being denied housing which is the same quality and cost to which single and married people have access.[288] This goal is impeded by the actions of religious landlords who refuse to rent housing to unmarried couples because they believe they would be facilitating sin. Statutes which prohibit landlords from denying rental opportunities to potential tenants because of their marital status apply specifically to the actions which the legislature intended to address.[289] There are no less restrictive means which would lessen or remove the burden on landlords while still achieving the intended goal.[290] Thus, because these statutes only prohibit the action which threatens the state interest, they are the least restrictive means to achieve the government interest.

Another way to understand how the Court views the "least restrictive means" requirement is by discussing an alternative manner in which the least restrictive means test is phrased in the free exercise arena. According to this phrasing, a governmental action utilizes the "least restrictive means" if accommodating the religious belief would "unduly interfere with [the] fulfillment

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286. *See supra* note 98. Using the "least restrictive means" is also required under the pre-*Smith* free exercise jurisprudence. Thomas v. Review Bd., Ind. Employment Sec. Div. 450 U.S. 707, 718 (1981); Sherbert v. Verner, 374 U.S. 398, 407 (1963).

287. *See* American Life League, Inc. v. Reno, 47 F.3d 642, 656 (4th Cir. 1995) (analyzing whether the Freedom of Access to Clinic Entrances Act was the least restrictive means to effectuate the government's compelling interest).

288. *See* Attorney Gen. v. Desilets, 636 N.E.2d 233, 240 (Mass. 1994) (noting that impeding the availability of rental housing for persons who wish to cohabit would support a compelling interest); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 282-83 (Alaska 1994) (noting that the state has a compelling interest in preventing every instance of discrimination based on irrelevant characteristics).

289. *Swanner*, 874 P.2d at 280 n.9 (stating that "[T]he most effective tool the state has for combatting discrimination is to prohibit discrimination; these laws do exactly that. Consequently, the means are narrowly tailored and there is no less restrictive alternative.").

290. Cooper v. French, 460 N.W.2d 2, 19-20 (Minn. 1990) (Popovich, C.J., dissenting); *Swanner*, 874 P.2d at 280 n.9.

of the governmental interest"[291] or render the government's goal unworkable.[292] Since the governmental interest in the instance of marital status discrimination is to prevent landlords from discriminating against unmarried cohabitants in rental housing, accommodating the landlords' religious beliefs which motivate the landlord to refuse to rent would indeed unduly interfere with the government's goal.[293] In fact, such accommodation would entirely defeat the intent of the statute.[294] Thus, under either interpretation of the least restrictive means prong of the compelling interest test, laws preventing unmarried tenants from being denied housing due to landlords' religious preferences are the least restrictive means of achieving the governmental interest. Coupled with the conclusion that marital status discrimination laws also serve a compelling interest, these laws would be able to survive the strict scrutiny analysis under RFRA.[295]

In summary, unmarried couples' first means of combating RFRA's effect upon landlords' free exercise defenses is to demonstrate that the laws which protect them from discriminatory landlords do not substantially burden the landlords' exercise of religion.[296] However, the deference which Supreme Court jurisprudence has given to religious claims[297] may prove to be a barrier to the success of this first method. If the first method should fail, then the second method would require the unmarried couples to demonstrate that there is a compelling state interest in protecting their right to equal access of housing. This two-pronged approach shows that whether RFRA is not implicated or whether RFRA is satisfied, RFRA is ultimately not a barrier to legislatures' intent to protect unmarried couples' equal access to housing. Despite this fact, Congress must still address the effect of RFRA on landlords' free exercise defenses. This is necessary because lower courts are permitting RFRA to function as a defense to unmarried couples' marital status discrimination claims. Lower courts are finding that marital status discrimination prohibition provisions are substantial burdens upon landlords' free exercise of religion and that the government has no compelling interest in assuring unmarried couples' access to housing.[298] To fully protect unmarried couples' access to equal housing,

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291. United States v. Lee, 455 U.S. 252, 259 (1982).

292. Sherbert v. Verner, 374 U.S. 398, 408-09 (1963).

293. *Cooper*, 460 N.W.2d at 20 (Popovich, C.J., dissenting).

294. *Id.*

295. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 284 (Alaska 1994) (reaching this conclusion under an analysis of Alaska free exercise principles); *Cooper*, 460 N.W.2d at 19-20 (Popovich, C.J., dissenting) (reaching this conclusion under an analysis of Minnesota free exercise jurisprudence).

296. *See supra* notes 159-228 and accompanying text.

297. *See supra* notes 98, 103-04, 161 (explaining that the Supreme Court's jurisprudence prior to *Employment Division v. Smith* is what guides courts in their interpretation of RFRA).

