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RELIGIOUS FREEDOM: WHY STATES ARE UNCONSTITUTIONALLY BURDENING THEIR OWN CITIZENS AS THEY "LOWER" THE BURDEN

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INTRODUCTION

When drafting the Constitution, our founders formed a natural tension within the First Amendment, essentially creating a "two-sided coin" that harmonizes both the protection and non-establishment of religion.[1] As written, the amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[2] Separate and complementary, the Religion Clauses[3] left the Supreme Court with the difficult task of articulating a logical and functional way of calibrating the relationship between government and the citizenry,[4] which has resulted in wide scholarly debate on when and how legislators may create laws that have an oppressive effect on the practice of religion.[5]

In one of the earliest reviews of religious free exercise, the Court—in *Reynolds v. United States*[6]—determined that the right to free exercise is not absolute, acknowledging the importance of preventing "every citizen [from] becom[ing] a law unto himself."[7] The Court expressed deep concern that permitting individuals to escape liability whenever a religious duty conflicted with the law[8] would effectively mean that

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1 President William J. Clinton, *Remarks Announcing Guidelines on Religious Exercise and Religious Expression in the Federal Workplace*, GPO (Aug. 14, 1997), http://www.gpo.gov/fdsys/pkg/WCPD-1997-08-18/pdf/WCPD-1997-08-18-Pg1245.pdf. President Clinton further stated, "[t]his careful balance is the genius, the enduring genius of the [F]irst [A]mendment." *Id.*

2 U.S. CONST. amend. I.

3 The Establishment Clause and the Free Exercise Clause, collectively. *See id.*

4 *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599, 605 (1961) ("[T]o make accommodation between the religious action and an exercise of state authority is a particularly delicate task . . . .").

5 *See* Milner S. Ball, *The Unfree Exercise of Religion*, 20 CAP. L. REV. 39 (1991); John Delaney, *Police Power Absolutism and Nullifying the Free Exercise Clause: A Critique of* Oregon v. Smith, 25 IND. L. REV. 71 (1991); Michael W. McConnell, *Should Congress Pass Legislation Restoring the Broader Interpretation of Free Exercise of Religion?*, 15 HARV. J.L. & PUB. POL'Y 181 (1992); David C. Williams & Susan H. Williams, *Volitionalism and Religious Liberty*, 76 CORNELL L. REV. 769 (1991).

6 98 U.S. 145 (1878).

7 *Id.* at 167. In its reasoning, the Court relied on Thomas Jefferson's view of religious freedom, in which he declared that "[b]elieving with you that religion is a matter which lies solely between man and his God; [yet] the legislative powers of the government [may] reach actions . . . ." *Id.* at 164. *See also id.* at 166 ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.").

8 In *Reynolds*, a member of The Church of Jesus Christ of Latter-Day Saints ignored the Morrill Anti-Bigamy Act—which outlawed bigamy in United States territories—arguing that as a Mormon, the law unconstitutionally violated his right to freely exercise his religious belief in polygamy. *See generally* 98 U.S. 145.

one's religious beliefs are superior to the governing body.[9] A century later, the Court had developed a wide spectrum of precedent regarding free exercise; part of which views intrusive government laws as presumptively suspicious, thus analyzing them under a strict scrutiny standard of review.[10] At this heightened level, a law cannot substantially burden one's religious exercise unless it is the least restrictive means of furthering a compelling government interest.[11] Notably, however, the other share of free exercise precedent arises from many additional cases beyond those calling for strict scrutiny review.[12]

In 1990, amidst many questions surrounding the use of strict scrutiny review,[13] the Court—in the seminal case *Employment Division v. Smith*[14]—held that a neutral and generally applicable law could not trigger the strict scrutiny test.[15] Rather, Justice Scalia recognized that such a standard would effectively deem most laws invalid.[16] While many commentators believe that *Smith* should have been decided narrowly under the strict scrutiny test,[17] the Court acknowledged the case as one of first impression,[18] thus calling for a comprehensive

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9 *Id.* at 167 ("Government could exist only in name under such circumstances.").

10 *See* Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) (evaluating if state's interest in universal education is "so compelling" as to trump Amish society's religious practice); Sherbert v. Verner, 374 U.S. 398, 406 (1963) ("It is basic that no showing merely of a rational relationship to some colorable state interest would suffice . . . .").

11 The concept of strict scrutiny review was first introduced in United States v. Carolene Products Co. *See* 304 U.S. 144, 152 n.4 (1938). Strict scrutiny, the highest standard of review, requires the action be narrowly tailored and the least restrictive means to further a compelling governmental interest. *Id.* (The concept was first applied in Korematsu v. United States, 323 U.S. 214 (1944)). This Note will later propose that "rational basis" and "intermediate scrutiny" should also be considered when evaluating certain free exercise claims. *See infra* note 221 and accompanying text for the articulation of these two tests.

12 *See generally* United States v. Lee, 455 U.S. 252 (1982) (holding Amish society's belief against tax payments affords no basis for resisting a social security tax imposed uniformly on all employers); Gillette v. United States, 401 U.S. 437, 462 (1971) (holding "incidental burdens felt by persons [denied exemption from military service because they object to participation in a particular war] are strictly justified by substantial governmental interests"); Braunfeld v. Brown, 366 U.S. 599 (1961) (holding state law proscribing retail sales on Sunday was not unconstitutional burden on Orthodox Jewish business owners, who were religiously required to be closed on Saturday).

13 *See* cases cited *supra* note 12; *see also* cases cited *infra* note 52.

14 494 U.S. 872 (1990). *See also infra* notes 54–60 and accompanying text.

15 *Id.* at 885 ("To make an individual's obligation to obey such a [generally applicable] law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling,' . . . contradicts both constitutional tradition and common sense.") (citation omitted).

16 *Id.* at 888 ("[I]f 'compelling interest' really means what it says . . . many laws will not meet the test.").

17 Alluding to the strict scrutiny test formulated in *Sherbert v. Verner* and *Wisconsin v. Yoder*. *See also supra* note 5 for backlash from legal commentators following *Smith*.

18 Brief for Petitioners at 11–12, Emp't Div., Dep't of Human Res. v. Smith, 485 U.S. 660 (1990) (Nos. 86-946, 86-947), 1987 WL 880306, at *10–11 ("The criminality of claimants' conduct powerfully distinguishes these cases from *Sherbert*, as does the claimants' insistence on actively undermining their employer's interests rather than resigning from work or refusing to work on terms that offended their religious beliefs."). *See also* Emp't Div., Dep't of Human Res.

evaluation of prior free exercise cases.[19] The rather astonishing outpour from religious lobbyists and policy-makers following *Smith*[20] led Congress to quickly enact The Religious Freedom Restoration Act of 1993 (Federal RFRA).[21] Federal RFRA was drafted with the goal of restoring the strict scrutiny standard for every case challenging laws as unfairly impeding religious exercise.[22] In supporting its main premise, this Note will demonstrate that rather than restoring the previous test employed by the Court, Congress truly enacted Federal RFRA to displace the bulk of common law precedent with a standard used in only a minority of prior cases.[23]

Four years later, in *City of Boerne v. Flores*,[24] the Court found that Congress exceeded the scope of its Fourteenth Amendment[25] authority when it imposed Federal RFRA onto the states.[26] Crucially, the majority in *Boerne* noted that Federal RFRA "contradicts vital principles necessary to maintain separation of powers and the federal balance."[27] This invalidation triggered prompt State RFRA legislation seeking to replicate its previous federal counterpart.[28] Most recently, however, a

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v. Smith, 485 U.S. 660, 675 (1990) (Brennan, J., dissenting) ("This Court today strains the state court's opinion to transform the straightforward question that is presented into a question of first impression that is not.").

19 Marci A. Hamilton, Employment Division v. Smith *at the Supreme Court: The Justices, the Litigants, and the Doctrinal Discourse*, 32 CARDOZO L. REV. 1671, 1672–73 (2011) (providing an exhaustive list of cases considered by the Court in *Smith*).

20 *See supra* note 5.

21 42 U.S.C. §§ 2000bb-1–2000bb-4 (Supp. 2006) [hereinafter Federal RFRA]. Federal RFRA was declared unconstitutional as applied to the states in *City of Boerne v. Flores*. 521 U.S. 507 (1997). *See infra* notes 24–27. In 2014, Federal RFRA was interpreted to allow closely held for-profit corporations exemption from a law its owners object to on religious grounds if there is a less restrictive means of furthering the law's interest. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

22 42 U.S.C. § 2000bb ("The purposes of this chapter are to restore the compelling interest test set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened . . . .").

23 *See* discussion *infra* Part III.B. *See also infra* note 57. Federal RFRA mandates that "[g]overnment shall not *substantially burden* a person's exercise of religion," unless it can show it has a compelling and narrowly tailored interest. 42 U.S.C. § 2000bb-1 (emphasis added). However, by implementing this standard, Federal RFRA became the only law in United States history to proclaim a level of constitutional review as the substance of the law. *See* Marci A. Hamilton, *The Religious Freedom Restoration Act Is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1, 3 (1998) ("RFRA, however, does not amend the text of any federal law. Rather, it changes the way in which the courts scrutinize federal law.").

24 521 U.S. 507, 519 (1997) ("Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is.").

25 U.S. CONST. amend. XIV, § 5.

26 521 U.S. at 532 ("RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."). *See also infra* Part I.C.

27 *Id.* at 536.

28 Within two years of *Boerne*, seven states had successfully passed their own Religious Freedom Restoration Acts [hereinafter State RFRA]. As of December 2014, the following states

small but significant handful of state lawmakers have taken this opportunity to go a step further than the language used in Federal RFRA; these states have called only for an individual to show a mere "burden" on religious exercise—as opposed to a "substantial burden"—in order to trigger strict scrutiny review.[29]

Part I of this Note traces the development of the Supreme Court's First Amendment precedent, including a discussion of Congress's enactment of Federal RFRA. Part II introduces the states' legislative efforts with regard to free exercise statutes, culminating with the problematic "burden" RFRA movement. Part III outlines a brief history of both the Establishment Clause and Separation of Powers doctrine, and analyzes how "burden" RFRAs are unconstitutional in light of each, respectively. Part IV discusses the implications of this progressive trend, specifically focusing on the boundless government litigation, civil rights concerns, and the health and safety issues that have resulted. Part V then proposes that the more effective and prudent approach is to return the religious free exercise discussion to the judicial arena by adopting pointed RFRA statutes with distinct levels of scrutiny that can guide the courts in making sensible and fact-specific exemptions to certain government regulations.

I. BACKGROUND

A. *The Supreme Court's Evolving Precedent*

In the 1960s, the Court implemented a balancing test for reviewing religious exercise claims.[30] In *Braunfeld v. Brown*,[31] the Court

have passed RFRA-type statutes: Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia. *See* ALA. CONST. art. I, § 3.01; ARIZ. REV. STAT. ANN. §§ 41-1493–1493.02 (2009); CONN. GEN. STAT. ANN. § 52-571b (West 2009); FLA. STAT. ANN. §§ 761.01–.05 (West 2010); IDAHO CODE ANN. §§ 73-401–404 (2006); 775 ILL. COMP. STAT. ANN. 35/1–99 (West 2000); H.R. 279, 2013 Reg. Sess. (Ky. 2013); MO. ANN. STAT. §§ 1.302–.307 (West 2009); N.M. STAT. ANN. §§ 28-22-1–5 (2006); OKLA. STAT. ANN. tit. 51, §§ 251–258 (West 2009); 71 PA. CONS. STAT. ANN. §§ 2401–2407 (West 2008); R.I. GEN. LAWS §§ 42-80.1-1–4 (1998); S.C. CODE ANN. §§ 1-32-10–60 (1999); TENN. CODE ANN. § 4-1-407 (2011); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001–.012 (West 2000); UTAH CODE ANN. §§ 63L-5-101–403 (2008); VA. CODE ANN. §§ 57-1–2.02 (2009).

