North Dakota Law Review

Volume 77 | Number 1 Article 2

2001

Fundamental Rights in Conflict: The Price of a Maturing Democracy

Harlan Loeb

David Rosenberg

Follow this and additional works at: https://commons.und.edu/ndlr

 Part of the Law Commons

Recommended Citation

Loeb, Harlan and Rosenberg, David (2001) "Fundamental Rights in Conflict: The Price of a Maturing Democracy," *North Dakota Law Review*: Vol. 77 : No. 1 , Article 2.
Available at: https://commons.und.edu/ndlr/vol77/iss1/2

This Article is brought to you for free and open access by the School of Law at UND Scholarly Commons. It has been accepted for inclusion in North Dakota Law Review by an authorized editor of UND Scholarly Commons. For more information, please contact und.commons@library.und.edu.

FUNDAMENTAL RIGHTS IN CONFLICT: THE PRICE OF A MATURING DEMOCRACY

HARLAN LOEB* AND DAVID ROSENBERG**

Describing the United States Constitution as a "living" and "breathing" document evokes a variety of reactions, from the interpretavist view that circumstances change while the corpus of the Constitution does not, to the evolutionist perspective which posits that the Constitution was designed to be dynamic. Both views, however, recognize that the success of this experiment in democracy has been correlated to the protection of certain fundamental rights explicitly protected under the Constitution. But the Constitution's civil rights protections are not the end of the story. Congress, along with state and local legislatures, is constantly passing new laws that fill in the gaps not addressed in the Constitution itself. Inevitably, some of the civil rights created by such laws come into conflict with constitutional rights, and courts are called upon to determine which right should receive greater deference.

Several Supreme Court decisions in the last year alone have addressed individual rights that derive from a broad variety of sources—constitutional, legislative, and judicial. These rights, of course, are ultimately dependent upon the Supreme Court's recognition of the legitimacy of their origin whether as a constitutional right, legislation, or judicial extrapolation. In three cases, the Court voided a legislative enactment on civil rights—but the effects on personal freedom were extremely varied in each case.

Early in the 2000 Term, the Supreme Court struck down an important provision of the Violence Against Women Act because Congress did not have the power to pass the Act under the Commerce Clause; the case was *United States v. Morrison*.[1] This decision plainly weakened the federal government's role in strengthening women's rights to be free

---

* Harlan Loeb is a senior civil rights litigation strategist with Hill and Knowlton and an Adjunct Professor of Law at Northwestern University Law School. He graduated *cum laude* from the University of Minnesota Law School in 1991 and is a council member of the ABA's Section on Individual Rights.

** David Rosenberg is an Associate Professor of Law in Baruch College's Law Department. He graduated from Cornell Law School in 1991 and was the book review editor for the Cornell Law Review.

The authors worked together as legal counsel for the Anti-Defamation League and participated in many of the cases discussed in this article. The authors would like to extend their gratitude to Sherri Drucker, a law student at Northwestern Law School, for the immeasurable contribution she made to this article.

1. 529 U.S. 598 (2000).

from domestic violence.[2] More broadly, it further weakened Congress' already-limited ability to legislate protection of civil rights under the Commerce Clause.[3]

In a case that serves as a kind of inverse to the *Morrison* decision, the Supreme Court upheld a civil rights protection by striking down a congressional attempt to limit that right. In *Dickerson v. United States*,[4] the Court held that Congress could not pass legislation trumping the Court's ruling in *Miranda v. Arizona*.[5] Citing *City of Boerne v. Flores*,[6] the case that found the Religious Freedom Restoration Act (RFRA) unconstitutional, the Court said, "Congress may not legislatively supersede our decisions interpreting and applying the Constitution."[7] Thus, *Dickerson* represents an instance in which a constitutional right first elucidated by the judiciary—the right to remain silent—defeated an attempt by the legislature to override it. Here, a limit on congressional power translated into a victory for civil rights protections.

Finally, in *Boy Scouts of America v. Dale*,[8] the Court held that a constitutional civil right—freedom of association—defeated an attempt by a state to create a competing right—freedom from discrimination based on sexual orientation. In *Dale*, the Court said that New Jersey could not enforce its anti-discrimination law against the Boy Scouts because the group had a First Amendment right to exclude certain groups—in this case, gays—from its membership rolls.

In all three of these recent cases, the legislative attempt to expand or modify a civil right was defeated in the face of a competing constitutional claim: either a First Amendment right or a limit on congressional power. It remains to be seen how federal courts, Congress, and state legislatures will respond to these pivotal rulings. But for nearly a decade, we have had the opportunity to observe how courts and legislatures have responded to the judicial evisceration of the constitutional right to the free exercise of religion[9] and the inevitable conflict between religious rights and anti-discrimination laws.

---

2. The decision could likely also prevent any expansion of the federal government's role in legislating against so-called hate crimes. The Hate Crimes Prevention Act, currently before Congress, also draws on Congress' power under the Commerce Clause. H.R. 74, 107th Cong. (2001). If it fails, hate crimes, like domestic violence, will remain predominantly matters for the state courts.

3. United States v. Lopez, 514 U.S. 549 (1995).

4. 120 S. Ct. 2326 (2000).

5. 384 U.S. 436 (1963).

6. 521 U.S. 507 (1993).

7. *Dickerson*, 120 S. Ct. at 2332.

8. 120 S. Ct. 2446 (2000).

9. Employment Division, Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990); *see also Boerne*, 521 U.S. 507 (finding the RFRA unconstitutional).

I. THE FREE EXERCISE OF RELIGION V. ANTI-DISCRIMINATION LAWS

The rights of religious liberty and equal protection found their way into the United States Constitution by way of the First Amendment's Free Exercise Clause[10] and the Fourteenth Amendment's Equal Protection Clause,[11] into laws like the Civil Rights Acts of 1866 and 1968 and the Religious Freedom Restoration Act of 1993,[12] and into contemporary legislative efforts such as the recently defeated Religious Liberty Protection Act (RLPA).[13] As civil liberties jurisprudence has evolved, these two values have, until recently, coexisted peacefully, even complemented each other. The Free Exercise Clause allows religious adherents the liberty to practice their religion without governmental interference, and the Fourteenth Amendment keeps states from infringing on individual liberty by granting equal protection under the law.

While individual rights have always been one of the primary beneficiaries of our democracy, a paradoxical by-product has emerged over the last decade, which positions fundamental civil rights in conflict. Increasingly, the civil liberties protections residing in free exercise mandates and anti-discrimination laws derived from equal protection and due process guarantees are colliding. A growing number of state and federal courts are now faced with deciding claims seeking relief for discriminatory practices that are predicated on religious grounds.

---

10. "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. In *Cantwell v. Connecticut*, 310 U.S. 269, 303 (1940), the Supreme Court held that the religion clauses of the First Amendment adhered to the states through the Fourteenth Amendment.

11. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

12. The Religious Freedom Restoration Act will be discussed at length later in this article. *See infra* Part IV.

13. H.R. 1691, 106th Cong., 1st Sess. (1999). Since the fall of the Religious Freedom Restoration Act, discussed *infra*, the Committee on the Judiciary of the United States House of Representatives has heard testimony regarding this bill to restore "strict scrutiny" as the proper level of review for cases involving the free exercise of religion. While many religious organizations who supported the passage of the RFRA also support the RLPA, the American Civil Liberties Union (ACLU) has notably not supported the bill because its sponsors refuse to include provisions that would guarantee that the RLPA's increased protection for religious freedom could not be used to prevent enforcement of certain anti-discrimination statutes, such as laws banning discrimination against homosexuals in employment and housing. Speaking before a House subcommittee, ACLU Legislative Counsel Christopher E. Anders said, "[O]ur concern is that some courts may turn RLPA's shield for religious exercise into a sword against civil rights." *Religious Liberty Protection Act of 1999: Hearings on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (1999) (statement on behalf of the ACLU).