298. *See supra* note 130.

Congress should prohibit marital status discrimination and simultaneously correct the lower courts' misinterpretation of RFRA by making it inapplicable to the protections against discrimination in housing.

V. AMENDING THE FAIR HOUSING ACT SOLVES ONE PROBLEM BUT CREATES ANOTHER

After examining the differing degrees of protection which the states grant to unmarried couples in housing,[299] it is clear that to uniformly protect unmarried cohabitants' access to housing, national legislation is necessary. An existing statute, the federal Fair Housing Act (FHA), already prohibits certain forms of discrimination in housing.[300] The Act's goal is "to provide, within constitutional limitations, for fair housing throughout the United States."[301] Thus, an amendment to this act is the most logical manner in which to protect unmarried couples' rights to equal access to housing.[302] Currently, the FHA

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299. *See supra* notes 130-37 and accompanying text.

300. 42 U.S.C. §§ 3601-3619, 3631 (1994). The Fair Housing Act was a part of the Civil Rights Act of 1968, passed in memory of Martin Luther King, Jr. UNITED STATES COMMISSION ON CIVIL RIGHTS, THE FAIR HOUSING AMENDMENTS ACT OF 1988: THE ENFORCEMENT REPORT 8 (1994) [hereinafter ENFORCEMENT REPORT]. In fact, the assassination of King in early 1968 hastened the passage of the Act. Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149, 160 (1969). It originally prohibited discrimination based on race, color, religion and national origin in most housing transactions. ENFORCEMENT REPORT, *supra*, at 8. The FHA gave the U.S. Department of Housing and Urban Development the authority to investigate and conciliate complaints of housing discrimination, but the Act provided no power to remedy any acts of discrimination against an individual. *Id.* In 1988, many housing experts participated in a conference to discuss the shortcomings of the FHA of 1968. Guido Calabresi, *Preface* to THE FAIR HOUSING ACT AFTER TWENTY YEARS 7 (Robert G. Schwemm ed., 1989). Several reasons for its failure were put forth; all agreed that the Act did not meet expectations. *Id.* For further discussion of the shortcomings of the 1968 FHA, see *id.* In 1988, the Fair Housing Amendments Act was passed, adding prohibitions against discrimination based on familial status or against handicapped persons. Pub. L. No. 100-430, 102 Stat. 1619 (1988) (codified as amended at 42 U.S.C. §§ 3601-3619, 3631 (1994)). The 1988 Amendments also strengthen HUD's enforcement powers, providing an administrative mechanism for enforcement, which could result in damages or civil penalties and a trial in an administrative court. ENFORCEMENT REPORT, *supra*, at 11.

The FHA reaches private housing in addition to public housing and military housing. Peter Brandon Bayer, *Rationality—and the Irrational Underinclusiveness of the Civil Rights Laws*, 45 WASH. & LEE L. REV. 1, 67 (1988). The constitutional justification for this broad reach of power is the Thirteenth Amendment. *Id.*

301. 42 U.S.C. § 3601 (1994).

302. One commentator has even proposed such an amendment to the FHA. *See* Smith, *supra* note 21, at 1092-97 & n.159 (proposing that to fully protect unmarried couples' right to access the basic human need of housing, Congress should amend the FHA to include a prohibition against marital status discrimination and define "marital status" to protect unmarried couples). Unfortunately, amending the FHA is only the first step. An amendment which merely prohibited discrimination on the basis of marital status would not adequately protect tenants from landlords' claims that their free exercise rights are burdened by renting to unmarried couples. *See infra* notes

only prohibits landlords from refusing to sell or rent a dwelling[303] based on the tenants' race, color, religion, sex, familial status, handicap or national origin.[304] The Act does not prohibit marital status discrimination.[305] The FHA also prevents landlords from discriminating in the terms, conditions, or privileges of the sale or rental of a dwelling,[306] and also from printing any

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325-28 and accompanying text.

303. "Dwelling," as defined by the Act includes any "building, structure, or portion thereof which is occupied as, a residence by one or more families . . . ." 42 U.S.C. § 3602(b) (1994). The court in *United States v. Real Estate Development Corp.*, 347 F.Supp. 776 (D. Miss. 1972), held that an apartment building was considered a "dwelling" for the purposes of the FHA. *Id.*

304. 42 U.S.C. § 3604(a), (f)(1)(A) (1994). The Act provides in relevant part:

> [I]t shall be unlawful—
>
> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin
>
> . . . .
>
> (f)(1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of—
>
> (A) that buyer or renter . . . .