[29] The following states have currently enacted RFRAs using "burden" in place of "substantially burden": Alabama (enacted); Connecticut (enacted); Kentucky (enacted); and Texas (enacted). Further, New Mexico, Missouri, and Rhode Island use the word "restrict" in place of "substantially burden." *See supra* note 28 for citations to each state's statute.

[30] Braunfeld v. Brown, 366 U.S. 599, 607 (1961) ("If the purpose or effect of a law is to impede the observance of . . . religion[] or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be . . . indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious

addressed whether a Pennsylvania law[32] forbidding certain businesses to open on Sundays unconstitutionally impeded the free exercise of members of the Orthodox Jewish faith, who were religiously required to close on Saturdays as well.[33] Following *Reynolds*, the Court determined that to invalidate a statute that did not make unlawful the religious practice itself would drastically confine the legislature's lawmaking authority.[34]

Two years later, in *Sherbert v. Verner*,[35] the Court formulated a stricter test for certain free exercise claims. While reviewing the South Carolina Unemployment Compensation Act,[36] the majority held that upon an individual's showing that a law substantially burdened a sincerely held religious belief, the government would have to prove the regulation serves a compelling interest in a way that is least burdensome upon religion.[37] The law in question provided unemployment benefits only for those who missed work for "good cause."[38] Plaintiff—a Seventh-day Adventist—was fired and denied unemployment benefits after refusing to work on Saturdays (the religion's Sabbath), since this absence was not deemed a "good cause."[39] The Court interpreted this to mean that ineligibility for benefits arose solely from plaintiff's religious observance.[40] Pointedly, Justice Brennan limited this strict scrutiny test to situations in which the disputed law is administered unevenly and arbitrarily—resulting in differential treatment[41]—as opposed to those

observance unless the State may accomplish its purpose by means which do not impose such a burden.").

31 366 U.S. 599 (1961).

32 18 Purdon's PA. STAT. ANN. (1960 Cum. Supp.) § 7363.

33 Appellants argued that they "had done a substantial amount of business on Sunday, compensating somewhat for their closing Saturday," and thus the law would "result in impairing the ability of all appellants to earn a livelihood . . . ." 366 U.S. at 601.

34 366 U.S. at 606 ("To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature."). Furthermore, the Court noted that an indirect burden against an individual would not trump a government interest in advancing a state's secular goals, which in this case was "eliminate[ing] . . . commercial noise and activity" for one day each week. *Id.* at 608.

35 374 U.S. 398 (1963).

36 S.C. CODE ANN. § 68-114 (this statute, which was the focal point of *Sherbert*, no longer exists in South Carolina). Fundamental to the holding, the state Act withheld unemployment compensation if the employee failed to show "good cause" for missing assigned work. *Id.*

37 374 U.S. 398, at 408–09 (distinguishing the state interest and means used required in *Braunfeld*, which noted that a statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden). *See* Braunfeld v. Brown, 366 U.S. 599, 607 (1961).

38 S.C. CODE ANN. § 68-114 (as the statute stood in 1963).

39 374 U.S. 398, at 403–06.

40 *Id.* at 401 (The law did not disqualify all applicants for benefits who were unavailable for work for a "personal reason."). This differential treatment in the statute resulted in an unconstitutional "coercive effect." *Id.* at 404 n.5.

41 *Id.* at 406 ("[T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her

laws applied neutrally and generally.[42]

Shortly thereafter, in *Wisconsin v. Yoder*,[43] the Court went even further than *Sherbert*, this time using strict scrutiny review for a law that was neutral and generally applicable.[44] In *Yoder*, respondents challenged the compulsory education law—which required a child's school attendance until age sixteen—since it directly conflicted with the Amish community's educational practices.[45] Possibly looking for a way to protect the "goodness"[46] of the Amish society during a period of educational controversy in America,[47] the majority emphasized the shortfall of the government's interest in the law, strongly concluding that only state interests "of the highest order"[48] can prevail over free exercise claims. Viewed as "[p]erhaps the single dearest statement of the [free exercise] doctrine,"[49] *Yoder* was no stranger to criticism.[50] Nevertheless, it should be stressed that *Yoder* was the only case outside the context of unemployment benefits to apply strict scrutiny in finding a law violated free exercise rights.[51]

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constitutional liberties."). Furthermore, in a footnote, the Court noted that "[w]here the consequence of disqualification so directly affects First Amendment rights, surely [it] should not conclude that every 'personal reason' is a basis for disqualification in the absence of explicit language to that effect in the statute . . . ."). *Id.* at 401 n.4. Thus, the Court held the law invalid because non-religious reasons would have led to benefits eligibility, while religious reasons did not. *Id.* at 405.

42 *Id.* at 409 (The extension of benefits in this case "reflects nothing more than the governmental obligation of neutrality in the face of religious differences.").

43 406 U.S. 205 (1972).

44 406 U.S. at 220 ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.").

45 *Id.* at 207.

46 *Id.* at 211. The Court feared that the compulsory attendance law would have an adverse impact on the children of the Amish society by exposing them to "worldly influences . . . at the crucial adolescent stage of development . . . ." *Id.* at 218.

47 SHAWN FRANCIS PETERS, THE *YODER* CASE: RELIGIOUS FREEDOM, EDUCATION, AND PARENTAL RIGHTS, 50–55 (2003).

48 406 U.S. at 215.

49 Bette Novit Evans, *Religious Freedom vs. Compelling State Interests*, RABBI MYER AND DOROTHY KRIPKE CENTER FOR THE STUDY OF RELIGION & SOCIETY (Spring 1998), http://moses.creighton.edu/csrs/news/s98-1.html. *See also* MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW, 209 (2005) ("*Yoder*, however, stands by itself, and is later explained by the Court as a case that is more easily explained in terms of parental rights than in terms of what religious entities owe to the public good.").

50 *See e.g.*, Justice Harry A. Blackmun, Conference Notes, *Smith* (Nos. 86-946, 86-947) (Dec. 11, 1987) (on file with the Library of Congress, Manuscript Division, Harry A. Blackmun Papers, Box 495: Folder 7) (Justice Stevens believing that *Wisconsin v. Yoder* was "all wrong"); PAUL FINKELMAN, ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 1788 (Vol. 1 2006); HAMILTON, *supra* note 49, at 131–33.

51 *See* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 883 (1990) ("We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation."); Hobbie v. Unemp't Appeals Comm'n of Fla., 480 U.S. 136 (1987) (state's refusal to award unemployment benefits to a Seventh-day Adventist violated the Free Exercise Clause); Thomas v. Review Bd. of Ind. Emp't Sec., 450 U.S. 707 (1981) (state's denial of unemployment benefits violated a Jehovah's Witness' right to free exercise).

In the 1980s, the Court began to retreat from *Sherbert*'s strict scrutiny analysis,[52] culminating in 1990, when it heard the landmark case *Employment Division v. Smith*.[53] In *Smith*, the plaintiffs claimed that denial of unemployment benefits due to their sacramental use of peyote was a violation of free exercise rights.[54] Writing for the majority, Justice Scalia determined that strict scrutiny review was not the approach most consistent with Supreme Court precedent when evaluating neutral and generally applicable laws.[55] Rather, the Court determined it would be more harmonious to adhere to the *Reynolds* analysis, upholding such laws as constitutional by giving deference to government's lawmaking ability.[56] Citing a wide gamut of past cases,[57] Justice Scalia harped on the historical concern that citizens may become superior to the law,[58] and able to obtain religious exemptions for almost any sincerely held religious belief under the *Sherbert* analysis.[59] Perhaps most importantly, *Smith* distinguished *Yoder* as a "hybrid situation"[60] that only triggered strict scrutiny of a generally applicable law because it was "in conjunction"[61] with other constitutional protections.

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52 *See* O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (rejecting application of *Sherbert*'s test and holding that a prison may enforce regulations that interfere with religious practices provided they are reasonably related to legitimate objectives); Goldman v. Weinberger, 475 U.S. 503 (1986) (rejecting application of *Sherbert*'s test and acknowledging that a burden on religious exercise, albeit a permissible one, resulted from an Air Force regulation that restricted an Orthodox Rabbi from wearing a yarmulke).

53 494 U.S. 872 (1990).

54 As part of the Native American Church, Respondents ingested peyote for sacramental purposes, violating state law. *See* OR. REV. STAT. § 475.992(4) (1987) (prohibiting the knowing or intentional possession of a controlled substance). The pertinent statute in Oregon has since been renumbered and now specifically includes the use of peyote. *See* OR. REV. STAT. § 475.752.

55 494 U.S. at 888 ("[W]e cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.").

56 *Id.* at 879–84.

57 In total, the majority in *Smith* cited to thirty cases involving free exercise rights. *Id.* at 874–90.

58 *Id.* at 885 (citing Reynolds v. United States, 98 U.S. 145, 167 (1878)).

59 *Id.* at 888 ("[I]f 'compelling interest' really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them."). Justice Rehnquist has also expressed his concern over the danger and difficulties of the "least restrictive means" element of the *Sherbert* test, noting that few legislative decisions could survive, which "does little to help resolve [the First Amendment] tension or to offer meaningful guidance to other courts which must decide cases like this on a day-by-day basis." *See* Thomas v. Review Bd. Of Ind. Emp't Sec. Div., 450 U.S. 707, 718, 722 (1981) (Rehnquist, J., dissenting).

60 494 U.S. at 882.

61 *Id*. at 881. In *Yoder*, the free exercise claim was in conjunction with a "parental right" to refuse on religious grounds to send their children to school. *Id*. at 882.

B. *The Religious Freedom Restoration Act of 1993*

The *Smith* decision led to protest in the legal arena,[62] with the loudest outcry coming from religious lobbyists and groups demanding exemptions from generally applicable yet burdensome laws.[63] This sharp reaction led directly to Congress's swift enactment of the Federal RFRA.[64] Federal RFRA essentially abolished the Court's holding in *Smith*—and all of the cases on which it relied[65]—while taking favor to what Congress believed was the previous strict scrutiny standard applied by *Sherbert* and *Yoder*.[66] Consequently, following Federal RFRA's enactment, a law could be viewed as constitutional under *Smith*, yet invalid under the statute's heightened review. Perhaps most concerning was the extensive scope of Federal RFRA in a nation of ever-expanding and markedly distinct religious groups and practices.[67]

C. *The Supreme Court's Response:* City of Boerne v. Flores

Federal RFRA was met with abrupt opposition, mainly due to its "blatant attempt" to re-write the meaning of the Free Exercise Clause in

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62 *See, e.g.*, Mark F. Kohler, *Neutral Laws, Incidental Effects, and the Regulation of Religion and Speech*, 40 DRAKE L. REV. 255 (1991); Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555 (1991); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992).

63 Some of the religious groups that have historically supported RFRA include, The Family Leader, Focus on the Family, and The Catholic Bishops. *See* Marci A. Hamilton, *The New Wave of Extreme State Religious Freedom Restoration Act (RFRA) Legislation: Why It's Dangerous*, FINDLAW (Oct. 14, 2010), http://writ.lp.findlaw.com/hamilton/20101014.html.

64 42 U.S.C. §§ 2000bb-1–2000bb-4.

65 *See* Sasnett v. Sullivan, 91 F.3d 1018, 1019–1021 (7th Cir. 1996) ("[RFRA] thus seeks to return the courts . . . to the approach they had taken before *Smith*. . . . The motivation behind [RFRA] was in fact disagreement with the Supreme Court's interpretation of the Constitution."); Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 219 (1994) ("[RFRA] is designed to restore . . . rights that Congress believes should exist if the Constitution were properly interpreted.").

66 The inconsistency is evidenced by Congress's statement of findings for Federal RFRA. While the purpose of the statute was to restore the test in *Sherbert* and *Yoder*, there is also a reference to unspecified "prior Federal court rulings," for "striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a)(5). Thus, the findings point to all Pre-*Smith* case law as guidance for application of the compelling interest test, which, as illustrated, includes numerous cases deviating from *Sherbert*'s approach. *See supra* note 57.