What happens when a religious university refuses to recognize homosexual student groups,[14] a health club managed by religious devotees does not want to employ non-Christians,[15] a religious landlord does not want to rent to an unmarried couple,[16] or a religious entrepreneur refuses to employ homosexuals? The dilemma is easily presented, but the solution is elusive. Reconciling fundamental free exercise rights with local, state, and federal laws prohibiting discrimination has quietly developed into a defining test for civil rights jurisprudence.

This article will explore the jurisprudential history of the intersection of the Free Exercise Clause and anti-discrimination laws. In the process, it will explain the ways in which the law reconciles conflicting rights in other areas, in order to explore the available options for solving the dilemma presented by the conflict between the free exercise of religion and the efforts to eliminate certain forms of discrimination.

II. THE RISE OF FREE EXERCISE PROTECTION

From the beginning of Free Exercise Clause jurisprudence, the United States Supreme Court has tried to distinguish between religious belief and religious conduct.[17] It has determined that religious *belief* receives absolute protection under the Constitution, but that government may regulate *conduct motivated* by religious belief. In *Reynolds v. United States*,[18] the very first Supreme Court case dealing with the Free Exercise Clause, the Court introduced this distinction saying it was necessary to the functioning of a democratic governmental system.[19] To hold otherwise, the Court said, would be to "permit every citizen to become a law unto himself."[20]

Reynolds upheld the application of a polygamy statute to a Mormon man whose religious beliefs allowed polygamous marriages.[21] The Court reasoned that, while the man was free to believe in polygamy, the

---

14. Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 4 (D.C. 1987).

15. Minnesota *ex rel* McClure v. St. Louis Sports & Health Club, 370 N.W.2d 844, 845-46 (Minn. 1985).

16. Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 696 (9th Cir. 1999); McCready v. Hoffius, 586 N.W.2d 723, 725 (Mich. 1998).

17. Much has been written on the impossibility of this distinction since religious belief often compels certain conduct. *See, e.g.*, Marci A. Hamilton, *The Belief/Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct*, 54 OHIO ST. L.J. 713 (1993) (theorizing that the belief/conduct "paradigm" continues to be the threshold through which religious claimants must pass in order to get a favorable decision from a court).

18. 98 U.S. 145 (1878).

19. *Id.* at 166.

20. *Id.* at 167.

21. *Id.* at 168.

state was permitted to restrict his right to practice it.[22] Taking an originalist perspective, the Court traced the history of polygamy and cited the Virginia law—passed just after that state had recommended the Free Exercise Clause as an amendment to the United States Constitution—that made polygamy punishable by the death penalty in order to prove that the Framers could not possibly have intended to protect polygamy under the First Amendment.[23] This reasoning flowed from Thomas Jefferson's comment, after the adoption of the Free Exercise Clause, that he was "convinced [that man] has no natural right in opposition to his social duties."[24] Since Jefferson saw no possible conflict between religious practice and societal need, neither did the Court. It neatly compartmentalized belief and conduct, leaving religious adherents free to believe in their religion, but free to practice it only if it was inoffensive to mainstream society.[25]

Reynolds forced the Court to choose between absolute religious freedom and state regulation of moral behavior that might allow governmental burdens on religion.[26] It chose regulation, as it would in a string of later cases. In *Minersville School District v. Gobitis*,[27] for example, the Court upheld a school's right to require Jehovah's Witness children to salute the flag or face expulsion.[28]

Just four years later, in *Prince v. Massachusetts*,[29] the Court upheld a statute that forbade minors from distributing Jehovah's Witness literature in compliance with their religious belief.[30] The Court reasoned that

---

22. *Id.* at 164.
23. *Id.* at 165.
24. *Id.* at 164.
25. *Id.* at 165. The belief/conduct distinction arises in the religious context as well. In the Catholic religion, even belief without conduct can cause excommunication. For instance, all Catholics are required to believe that Mary's body rose to heaven after her death; it is infallible doctrine. The church does not officially recognize people who do not so believe.
26. *Id.* at 165. The Court's choice of state regulation of marriage can be seen as a moral choice, or as a religious choice itself, since polygamy generally conflicts with Judeo-Christian scripture. The enforcement of mainstream Judeo-Christian morality against Mormon morality could, in itself, be construed as a violation of the Establishment Clause's restriction of the entanglement of government and religion. The First Amendment's religion clauses could be interpreted as at odds in this way. Any governmental accommodation for one religion, in accordance with the Free Exercise Clause, could be seen as government support for that religion, a violation of the Establishment Clause. In this situation, when a court evidences a preference for a particular mode of "moral" conduct as more valuable than another, it is implicitly labeling one as more valuable, and thus making it the preferred kind of conduct. For a more detailed discussion of the tension between the Free Exercise and Establishment Clauses, see Thomas C. Marks, Jr. & Michael Bertolini, *Lemon is a Lemon: Toward a Rational Interpretation of the Establishment Clause*, 12 BYU J. PUB. L. 1 (1999), Andrew Rostein, *Good Faith? Religious-Secular Parallelism and the Establishment Clause*, 93 COLUM. L. REV. 1763 (1993), and Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997).
27. 310 U.S. 586 (1940).
28. *Id.* at 595.
29. 321 U.S. 158 (1944).
30. *Id.* at 168.

the state's interest in regulating the conduct of children could not be sacrificed in this case, although it limited its holding to the facts, explicitly refusing to rule that general health and welfare concerns always outweigh the free exercise rights of children. The Court weighed free exercise rights against the community's need to regulate health, education, and marriage. In its view, the Court was restricting religious conduct without compromising the Free Exercise Clause because it was not restricting belief.[31]

The same belief/conduct dichotomy appeared again in the plurality's opinion in *Braunfeld v. Brown*,[32] in which the Court refused to force state accommodation of minority religious belief. The dissent in this case, however, had begun to recognize an explicit balancing approach. Here, the Court upheld the application of a Sunday closing law to Orthodox Jewish shopkeepers whose religion required them to close on Saturdays.[33] The Court used the belief/conduct distinction to conclude that the religious adherents were free to believe in a Saturday Sabbath, but the state could not be required to accommodate their conduct, based on that belief, by exempting them from Sunday closing laws.[34] This reasoning allowed the Court to approve Pennsylvania's Sunday closing law as applied to these Saturday Sabbatarians. The Court reasoned that the law neither made criminal "the holding of any religious belief or opinion," nor forced "anyone to embrace any religious belief . . . in conflict with his religious tenets."[35] Although the plurality opinion held fast to this belief/conduct distinction, Justice Brennan's dissent began to light the way for the future of Free Exercise Clause jurisprudence.

In his dissent, Justice Brennan identified two parts of a balancing test that would later become essential to both the law of free exercise and to congressional and state legislation: *substantial burden* and *compelling governmental interest*.[36] As Mr. Braunfeld would be put out of business if he closed his shop on Saturday, in accordance with his religious beliefs, as well as on Sunday, in accordance with Pennsylvania law, Brennan found a substantial burden on religion because the law forced Mr. Braunfeld to choose between his business and his religion.[37]

---

31. *Reynolds*, 98 U.S. at 164.
32. 366 U.S. 599 (1961).
33. *Id.* at 609.
34. *Id.* at 606.
35. *Id.* at 603.
36. *Id.* at 613.
37. *Id.* at 611. To this day, however, some courts refuse to view such dilemmas as questions of religious freedom at all. *See, e.g.*, Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 928-29 (Cal. 1996) ("Smith's religion does not require her to rent apartments, nor is investment in rental units the only available income-producing use of her capital. Thus, she can avoid the burden on her religious exercise without violating her beliefs or threatening her livelihood.").