305. No existing prohibited bases of discrimination in the FHA could be interpreted to protect unmarried couples and thus obviate the proposed amendment. Not even the definition of "familial status" could be reasonably expanded to include marital status. "Familial status" is defined by the FHA to only include persons domiciled with a parent or legal custodian, the designee of such parent or custodian, persons who are pregnant or who are in the process of securing legal custody of a person under 18 years of age. 42 U.S.C. § 3602(k) (1994). "Familial status" was a category added by the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 6, 102 Stat. 1622 (1988), specifically in response to a survey which revealed discrimination in housing rentals against families with children. James C. Frooman, *Statutory Analysis of the Familial Status Provision of the Fair Housing Amendments Act of 1988—Or, "Why Do I Have to Live With Those Curtain-Climbing Rug Rats?,"* 17 N. KY. L. REV. 215, 217-19 (1989). This 1980 Housing and Urban Development survey found that 25% of rental units did not allow children, 50% of all rental units had policies which restricted the ability of families to live in them, and nearly 20% of families were living in homes which were below their means due to restrictive policies. H.R. REP. NO. 100-711, at 19 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2180. Finally, "familial status" was not intended to include marital status: the Committee on the Judiciary, which was assigned to amend the FHA specifically stated that it "did not intend this definition [of familial status] to include marital status." *Id.*

Currently, the only way to circumvent the fact that the existing provisions of the FHA do not reach marital status discrimination is by disparate impact: if the marital status discrimination creates a disproportional racial, ethnic, religious, or gender-based impact. James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1106 (1989).

306. 42 U.S.C. § 3604(b), (f)(2)(A) (1994). The Act provides in relevant part:

> [I]t shall be unlawful—
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.
>
> . . . .
>
> (f) . . . [or] because of a handicap of—
>
> (A) that person . . . .

advertisement which indicates a preference, limitation or discrimination based on any of the previously-mentioned characteristics.[307] Two considerations come into play when looking to the Fair Housing Act to address the problems facing unmarried cohabitants. The first consideration is the provisions of the FHA which prevent its application to certain instances of discrimination. The second issue to consider is the interaction of such an amendment to the FHA with the Religious Freedom Restoration Act.

An important limitation of the FHA in preventing any sort of housing discrimination is that the FHA does not prohibit every instance of discrimination against the categories of persons which it protects. The Act provides for a limited number of exemptions which allow certain landlords to discriminate against tenants on the basis of the tenants' race, color, religion, sex, familial status, handicap or national origin.[308] These exemptions are important to note when considering the efficacy of any provision of the FHA in preventing a particular type of discrimination, including marital status discrimination.[309]

The first of these exemptions allows religious organizations to limit the rental or occupancy of dwellings which the organization owns or operates, for

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Id.

307. 42 U.S.C. § 3604(c) (1994). The Act provides in relevant part:

> [I]t shall be unlawful—
>
> (c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

Id.

Additionally, the FHA prohibits a landlord "[t]o represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available." *Id.* § 3604(d).

Finally, the FHA prohibits a landlord to "[f]or profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin." *Id.* § 3604(e).

308. *See infra* notes 310-24 and accompanying text. Discrimination based on these characteristics is otherwise forbidden under the Fair Housing Act. *See supra* notes 304, 306-07.

309. It should be noted that the legislative intent behind these exemptions is unclear. United States v. Mitchell, 327 F. Supp. 476, 480-81 (N.D. Ga. 1971). This is due to the fact that the "open housing" portion of the Civil Rights Act of 1968 was passed by the legislature as an amendment by the Senate to the House's anti-riot bill which was more in the political forefront at that time. *Id.* The Congressional Record indicates that there was little discussion on the "open housing" amendments, so it is difficult to know exactly what the Senate intended by including those amendments and their exceptions. *Id.*

other than commercial purposes, to members of the same religion.[310] This exemption is not likely to create a loophole large enough for the purpose of the proposed amendments to be circumvented. No cases of marital status discrimination in housing have yet involved a landlord who was a religious organization.[311]

Another exemption under the FHA is what is known as the "Mrs. Murphy's Boarding House" exemption.[312] This exemption allows landlords of a dwelling which has no more than four units to discriminate in their selection of tenants if the landlord lives in one of the units.[313] This provision was included in the Fair Housing Act of 1968[314] as a compromise to protect owners of boarding houses and to win a majority of votes to ensure the Act's passage.[315] It is difficult to estimate how many religious landlords to which the exemption

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310. 42 U.S.C. § 3607(a) (1994). This statute provides in relevant part:

> Nothing in this subchapter shall prohibit a religious organization, association, or society . . . from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion . . . unless membership in such religion is restricted on account of race, color, or national origin. . . .