67 *See* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 888 (1990); Braunfeld v. Brown, 366 U.S. 599, 606 (1961) ("[W]e are a cosmopolitan nation made up of people of almost every conceivable religious preference. These denominations number almost three hundred."); President William J. Clinton, *Remarks Announcing Guidelines on Religious Exercise and Religious Expression in the Federal Workplace*, GPO (Aug. 14, 1997), http://www.gpo.gov/fdsys/pkg/WCPD-1997-08-18/pdf/WCPD-1997-08-18-Pg1245.pdf ("[M]ore and more and more people of many different faiths have been able to put down roots and pursue their beliefs freely here.").

the face of the Court's interpretation.[68] Thus, it came with little surprise that Congress's endeavor to order the states into following the strict scrutiny test was short-lived. The Court addressed this matter in *City of Boerne v. Flores*,[69] in which the Catholic Archbishop of San Antonio, attempting to expand its Church, claimed that a conflicting zoning ordinance was a violation of free exercise.[70] In denying respondents' Federal RFRA claim,[71] the Court concluded that Congress exceeded the scope of its enforcement power under the Fourteenth Amendment.[72] While the Court's holding turned on this constitutional violation,[73] the majority spent time criticizing Federal RFRA as a whole, deeming it "the most demanding test known to constitutional law."[74] Central to its reasoning, the Court, in noting the statute's underlying effort to make a substantive change in constitutional protections,[75] displayed concern that Federal RFRA was an impermissible advancement of religion by Congress.[76]

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68 *See* Hamilton, *supra* note 23, at 3. *See also* Joanne C. Brant, *Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L REV. 5, 5 (1995) ("RFRA is intended to guarantee greater protection for religious freedom than the Smith Court has been willing to provide under the Free Exercise Clause . . . ."); Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. LJ. 65, 67 (1996) ("Seldom has Congress been inspired to express such quick indignation and displeasure with a constitutional decision of the Supreme Court or been so eager to overturn the substance of such a decision.").

69 521 U.S. 507 (1997).

70 *Id*. at 511–12.

71 *Id*. at 507.

72 U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."). The Court in *Boerne* reasoned that:

> RFRA's substantial-burden test . . . is not even a discriminatory effects or disparate-impact test. It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs.

521 U.S. at 535. The court concluded, therefore, that Federal RFRA was unconstitutional as applied to the states. *Id.* at 536.

73 *See* discussion *infra* Part III.B.

74 *Boerne*, 521 U.S. at 534. The Court further noted that "[RFRA's] [s]weeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." *Id.* at 532. In his concurrence, Justice Stevens determined that "[t]his governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment." *Id*. at 537 (Stevens, J., concurring). *See also* sources cited *supra* note 59 and accompanying text.

75 *Id.* at 532.

76 *See* discussion *infra* Part III.A. *See also* Hamilton, *supra* note 23, at 1 ("The Supreme Court's opinion in Boerne v. Flores declared unequivocally that the Religious Freedom Restoration Act . . . is unconstitutional."). *Cf.* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) (holding that the government failed to meet its compelling interest burden under Federal RFRA when it barred a sect's sacramental use of a Schedule I substance). *But see infra* text accompanying notes 206–214.

II. PROBLEM

A. Boerne *Aftermath and "Substantial Burden" State RFRAs*

Following *Boerne*, many policy-makers that were part of the original Federal RFRA coalition once again pressed Congress to explore its powers, with hopes of passing a new bill to counteract the Court's findings.[77] Although some proponents of lenient religious exercise rights—perhaps deliberately—fail to acknowledge it,[78] Congress was first unsuccessful in its quest for broader protection when it attempted to push the Religious Liberty Protection Act (RLPA) through the Senate in 1999.[79] Rather, it had to compromise for passing the Religious Land Use and Institutionalized Persons Act (RLUIPA),[80] a considerably narrower statute that only provides heightened protection for substantially burdensome land restrictions and prisoner worship rights.[81] Simultaneously, a number of state legislative branches began the same endeavor as Congress following *Smith*, with similar intentions of instituting a strict scrutiny test no matter the law's applicability.[82] Drawing primarily from Federal RFRA's text, about a dozen State RFRAs were passed rather quickly, before opponents could lobby for a stand against the pro-RFRA movement.[83] In total, seventeen states have

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77 *See* Hamilton, *supra* note 63; Andy Kopsa, *America's Non-Existent War on Religion and the Return of the Radical Religious Freedom Restoration Act*, RH REALITY CHECK (Feb. 13, 2012, 12:53 PM), http://rhrealitycheck.org/article/2012/02/13/americas-non-existant-war-on-religion-and-return-rfra.

78 *See generally* Daniel O. Conkle, *Religious Truth, Pluralism, and Secularization: The Shaking Foundations of American Religious Liberty*, 32 CARDOZO L. REV. 1755 (2011); Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466 (2010); James W. Wright Jr., Note, *Making State Religious Freedom Restoration Amendments Effective*, 61 ALA. L. REV. 425, 429–31 (2010).

79 *See* Richard T. Foltin, *Reconciling Equal Protection and Religious Liberty*, AM. BAR ASS'N, Vol. 39, No. 2, 2013 ("By the end of 1999, having passed in the House . . . it became evident that this second effort to effectuate a general 'compelling standard' test was not going to clear the Senate . . . [and] RLPA was shelved . . . .").

80 42 U.S.C. §§ 2000cc–2000cc-1 [hereinafter RLUIPA]. *See also* Cambodian Buddhist Soc. of Conn., Inc. v. Planning & Zoning Comm'n of Newton, 941 A.2d 868, 881–91 (Conn. Super. Ct. 2008) (providing a comprehensive analysis of RLUIPA and determining its substantial burden provision did not apply to the claim that the town's refusal to grant special exception to build temple was discriminatory).

81 In enacting RLUIPA, Congress sought to "to avoid RFRA's fate by limiting the scope of [RLUIPA] to (1) state regulations . . . that affect commerce, (2) programs that receive federal financial assistance, and (3) programs under which the agency makes 'individualized assessments of the proposed uses for the property involved.' " Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 897 (7th Cir. 2005). As one commentator voiced, this compact timeline of events "was the first sign of a paradigm shift" with regards to broad religious exercise statutes. *See* Foltin, *supra* note 79.

82 *See supra* note 28.

83 Some groups included the American Academy of Pediatrics and the National Association of Regulatory Agencies. *See* Hamilton, *supra* note 63.

now enacted their own versions of the bill in order to ensure heightened protections at the state level.[84]

B. *Some States Take It a Step Further*

Many states have realized that it would be unjustified to substantively differentiate their RFRAs from that of the federal version.[85] Yet, of the highest concern, and the focal point of this Note,[86] is the growing number of states that have either enacted or are considering RFRAs that require the individual only display a "burden" on religious exercise in order to prompt strict scrutiny review.[87] By eliminating the "substantial" threshold, these statutes depart significantly from both Federal RFRA and Supreme Court precedent, inevitably paving the way for many unintended religious exercise exemptions.[88] Take, for example, a recent amendment to Texas's Constitution:

> Government may not *burden* an individual's or religious organization's freedom of religion or right to act or refuse to act in a manner motivated by a sincerely held religious belief unless the government proves that the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. For purposes of this subsection, the term "burden" includes indirect burdens such as withholding benefits, assessing penalties, and denying access to facilitates or programs.[89]

By requiring the religious objector to show a mere burden on religious activity, the Texas bill—in the face of both Supreme Court precedent[90] and Federal RFRA[91]—goes to unparalleled lengths in

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84 *See supra* note 28.

85 *See supra* notes 28–29.

86 Since the passage of the original Federal RFRA, there has been much publication and scholarly debate on both Federal RFRA and its succeeding state counterparts. *See, e.g.*, Wright Jr., *supra* note 78 (discussing differing State "substantial burden" RFRA statutes); Hamilton, *supra* note 23 (analyzing the Court's ruling in *Boerne* and what it meant for Federal RFRA); Erwin Chemerinsky, *Do State Religious Freedom Restoration Acts Violate the Establishment Clause or Separation of Powers?*, 32 U.C. DAVIS L. REV. 645 (1999) (discussing the constitutionality of State "substantial burden" RFRA statutes, concluding that they do not violate constitutional principles). Yet, the emergence of "burden" RFRAs is a new, unaddressed phenomenon, which presents different problems and issues than "substantial burden" RFRAs and forms the central focus of this Note and its proposal. *See* discussion *infra* Parts II.C., III., IV.

87 These states include Alabama, Connecticut, Kentucky, and Texas. *See supra* note 29 for citations to each state's statute.

88 At least one proponent of broad exercise rights has conceded that such "burden" statutes "go beyond what the federal RFRA intended . . . easing the way for exemptions." K. Hollyn Hollman, *Free Exercise Standards Increasingly Debated*, BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY (Apr. 2013), http://bjconline.org/free-exercise-standards-increasingly-debated.

89 S.J. Res. 10, 84th Leg. (Tex. 2014) (emphasis added).

90 *See supra* note 57.

protecting and expanding religious free exercise claims.[92]

C. *Lowering the Threshold*

The distinction between "burden" and "substantial burden" is both nebulous and difficult to ascertain.[93] The prior Supreme Court cases, including *Sherbert* and *Yoder*, failed to articulate any clear-cut instruction for resolving the threshold question of whether, and to what extent, a burden exists.[94] A number of states have left the judiciary with the discretion to determine what constitutes a "substantial burden" for the purposes of triggering strict scrutiny.[95] Other state legislatures have provided some direction and reference for the courts by including definitions within their statutes.[96] Each of these states has put its own spin on "substantial burden," yet they all include similar language that hints at a requirement of showing that government infringement is on some significant aspect of the religious belief.[97] For instance, in Idaho, a substantial burden is found when the law "inhibit[s] or curtail[s] religiously motivated practices."[98] In Pennsylvania, an infringed activity "fundamental to the person's religion,"[99] will similarly constitute a substantial burden. Viewed as a whole, these definitions appear to have

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91 42 U.S.C. §§ 2000bb-1–2000bb-4 (Supp. 2006). *See also* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter–Day Saints v. City of W. Linn, 111 P.3d 1123, 1128 (2005) ("Congress used the term 'substantial burden' because that was the term that the Court had used in *Sherbert* and other Free Exercise cases . . . before *Smith*.").

92 Just as controversial, both the Idaho and Tennessee RFRAs put the burden of proof on the government to show that its regulation of a religious practice is "essential" to achieve a compelling governmental interest. *See* IDAHO CODE ANN. §§ 73-401–404 (2006); TENN. CODE ANN. § 4-1-407 (2011).

93 *See generally* Jonathan Knapp, Note, *Making Snow in the Desert: Defining a Substantial Burden Under RFRA*, 36 ECOLOGY L.Q. 259 (2009) ("[RFRA] is purposely ambiguous concerning the meaning to be supplied to all of its critical terms, such as what types of governmental action 'substantially burden' the free exercise of religion, Congress simply returned a number of intractable issues to the courts. This . . . has resulted in pervasive confusion over how the term 'substantial burden' should be defined and analyzed . . . .").

94 *Id*. at 268–71 (noting that both *Sherbert* and *Yoder* failed to include any "express guidance for future courts to use in resolving the threshold question of whether a burden exists").

95 Currently, eight states—Alabama, Connecticut, Florida, Illinois, New Mexico, Rhode Island, South Carolina, and Texas—do not provide a statutory definition for "substantial burden," leaving the court, as a recognized canon of statutory construction, to define this term. See *supra* note 28 for citations to each state's RFRA statute. *See also* Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1033 (9th Cir. 2007) (stating that substantial burden "must be 'more than an inconvenience,' . . . and must prevent the plaintiff 'from engaging in [religious] conduct or having a religious experience'") (citations omitted).

96 Currently, four states—Arizona, Idaho, Oklahoma, and Pennsylvania—include some statutory definition of "substantial burden." See *supra* note 28 for citations to each state's RFRA statute.

97 *See infra* notes 98–99, 101.