Justice Brennan disapproved of the plurality's "deferential nod" toward the state's claimed interest in maintaining a quiet and peaceful day of rest for the community as a justification for denying the Saturday Sabbatarians a right to run their businesses on Sundays.[38] He claimed, instead, that the government's interest should be "compelling" in order to justify such a limitation on free exercise. This state interest, Brennan said, was not so "weighty in the constitutional scale that it justifies the substantial, though indirect, limitation of appellants' freedom."[39] This demarcation point set into motion the development of a free exercise matrix, and Justice Brennan outlined the rules. Two years later, Justice Brennan ushered in the "strict scrutiny" era of free exercise jurisprudence.

In his majority opinion in *Sherbert v. Verner*,[40] Brennan identified a two-part test for the constitutionality of the state unemployment statute as applied to a Seventh-Day Adventist who was unable to find employment that did not require her to work on Saturday, her Sabbath.[41] To be constitutional as applied, the Court held, the law must either pose no "infringement" on the religious adherent's free exercise right, or the law's burden on free exercise must be justified by a "compelling state interest within the state's constitutional power to regulate."[42] The Court found that the statute did infringe on Appellant's free exercise rights, since it penalized her for her religious beliefs by operating as would a fine for her refusal to work on Saturdays.[43]

The Court then examined the state's interest in denying Appellant unemployment benefits. The state suggested that exempting Appellant from the statute might lead to fraudulent religious objections to Saturday work and thus an unnecessary drain on state unemployment funds. Since this claim was not raised in the lower court, however, the Court refused to address it, although it noted that the record did not support such a claim.[44] Furthermore, Justice Brennan added another element to the test of a state's interest when he noted that it would be Appellee's responsibility to show that "no alternative forms of regulation would combat such abuses without infringing on First Amendment rights."[45]

---

38. *Braunfeld*, 366 U.S. at 613.
39. *Id.* at 614.
40. 374 U.S. 398 (1963).
41. *Id.* at 403.
42. *Id.*
43. *Id.* at 404. The Court was careful to dispel the argument that unemployment benefits are a "privilege," not a "right," and therefore not subject to free exercise scrutiny. *Id.* The Court noted that denial of benefits based on religious belief can constitute a denial of religious liberty. *Id.* at 405.
44. *Id.* at 406-07.
45. *Id.*

This strict test of a state's interest in its laws against a free exercise challenge did not seem to jibe with the holding in *Braunfeld*. The *Sherbert* Court acknowledged this, however, and attempted to resolve it by holding that the state interest in *Braunfeld*, providing one uniform day of rest, was in fact compelling.[46] In his concurrence, however, Justice Stewart pointed out that Justice Brennan's dissent in *Braunfeld* clearly stated that Brennan did not find the state's interest compelling.[47] The debate over what is, and what is not, "compelling" would not end there.

The Court conducted a similar balancing test, between free exercise rights and state interests, when, nine years later, it held in *Wisconsin v. Yoder*,[48] that Amish parents were not chargeable under a law requiring parents to send their children to secondary school until those children reached the age of sixteen. Again, the majority used a two-part test of statutory validity as applied to the religious adherents. The state could vindicate its statute by showing either that it did not infringe on the religious adherents' free exercise rights, or that the state's interest was of a "sufficient magnitude" to override the protected interest.[49]

First, the majority held that secondary school education "contraven[ed]" the Amish faith by exposing children to worldly influences at odds with that faith. The state interest in educating its children between the ages of fourteen and sixteen (the children had already completed an elementary school education) was not deemed sufficient to overcome the parents' and children's free exercise rights, especially given that the Amish continued to educate their children in Amish teachings and custom after elementary school.[50]

In balancing free exercise rights and states' interests, the Court had come a long way in protecting less common religious beliefs under the Free Exercise Clause. Under a pure belief/conduct distinction, the Court could easily have found the Amish free to believe that education past the eighth grade was unnecessary, but then the Court could have forbidden them from practicing that belief. Instead, *Yoder* implicitly criticized the belief/conduct distinction used to decide early free exercise cases in noting that "in this context[,] belief and action cannot be confined in logic-tight compartments."[51] This criticism was fairly limited, however, as the *Yoder* decision also distinguished cases demonstrating any

46. *Id.* at 408.
47. *Id.* at 417.
48. 406 U.S. 205 (1972).
49. *Id.* at 214.
50. *Id.* at 226-27.
51. *Id.* at 220.

possible harm to the public health, safety, or order. This standard—which would be the limit of judicial protection for free exercise rights—served the Court well for eighteen additional years.

III. *SMITH* CHANGES THE RULES

After twenty-seven years of strict scrutiny of Free Exercise Clause cases, the Court, in 1990, took an extreme departure, tipping the balance of the equation in favor of the legitimacy of state legislation that burdens free exercise.[52] With its decision in *Employment Division, Department of Human Resources of Oregon v. Smith*,[53] the Court abandoned the strict scrutiny standard in favor of a standard that requires all laws conflicting with religious beliefs to be merely "neutral" and of "general applicability."[54] The Court held that if a law is not aimed at restricting a particular religion or religious practice, religious adherents whose free exercise is hampered by that law are not entitled to an exemption.[55]

In *Smith*, the Court upheld the denial of unemployment benefits to Native American drug-rehabilitation workers who were fired for ingesting peyote in accordance with their religious beliefs. The Court seemed to base this holding on the belief/conduct distinction, even quoting the warning in *Reynolds v. United States*[56] that to allow exemptions to laws for religious belief would make every individual a "law unto himself."[57]

In distinguishing earlier cases granting exemptions for religiously motivated conduct, the Court limited the *Sherbert* strict scrutiny test to the field of unemployment compensation, denying that it had ever been an across-the-board test, and avoided overruling the case.[58] The *Sherbert* test was not applicable in this case, the Court held, because in *Smith* a criminal law (barring the ingestion of peyote) was involved.[59] The Court further distinguished previous cases by stating that those cases involved "not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press."[60] This "hybrid rights" exception,

52. Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990).
53. 494 U.S. 872 (1990).
54. *Id.* at 878.
55. *Id.*
56. 98 U.S. 145 (1879).
57. *Smith*, 494 U.S. at 879 (quoting *Reynolds*, 98 U.S. at 166-67). The decision also quotes *Reynolds* in saying, "Laws . . . are made for the government of actions, and while [government] cannot interfere with mere religious belief and opinions, they may with practices." *Id.* (quoting *Reynolds*, 98 U.S. at 166-67).
58. *Smith*, 494 U.S. at 883.
59. *Id.* at 882-85.
60. *Id.* at 881. As examples, the Court cited many cases where more than one constitutional protection was raised. *Yoder* itself was cited as a case in which the issue was free exercise combined with parents' rights to direct the education of their children. This seems to be a never-ending loophole

which might include combined complaints of a free exercise and privacy or property violation, has been cited by other courts as requiring strict scrutiny analysis for cases involving the Free Exercise Clause coupled with another constitutional protection.[61]

While refusing to *require* the government to exempt religious adherents from neutral and generally applicable laws, the Court noted that such exemptions were certainly "permitted" and "desirable."[62] The Court articulated a preference for a system where judges are not required to "weigh the social importance of all laws against the centrality of all religious belief."[63]

The *Smith* decision thus almost entirely eviscerated any protections that the First Amendment offers religious adherents whose ability to practice their religion is compromised by neutral laws of general applicability. For example, after *Smith* it appeared that religious communities would be powerless to respond to zoning ordinances that effectively prohibited the construction of houses of worship in certain neighborhoods—if the law in question did not appear to specifically target the practice of any religion. This seemed to leave the accommodation of religious practices to legislatures.

IV. THE RELIGIOUS FREEDOM RESTORATION ACT AND ITS FALL

Acting on this invitation to exempt religious observance from neutral laws of general applicability, Congress enacted the Religious Freedom Restoration Act (RFRA) of 1993.[64] The RFRA's aim was to

---

in the "neutral laws of general applicability" standard because most free exercise claims can be combined with other constitutional protections such as freedom of speech.