Id.

Thus, if membership in the religious organization is not restricted according to race, color, or national origin, the organization is permitted to discriminate according to religion in the dwellings it sells or rents. *Id.*

311. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 276 (Alaska 1994) (landlord was real estate agent); Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32, 33 (Cal. Ct. App. 1991) (landlord was private individual); Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 911-12 (Cal. 1996) (same); Cooper v. French, 460 N.W.2d 2, 3 (Minn. 1990) (same); Attorney Gen. v. Desilets, 636 N.E.2d 233, 234 (Mass. 1994) (same).

312. 42 U.S.C. § 3603(b)(2) (1994). This exemption seems to have been dubbed the "Mrs. Murphy's Boarding House" exemption during debate on the 1968 Fair Housing Act. Dubofsky, *supra* note 300, at 156, 161.

313. 42 U.S.C. § 3603(b)(2) (1994). The Act in relevant part provides:

> (b) Exemptions
> Nothing in section 3604 of this title . . . shall apply to—
> (2) rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his [or her] residence.

Id.

314. *Id.* §§ 3601-3631.

315. Dubofsky, *supra* note 300, at 156. One author has expressed his opinion concerning this "compromise": this exemption allows "'Mrs. Murphy' . . . to express herself by indulging her racist tastes, if any, and societal support for her freedom to discriminate trumps the conflicting personal and societal interests in prohibiting discrimination." Sam Stonefield, *Non-Determinative Discrimination, Mixed Motives, and the Inner Boundary of Discrimination Law*, 35 BUFF. L. REV. 85, 101 (1986).

Approximately half of the state fair housing laws include such a provision. Cordish, *supra* note 118, at 2141 n.144. *See, e.g.*, ALASKA STAT. § 18.80.240 (1994); CONN. GEN. STAT. § 46a-64c(b)(1) (West 1995); OR. REV. STAT. § 659.033 (1991). *Id.* at 2141 n.6.

applies.[316] Estimates of how many landlords who would fit into this

316. The Bureau of the Census has collected statistics on the number of units which are owner-occupied and renter-occupied, and also the number of units which consist of more than four units. This data was not assembled with the "Mrs. Murphy's Boarding House" exception in mind, so the two categories of data are not merged to provide accurate information of how many total units of housing are between one and four in which the landlord also resides. Still, the Census data provides some useful information:

County, State	Lake, Ind.*	Marion, Ind.*	Porter, Ind.*	Cook, Ill.**	DuPage, Ill.**
Ratio Own-Occ'd to Renter-Occ'd	2.1:1	1.3:1	3.0:1	1.2:1	2.9:1
County, State	Will, Ill.**	Champaign, Ill.**	St. Clair, Ill.**	Johnson, Ia.***	Polk, Ia.***
Ratio Own-Occ'd to Renter-Occ'd	3.4:1	1.2:1	1.8:1	1.1:1	1.9:1

County, State	Lake, Ind.†	Marion, Ind.†	Porter, Ind.†	Cook, Ill. ††	DuPage, Ill. ††
% of Tot. Dwell. that are 5+ Units	13.5%	26.0%	8.8%	32.8%	25.1%
County, State	Will, Ill. ††	Champaign, Ill. ††	St. Clair, Ill. ††	Johnson, Ia.†††	Polk, Ia. †††
% of Tot. Dwell. that are 5+ Units	10.3%	26.0%	10.5%	28.5%	21.6%

*BUREAU OF THE CENSUS, U.S. DEP'T OF COMMMERCE, 1990 CENSUS OF POPULATION & HOUSING, SUMMARY SOCIAL, ECONOMIC AND HOUSING CHARACTERISTICS, INDIANA, at tbl. 15 (1992).

** *Id.*, ILLINOIS, at tbl. 15.

*** *Id.*, IOWA, at tbl. 15.

† BUREAU OF THE CENSUS, U.S. DEP'T OF COMMMERCE, 1990 CENSUS OF POPULATION AND HOUSING, SUMMARY POPULATION AND HOUSING CHARACTERISTICS, INDIANA, at tbl. 7 (1991).

†† *Id.*, ILLINOIS, at tbl. 7.

††† *Id.*, IOWA, at tbl. 7.