98 IDAHO CODE ANN. § 73-401(5) (West 2006); *see also* OKLA. STAT. ANN. tit. 51, § 252(7) (West 2000).

99 71 PA. STAT. ANN. § 2403 (West 2008).

one goal in common: to protect religious practices that are "central"[100] to a claimant's faith, as opposed to infractions that are "trivial, technical, or de minimis."[101]

The concept of "centrality" stems from *Yoder*, which represents the broadest protection the Court has given to religious claimants by applying the strict scrutiny test to a neutral and generally applicable law.[102] Even so, the Court stressed the importance of assessing the religious "centrality" when determining whether particular practices or beliefs are sufficiently important to warrant constitutional protection.[103] Consequently, at a minimum, the judiciary's historical statutory construction reveals a rooted preference for interpreting "substantial burden" as one that relates to a practice that is core to a claimant's religious belief.[104]

III. ANALYSIS: THE SUSCEPTIBILITY OF "BURDEN" STATUTES

A. *Entanglement with the Establishment Clause*

Historically, many legal commentators have been troubled by Federal RFRA's fostering of non-secular initiatives by granting certain religious exemptions,[105] since the First Amendment explicitly forbids Congress from making laws respecting an establishment of religion.[106] The Supreme Court, in *Lemon v. Kurtzman*,[107] formulated a three-prong test which broadly interpreted an establishment of religion to include laws that lack a secular purpose or intent,[108] advance or endorse

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100 Wis. v. Yoder, 406 U.S. 205, 210 (1972).

101 ARIZ. REV. STAT. ANN. § 41-1493.01(E) (1999).

102 *See* discussion *supra* notes 45–53.

103 406 U.S. at 215–19.

104 *See also* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 474–76 (1988) (Brennan, J., dissenting) (A substantial burden is one that "poses a substantial and realistic threat of undermining or frustrating . . . religious practices.").

105 *See generally* Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 457–58 (1994); Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247, 294 (1994) (RFRA is "an across-the board mandate of accommodation for all religious claimants in all governmental situations."). Opponents, on the other hand, claim that because the strict scrutiny standard did not violate the Establishment Clause before *Smith*, it should not be regarded as offending that provision after *Smith*. *See* Chemerinsky, *supra* note 86, at 651. However, this argument can be refuted on at least two grounds. First, the strict scrutiny test employed before *Smith* was simply that of the Court's precedent, and not a legislative initiative, which raises distinct Establishment Clause concerns. Second, as noted previously, cases outside of the unemployment benefits context and *Yoder* did not exclusively use a strict scrutiny analysis in forming their opinions. *See supra* note 57.

106 U.S. CONST. amend. I.

107 403 U.S. 602, 612–13 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)). A law is unconstitutional if it fails any of the three prongs. *Id*.

108 *See* Edwards v. Aguillard, 482 U.S. 578, 594 (1987) (deeming a Louisiana statute

religion,[109] or foster excessive entanglement between government and religious belief.[110] Additionally, the Court has expressly noted that a law also violates the Establishment Clause when it leads to a favoring of one religion to another, or religion to irreligion.[111] Thus, there is a credible argument that on their face, "burden" statutes violate the Court's time-honored articulation of the Establishment Clause outlined above.[112] This is because at its very core, by not seeking to protect all burdened conduct—including both religious and nonreligious activity—broad religious exercise statutes inherently result in religious advancement at the cost of purely secular conduct.[113]

This effect can be seen in two classic Supreme Court cases: *Texas Monthly, Inc. v. Bullock*,[114] and *Estate of Thornton v. Caldor, Inc*.[115] In *Bullock*, the Court analyzed a Texas statute that exempted from sales tax periodicals published by a religious group whose content consisted exclusively of teachings of that faith.[116] Thus by default, the statute had the effect of subsidizing religious magazines (recognized through increased profits) with tax payments by secular publications.[117] Through

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unconstitutional because "the primary purpose of the Creationism Act is to endorse a particular religious doctrine").

109 *See Lemon*, 403 U.S. at 612 (holding that to remain constitutional, government's actions' "principal or primary effect must be one that neither advances nor inhibits religion.").

110 *See* Lee v. Weisman, 505 U.S. 577, 592 (1992) (holding a public school graduation invocation unconstitutional because it may have been "an attempt to employ the machinery of the State to enforce a religious orthodoxy").

111 *See* Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947). *See also id.* at 18 ("[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them."). For the historical significance and impact of *Everson*, see Donald L. Drakeman, Everson v. Board of Education *and the Quest for the Historical Establishment Clause*, 49 AM. J. LEGAL HIST. 119, 120 (2007) (noting that Everson has been cited in nearly eighty Supreme Court cases). *See also* Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 703 (1994) ("[A]t the heart of the Establishment Clause [is] that government should not prefer . . . religion to irreligion."); Epperson v. Ark., 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality . . . between religion and nonreligion.").

112 *See* Idleman, *supra* note 105, at 285–86 ("[RFRA's] principal purpose is to advance religion, or at least to advance the free exercise thereof, relative to other conscientious conduct that is not deemed religious."). Indeed, as at least one scholar has noted, "[t]he unquestionable objective of a RFRA is to further the ability of people to practice their religion. Chemerinsky, *supra* note 86, at 648. Chemerinsky did not address "burden statutes," but concluded that "substantial burden" RFRAs do not violate the Establishment Clause while conceding that "[b]y its very terms, [RFRA] is meant to increase the likelihood that courts will invalidate laws that burden religious practices, and thus advance religion." *Id.*

113 *See infra* notes 125–133 and accompanying text. *See also* discussion *infra* Parts IV.B., IV.C.

114 489 U.S. 1 (1989).

115 472 U.S. 703 (1985).

116 489 U.S. 1 at 5 ("[P]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith.") (citing TEX. TAX CODE ANN. § 151.312 (West 1982)).

117 489 U.S. at 15 ("[W]hen government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens

this rationale, the Court determined the statute to be an invalid advancement of religion by the Texas state legislature.[118] Similarly, in *Estate of Thornton*, the Court found that a Connecticut state statute,[119] which provided employees with an unqualified right not to work on their chosen religious day of rest, violated the Establishment Clause.[120] Specifically, Justice Burger noted the law meant that religious concerns "automatically control[led]"[121] over secular interests at the workplace, deducing that the statute impermissibly advanced religion in favor of purely secular matters.[122]

Viewed under the Supreme Court's matured interpretation of the Establishment Clause, it is evident that progressive "burden" RFRAs undoubtedly penetrate the bounds of the First Amendment. Courts analyzing the meaning of "substantial burden" in the religious context have determined that the threshold cannot be interpreted in a way that would grant a broader right to religious practice than the judiciary has previously allowed for under the Free Exercise Clause.[123] Accordingly, "burden" RFRAs' patent lack of neutrality appears to violate the Court's established principles set forth above, calling their constitutionality into doubt.[124]

An example of the harmful impact and latent fostering of religion resulting from "burden" statutes is seen in *Kubala v. Hartford Roman*

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nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion, . . . [it cannot be viewed] as anything but [impermissible] state sponsorship of religious belief . . . .").

118 *Id*. at 15 (The subsidy "'provide[s] unjustifiable awards of assistance to religious organizations' and cannot but 'conve[y] a message of endorsement' to slighted members of the community.") (citing Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring in judgment)).

119 *See Estate of Thornton*, 472 U.S. at 706 ("No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal.") (citing CONN. GEN. STAT. § 53-303e(b) (1976)).

120 *Id.* at 710 ("This unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses . . . .").

121 *Id.* at 709. *See also id.* at 708–09 ("The State has thus decreed that those who observe a Sabbath any day of the week as a matter of religious conviction must be relieved of the duty to work on that day, no matter what burden or inconvenience this imposes on the employer or fellow workers.").

122 *Id.* at 708–09.

123 Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752 (7th Cir. 2003) ("substantial burden" standard that reflects the First Amendment principle that the government may not entirely exclude religious uses from a jurisdiction or grant a broader right than courts have recognized under it); Cambodian Buddhist Soc'y of Conn., Inc. v. Planning and Zoning Comm'n of Newton, 941 A.2d 868, 885 (Conn. Super. Ct. 2008) ("the phrase 'substantial burden' cannot be interpreted in a manner that would grant a broader right to religious exercise than the courts have recognized under the free exercise clause"). *See also* 146 CONG. REC. 16,700 (2000) ("The term 'substantial burden' . . . [was] not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise.").

124 *See supra* Part II.C. *See also supra* note 112.

Catholic Diocesan Corp.[125] The plaintiff, Dorothy Kubala, voluntarily attended a religious "healing" service, which was held for the general public at St. Augustine's Church in New Haven, Connecticut.[126] While attending the service, the plaintiff approached the altar, "rested in the spirit," and fell backwards, hitting the back of her head on the floor, resulting in severe injuries.[127] The thrust of plaintiff's allegations centered on defendant's negligence in failing to provide a safe area to pray and failing to warn members about the possibility of injury through this unique method of prayer.[128] However, the church answered by claiming its conduct in the performance of the healing service was protected by the Free Exercise Clause,[129] as well as the Connecticut state RFRA.[130]

The Connecticut statute provides that the "state shall not *burden* a person's exercise of religion,"[131] even if the burden results from a rule of general applicability, unless the state can show a compelling interest is being furthered through the least restrictive means. In light of this difficult hurdle, the plaintiff urged the court to determine that the incident was not "ecclesiastical" in nature but rather grounded in simple negligence.[132] To the contrary, the church argued—and the Superior Court ultimately agreed—that the incident was within the religious context and therefore a motion to dismiss was proper because review of plaintiff's claims would have subjected the church to investigation and litigation, resulting in "impermissible State entanglement" with the religious entity.[133] In making this determination, the court turned to the defendant's protections under Connecticut General Statute § 52-571(b).

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125 41 A.3d 351 (Conn. Super. Ct. 2011).

126 *Id.* at 354.

127 *Id.* at 354–55.

128 The plaintiff described "resting in the spirit" in her memorandum in opposition to the defendants' motion to dismiss:

> [T]he priest, Father Rousseau, anoints and prays over each person by having each person come to the front of the church . . . the priest anoints the person's forehead and prays over them . . . . Often, people will fall back in a relaxed state as the priest prays over them . . . . This is sometimes called 'Resting in the Spirit' . . . . [T]here are always Catchers, men who stand behind the person being prayed over . . . . The Catcher catches the person before they hit the floor and places them gently on the floor until they wake up again.

Id. at 354 n.1. Although the plaintiff expected that a catcher would be placed behind her while she fell backwards to ensure she would not fall onto the floor, she was not caught from behind. *Id*.

129 *Id.* at 355.

130 CONN. GEN. STAT. ANN. § 52-571b (West 2015).

131 *Id.* (emphasis added).

132 41 A.3d at 356.

133 *Id. See also id.* at 358 ("[T]he incident . . . occurred during a religious healing ritual. It would be improper to completely remove the incident from the religious context in which it occurred. Thus, despite the plaintiff's argument that the defendants' alleged omissions during the healing ritual are not religious in nature, the subject matter of the complaint clearly involves issues of spirituality and religious worship.").

Although required by the statute to apply strict scrutiny,[134] the court expressly recognized that the state's Appellate Court had emphasized that § 52-571(b) resulted in broader protection of religious exercise than the decision in *Smith* would have provided for under federal law.[135] Ultimately, the court concluded that no compelling state interest existed in reviewing plaintiff's claim for civil liability.[136] Nevertheless, it should be noted that plaintiff—believing her claim was grounded in tort negligence and thus outside the religious context—cited no authority supporting a compelling state interest in permitting the court to evaluate her claims, thus limiting the court's opportunity to find strict scrutiny satisfied.[137]

As a result, Ms. Kubala was prevented from having the court review her claim for damages due to the Connecticut statute. In this instance, the court was left to defer to the Church's "internal governance" rather than probing into whether such conduct violated the applicable standard of care.[138] Besides the overt effect on health and safety, the court's reasoning and ultimate holding for the church exemplify one way in which "burden" statutes—by favoring religious beliefs over secular claims—indeed work to foster religion. Yet, within *Kubala*'s factual backdrop, it becomes evident that a "substantial burden" statute would have permitted review of plaintiff's claims, as exposure to investigation and litigation does not interfere with a "central" part of the church's religious belief and exercise.[139]

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134 *Id*. at 365 ("§ 52–571b requires that the court apply strict scrutiny before allowing State actors to burden the exercise of religion . . . .").