Another route around the *Smith* standard seems to be the "individualized exemptions" exception. The Court wrote that "where the State has in place a system of individualized exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason." *Smith*, 494 U.S. at 885. In *Keeler v. City of Cumberland*, 940 F. Supp. 879 (D. Md. 1996), the court reasoned that when a government enacts a law with a system of exemptions, that government has acknowledged that "its interest in enforcement is not paramount." *Id.* at 886. For this reason, the court said, the government must show that the law, when applied in this case, will "advance interests of the highest order." *Id.* (quoting Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993)). In its application of this standard in *Keeler*, the court held that a Catholic Church that was denied a zoning permit to tear down and rebuild its church in order to further its religious mission should be granted the permit. The court held that the city's interest in denying the permit, to preserve a historic structure, was not compelling. *Id.*

61. *See* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 703 (9th Cir. 1999) (requiring that an additional constitutional claim coupled with a free exercise claim be "colorable" in order to fall into the hybrid rights exception).

62. *Smith*, 494 U.S. at 890. The decision listed a number of states that had exempted sacramental peyote use from their drug laws.

63. *Id.*

64. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994). The *Sherbert* and *Yoder* standard, which the RFRA attempted to codify, was only used for a small portion of the timeline of the Supreme Court's free exercise jurisprudence. Commentator Eugene Volokh has criticized the RFRA strict scrutiny standard as not really restoring the *Sherbert*-era standard of review, in which there was more than one test of a

restore the compelling interest test from the *Sherbert* and *Yoder* era. The statute required an exemption to any state, local, or federal statute for any individual whose religious exercise was substantially burdened, even by a law that was neutral and of general applicability, absent a compelling governmental interest for enforcing the law against the individual.[65] Furthermore, the RFRA required, as did *Sherbert*,[66] that no less restrictive means of furthering that interest was available.[67] The RFRA was endorsed by one of the largest coalitions ever assembled, and not one member of the House of Representatives voted against it. Congress passed the RFRA under the Fourteenth Amendment's enforcement power,[68] thus allowing the law to apply to state and local statutes as well as federal statutes. This, however, became the statute's downfall.

The RFRA's undoing started very quietly when St. Peter Catholic Church applied for a building permit from the City of Boerne, Texas, in order to accommodate its growing congregation. The city, having recently designated the church's neighborhood as a historic district, denied the permit.[69] The Archbishop of San Antonio then brought suit against the city, arguing, among other things, that denial of the permit violated the RFRA standard. The district court, however, found that, in passing the RFRA, Congress had exceeded its enforcement power under the Fourteenth Amendment and that the statute was thus unconstitutional.

In its decision in *Boerne*, the Supreme Court agreed with the lower court and found the RFRA unconstitutional, at least as it applied to the states.[70] The Court held that the Fourteenth Amendment's enforcement power is remedial or preventative only.[71] This remedial power, the Court held, allows Congress to enforce the mandates of the Fourteenth Amendment as interpreted by the Court. Congress could not, the Court held, require the states to afford a higher level of protection for religion

---

statute's constitutionality when faced with a free exercise claim. *See generally* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465 (1999). If applied as commanded by the text of the federal and state RFRAs, Volokh says, the strict scrutiny standard will lead to "wrong" results in cases that require a lower standard. *See generally id.*

65. 42 U.S.C. § 2000bb.

66. 374 U.S. 398, 407 (1963).

67. 42 U.S.C. § 2000bb.

68. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

69. City of Boerne v. Flores, 521 U.S. 507, 512 (1997).

70. There remains some ambiguity as to whether the RFRA is still good law when applied to the federal government. The Court in *Boerne* held that "the judgment of the Court of Appeals sustaining the Act's constitutionality is reversed." *Id.* at 536. The opinion, however, seemed to hold open the possibility that the RFRA is constitutional as applied to federal laws by saying that "when Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgement on the meaning and force of the Constitution." *Id.* at 535. In fact, since *Boerne*, the RFRA has been found constitutional as applied to federal law. *In re* Young, 141 F.3d 854 (8th Cir. 1998).

71. *Boerne*, 521 U.S. at 529.

than the Constitution, required.[72] In this sense, the Court said, Congress was substantively interpreting the Fourteenth Amendment and forcing it on the states.[73] The *Boerne* decision left the states to decide the appropriate level of free exercise protection for their citizens.[74]

V. FREE EXERCISE UNDER THE COMPELLING INTEREST STANDARD

While the Supreme Court had established a comparatively low floor of required free exercise protections, states were working to find their own ceilings.[75] This put the states, and their courts, in a difficult position. At what price would they protect religious liberty? How high would the ceiling be, and what would reach it? Which values would weigh more heavily than others would? Can a religious landlord refuse to rent to an unmarried couple if he or she believes it would be a sin to allow fornication on his or her property? Can a religious employer refuse to hire a homosexual if he or she believes that to do otherwise would be a sin?[76] Where should the courts look for guidance?

These questions are not easily answered. At an almost universal level, liberty is ensured for all Americans in the freedom to contract. Americans are able to contract when and with whom they choose. Unfortunately, however, everyone cannot have perfect liberty all of the time. When liberty allows individuals only to contract when and with whom they choose, whole classes of people can be excluded from all contracts, thus being denied an aspect of liberty themselves. Anti-discrimination

---

72. *Id.* at 532.

73. *Id.* at 533.

74. In response, the Supreme Courts of Massachusetts, Minnesota, Wisconsin, Kansas, Oregon, Vermont, and Michigan have interpreted their state constitutions to require strict scrutiny for religious liberty claims. The legislatures of Arizona, Connecticut, Florida, Idaho, Illinois, New Mexico, Rhode Island, South Carolina, and Texas have passed statutes requiring a heightened level of protection for religious liberty. ARIZ. REV. STAT. § 41-1493.01 (2000); CONN. GEN. STAT. 52-571b(b) (1997); FLA. STAT. ANN. 761.03 (West 1998); IDAHO CODE § 73-402 (Michie 2000); 775 ILL. COMP. STAT. 35/15 (2000); N.M. STAT. ANN. § 28-22-3 (Michie 2000); R.I. GEN. LAWS 42-80.1-3 (1998); S.C. CODE ANN. 1-32-40 (Law. Co-op. 2000); TEX. CIV. PRAC. & REM. CODE ANN. 110.003 (West 1999). Alabama adopted a state RFRA as a constitutional amendment. ALA. CONST. amend. 622.

75. The debate continues over the validity of a federal law protecting religious liberty, since Congress is currently considering the Religious Liberty Protection Act (RLPA), a measure that would restore strict scrutiny for all federal, state, and local laws that substantially burden religious free exercise. The RLPA's legitimacy as applied to the states is tied to Congress' spending, commerce, due process, equal protection, and privileges and immunities powers. H.R. 1691, 106th Cong., 1st Sess. (1999).

76. In the wake of the Supreme Court's ruling in *Dale*, lower courts might well give greater deference to those who discriminate against homosexuals on religious grounds. Boy Scouts of America v. Dale, 120 S. Ct. 2446 (2000). It is unclear, however, to what extent the decision will apply to the commercial context.

laws are aimed at reconciling this injustice, codifying the societal preference for one kind of liberty at the expense of another.[77]

Free exercise rights are an extension of this idea about liberty. The Free Exercise Clause dictates that religious adherents should not be forced to engage in activities that violate their religious beliefs. The Free Exercise Clause of the United States Constitution and similar clauses in most state constitutions embody the societal value placed on the freedom of religion. These same documents, however, call for equal protection under the law for all Americans. After the Supreme Court's decisions in *Smith* and *Boerne*, states were given the primary responsibility for reconciling these values. In the following pages, we will present the ways in which states have tried to reconcile these values already, and present a framework for doing so in the future. States have a variety of different options to restore the strict scrutiny standard: passing a state RFRA, finding a *Sherbert* level of protection in their state constitutions, applying the *Smith* standard, or finding a hybrid right. The article will focus only on the best way to reconcile competing rights under a strict scrutiny standard regardless of how that standard is made into law.