Summarizing these counties' data, between approximately 9% and 33% of dwellings are in buildings of 5 or more units, and between approximately 25% and 50% of dwellings are renter-occupied, depending on the locale. For the best application of this data to the problem of the "Mrs. Murphy's Boarding House" exemption, other data must be theoretically included. Such data may include estimates of how many unmarried partner households there are in each county, if such data exists, and how many landlords in a county believe that renting to unmarried couples is against their

exemption are very difficult to find because neither housing agencies nor the Department of Housing and Urban Development (HUD) keep such statistics.[317] When complaints of discrimination which fall into one of these exemptions are received, they are not pursued for lack of jurisdiction.[318] These agencies' lack of resources prevents them from keeping data of how many complaints could not be pursued due to particular exemptions.[319] From what the cases indicate about what types of units were involved in the marital status discrimination cases, it seems that none of those landlords could have been permitted to discriminate against any person due to this exemption.[320] While the numbers of unmarried couples who may be discriminated against amount to less than a majority of the population, the number of individuals who are affected is not directly proportional to the seriousness of the deprivation. Depriving even a small number of people of the access to the same quality and cost of housing to which others have access is still detrimental to those people who are denied housing.[321]

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religion, which is even more difficult to tabulate.

317. Telephone Interview with Pat Sullivan, Director of Fair Housing Enforcement of HUD's Midwestern Region (Feb. 23, 1996).

318. *Id.* In other words, if the landlord lives in the building and the building has no more than four units, then the situation falls within this exemption and no cause of action lies under the FHA.

319. *Id.* Sullivan's personal estimate of the number of general housing discrimination complaints (i.e. including discrimination by race, handicap, familial status, etc.) which are not pursued for lack of jurisdiction was approximately 25 of 3000 complaints received in one year. *Id.*

320. This exemption would not have exempted the landlords in *Donahue v. Fair Employment & Housing Commission*, 2 Cal. Rptr. 2d 32, 33 (Cal. Ct. App. 1991) (landlord owned a five-unit building); Jasniowski v. Rushing, 94 CH 5546, 1 (Cook County Cir. Ct. Dec. 22, 1994) (landlord leased a building partly for business and partly as a rental apartment, i.e. one unit); Attorney Gen. v. Desilets, 636 N.E.2d 233, 234-35 (Mass. 1994) (landlord owned a four-unit building; facts do not indicate that landlord lived there); Cooper v. French, 460 N.W.2d 2, 3 (Minn. 1990) (landlord rented a single family home, i.e. one unit); Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 912 (Cal. 1996) (landlord owned and rented two duplexes, i.e. two units; she did not live there). The decision in *Swanner v. Anchorage Equal Rights Commission*, 874 P.2d 274 (Alaska 1994), does not indicate the type of properties which the landlord refused to rent.

321. The Alaska Supreme Court in *Swanner* held that not only did Alaska have a 'derivative interest' in providing access to housing for everyone, but it also had a 'transactional interest' in prohibiting each and every individual act of discrimination based on irrelevant characteristics. *Swanner*, 874 P.2d at 282.

The Mrs. Murphy's Boarding House exemption is also relevant to the burden which is imposed upon landlords by being required to rent to unmarried cohabitants. The free exercise of religion of landlords who object to the behavior of unmarried cohabitants and who live in close proximity to their tenants would arguably be more significantly burdened than similarly religious landlords who do not live in the same building as their tenants. Their burden would be more significant because of the constant reminder of the presence of the unmarried couples and the conduct in which the landlords presume the tenants are engaging. This is not a trivial argument constitutionally speaking, for it potentially involves interests of freedom of intimate association, as well as the free exercise of religion. However, whether or not the rationale behind this exemption was to specifically take into account these interests, the existence of this exemption can arguably be interpreted to accommodate these interests. While neither the situations which fall within the Mrs. Murphy's Boarding House exemption—nor the situations which do not—impose a substantial burden upon the

A third exemption applies to single family homes. If the owner-occupant of a single family home sells or rents that home without the use of a broker, and does not own more than three single-family houses at once, then the owner may discriminate against the person to whom the owner sells or rents the house.[322] Of the cases of marital status discrimination in housing which have thus been heard, only one landlord would have seemed to be exempt from the provisions of the FHA under this category.[323] Since there are few statistics which could inform a discussion on this exemption, it is not appropriate to judge whether or not this exemption would hinder unmarried couples' access to housing.[324]

Though these exemptions may affect the actual number of landlords to whom the FHA would apply, there is a problem with merely amending the FHA to prohibit marital status discrimination. Just as amendments to state fair housing laws have not been able to fully protect unmarried couples' access to housing because landlords have been successful in arguing that such laws impose a burden upon their free exercise of religion,[325] a similar amendment to the FHA would likely suffer similar consequences. If the FHA is just amended to prohibit marital status discrimination, unmarried couples at the federal level would be placed in the same situation they previously faced at the state level: able to bring a claim under the fair housing laws, but ultimately defeated by

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landlord, the exemption is a form of compromise. Since the FHA already incorporates an exemption for the situation which would be the most burdensome upon the landlord, the remaining situations to which the proposed amendment will apply are even less of a burden upon the landlord.