135 *Id.* at 364 ("State legislature enacted § 52–571b for the 'overarching purpose' of 'provid[ing] more protection for religious freedom under Connecticut law than the *Smith* decision would provide under federal law.'" (quoting Rweyemamu v. Comm'n on Human Rights & Opportunities, 911 A.2d 319, 328 (2006)). The court further noted that in comparison, "federal law allows the government to burden religious exercise if it can apply neutral principles of secular law."). *Kubala*, 41 A.3d at 365. It is not surprising then—perhaps as a matter of displaying their cautious viewpoint—that Connecticut courts have interpreted the state's RFRA as simply employing the pre-*Smith* "substantial" test, and nothing greater. The Superior Court noted in another case that "[t]he first amendment cannot be extended to such an extent that a claim of exemption from the laws based on religious freedom can be extended to avoid otherwise reasonable and neutral legal obligations imposed by government." *See* Grace Cmty. Church v. Town of Bethel, No. 306994, 1992 WL 174923, at *4 (Conn. Super. Ct. July 16, 1992) (Fuller, J.) (citing Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 888 (1990)).

136 41 A.3d at 365 ("the 'internal governance of a religious institution . . . is a protected religious belief'") (citing Rweyemamu v. Comm'n on Human Rights & Opportunities, 911 A.2d 319 (2006)).

137 41 A.3d at 365–66.

138 *Id.*

139 Vital to this point is the recognition that the plaintiff in *Kubala* was seeking liability based on the church's negligence in *her* incident. *See supra* note 128. Plaintiff was not arguing for the court to review that the unique "healing service" as a whole was negligent; if she were, then the church would have a valid argument that its review could be considered a substantial burden on a religiously motivated practice "central" to the church's belief. This reasoning and distinction is of central importance to this Note's proposal outlined in Part V.

B. *Upsetting the Balance of Power*

When assessing "burden" RFRAs within the separation of powers context, it is fitting to initiate the analysis with one of the most significant decisions in American constitutional law: *Marbury v. Madison*.[140] While the doctrine as a whole is a testament to the Court's duty in interpreting the Constitution through judicial review, Chief Justice Marshall—in the passage most applicable to this Note—announced that the Constitution is a "superior, paramount law, unchangeable by ordinary means"[141] that cannot be altered by the legislature when it pleases.[142] Against this backdrop, a fine line has developed between congressional actions permissibly expanding individual rights[143] and directing or controlling the judiciary's role in constitutional interpretation.[144] With regard to the former, take, for example, the Civil Rights Act of 1964.[145] Certainly, legislatures have the power to create additional rights as they did in 1964, which gave claimants a cause of action in certain discrimination-based cases.[146] Yet, when Congress takes such action, it is the judiciary's duty to deem whether Congress is acting constitutionally or not.[147] The Civil Rights Act did not in fact change a constitutional interpretation in the face of Supreme Court precedent, but rather found a new, previously unrecognized right for citizens in our country.[148] In contrast, on the state level—in which the separation of powers doctrine is historically more stringent[149]—"burden" statutes represent the legislature's unconcealed

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140 5 U.S. 137 (1803). Many publications have discussed the case and its historical impact. *See, e.g.*, Davison M. Douglas, *The Rhetorical Uses of* Marbury v. Madison: *The Emergence of a "Great Case*," 38 WAKE FOREST L. REV. 375 (2003); Robert J. Reinstein & Mark C. Rahdert, *Reconstructing* Marbury, 57 ARK. L. REV. 729 (2005); Louise Weinberg, *Our* Marbury, 89 VA. L. REV. 1235 (2003).

141 5 U.S. at 177 (further noting that "[i]t is emphatically the province and duty of the judicial department to say what the law is").

142 *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958) (describing *Marbury* as "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system").

143 *See* William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 DUKE L.J. 291, 305–06 (1996). *See also id.* at 314 (noting numerous cases in which the Court stated that Congress does not have an absolute lawmaking power).

144 Indeed, Congress admits that "[Federal RFRA] creates no new rights for any religious practice or for any potential litigant." 139 CONG. REC. S14350-01 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy).

145 Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241 (enacted July 2, 1964).

146 *Id.*

147 *See* Van Alstyne, *supra* note 143, at 305 ("Nevertheless, whenever Congress so conducts itself, it is necessarily for the Court eventually to say . . . whether Congress has got the matter right, or got it quite wrong.").

148 To compare with Federal RFRA's purpose, see *supra* note 144.

149 *See generally* RONALD J. KROTOSZYNSKI JR., *The Separation of Legislative and Executive*

endeavor at trumping the historical interpretation behind the First Amendment.[150] Numerous court holdings have expressed the same concern that the legislative branch cannot constitutionally direct substantive results through the enactment of regulations and statutes.[151]

In the free exercise setting, this view was expressed most clearly in *Boerne*, in which the Supreme Court held that Congress acted outside its enforcement power because Federal RFRA's impact contradicted fundamental separation of powers principles.[152] Many proponents of RFRAs are keen to point out that it has always been within Congress's authority to create or modify a law to reflect its intent with regards to an individual's statutory rights.[153] While this Note does not challenge the text of Federal RFRA,[154] it does set out to demonstrate how states employing the "burden" threshold are rewriting the First Amendment by unconstitutionally creating a right *greater* than that found in the judiciary's historical interpretation[155] and injecting a level of scrutiny by which courts must abide.[156]

Despite the differing structures of state constitutions, one factor

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Powers, HANDBOOK OF RESEARCH ON COMPARATIVE CONSTITUTIONAL LAW 234–53 (Thomas Ginsburg & Rosalind Dixon eds., 2011).

150 *See* Brant, *supra* note 68, at 6 (arguing RFRA is unconstitutional because it violates separation of power principles and "undermines the most fundamental power held by any branch of government: the power to determine its own limitations"); Gressman & Carmella, *supra* note 68, at 121 ("RFRA is a congressional arrow aimed directly at the heart of the independent judicial function of constitutional interpretation."). *See also* Hamilton, *supra* note 23, at 3 ("RFRA, however, does not amend the text of any federal law. Rather, it changes the way in which the courts scrutinize federal law.").

151 Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) (holding a new congressional statute unconstitutional because it overturned a prior Supreme Court decision). In *Plaut*, Justice Scalia further reasoned that the Constitution "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them . . . ." *Id*. at 218–19. Thus, he determined that the conflicting federal law was "a clear violation of the separation-of-powers . . . ." *Id.* at 225. *See also* United States v. Klein, 80 U.S. 128 (1871) (Congress may not direct the outcome of a case by prescribing the rule of decision nor direct particular substantive results).

152 City of Boerne v. Flores, 521 U.S. 507, 508 (1997).

153 *See* Chemerinsky, *supra* note 86, at 661 ("[I]f the legislature disagrees with a judicial interpretation of the statute, the legislature can modify the law to reflect its intent. These legislative actions are entirely within the proper legislative realm. RFRAs . . . simply create a statutory right of individuals to be free from significant burdens of religion unless the government can meet strict scrutiny.").

154 *See infra* notes 206–214 and accompanying text. *See also supra* note 86.

155 *See supra* note 22 and accompanying text. *See also* Hamilton, *supra* note 23, at 4 ("By enacting RFRA, Congress intended to reject, to reverse, and to eviscerate the Supreme Court's recent decision under the Free Exercise Clause, *Employment Div., Dep't of Human Resources of Oregon v. Smith*."). *See* 139 CONG. REC. S14350-01 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy) ("The bill simply restores the long-established standard of review that had worked well for many years, and that requires courts to weight free exercise claims against the compelling-state-interest test."). *See also* Cooper v. Aaron, 358 U.S. 1, 18 (1958) (holding that the federal judiciary is supreme in the exposition of the law of the Constitution). Additionally, the Senate Judiciary Committee reported that "the purpose of [RFRA] is only to overturn the Supreme Court's decision in Smith," not to "unsettle other areas of the law." S. REP. NO. 103-111, at 12 (1993).

156 *See* Hamilton, *supra* note 23, at 3.

remains constant when analyzing "burden" RFRAs: state legislatures—parallel to Congress—cannot usurp the judiciary's role of interpreting the free exercise doctrine by dictating the way in which it decides cases. By lowering the threshold to require a plaintiff prove only some *burden* on his religious practice, these states have indeed taken the religious freedom analysis beyond that of the *Sherbert* test they claim to be reinstating.[157] To emphasize, the Court in *Sherbert* centered on evaluating the South Carolina law's *substantial* infringement of religious exercise.[158] Hence, while many state legislatures instituting "burden" standards have claimed to be permissibly restoring the *Sherbert* approach[159]—or merely replicating Federal RFRA[160]—in actuality they are doing neither by eliminating the "substantial" modifier.[161] For example, the currently enacted Arizona RFRA states that government may not "substantially burden" one's practice even if the law is generally applicable.[162] The state legislature has noted that the substantial burden threshold is intended solely to filter out "trivial, technical, or de minimis" burdens.[163] However, by diluting this threshold to require that claimants merely show a religious exercise is "likely to be burdened" by state action, the Arizona legislature's proposed amendment steps into the judicial arena by creating a new constitutional standard for religious believers.[164]

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157 For example, in its findings, the Alabama legislature stated that "[t]he compelling interest test as set forth in prior court rulings is a workable test . . . ." Additionally, the findings also noted that "Congress passed [RFRA] to establish the compelling interest test set forth in prior federal court rulings . . . .." ALA. CONST. art. I, § 3.01(5)(6). Thus, by only requiring claimants to show a religious *burden*, the legislature is going beyond both Supreme Court precedent and the Federal RFRA that it claims to be following.

158 *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 407 (1963) (using "substantial" throughout the decision to modify descriptions of injury to free exercise rights).

159 *See supra* note 157 and accompanying text.

160 42 U.S.C. 2000bb-1. Even in *Gonzales*, the Court's most recent affirmation of Federal RFRA—and religious freedom proponents' biggest case for argument—the Court consistently noted the need for a "substantial burden" to trigger strict scrutiny. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

161 Recently, North Dakota voters rejected a ballot measure that would have amended the state constitution to prohibit the government from *burdening* any citizen's religious beliefs unless it could prove a compelling governmental interest. Supporters of the new bill claimed it was consistent with other laws protecting religious exercise. However, the new bill "went beyond existing law in ways that raised concern among some religious liberty advocates, including the Baptist Joint Committee." *See* Nan Futrell, *North Dakota Rejects Ballot Measure Opposed by BJC*, BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY (Aug. 14, 2012), http://bjcmobile.org/north-dakota-rejects-ballot-measure-opposed-by-bjc. *See also supra* notes 90–93 and accompanying text. Other states that have recently failed to pass "burden" statutes including Maryland, whose "legislators had the good sense to withdraw their RFRA, citing that it might have 'unanticipated consequences.' " *See* Austin Cline, *Religious Freedom Restoration Act—RFRAs Redefine Religious Freedom*, ABOUT RELIGION, http://atheism.about.com/od/churchstate/a/RFRAstates.htm.

162 ARIZ. REV. STAT. ANN. § 41-1493.01(C) (2015).

163 *Id.* at §§41-1493.01(E).