When courts are faced with the application of a *Sherbert*/RFRA type standard, they are asked to balance a "substantial burden" on religious freedom against a "state interest" in an applicable law.[78] Usually, state interests are categorized. Once an interest is found compelling, it remains so regardless of the specific circumstances of the case and

77. When the Civil Rights Acts were passed, many strict civil libertarians opposed anti-discrimination laws as violative of personal contract and property rights. This worry was recognized in some of the exemptions included in the Act. For example, the Fair Housing Act exempts properties with a small number of units and the property where the landlord lives. This is a compromise on a few axes. The landlord is granted freedom of contract and property in a space that is personal to him. At the same time, since his home is only a small fraction of the housing market, the ultimate threat to liberty for those against whom he might discriminate is small. If larger-scale housing is available in the market, the renter's freedom to contract will still be viable. It is notable that in the City of Chicago, where the housing market consists mainly of smaller (2-6 flat) apartment buildings, this exemption does not exist in the housing laws, possibly for fear that individual landlords could deny whole classes of tenants their liberty by excluding them from the housing market.

78. In enacting an RFRA, some people might worry that states are stacking the deck in favor of religious liberty in all cases. This should not be the case under an RFRA, however, since it was never the case under the strict scrutiny standard. As Professor James E. Ryan said in his article, *Smith and the Religious Freedom Reformation Act: An Iconoclastic Analysis*, 78 VA. L. REV. 1407, 1412 (1992), "despite the apparent protection afforded claimants by the language of the compelling interest test, courts overwhelmingly sided with the government when applying that test." Similarly, since *Smith*, state courts have applied an RFRA-type standard (though in the absence of an RFRA) to their state constitutions and sided with the government nonetheless. This is possible because of the number of hoops the RFRA standard requires claimants to jump through. A court may find that a particular law does not substantially burden religious freedom, or that a government interest is compelling. The "compelling" analysis can change drastically depending on the way in which the issue is framed. In a religious landlord case, a court may find that a state has a compelling interest in preventing discrimination in general, even if it may not have held the same for preventing discrimination based on marital status in particular.

vice-versa. Some interests are across-the-board compelling, but others remain in a middle ground. For instance, all three branches of the federal government, as well as most state governments, have demonstrated a commitment to fighting racism. And courts have overwhelmingly held that race is an across-the-board compelling interest. In our free exercise matrix, race established itself as a dominant compelling interest.

Other civil rights interests, however, do not receive such universal deference from the courts and legislatures. For instance, some states have passed laws criminalizing cohabitation coupled with laws banning marital status discrimination in housing. In these cases, the competing rights meet each other head-on in a seemingly even fight.

VI. RACIAL DISCRIMINATION

It is seemingly axiomatic that a state's interest in preventing discrimination based on race is compelling enough to outweigh an individual's free exercise rights. Race, unlike other categories, has been found by the Supreme Court to be a "suspect classification." This has lead the Court to protect against race discrimination under the Fourteenth Amendment.[79] This protected status has reached into free exercise jurisprudence.[80]

In *Bob Jones University v. United States*,[81] a private, religious university claimed that the United States had abridged its free exercise rights by denying it a tax-exemption based on the school's policy of racial discrimination, which the school claimed was based on religious belief. The United States Supreme Court unanimously held for the government, concluding that, "the Government has a fundamental, overriding interest in eradicating racial discrimination in education [that] substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."[82]

Many courts, in holding that preventing all forms of racial discrimination is a compelling governmental interest, have followed this case.[83]

---

79. Korematsu v. United States, 323 U.S. 214 (1944). The Court stated that any law that classifies on the basis of race is immediately suspect and subject to strict scrutiny in terms of Fourteenth Amendment analysis. *Id.* at 216.

80. Protection against racial discrimination is an almost-reflexive compelling interest. Where new modes of analysis are needed is in such areas as discrimination based on sexual orientation or marital status, which are not entitled to as much protection from the Constitution.

81. 461 U.S. 574 (1983).

82. *Id.* at 604.

83. *Bob Jones* has been explicitly followed in a plethora of cases, including: *Maini v. INS*, 212 F.3d 1167 (9th Cir. 2000); *Thomas v. Anchorage Equal Rights Commission*, 165 F.3d 692 (9th Cir. 1999); *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155 (4th Cir. 1998); *Albertson's v. Commissioner*, 42 F.3d 537 (9th Cir. 1994); *Geisinger Health Plan v. Commissioner*, 985 F.2d 1210 (3d Cir. 1993); *Davis v. United States*, 972 F.2d 869 (7th Cir. 1992); *United States v. Means*, 858 F.2d 404 (8th Cir. 1988); *Presbyterian & Reformed Public Co. v. Commissioner*, 743 F.2d 148 (3d Cir. 1984);

Therefore, race, as an interest, has won in its head-to-head encounter with religion. Prevention of racial discrimination is always a compelling interest.

VII. GENDER DISCRIMINATION

When free exercise interests are pitted against a state's interest in preventing gender discrimination, the state almost always prevails. Although gender is not as highly protected an interest as race in equal protection jurisprudence, the Supreme Court has found that preventing discrimination based on gender is a compelling state interest.[84]

In *Roberts v. United States Jaycees*,[85] a case addressing a First Amendment freedom of association challenge to a law restricting sex discrimination, the Supreme Court found the state's interest in preventing sex discrimination compelling.[86] The court said, "We are persuaded that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms."[87] Although this case did not implicate the Free Exercise Clause per se, the suggestion that eradication of gender discrimination is a compelling interest would likely apply to such cases. Therefore, gender, like race, qualifies as a superior interest.

VIII. DISCRIMINATION BASED ON SEXUAL ORIENTATION

The Supreme Court has never held that sexual orientation is a suspect classification.[88] Further, in the recent ruling in *Dale*, the Supreme Court held that the First Amendment right of "freedom of expressive association" outweighed a state's interest in eradicating discrimination against homosexuals.[89] The Court did not explicitly state, however, what kind of scrutiny the state law in question deserved. This

---

United States v. Washington, 672 F. Supp. 167 (M.D. Pa. 1987); *Bethel Baptist Church v. United States*, 629 F. Supp. 1073 (M.D. Pa. 1986); *Dayton Christian Schools v. Ohio Civil Rights Commission*, 578 F. Supp. 1004 (S.D. Ohio 1984); *United Cancer Council v. Commissioner*, 109 T.C. 326 (1997).

84. Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984). In a plurality opinion in *Frontiero v. Richardson*, 411 U.S. 677 (1973), the Court applied a strict scrutiny test to classifications based on gender, giving gender as much constitutional protection against discrimination as race. Three years later, in the majority opinion in *Craig v. Boren*, 429 U.S. 190 (1976), the Court settled on a kind of intermediate scrutiny for cases involving classifications based on gender, leaving gender not as highly protected as race, but constitutionally protected nonetheless.

85. 462 U.S. 609 (1984).

86. *Roberts*, 468 U.S. at 623.

87. *Id.*

88. Bowers v. Hardwick, 478 U.S. 186 (1986). For a more thorough discussion of the rights of homosexuals when weighed against the Free Exercise Clause, see David B. Cruz, *Piety and Prejudice: Free Exercise Exemption from Laws Prohibiting Sexual Orientation Discrimination*, 69 N.Y.U. L. REV. 1176 (1994), and Richard M. Paul III & Derek Rose, *The Clash Between the First Amendment and Civil Rights: Public University Nondiscrimination Clauses*, 60 MO. L. REV. 889 (1995).