See Cordish, *supra* note 118, at 2133 (stating that the Mrs. Murphy exception "statutorily raise[s] the rights of privacy and free association of an on-site owner above the government's interest in prohibiting discrimination").

One author has proposed solving the clash between anti-discriminatory aims and free exercise rights by adopting a "Mrs. Murphy" approach. *Id.* at 2138. The benefit of this solution is that it is not based on a hierarchy of rights but upon the context in which the discrimination occurs. *Id.* at 2139.

322. 42 U.S.C. § 3603(b)(1) (1994). The Act provides in relevant part:

> (b) Exemptions
>
> Nothing in section 3604 of this title . . . shall apply to—
>
> (1) any single-family house sold or rented by an owner: *Provided*, That such private individual owner does not own more than three such single-family houses at any one time . . . only if such house is sold or rented (A) without the use in any manner of the sales or rental facilities . . . of any real estate broker . . . and (B) without the publication . . . of any advertisement or written notice in violation of section 3604(c) of this title . . . .

323. Cooper v. French, 460 N.W.2d 2, 3 (Minn. 1990) (landlord denied rental of a single family home to the unmarried couple). The decision in *Swanner* does not indicate the type of properties which the landlord refused to rent. *Swanner*, 874 P.2d at 274.

324. There is some old data finding that in 1968, only 11.2% of all housing units fit the requirements of this exemption. Dubofsky, *supra* note 300, at 157. If this percentage has not increased significantly, then tenants will be favored in that not many landlords' situations will fall under this exemption.

325. *See supra* note 130 and accompanying text.

landlords' free exercise defenses.[326] Because RFRA utilizes the same test under which most states currently analyze their free exercise clauses,[327] landlords would prevail under RFRA just as they have prevailed in state courts in most of the jurisdictions which have heard such cases.[328]

Since RFRA will likely create a defense for landlords who claim that complying with the amended FHA burdens their free exercise of religion, an additional amendment is necessary. Preventing RFRA from circumventing protection for unmarried couples in housing is the final step in assuring unmarried couples' equal access to housing. This second amendment will prevent religious defenses from being used as exceptions to discrimination prohibited by the Fair Housing Act. Fully protecting unmarried cohabitants' equal access to housing requires the implementation of both of these amendments.

VI. PROPOSED AMENDMENTS PROHIBITING MARITAL STATUS DISCRIMINATION AND ELIMINATING RFRA AS A DEFENSE TO MARITAL STATUS DISCRIMINATION

This Note proposes to amend the Fair Housing Act[329] to prohibit discrimination based on marital status. This Note further proposes to amend RFRA[330] to exempt the application of RFRA to marital status discrimination in housing.[331] Together, both amendments prevent the renewed success of landlords' religious defenses to marital status discrimination claims which courts are effectuating under RFRA.[332] These amendments are vital to accomplish

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326. See *supra* note 130 for a listing of the cases in which this occurred. At the state level, the basis for landlords' defenses was the states' free exercise clauses; at the federal level, the basis for landlords' defenses would be RFRA.

327. In states which utilize an analysis which is less stringent than the strict scrutiny/compelling interest test which RFRA requires, RFRA will provide a stronger defense than the state's free exercise clause. In those cases, landlords would be likely to avail themselves of RFRA and the amendment which this note proposes would apply.

328. *See supra* note 130.

329. 42 U.S.C. §§ 3601-3619, 3631 (1994).

330. *Id.* § 2000bb to bb-4.

331. Ideally, the amendment to RFRA would prohibit the use of RFRA as a defense to any type of discrimination proscribed by the FHA as a whole. The scope of this note, however, only permits discussion of the RFRA amendment in the context of marital status discrimination.

332. When marital status is a prohibited basis of discrimination in the FHA, any unmarried couple—regardless of whether or not there is an analogous provision in their state's fair housing laws—who encounters discrimination can bring a federal cause of action against a violating landlord. Clearly, an unmarried couple who lives in a state which does not already have its own provision prohibiting marital status discrimination will be the most benefitted by the FHA's prohibition of such discrimination.

Admittedly, the amendment proposed by this note will be of no assistance to a tenant whose state has such a provision and who bases her action *only* upon her state's marital status

the protection of all tenants' rights to housing which are currently only available to citizens who are not unmarried couples or those unmarried couples who are lucky enough to find landlords who do not object to the tenants' marital status.