164 S.B. 1178, 51st Leg., 1st Reg. Sess. (Ariz. 2013).

Moreover, the Appellate Court in Connecticut highlighted that its state's legislature enacted RFRA for the "overarching purpose" of providing greater protection for religious free exercise under Connecticut state law than *Smith* provided for under federal law.[165] Yet, while members of the state legislature claimed that the bill did not alter the ability of claimants to receive exemptions in a manner consistent with the *Sherbert* approach,[166] they did exactly that by rewriting the pre-*Smith* jurisprudence absent the "substantial" modifier. As exhibited, "burden" RFRAs are not designed to counteract laws likely to be unconstitutional because of their infringement on religion, but have rather been enacted to make a substantive change to the judiciary's interpretation of constitutional rights.[167]

IV. APPLICATION: IMPACT ON SOCIETY

A. *Endless Government Litigation*

One unavoidable consequence arising from "burden" statutes is the increased government exposure to litigation.[168] While some point out that State RFRA cases have been scant in selected jurisdictions, this is presumably attributed to the likelihood of pre-trial settlement favoring religious claimants that is often an inadvertent by-product of such statutes.[169] To illustrate, recall the proposed amendment to the Arizona RFRA, which requires a claimant only show his religious exercise is *likely to be burdened*.[170] States following this approach would become

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165 Rweyemamu v. Comm'n on Human Rights & Opportunities, 911 A.2d 319, 328 (Conn. App. Ct. 2006) (drawing its conclusion from the legislative history surrounding § 52-571b, including Representative Richard D. Tulisano's remarks that the statute "enhances religious freedom and puts Connecticut once again in the forefront of supporting the variety of denominations that exist in the State and supporting that free exercise there") (citation omitted). The court in *Rweyemamu* also alluded that "the legislature was, in general, mindful of the impact that *Smith* might have had on employment discrimination laws, but that the legislature was, in particular, protecting individual religious practices through the strict scrutiny test." *Id*. at 329.

166 *See id.* at 328–29 ("[§ 52-571b] does not expand, contract or alter the ability of . . . obtain[ing] relief in a manner consistent with the Supreme Court's . . . compelling interest test prior to the *Smith* case.") (citation omitted).

167 *See* City of Boerne v. Flores, 521 U.S. 507, 508 (1997).

168 Upon vetoing the state's bill, Kentucky Governor Steve Beshear concluded that, "[t]he bill will undoubtedly lead to costly litigation." *See* Greene, *supra* note 90.

169 *See* Lund, *supra* note 78, at Part III.B. (noting "increase[d] prospects of favorable settlements for religious claimants" and providing detailed breakdown of the number of cases brought within specific states; admitting however that state court cases "are hard to find" through legal databases).

170 S.B. 1178, 51st Leg., 1st Reg. Sess. (Ariz. 2013) (emphasis added). A full discussion on standing issues as they relate to Free Exercise claims is beyond the scope of this Note. However, it is reasonable to anticipate that the proposed language of the Arizona Bill will encounter significant standing issues. Historically, many plaintiffs bringing Federal RFRA claims under "substantial burden" have run into trouble on standing and ripeness grounds, especially in the

especially prone to claims for exemptions due to personalized religious practices that may possibly be burdened in the future.[171] As these claims materialize, courts will be left with little or no guidance to distinguish between beliefs "central" to one's religion and implausible or individualized practices that are incidentally burdened by necessary state regulation.[172] This poses a danger of further hampering our judicial system, which is consistently faced with a scarcity of resources and ongoing backlog.[173] As the Court in *Braunfeld* cautiously foreshadowed, litigation may become nearly limitless once we consider lowering the standard for claims.[174]

B. *Civil Rights: A Counterintuitive Effect*

Another area of concern is the use of RFRA statutes as a defense to meritorious civil rights claims. By increasing the possibility that a citizen's religious belief will trump a certain state regulation, many will seek to avoid liability and government intrusion even when acting in a discriminatory fashion; a trend seen especially within the housing context.[175] This development became particularly noticeable while

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more recent contraception mandate cases. *See Belmont Abbey College v. Sebelius*, 878 F. Supp. 2d 25 (2012) (dismissing a claimant's challenge to the Health and Human Services mandate because the injury was speculative and the challenged rule was not sufficiently final to render the dispute fit for judicial resolution").

171 In 2006, Idaho resident Larry Lewis challenged his state's requirement that he have a Social Security Number (SSN) to obtain a driver's license. He argued that the statute requiring his SSN, 42 U.S.C. § 666, included the same number (666) as the number of the Beast in the Book of Revelation, and thus he would be damned if he obeyed it; the Court held for the State. Lewis v. Idaho Dep't of Transp., 146 P.3d 684 (2006); *see also* State v. Loudon, 857 S.W.2d 878 (Tenn. Crim. App. 1993) (defendant who believed that social security number was "mark of the beast" was not entitled to exemption from statute).

172 *See* Leonard Hitchcock, *Idaho's Religious Freedom Act*, IDAHO STATE JOURNAL POLITICS (May 30, 2013, 12:16 AM), http://www.pocatelloshops.com/new_blogs/politics/?p=10631. *See also supra* note 171.

173 *See* Ray Rivera, *Bronx Courts Trim Big Backlog, With Outside Judge at the Helm*, N.Y. TIMES (July 29, 2013), http://www.nytimes.com/2013/07/30/nyregion/bronx-courts-trim-big-backlog-with-outside-judge-at-the-helm.html; Elise Foley, *Immigration Court Backlogs at Record High, Keeping Immigrants in Limbo*, THE HUFFINGTON POST (July 7, 2012), http://www.huffingtonpost.com/2012/07/27/immigration-court-backlogs_n_1711505.html; Holly Herman, *New Judges to Get Civil Court Backlog*, READING EAGLE (May 5, 2013), http://readingeagle.com/article.aspx?id=475224. As of late, this problem has drawn increased attention from those within the legal community due to the recently enacted federal and state budget cuts. In one outspoken instance, Chief Judge Preska of the U.S. District Court for the Southern District of New York warned that these cuts, "slash[ed] operations to the bone and [as a result] our constitutional duties, public safety, and the quality of the justice system will be compromised . . . ." Letter from Loretta A. Preska, Chief Judge, S.D.N.Y., to Congressional Leaders (Aug. 15, 2013) (on file at http://www.scribd.com/doc/160532510/Funding-Letter).

174 Braunfeld v. Brown, 366 U.S. 599, 606 (1961).

175 *See generally* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692 (9th Cir. 1999) (holding for religious claimants challenging the Alaska housing discrimination prohibition by relying on "hybrid rights" and First Amendment free exercise); Smith v. Fair Emp't and Housing

Congress was unsuccessfully trying to implement the more permissive RLPA following *Boerne*.[176] Landlords during this time began refusing housing opportunities to unmarried couples[177] or individuals with contrary religious backgrounds, notwithstanding local laws prohibiting this type of discrimination.[178] One court—holding for a prospective, unmarried couple—noted that allowing landlords to escape liability through a RFRA exemption in civil rights claims would "considerably alter the nature and efficacy of legal duties in our constitutional system."[179] While advocates for expansive free exercise rights note that in most housing discrimination cases, courts will find a compelling government interest and hold for tenants,[180] this scenario still highlights the undesirable consequences on society and increased litigation concerns addressed previously.[181] Conclusively, under "burden" statutes, deceitful landlords may further discriminate, as they can expect—and rightly so—either that tenants will not bother raising

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Comm'n, 913 P.2d 909 (Cal. 1996) (California prohibition against discrimination because of "marital status" that prohibited landlord from refusing to rent to prospective tenants because they were not married did not violate landlord's free exercise rights); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994) (Alaska prohibition on discrimination did not violate landlord's right to religious freedom); Cooper v. French, 460 N.W.2d 2 (Minn. 1990) (landlord's right to exercise his religion under RFRA outweighed any interest of tenant to cohabitate with her fiancé in rental property prior to her marriage). *See also* Keirsten G. Anderson, *Protecting Unmarried Cohabitants from the Religious Freedom Restoration Act*, 31 VAL. U. L. REV. 1017 (1997) (discussing how RFRA strengthens a landlord's likelihood of success in arguing that his free exercise of religion is burdened by antidiscrimination housing laws).

176 *See supra* Part II.A. *See also* Foltin, *supra* note 79 ("[E]ven as RLPA was pending, lawsuits began to come to the fore involving landlords . . . who, because of religious objections to renting apartments to unmarried couples, sought to be exempted from state and local laws prohibiting housing discrimination on the basis of marital status.").

177 *See* cases cited *supra* note 175.

178 For example, California's Fair Employment and Housing Act (FEHA) states that it is unlawful "[f]or the owner of any housing accommodation to discriminate against or harass any person because of the . . . religion [or] marital status . . . of that person."). CAL. GOV'T CODE § 12955 (West 2014).

179 *Smith*, 913 P.2d at 924 (further stating that in such a religious "accommodation" system, "[e]ach person would unilaterally decide, in each of the multitude situations affected by state regulation, which laws to obey and which to ignore. This would turn on its head the ordinary assumption that legislation on economic and social matters need only have a rational basis . . . ."). *See also Thomas*, 165 F.3d at 726 (Hawkins, J., dissenting) ("[The] potential for harm [in carving out religious exceptions] will be seen when a landlord . . . refuses, on the basis of religious beliefs . . . to rent or sell housing to divorced individuals, interracial couples, victims of domestic abuse seeking shelter, or single men or women living together simply because they cannot afford to do otherwise, in spite of . . . laws forbidding such discrimination.").

180 *See* Foltin, *supra* note 79, at 3 ("With respect to the assertion of RLPA as a defense to a civil rights claim, these [RLPA] advocates argued the courts were likely to find in most cases that the state's interest in protecting individuals from . . . discrimination was . . . a compelling interest—and one that could not be satisfied by more narrowly tailored means . . . .").

181 *See supra* Part IV.A. *See also* Foltin, *supra* note 79 ("It was also noted by advocates . . . [that] the only way to safeguard the principle of broad protection for the free exercise of religion from government incursion was to rely on the courts . . . .").

meritorious claims[182] or that courts will find the low threshold satisfied when cases do reach trial.[183]

Similar discrimination issues will also arise within the employment field. Title VII of the Civil Rights Act bars employment discrimination on the basis of—among other categories—religious beliefs.[184] However, the Act also acknowledges an exemption for faith-based organizations when hiring new employees.[185] A problem has recently presented itself in which for-profit company owners, arguing they are not distinct "persons" from their corporations, attempt to extend this exemption in order to avoid liability while engaging in unfair hiring practices or subjecting employees to workplace discrimination.[186] Notably, in *Burwell v. Hobby Lobby Stores, Inc.*,[187] the Supreme Court held that a for-profit corporation may be exempt from a law if its owners religiously object that there is a less restrictive means in furthering the law's interest. As illustrated, many employers—analogous to the landlord discussed above—see "burden" statutes as a tool for escaping liability as it gives them reason to be optimistic that courts will be wary of reviewing employment practices of those

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182 As a general proposition, tenants are less likely to be able to afford litigation in comparison to the landlords they lease property from. In New York, 99% of tenants are unrepresented in eviction actions, arguing cases pro se. Letter from Helaine M. Barnett, Chair, Task Force to Expand Access to Civil Legal Services in New York, to Chief Judge Lippmann, Chief Judge of the State of New York (Nov. 23, 2010), *available at* http://nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT.pdf.

183 *See Thomas*, 165 F.3d 692 (Christians, who believe that cohabitation between unmarried individuals constitutes the sin of fornication, were unconstitutionally burdened by state's anti-discrimination housing law).

184 42 U.S.C. § 2000e-2(a) ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin.").

185 42 U.S.C. § 2000e-1(a) ("This subchapter shall not apply . . . to a religious corporation . . . with respect to the employment of individuals of a particular religion to perform work connected with the carrying on . . . of its activities.").

186 *See* The Editorial Board, *Contraception and Corporations*, N.Y. TIMES (Aug 2, 2013), http://www.nytimes.com/2013/08/03/opinion/contraception-and-corporations.html?ref=contraception&_r=0 ("At least three dozen lawsuits have been filed by private businesses challenging, on religious grounds, the new health care law's requirement that most company health plans provide no-cost coverage of contraceptives."). As part of a recent circuit split, the Third Circuit Court of Appeals held that "the law has long recognized the distinction between the owners of a corporation and the corporation itself . . . . A holding to the contrary—that a for-profit corporation can engage in religious exercise—would eviscerate the fundamental principle that a corporation is a legally distinct entity from its owners." Conestoga Wood Specialties Corp. v. Secretary of U.S. Dept. of Health and Human Services, 724 F.3d 377, 389 (3d Cir. 2013), *rev'd and remanded by* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014). In deciding the circuit split, the Supreme Court made the following three primary determinations in *Hobby Lobby*: 1) "person," within meaning of RFRA's protection of a person's exercise of religion, includes for-profit corporations, 2) the HHS contraceptives mandate, as applied to for-profit closely held corporations, substantially burdened the exercise of religion, for purposes of RFRA, and 3) the HHS contraceptives mandate did not satisfy RFRA's least-restrictive-means requirement. 134 S. Ct. 2751.