89. Boy Scouts of America v. Dale, 120 S. Ct. 2446, 2457 (2000).

leaves courts with little direction in deciding whether prevention of discrimination against homosexuals is a compelling state interest when weighed against free exercise rights. In its decision in *Bowers v. Hardwick*,[90] the Court rejected heightened due process protection under the Fourteenth Amendment for a homosexual man who had been charged with sodomy under a Georgia statute.[91] The Court cited the historical prohibitions against homosexual conduct in America as reason to allow the states to proscribe such conduct as they pleased.[92] In *Romer v. Evans*,[93] however, the Court found unconstitutional a Colorado constitutional amendment that denied heightened protection for homosexuals—on equal protection grounds. The combination of these three cases leaves discrimination based on sexual orientation in a shaky middle ground.

Although the theory has only nominally been tested, it is unlikely that courts will find the eradication of sexual-orientation discrimination compelling when weighed against free exercise rights.[94] The states themselves have laws that discriminate against homosexual couples. In all states—with the possible exception of Vermont—same-sex couples are not allowed to marry, while heterosexual couples, of course, can. In some states, laws criminalizing sodomy remain on the books. As Michael McConnell, a First Amendment expert at the University of Utah College of Law noted, "As long as states say that heterosexuals may get married but homosexuals may not, it's very hard to argue that a state has a compelling interest in prohibiting an individual from making the same kind of distinction."[95] Nonetheless, some states have laws prohibiting discrimination based on sexual orientation.[96] These laws can come into conflict with individual free exercise rights, forcing the courts to find a solution.

Given that sexual orientation has not been found universally compelling, but is afforded some protection, state courts are left to decide whether they find a state's interest in preventing discrimination based on sexual orientation compelling. Because of the divergent messages that

90. 478 U.S. 186 (1986).

91. *Id.* at 191.

92. *Id.* at 193.

93. 517 U.S. 620 (1996).

94. *See* Paul & Rose, *supra* note 88, at 912. David Cruz thinks otherwise, although he did not have the benefit of the Supreme Court's decision in *Dale*. Cruz, *supra* note 88, at 1178. Given the clear victory for freedom of association (a fundamental right commensurate with free exercise under a RFRA) in the *Dale* case, it seems unlikely that a federal court using a compelling interest test would rule in favor of an anti-discrimination law that conflicts with religious observance.

95. Steve France, *Not Under My Roof You Don't*, 85 A.B.A. J., 26, 28 (Apr. 1999) (quoting McConnell). This same reasoning is what led the ACLU to withdraw its support for the passage of state RFRAs and the federal RLPA.

96. Religious organizations may be explicitly exempted from these laws.

the states are sending, the present qualification procedures for matrix positioning seem useless. Judges may find the prevention of sexual orientation discrimination compelling in a particular case, but may not yet be willing to rule it across-the-board compelling because to do so might help to fell all laws giving heterosexual couples rights that homosexual couples are not allowed.[97] New evaluation techniques that would allow religious exercise to outweigh sexual orientation discrimination in some situations, but not in others, are necessary.

IX. MARITAL STATUS DISCRIMINATION

The prevention of marital status discrimination,[98] like discrimination based on sexual orientation, is in the nebulous middle ground of interests that may or may not be compelling. Many states discriminate against unmarried couples in a variety of ways. Unmarried partners are not given the same preference as married partners in intestate successions or in insurance benefits.[99] Unmarried couples do not have the same legal privilege of communication as married couples.[100] In some cases, this has enabled courts to find the state's interest in eradicating discrimination based on marital status less than compelling. Other courts have reached a variety of conclusions, all of which have left marital status without a clear place in the free exercise matrix.

Several state supreme courts, as well as the Ninth Circuit Court of Appeals, have decided cases involving non-married couples denied tenancy by landlords whose religious beliefs tell them that renting to unmarried couples amounts to aiding in fornication, a sin according to many religions. The state cases have been decided in accordance with the housing laws and free exercise clauses of each state. In all of these cases, however, the laws in question closely resemble the Free Exercise Clause of the United States Constitution and the federal Fair Housing Act.

---

97. This would be a kind of backward equal protection analysis. If the Court found that protecting homosexuals from discrimination is a compelling state interest in a free exercise context, it might logically also have to hold in an equal protection case that a state must have a compelling interest to discriminate on the basis of sexual orientation.

98. For the purposes of this note the term "marital status" will refer to either the present or past marital status of an individual or of a heterosexual couple collectively.

99. State v. French, 460 N.W.2d 2, 10 (Minn. 1990).

100. *Id.*

Although Minnesota bans housing discrimination based on "marital status,"[101] the Minnesota Supreme Court, in *State v. French*,[102] held a landlord's discrimination against an unmarried couple legal under Minnesota law. The court held that "marital status" in the statute referred to an individual's status as single, married, or divorced, not a couple's status. In denying that Minnesota law banned marital status discrimination based on cohabitation at all,[103] the majority was able to avoid deciding on the appropriate level of scrutiny under the Minnesota Constitution in a free exercise case.

Three members of the *French* majority, however, went on to write that the Minnesota Constitution provides absolute protection for religious practice unless such practice is "inconsistent with the peace or safety of the state."[104] Writing that the state must show a compelling and overriding interest to deny French an exemption to the housing statute, this part of the opinion found that marital status was not a compelling interest, and therefore this case failed even a strict scrutiny test.

The Massachusetts Supreme Court has similarly avoided definitively deciding whether protecting unmarried couples from housing discrimination constitutes a compelling state interest.[105] In *Attorney General v. Desilets*,[106] the Massachusetts court ruled that summary judgement in favor of a religious landlord was not appropriate in a free exercise case when no finding on the existence of a "compelling" state interest had been made by the trial court.[107] The *Desilets* Court refused to apply the *Smith* standard in interpreting the Free Exercise Clause of the Massachusetts Constitution, however, and applied state precedent in holding that strict scrutiny should be applied to free exercise cases.[108] Furthermore,

---

101. MINN. STAT. § 363.03, subd. 2(1)(a) (1998). It is worthwhile to note that although this statute did not define "marital status" at the time this suit was filed, the statute was modified during the adjudication of this suit to define "marital status" as "whether a person is single, married, remarried, divorced, separated, or a surviving spouse and, in employment cases, includes protection against discrimination based on the identity, situation, actions, or beliefs of a spouse or former spouse." MINN. STAT. § 363.01, subd. 24 (1998).

102. 460 N.W.2d 2 (Minn. 1990).

103. *Id.* at 6. In coming to this conclusion, the court tried to uncover the legislative intent in banning marital status discrimination. As support for its conclusion that the legislature did not intend to protect cohabiting couples, the court pointed to a Minnesota statute outlawing male-female cohabitation as fornication. *See* MINN. STAT. § 609.34 (1998).

104. *French*, 460 N.W.2d at 9. The three members of the majority again relied on the Minnesota statute outlawing fornication in denouncing the state's claim of a "compelling interest" in eradicating discrimination against unmarried couples. The opinion asks, "How can there be a compelling state interest in promoting fornication when there is a statute on the books prohibiting it?" *Id.* at 10.

105. Attorney General v. Desilets, 636 N.E.2d 233 (Mass. 1994).

106. 636 N.E.2d 233 (Mass. 1994).

107. *Id.* at 240.

108. Although the court decided the appropriate level of scrutiny on state constitutional grounds, it noted that the RFRA (which was yet to be found unconstitutional as applied to the states by *Boerne*) would also have required a "compelling interest" standard. *Id.* at 236 n.5.

although it did not decide whether protecting unmarried couples from housing discrimination was a compelling interest, the court noted that marital status did not require as much protection under the Massachusetts Constitution as sex, race, creed, or national origin, which are all protected by that document explicitly.[109]

In another "religious landlord discriminates against an unmarried couple" case, the Supreme Court of Alaska sided with the couple after holding that the Alaska Constitution required strict scrutiny.[110] The court held that the state's interest in eliminating marital status discrimination in housing was sufficiently compelling to outweigh Mr. Swanner's free exercise claim.[111] The court limited the "marital status as compelling interest" analysis to housing only, citing its commercial nature.[112] Therefore, although the *Swanner* Court purported to use strict scrutiny, its opinion sounds more like the early United States Supreme Court cases that distinguished between laws regulating religious belief and those regulating religious conduct.[113] This leaves the case with questionable precedential value in determining how heavily the state weighs discrimination claims against free exercise rights in other, less commercial, situations.