A. Proposed Amendment to FHA Prohibiting Marital Status Discrimination

The amendment to the FHA would not be very complex. The words "marital status" would be added to the list of prohibited forms of discrimination in several sections of the FHA.[333] The amendment must also explicitly define "marital status" to apply to unmarried couples.[334] As some state courts' legislative interpretation has shown,[335] it does not follow that "marital status" automatically applies to unmarried cohabitants.[336] Without specific inclusion in the definition of "marital status," unmarried couples are likely to not be afforded the full protection intended by this amendment.[337]

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discrimination provision. A gap in the goal of ensuring equal access to tenants thus seems evident because the outcome of her claim will be determined by how that state's courts define marital status and whether those courts consider providing equal access to housing for unmarried couples to be a compelling interest. See *supra* note 130 for a discussion of how some state courts have already handled these issues. However, with the existence of both amendments which this note proposes, it seems probable that tenants will forego basing their claim on their state's statute and proceed under the FHA instead. The power of this amendment will short-circuit a landlord's potential defense of a free exercise exemption and will motivate tenants who are discriminated against to proceed under the FHA, closing the apparent gap.

Furthermore, if a tenant brings a claim under the FHA, a landlord cannot raise a free exercise defense to such a claim under the state constitution's Free Exercise Clause. *See* Northwest Central Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493, 509 (1989). A federal right, created by a statute or the federal Constitution, cannot be trumped by a state constitutional provision. *Id.*

333. To effect this change, Congress would need to amend 42 U.S.C. §§ 3604(a)-(e), 3605(a), 3605(c), 3606, 3613(a)-(c) (1994). Smith, *supra* note 21, at 1095 n.158. *See supra* notes 304, 306-07.

334. *See* Smith, *supra* note 21, at 1097 n.159 (proposing that marital status be defined as "the state of being single, married, separated, divorced, or widowed, and includes the marriage or lack of a marriage between a man and woman cohabiting or intending to cohabit").

335. *See supra* note 130.

336. See *supra* note 130 for a discussion about the definition of "marital status" and its implications. While in some cases, the landlords argued that the state's marital status discrimination prohibition did not apply to unmarried cohabitants because what the landlord was objecting to was the couple's "conduct" and not their "status," this is a specious distinction. The majority in *Attorney General v. Desilets* provides an apt explanation as to why this distinction is inappropriate. *Desilets*, 636 N.E.2d 233, 235 (Mass. 1994). The *Desilets* court explained that if married couple "A"—who presumably engages in sexual relations—sought to rent an apartment from a religious landlord, the landlord would have no objection. *Id.* If unmarried couple "B"—who also presumably engages in sexual relations—sought to rent the same apartment, the landlord would object. *Id.* The only difference between these two couples situations is their marital status. *Id.*

337. Smith, *supra* note 21, at 1093-96. There is also some discussion that "marital status" may be interpreted to apply to same-sex couples. *See* Neuman, *supra* note 10, at 996-99. For the same reasons that landlords should be prohibited from discriminating against unmarried couples, it may be argued that "marital status" should apply to same-sex couples. However, such implications are

B. Proposed Amendment to RFRA Making the Act Inapplicable as a Defense to the FHA

1. Proposed Amendment

Section 2000bb-1 of RFRA should be amended to include:

> *This chapter shall not be construed to serve as a defense to the prohibition of marital status discrimination, as defined in the Fair Housing Act.*[338]

2. Analysis of Proposed Amendment

Since RFRA is a statutory creation and it exceeds the protection which is provided under the Free Exercise Clause, Congress can choose to limit RFRA's application to other situations which are regulated by prior statutes, such as the FHA.[339] Thus, if RFRA is held to be constitutional, an amendment to the Act would merely be an exercise of Congress' legislative function.[340] Further, the proposed amendment does not contravene Congress' intent in RFRA[341] because RFRA was intended to protect the free exercise of religion from substantial burdens by the government which are not justified by a compelling interest.[342] As this Note has shown, the burden on religious landlords is not substantial and it is justified by a compelling interest.[343]

While the need for the amendment to RFRA may be questioned because this Note's argument is that RFRA is either not triggered or is satisfied, the amendment is indispensable for two reasons. First, exempting RFRA from providing a defense to marital status discrimination will be a clear indication of Congress' intent. Such an amendment will indicate that Congress did not intend

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beyond the scope of this note.

338. *See supra* notes 300-07.

339. *See* CHOPER, *supra* note 52, at 58.