187 134 S. Ct. 2751 (2014).

claiming free exercise rights.

C. *Public-Policy Concerns: Health and Safety*

Perhaps the most troubling ramification of "burden" RFRAs is the effect they have on general public health and safety.[188] Although in some instances these consequences may be sincerely unintentional, they nevertheless harm many individuals throughout the nation, predominantly women and children.[189] Recently, there has been extensive litigation involving women's ability to receive health care coverage from their employers,[190] including access to contraception, mammograms, and cervical cancer screenings.[191] Many of these lawsuits have centered on the recently imposed contraceptive mandate, which requires that most company health plans provide no-cost coverage for all FDA-approved contraceptives.[192] Despite a noticeable outcry from some religious groups,[193] the mandate represents a

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188 While vetoing his state's "burden" RFRA, Kentucky Governor Steve Beshear stated that he "ha[d] significant concerns that this bill [would] cause serious unintentional consequences that could threaten public safety, health care, and individuals' civil rights . . . " *See* Greene, *supra* note 90. Similarly, Nancie Clark, a priestess in Kentucky, found the legislation, "being pushed by those with their own religious agendas . . . sadden[ing because] many people . . . may not be aware of just how this law will affect them until of course something happens to them or someone they love." *Id*.

189 *See infra* notes 190–202.

190 *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) (corporation has protected rights under the Free Exercise Clause and has shown substantial likelihood that the U.S. Department of Health and Human Services' contraception mandate substantially burdens the free exercise of the company's religion); Conestoga Wood Specialties Corp. v. Secretary of U.S. Dept. of Health and Human Services, 724 F.3d 377 (3d Cir. 2013) (for-profit, secular corporation could not engage in religious exercise under Free Exercise Clause of First Amendment, and thus could not assert RFRA claim); Monaghan v. Sebelius, 931 F. Supp. 2d 794 (E.D. Mich. 2013) (contraception coverage mandate imposed substantial burden on employer, supporting a RFRA claim); Beckwith Electric Co. v. Sebelius, 960 F.Supp.2d 1328 (M.D. Fla. 2013) (corporation had standing to assert shareholder's free exercise right and had substantial likelihood of success on merits of their claims); Autocam Corp. v. Sebelius, 730 F.3d 618 (6th Cir. 2013) (secular, profit-seeking corporate employer was not a "person" capable of "religious exercise" as intended by RFRA, and therefore could not seek to enjoin implementation of the Patient Protection and Affordable Care Act's mandatory coverage requirements). *See also supra* note 187 and accompanying text, which discusses the Supreme Court's recent resolution to a circuit split regarding a for-profit corporation's religious claim to exemption from the contraception mandate.

191 Coverage of Preventive Health Services states that employers offering group or individual health coverage shall provide to women "preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration . . . ." 42 U.S.C. § 300gg–13(a)(4).

192 *Id*. Successful passage through legislation, in and of itself, may signal the mandate's presumed constitutionality. *See* Chemerinsky, *supra* note 86, at 645 ("Obviously, constitutionality is important in assessing the desirability of any legislative effort."). Admittedly, the same argument can be made that "burden" RFRAs' passage may also signal its constitutionality. *But see supra* notes 143–145and accompanying text.

193 *See* Caroline Mala Corbin, *The Contraception Mandate*, 107 NW. U. L. REV. COLLOQUY 151 (2012); *See, e.g.*, Steven Spearie, *United States Conference for Catholic Bishops Files*

necessary safety measure for female health, which has even gained wide acceptance from Catholic women.[194] The executive branch has already allowed for faith-based employers to opt out of the regulation, but this very exception—accompanied by the "burden" threshold—will encourage private, for-profit employers to seek exemptions based on personal religious beliefs,[195] even if they were not intended to do so under the mandate.[196] As courts allow Catholic employers to drop contraceptives from their insurance coverage, additional religious-based employers will be enticed to exclude certain health care that does not

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Challenge to Contraception Mandate, WICKED LOCAL WALTHAM (June 15, 2012), http://waltham.wickedlocal.com/article/20120615/News/306159997 (quoting Catholic Bishop Thomas John Paprocki as saying that the mandate was "an unprecedented attack by the federal government on one of America's most cherished freedoms: the freedom to practice one's religion without government interference").

194 *See* CBS News Poll, Mar. 2011, The Roper Center at the Univ. of Conn., *available at* http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html (84% of Catholics polled believed that someone who uses birth control can still be a good Catholic); CBS News Poll, Apr. 2011, The Roper Center at the Univ. of Conn., *available at* http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html (82% of Catholics polled believed it was possible to disagree with the Pope on birth control and abortion while still being a good Catholic). *See also* RACHEL K. JONES & JOERG DREWEKE, GUTTMACHER INST., COUNTERING CONVENTIONAL WISDOM: NEW EVIDENCE IN RELIGION AND CONTRACEPTIVE USE 4 (2011), available at http://www.guttmacher.org/pubs/Religion-and-Contraceptive-Use.pdf (finding 98% of Catholic women who have had sex have used an artificial contraception method).

195 During the summer of 2013, a federal circuit split was created between the Tenth and Third Circuit Courts regarding the constitutionality of the federal mandate. *Compare* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) (holding that the contraceptive mandate, as applied to a private for-profit company, violated the employer's religious freedom), *with* Conestoga Wood Specialties Corp. v. Secretary of U.S. Dept. of Health and Human Services, 724 F.3d 377 (3d Cir. 2013) (holding that a for-profit, secular corporation could not engage in religious exercise under Free Exercise Clause of First Amendment, and thus could not assert RFRA claim). On Nov. 26, 2013, the Supreme Court justices granted certiorari and agreed to review provisions in the Patient Protection and Affordable Care Act requiring employers to offer insurance coverage for birth control and other reproductive health services. *See* Bill Mears, *Supreme Court to take up Obamacare contraception case*, CNN (Nov. 26, 2013), http://www.cnn.com/2013/11/26/politics/obamacare-court/.

196 The requirement for qualifying as a religious employer is a high burden. HHS regulations currently define a "religious employer" as an organization that:

> (1) has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization described in a provision of the Internal Revenue Code that refers to churches, their integrated auxiliaries, conventions or associations of churches, and to the exclusively religious activities of any religious order.

45 C.F.R. § 147.130(a)(1)(iv)(B) (formulated during a one-year safe harbor period, and in response to objections that the religious-employer exemption was too narrow, HHS undertook this new rulemaking to develop an accommodation for certain religious nonprofit organizations). However, a new rule has been proposed that would eliminate the first three requirements, and allow for an exemption to all non-profit organizations falling within the scope a new federal provision. 78. Fed. Reg. 8456-01 (Feb. 6, 2013). *See also* The Editorial Board, *The Contraception Battle*, N.Y. TIMES (July 1, 2013), http://www.nytimes.com/2013/07/02/opinion/the-contraception-battle.html?ref=contraception&_r=0.

necessarily align with their own religious beliefs.[197] This trend is a slippery slope with the realistic potential to dangerously impact citizens in many different employment settings.

Likewise, religious organizations arguing for broad religious liberty protections in a wide-array of situations have steadily weakened child health and safety. First, as evidenced by their backing of "burden" statutes through efforts of religious lobbyists, certain Catholic groups may be seeking greater shelter in clergy child sex abuse claims.[198] In these cases, a plaintiff typically files a negligence suit alleging a church cover-up of its own abusive clergy.[199] In response, the church leans on protective RFRA statutes to argue that pursuing discovery will be a burden on its organization and operation, thus exempting it from the pending lawsuit.[200] This strategy for immunity has been recognized since the early 1990s,[201] and the "burden" threshold would appear to strengthen this defense against judicial investigation and review.[202]

Additionally, general sacramental drug use can present a variety of grave dangers; one practical concern is driving under the influence following a religious service. For instance, a religious group that uses hallucinogenic substances during its ceremony may apply to a local zoning authority for an expanded parking lot, even with the existence of a competing zoning law.[203] Presenting its claim under a "burden" RFRA, the group will likely be able to obtain the expansion permit, since they can argue that alternate public transportation or carpooling makes participation at the Church more difficult and burdensome.[204] Yet, viewed under some state's noted definitions of "substantial burden," it is evident that this transportation burden would likely not

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197 For example, knowing they will have the courts support, Jehova's Witness employers may attempt to exclude blood transfusions from coverage because the procedure conflicts directly with their religious belief.

198 *See* Hamilton, *supra* note 63.

199 *Compare* Redwing v. Catholic Bishop for the Diocese of Memphis, 363 S.W.3d 436 (Tenn. 2012) (courts can hear matters involving religious institutions, as long as they can resolve the dispute by applying neutral legal principles and are not required to rely on religious doctrine to adjudicate the matter), *and* Malicki v. Doe, 814 So. 2d 347 (Fla. 2002) (First Amendment cannot be used at initial pleading stage to bar claims founded on a religious institution's alleged negligence in failing to prevent harm from sexual assault by one of its clergy), *with* Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780 (Wis. 1995) (First Amendment bars action against a church for negligence supervising a priest because such determination would require interpretation of church canons, policies, and practices), *and* Gibson v. Brewer, 952 S.W.2d 239 (Mo. 2002) (questions of retaining clergy necessarily involve interpretation of religious doctrine, policy, and administration, and judicial inquiry into those matter would in effect inhibit religion and violate the First Amendment).

200 *See supra* note 199.

201 Shruti Chaganti, Note, *Why the Religious Freedom Restoration Act Provides a Defense in Suits by Private Plaintiffs*, 99 VA. L. REV. 343, 353–54 (2013).

202 *See supra* Parts II.C and III.A.

203 Implying that the group's members who drive to and from the religious ceremony is expanding.

204 *See supra* Parts II.C and III.A.

have qualified as a "central" hardship, since it does not inhibit the practice itself but rather presents a mere inconvenience on the individual.[205]

This last point relates well to the 2006 Supreme Court case *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*.[206] Using Federal RFRA as the applicable statute, the Court held that the government did not satisfy its burden when it barred hoasca tea,[207] which was used by a branch of the Brazilian Church during religious ceremonies.[208] Although the Court noted that the drug in question was "exceptionally dangerous,"[209] it reasoned that since Congress had already exempted the religious use of peyote in the Controlled Substances Act,[210] it therefore had no compelling interest in not exempting hoasca tea as well.[211] The Court noted that while there may be situations where the "need for uniformity precludes the recognition of exceptions to generally applicable laws," this is no such case, "given the longstanding exemption from the Controlled Substances Act for religious use of peyote, and the fact that the very reason Congress enacted RFRA was to respond to a decision denying a claimed right to sacramental use of a controlled substance."[212] Thus in actuality, the Supreme Court used *Gonzales* as a means to tell the federal government to abide by its own statute and tolerate the side effects that stem from it. *Gonzales* manifested the genuine concern that almost any sacramental drug use may find exemption from government control, a credible argument furthered by the emerging "burden" RFRAs.[213] When proposing the initial Federal RFRA, Congress anticipated granting

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205 *See supra* notes 95–100 and accompanying text.

206 546 U.S. 418 (2006).

207 The tea contains N,N-dimethyltryptamine, a Schedule I substance that is banned by the Controlled Substances Act (CSA). *See* Schedules of Controlled Substances, 21 U.S.C. § 812(c) (2012). Better known as "DMT," when ingested the drug has psychedelic effects "similar to those of LSD, but with more rapid onset, greater likelihood of a panic reaction [and an] increase in blood pressure." MEDILEXICON INTERNATIONAL, http://www.medilexicon.com/medicaldictionary.php?t=24960 (last visited Oct. 20, 2013).