Like the Massachusetts Supreme Court in *Desilets*, the California Supreme Court, in *Smith v. Fair Employment & Housing Commission*,[114] avoided deciding whether protecting unmarried couples from housing discrimination is a compelling state interest. Instead, the court applied the still-valid RFRA and held that the housing law did not "substantially burden" the landlord's religious belief, and thus did not violate the landlord's right to freely exercise his religion.[115] The court set out a three-part test for determining whether religion is "substantially burden[ed]" by a statute: (1) it renders violation of religious belief

109. *Id.* at 239-40.

110. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994). This case was decided shortly after the passage of the RFRA. The court noted that strict scrutiny analysis would have been required under the RFRA as well.

111. *Id.* at 282.

112. The court also focused on the fact that Mr. Swanner's religious beliefs did not require him to engage in the property-rental business. Therefore, the court found that his "Hobson's choice," between his economic livelihood and his religious beliefs, was caused by his conscious decision to enter into a regulated field. This line of reasoning is evocative of that in *Braunfeld* in which the United States Supreme Court held it unnecessary for a state to accommodate Orthodox Jewish shopkeepers' religious belief by exempting them from Sunday closing laws.

113. Reynolds v. United States, 98 U.S. 145 (1878).

114. 913 P.2d 909 (Cal. 1996).

115. *Id.* This holding was especially surprising in light of an earlier California case in which the California Court of Appeals found that a landlord's religious exercise was substantially burdened when he was forced to rent his property to "fornicators" and that the prevention of discrimination against unmarried couples was a compelling interest. Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32 (Ct. App. 1991).

unavoidable, (2) its avoidance would inflict more than economic costs, and (3) an exemption would not affect a third party.[116] This analysis seems to delve into more than the substantiality of the religious belief, however. It is hard to imagine how a religious belief's effect on a third party changes the substantiality of a law's burden on that belief. This analysis, while questionable, serves as a valuable indicator of the ways in which courts will interpret the word "substantial" in state RFRAs and future federal laws (like a version of the RLPA). Since the fall of the RFRA, however, the precedential value of this case is minor.[117]

In *McCready v. Hoffius I*,[118] the Michigan Supreme Court followed *Smith* and held that the Michigan Civil Rights Act protects unmarried couples against housing discrimination and was not violative of the Free Exercise Clause because it is neutral and of general applicability, in accordance with the United States Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*. The court applied strict scrutiny under the Michigan Constitution in holding that the state had a compelling interest in providing equal access to housing.[119] Thus, the court ruled that the law prohibiting housing discrimination based on marital status did not violate the Michigan Constitution. This decision was later vacated and remanded for further consideration of whether the Michigan Civil Rights Act does in fact violate the United States and Michigan Constitutions.[120]

The only Federal Circuit Court case involving discrimination by a religious landlord comes out of the Ninth Circuit: *Thomas v. Anchorage Equal Rights Commission*.[121] There, the court used the "hybrid rights" exception in *Smith* to apply strict scrutiny to a law banning marital status discrimination by landlords. The court held that the hybrid rights exception was applicable when a free exercise violation claim combined with another "colorable" constitutional violation claim. In this case, the court found the landlord had a First Amendment free speech claim, as well as a Fifth Amendment property claim. These "hybrid" rights led the court into strict scrutiny analysis and an examination of the nature of the governmental interest in the protection of unmarried couples from housing discrimination.

---

116. *Smith*, 913 P.2d at 925-28.

117. The holding in *Smith* rested on the court's application of the RFRA to the facts of the case. The fall of the RFRA may change the Court's stance on this issue—or it may not. The California courts had already decided that the California Constitution requires strict scrutiny for free exercise cases. What remains to be seen is whether California will continue to apply the "substantial burden" requirement as strictly in the absence of a national RFRA.

118. 586 N.W.2d 723 (Mich. 1998).

119. *Id.* at 729.

120. McCready v. Hoffius II, 593 N.W.2d 545, 545 (Mich. 1999).

121. 165 F.3d 692 (9th Cir. 1999).

In finding that the government's interest was not compelling, the court examined what all three branches of government had done to further the interest.[122] Unlike racial discrimination, which was outlawed by the judicial (*Brown v. Board*), legislative (Civil Rights Acts), and executive branches (orders by Presidents Truman and Kennedy protecting minorities from racial discrimination), the court found no "firm national policy" against marital status discrimination.[123] Therefore, the court found that the lack of protection for unmarried couples under the Equal Protection Clause provides evidence of a lack of a "compelling" governmental interest in such protection.[124] Both California and Alaska are part of the Ninth Circuit. Therefore, the *Thomas* decision leaves the precedential value of *Swanner* and *Smith* in question at least as applying to federal claims of free exercise.

The foregoing analysis makes it questionable whether a state RFRA really changes the resolution of cases that pit free exercise against legislated civil rights. It seems that, whether an RFRA comes into play or not, protecting constitutionally recognized "discrete and insular" minorities[125] will always be compelling enough to override free exercise rights. Protecting other groups, however, might be compelling, depending on the jurisdiction. Courts seem hesitant to find those interests (particularly eradication of discrimination based on sexual orientation and marital status) compelling because such an interpretation would require religious exercise to yield to these interests in all circumstances.

X. LESSONS FROM OTHER AREAS OF LAW

There is nothing new about American courts balancing seemingly competing interests against each other. Indeed, in a variety of conflicts outside the area of free exercise, judges are called upon to decide cases by looking at the specific facts[126] at issue rather than simply at the nature

122. *Id.* at 715.

123. *Id.*

124. *Id.* This reliance on history in deciding what is, and is not compelling, weighs very heavily in favor of the status quo. History should have taught us, however, that historical approval does not make all practices acceptable today. Some of the most repulsive practices in American history were legally endorsed.

125. United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

126. Professor Robert M. O'Neil proposes that courts look closer at the facts of each case in order to distinguish different degrees of burden on religious freedom imposed by enforcement of anti-discrimination laws. Robert M. O'Neil, *Religious Freedom and Nondiscrimination: State RFRA Laws Versus Civil Rights*, 32 U.C. DAVIS L. REV. 785, 806 (1999). He suggests:

> One need not dismiss all religiously based objections to recognize, for example, a meaningful difference between a devout entrepreneur whose holdings include a chain of apartment houses, and a retired couple of similar conviction who seeks suitable tenants for a single guest bedroom in their small house. . . . But a court would surely recognize that the extent of the burden imposed on the retired couple differs in degree from that

of the rights in conflict. In deciding how to best resolve free exercise cases involving competing interests, it is instructive to look at other areas of the law in which two socially accepted interests (like nondiscrimination and religious freedom) intersect and how these incompatible interests are reconciled.

In tort (and property) law, the law of private nuisance keeps one landowner from conducting an activity that might be offensive to a neighboring landowner. For example, one neighbor cannot play his music to the point that it disrupts the activity of another.[127] One landowner cannot run a hog farm if the smell is too overpowering for another neighbor to handle.[128] One neighbor cannot run a funeral home if it interferes with his neighbor's use and enjoyment of his own land.[129] In all of these situations, none of the activities, neither running a hog farm nor owning a house, is illegal, or even socially unacceptable. The two activities, when undertaken together, however, are incompatible. So what does nuisance law do?