340. *Id.* The restriction on Congress with regard to quasi-constitutional legislation is that Congress cannot eliminate any protection of constitutional provisions which the Supreme Court has interpreted to exist. *See also* Eisgruber & Sager, *supra* note 91, at 462. Aside from that limitation, Congress can adjust "remedial legislation" which is more protective of rights than the Constitution. *Id.* If RFRA is interpreted as "remedial legislation," and not as an attempt by Congress to command the Supreme Court to yield to Congress' interpretation of the Constitution's "liberty-bearing provisions," RFRA may be constitutional. *Id.*

341. *See supra* notes 88-106 and accompanying text.

342. 42 U.S.C. § 2000bb-1(a), (b) (1994).

343. *See supra* notes 159-298 and accompanying text.

for rights under RFRA to trump rights under the FHA.[344] By passing the amendment to the FHA prohibiting marital status discrimination, Congress will clearly demonstrate its intent to protect unmarried couples and not to allow another statute to circumvent that intent. This amendment is needed to conclusively indicate to courts that RFRA was not meant to infringe upon the housing rights of unmarried couples. Once Congress' intent is clear, it will be the courts' duty to effectuate that intent.[345] Additionally, it is important that the legislature enact this amendment because it is Congress which has the authority and responsibility to effectuate social policy.[346]

The second reason this amendment is necessary is to provide uniform guidance to lower courts. State courts' contradictory application of RFRA to landlords' free exercise defenses clarifies why this amendment is important.[347]

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344. One example of the need for such an indication is that RFRA was designed to apply to all state or federal law, even if it was adopted before RFRA was passed. 42 U.S.C. § 2000bb-3(a)(1994) ("In general—This chapter applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993."). Thus, any exceptions to the broad protection of RFRA need to be made explicitly. 42 U.S.C. § 2000bb-3(b)(1994) ("Rule of construction—Federal statutory law adopted after November 16, 1993 is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.").

345. Sullivan v. Everhart, 494 U.S. 83, 106 (1990) (Stevens, J., dissenting) ("Our duty is to ask what Congress intended, and not to assay whether Congress might have stated that intent more naturally, more artfully, or more pithily."); Holder v. Hall, 114 S.Ct. 2581, 2624-25 (1994) (Ginsburg, J., dissenting).

> The statute's broad remedial purposes, as well as the constraints on the courts' remedial powers, need to be carefully considered . . . to arrive at an appropriate resolution of the competing congressional concerns. However difficult this task may prove to be, it is one that courts must undertake because it is their mission to effectuate Congress' multiple purposes as best they can.

Id.

346. *Holder*, 114 S. Ct. at 2624-25.

347. *See supra* note 130.

The amendment will provide landlords with clear guidance about their responsibilities as rental property owners and provide uniformity as courts expound upon free exercise jurisprudence in the area of marital status discrimination in housing. Finally and most importantly, this proposed amendment will provide unmarried cohabiting tenants with the same right to the access to housing which other citizens already have.

VII. CONCLUSION

Housing is a basic human need. Yet, unmarried couples are being denied equal access to housing because certain landlords believe that their religion forbids them from facilitating the sin which unmarried couples commit by fornication. Like the tenants from the *Donahue v. Fair Employment & Housing Commission* case profiled in the Introduction of this Note,[348] unmarried couples are beginning to bring claims of discrimination against such landlords. Landlords, in response, are raising free exercise of religion defenses grounded in RFRA to tenants' claims. In nearly all of the cases already decided, the landlords have prevailed and have been allowed to discriminate against unmarried couples.

Some states have provisions which prohibit landlords from discriminating on the basis of marital status. However, these provisions are not consistent in their application to unmarried couples. Additionally, the landlords' defenses of free exercise of religion almost always circumvent the marital status discrimination provisions. Thus, a federal provision which prohibits discrimination in housing against unmarried couples is necessary. Such a provision would indicate to the courts Congress' intent to protect unmarried couples in the area of housing. Enacting such a law, however, is only the first step to solving unmarried couples' housing problem. Due to Congress' earlier passage of RFRA—legislation which is intended to statutorily protect the free exercise of religion from substantial governmental burdens—landlords have a defense with which they can challenge tenants' claims. If RFRA is used as a defense to tenants' claims, their claims are likely to fail. Thus, a second amendment is needed if Congress' intention of providing equal access to housing for unmarried couples is to effectuated. This amendment would prevent landlords from raising RFRA as a defense to discrimination actions brought under the FHA. While this Note does not deny that renting to unmarried couples is a burden on landlords, the burden is not a substantial one and, therefore, the excesses of government which RFRA was intended to prevent are not implicated. Similarly, the government has a compelling interest in preventing this form of discrimination. Therefore, with the interaction of both

348. *See supra* notes 1-9 and accompanying text.

amendments which this Note proposes, Congress can ensure that unmarried couples have access to housing of like quality and expense that other citizens already enjoy.

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