The law solves nuisance cases in different ways depending on the situation. If a person purposely moves in next door to a hog farm, he sometimes may not be able to force the farmer to move because he is "coming to the nuisance."[130] The fact that a plaintiff has acquired his land, after a nuisance interfering with it has come into existence, is not in itself sufficient to bar an action, but it is a factor to be considered in determining whether the nuisance is actionable.

If, however, a whole city builds-up right next to the hog farm, the landowners may get an injunction against the farm and then be asked to pay for the farm's moving expenses.[131] Similarly, a court will almost automatically grant an injunction against a funeral home in a residential area,[132] but commercial neighbors would be much less likely to get one. In these ways, the law picks one interest over another based on the situation in which the nuisance occurs.[133] A hog farmer does not always

---

imposed upon the entrepreneur . . . .

Id.

127. In *Mayflower Holding Co. v Warrick*, 196 So. 428 (Fla. 1940), the Florida Supreme Court held that the noises coming from a night club, including loud music and laughter, disturbed the sleep of the patrons of complainants' hotel situated directly across the street, and therefore the complainants were entitled to money damages for the financial loss suffered by the hotel.

128. Phillips v. Elizabethtown Butter & Cheese Factory, 15 Ky. L. Rptr. 574 (1894).

129. Courts routinely grant injunctions in this situation; an example of one such case is *Mutual Service Funeral Homes v. Fehler*, 48 So. 2d 26 (Ala. 1950).

130. RESTATEMENT (SECOND) OF TORTS § 840D.

131. Spur Indus., Inc. v. Del Webb Dev. Co., 494 P.2d 700 (Ariz. 1972).

132. *See supra* note 129 and accompanying text.

133. Nuisance law provides remedies for aggrieved landowners if the nuisance in question is either intentional or unreasonable. Courts determine the unreasonableness of conduct by weighing its burden on others against its social utility. Alternatively, if the nuisance creator could afford to compensate others for the harm they endure without making his own conduct unfeasible, his conduct is unreasonable. RESTATEMENT (SECOND) OF TORTS § 826.

lose to a neighbor, and it would be hard to get an injunction against a funeral home in a commercial area. What matters in these situations is the setting.

Tort law often uses economic models to reconcile incompatible behaviors. One relevant model is accident cost/avoidance cost analysis. In a tort situation, if the accident cost is higher than the avoidance cost, then the law requires that the accident be avoided. In a free exercise case, financial cost is usually only part of the equation. Therefore, burden can be substituted for cost and can include the mental burden that religious issues include.

These same kind of rationales, situation and burden, can be applied in free exercise cases. In situations in which the interests involved are in the gray-area of constitutional protection, courts should look at the specific circumstances in which the rights compete instead of forcing one right to win under all circumstances. Currently, courts weigh the demonstrated societal interest in each value against each other and find one interest consistently more valuable than another. The problem with this type of evaluation, however, is that both free exercise rights and equal protection rights have already been deemed of the highest societal value.

We propose that when anti-discrimination interests in the gray-area of constitutional equal protection are pitted against free exercise interests, courts should weigh the individual burden of the competing interests, as opposed to the societal value in each interest, in deciding whether a state's interest in preventing such discrimination is compelling in a particular case.[134] Using this approach, the specific interests are balanced in order to determine the outcome of a particular case.[135]

The scenario is played out in the following example, albeit extreme. One religious landlord owns all of the economically priced apartment buildings in a particular town. The economy is weak, and unemployment is high. Two single, unemployed adults decide to live together for economic reasons, but they are unable to find an apartment because the one landlord in town refuses to rent to unmarried couples.[136] Whose

134. This approach would only be used for interests that have some protection under state law. Without any such protection, like a housing law banning discrimination based on sexual orientation or marital status, the free exercise interest would always prevail. Similarly, for cases in which there is a demonstrated state and/or federal policy in preventing discrimination based on certain characteristics, such as race and gender, such a determination is not necessary. This approach leaves open the possibility that a general state policy in preventing discrimination based on sexual orientation or marital status will surface, making an individuated burden analysis such as we propose no longer necessary.

135. Professor O'Neil puts it slightly different: "Varying degrees of burden, and of severity of impact upon religious faith and belief, are surely relevant and may guide courts in difficult cases." O'Neil, *supra* note 126, at 806.

136. This kind of hypothetical was proposed by Stephanie Hammond Knutson in her article, *The Religious Landlord and the Conflict Between Free Exercise Rights and Housing Discrimination Laws—Which Interest Prevails?*, 47 HASTINGS L.J. 1669 (1996).

rights should prevail, those of the landlord to exercise his religious beliefs, or those of the couple to be free from discrimination in housing? In an individuated burden analysis, the burden of denying the couple in this case, protection from discrimination based on marital status, is quite high. In contrast, although the discrimination law at hand does burden the landlord, the impact of that burden may not be as great as the couple's burden of homelessness.

Therefore, the state has a more compelling interest in preventing marital status discrimination in this example than it would in a more open real estate market. This is so only because the state has already shown an interest in generally preventing discrimination in state equal protection clauses and in generally protecting couples from marital status discrimination through housing laws.

In another example, the housing market is loose, and many apartments are available. An unmarried couple wants to live together, and one landlord refuses to rent to them. The couple takes the landlord to court even though they were able to find a comparable apartment at the same rent a block away. The interests are the same, but the burden of the discrimination has changed. The court now has a different burden to factor into its compelling interest determination.

This same reasoning can be persuasive when balancing the burden of state interests against burdened free exercise interests. For instance, in many Illinois towns, churches are required to apply for special use permits when locating anywhere but in residential areas.[137] As many Chicago suburbs are quite developed, however, appropriate residential space is hard to find.[138] Churches, then, are forced to locate in non-residential areas and apply for special use permits. If these permits are denied, the churches are unable to locate in these towns, infringing on members' ability to worship in the towns in which they live.[139] While the enforcement of zoning laws and the development of a strong tax base may be a compelling state interest that outweighs a church's free exercise rights when non-residential space is available, it may not be here. The burden of such laws on free exercise is greater in this situation than where residential space is available.

---

137. Letter from John W. Mauck, Attorney, Mauck, Bellande, Baker & O'Connell, to Rev. Jim Queen, Chicago Metropolitan Baptist Association (Oct. 7, 1992), *available at* http://www.house.gov/judiciary/mauck.pdf. These zoning ordinances usually are motivated by a community's desire to widen its tax base. As churches are generally tax-exempt, communities would rather have valuable commercial space occupied by revenue-generating businesses.

138. *Id.*

139. One example of this situation, *City of Chicago Heights v. Living Word Outreach Full Gospel Church & Ministries, Inc.*, 707 N.E.2d 53 (Ill. App. Ct. 1998), a case in which the court found the denial of a special use permit constitutional, is currently being reviewed by the Illinois Supreme Court.

This reasoning is quite compatible with, and supports the need for, state RFRAs. The circumstances of each case change the nature of an RFRA's test. When nothing but commercial land is available, the burden on religious exercise by zoning laws is much greater. When no other affordable apartments are available to an unmarried couple, the state's interest in keeping a landlord from discriminating against that couple is greater. Therefore, the circumstances of the case change the weight of the equation.

XI. CONCLUSION

In changing the analysis slightly for those interests that are not completely protected by the Equal Protection Clause, from a general balancing of interests to an individuated balancing of burden, RFRAs become useful devices for allowing important civil rights to battle it out in the courts. By looking to other areas of the law that reconcile incompatible, but legal, activities, courts can change the nature of free exercise dilemmas and come to more appropriate decisions. As more states (and possibly Congress) enact RFRAs, more and more courts will have the opportunity to resolve conflicts between free exercise and anti-discrimination laws in new ways by taking into account not merely the nature of the rights themselves but also the specific facts that gave rise to the dispute in the first place. The healthy consequence of litigation in such cases will be the clarification of the proper boundaries of religious freedom and equal protection in American society.

* * *