208 The case was brought by a New Mexico branch of the Brazilian church União do Vegetal. According to the church's United States' website, consumption of the hallucinogenic tea "serv[es] to heighten spiritual understanding and perception, and bring the practitioners closer to God." CENTRO ESPÍRITA BENEFICENTE UNIÃO DO VEGETAL IN THE UNITED STATES, http://udvusa.org (last visited Mar. 20, 2015).

209 *Gonzales*, 546 U.S. at 432 (citing Touby v. United States, 500 U.S. 160, 162 (1991)).

210 21 C.F.R. § 1307.31.

211 *Gonzalez*, 546 U.S. at 434 ("The Government argues that the existence of a congressional exemption for peyote does not indicate that the Controlled Substances Act is amenable to judicially crafted exceptions. RFRA, however, plainly contemplates that courts would recognize exceptions . . . .). The Court further noted that the "peyote exception also fatally undermines the Government's broader contention that the Controlled Substances Act establishes a closed regulatory system that admits of no exceptions under RFRA." *Id.*

212 *Id.* at 436–37.

213 *See supra* Part II.C.

narrow exemptions for harmless burdens upon religious believers.[214] Yet, the public policy concerns outlined indicate how "burden" statutes—deviating from the federal standard—pose serious and imminent dangers upon society.

V. PROPOSAL

A. *Reconciling Both Sides of the Legislature*

As demonstrated, removing "substantial" as a modifier is an unconventional, hazardous, and constitutionally questionable initiative by state legislators.[215] The ideal solution would be for these deviating states to follow the majority by instituting a "substantial burden" threshold. However, there are certainly some legitimate interests in easing the way for specific religious exemptions, especially when their effect on others, as well as the competing state interest, are both negligible. One can see why certain "central" religious practices should not be impinged upon by legislative action unless strict scrutiny is satisfied, since a lower standard of review would put important religious exercise in continuous jeopardy. However, if the goal of the "burden" states was simply to prevent these types of infringements,[216] they would have never needed to curtail the threshold, since such crucial invasions would have already failed to pass the "substantial" bar.[217] Accordingly, the very problem with universal "burden" statutes is their over-inclusive nature and coverage of inessential, personalized, or even questionably motivated "religious" practices.[218] From a regulatory standpoint however, there remains an obvious need to standardize certain government operations without having to withstand the challenges arising from the strict scrutiny standard,[219] where the difficulty of

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214 *See, e.g.*, 137 CONG. REC. E2422-01 (daily ed. June 27, 1991) (statement of Rep. Solarz) (allowing "Amish to withdraw their children from compulsory education"); *id.* ("use of wine in religious ceremonies"); *id.* ("deferments from conscription to accommodate religious pacifism even in times of war"). *See also* 139 CONG. REC. E1234-01 (daily ed. May 11, 1993) (statement of Rep. Cardin) (burial of veterans in "veterans' cemeteries on Saturday and Sunday . . . if their religious beliefs required it"); *id.* (precluding autopsies "on individuals whose religious beliefs prohibit autopsies"); 139 CONG. REC. S14350-01 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch) (allowing parents to home school their children); *id.* (volunteering in nursing homes).

215 *See supra* Parts III, IV, and accompanying text.

216 *See supra* note 157.

217 *See generally* Horen v. Commonwealth of Virginia, 479 S.E.2d 553 (Va. Ct. App. 1997) (finding Native American couple's conviction for possession of banned wild bird feathers to be a violation of free exercise since the statute "substantially burdened" their fundamental rights).

218 *See supra* Part IV.B.

219 *Compare* Roy v. Cohen, 590 F. Supp. 600 (M.D. Pa. 1984) (holding a state's compelling interest in assigning social security numbers for each citizen did not outweigh a Native American belief against such a delineation), *with* United States v. Lee, 455 U.S. 252 (1982) (holding the Amish society's belief against tax payments affords no basis for resisting tax imposed on

showing a compelling interest through least restrictive means has proven challenging.[220]

B. *Returning Religious Freedom to the Courts: A Flexible Model*

State legislatures desiring to provide greater protection to their citizens for certain religious claims should adopt RFRA-type clauses that incorporate different levels of scrutiny. The levels—rational, intermediate, and strict[221]—would depend on the distinct type of religious exercise encroached and the gravity of the state's competing interest.[222] The benefit of incorporating different levels of scrutiny for discrete claims is two-fold. First, by adopting such standards as guidelines for the judiciary to construe, this solution sidesteps many of the separation of powers issues that arise from the enactment of comprehensive "burden" RFRAs.[223] As a result, by essentially returning the religious restoration movement back into the judicial arena,[224] the courts can more easily use the scrutiny guidelines to create necessary religious exemptions without being compelled to do so through a hard-line "burden" statute.[225] This approach can prevent situations like that in *Kubala*, in which the court's hands were reluctantly tied by the

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employers to support social security system, which must be applied uniformly to all).

220 *See* sources cited *supra* note 59.

221 *See supra* note 11. "Rational basis" scrutiny, the lowest level of review, upholds legislation if it is rationally related to a legitimate government interest. *Id.* "Intermediate" scrutiny requires that the burden on religious exercise be "substantially related" to the achievement of an "important" governmental interest. *Id.* Strict scrutiny, the highest standard of review, requires narrowly tailored and least restrictive means to further a compelling governmental interest. *Id.*

222 For example, state interests in enforcing criminal laws should be evaluated in a different light than those interests in preserving state financial resources. For the classic cases highlighting this distinction: *compare* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 883 (1990) (determining that the state could deny unemployment benefits to a person fired for violating a state criminal law against the use of peyote, even though the use in this instance was part of a religious ritual), *with* Sherbert v. Verner, 374 U.S. 398 (1963) (state interest in preserving its benefits funds for those fired for "good cause" was a violation of Seventh-Day Adventists' religious free exercise).

223 *See supra* Part III.B. for the outlined Separation of Powers concerns.

224 An argument under this strategy is that the courts will become overburdened, countering the discussion in Part IV.A. However, as illustrated, "burden" RFRAs have encouraged claimants to bring litigation under the incentive of at least walking away with a favorable settlement, and possibly a religious exemption due to the statute's broad coverage. *See supra* note 169. Under RFRA, plaintiffs still need to first bring claims to find court-granted exemptions. By returning the decision-making and discretion back to the courts, there will ideally be less incentive—and certainly not an increase in claims brought—compared to the current method. The goal of this proposal is to discourage those claims that will likely, and shouldn't, pass muster (such as a religious tax exemption), because claimants will now realize the presumption of validity of the law in which they seek to challenge.

225 *See* discussion *supra* Part III.A. *See also* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 436 (2006) (affirming "the feasibility of case-by-case consideration of religious exemptions to generally applicable rules.").

Connecticut RFRA statute.[226] Importantly, this system also allows the judiciary the leeway to consider important additional variables that "burden" statutes overlook, such as the incentives and costs the law or exemption may have on nonbelievers.[227]

To illustrate further, Connecticut's constitution—like many other states—provides for the religious liberty of its citizens much the way the federal Free Exercise Clause does in the First Amendment.[228] Importantly, however, Connecticut's clause also acknowledges that religion must not be used as an excuse for behavior that is "inconsistent with the peace and safety of the state."[229] This proposal suggests that a state's RFRA statute go one step further by articulating distinct scrutiny levels for express exceptions or limitations on religious freedom. For example, certain government action—such as uniform taxes—may be deemed as "presumptively valid" within the legislative statute and thus reviewed by courts under a "rational basis" standard.[230] While such traditional tax regulations are prone to colorable claims under "burden" statutes,[231] they prevail here because of the presumed constitutionality in the state interest behind a neutral and generally applicable tax regulation.[232] Further, this targeted approach will guard against the strong incentives that nonreligious members—under favorable "burden" statutes—have in claiming an affiliation exclusively for the underlying purpose of avoiding such payments.[233]

Conversely, courts—based on the statutory language—would be

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226 The court in *Kubala* discussed how it was bound by the Connecticut RFRA, which called for the state to meet strict scrutiny upon a showing of a religious "burden." *See* Kubala v. Hartford Roman Catholic Diocesan Corp., 41 A.3d 351 (Conn. Super. Ct. 2011).

227 While courts have properly noted the inherent danger of judicial probing into a religious exercise's importance, sincerity, and relevance, the legislative body and its lobbyists have the resources and institutional competence to dedicate significant time and study to achieve unbiased findings for determining which religious practices deserve certain levels of scrutiny. *See* Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 714 (1981) ("The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task . . . . However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.").

228 *See, e.g.,* CONN. CONST. art 1, § 3.

229 *Id.*

230 *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) ("rational basis" scrutiny, the lowest level of review, upholds legislation if it is rationally related to a legitimate government interest).

231 *See supra* note 219.

232 *See generally* United States v. Lee, 455 U.S. 252 (1982).

233 Some may argue here that the prospects of avoiding certain tax payments would not outweigh the litigation costs associated with obtaining an exemption. However, the argument is strongest in the corporate realm, in which some state corporate taxes can exceed ten percent of a company's annual reported income. *See* FEDERATION OF TAX ADMINISTRATORS, http://www.taxadmin.org/fta/rate/tax_stru.html#Income.

free to carve out exemptions for religious practices "central" in nature, such as holiday observances, when a government law regulates the days in which businesses must be open.[234] Even though the state interest in a day of universal rest is persuasive, the action should be held to higher scrutiny, since the infringement is not a mere inconvenience, but rather prevents claimants from engaging in religious conduct or facing an otherwise severe burden.[235] This exemption-based theory is bolstered by the fact that this regulation—neutral on its face and in effect—does not give incentive to unaffiliated individuals or companies to align with a religion, since the exemption granted will simply put the burdened party on a level playing field.[236]

A difficult yet common scenario may arise when a legitimate government interest incidentally burdens an act related, but not central, to one's sincerely held religious belief. This obstacle is illustrated well by the hypothetical articulated earlier,[237] in which a Church applies for a parking lot expansion in the face of a competing zoning law.[238]

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234 *See* Braunfeld v. Brown, 366 U.S. 599 (1961).

235 This infringement differs from the tax cases and hypothetical above, where the claimed burden is more of an "inconvenience" and is inconsistent with the "peace, safety and order" of the state. *See, e.g.*, MO. CONST. art 1, § 5. To rehash, the law in *Braunfeld* forbids the sale of various retail products on Sunday. *Braunfeld*, 366 U.S. 599. Appellant, an Orthodox Jewish merchant, argued the statute unfairly burdened his religious practice since the law effectively required him to remain closed for one day in addition to Saturday, his religiously required day of rest. *Id.* The Court denied his claim since the law was neutral and generally applicable, and only incidentally burdened his exercise. *Id.* Under this Note's proposal, the claimant should be allowed an exemption since the universal day of rest is not as strong a state interest as that of a universal tax, while the holiday observance is a central part of the religion, thus failing strict scrutiny. While this Note warns against the danger of allowing citizens to become superior to the law itself, the assignment of scrutiny levels for courts to follow is a method to effectively counteract this fear that is prevalent under a vague "burden" statute. *See supra* Parts II.C and IV. *See also* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 436 (2006) (affirming "the feasibility of case-by-case consideration of religious exemptions to generally applicable rules.").

236 This is a key distinction from the previous scenario, where a direct economic advantage is found by allowing religious claimants to bypass tax payments, providing incentive to nonbelievers to claim an affiliation. Rather here—as in *Braunfeld*—the claimant is merely choosing (based solely on a religious belief), to rest on a different day. This proposition questions the reasoning in *Braunfeld*, where the Court believed that "[t]o allow only people who rest on a day other than Sunday to keep their businesses open on that day might well provide these people with an economic advantage over their competitors who must remain closed on that day; this might cause the Sunday-observers to complain that their religions are being discriminated against." *Braunfeld*, 366 U.S. at 608–09. *See also id.* at 614–16 (Brennan J., dissenting) (questioning the compelling state interest in not allowing for an alternate day of rest for certain religious believers).

237 *See* discussion *supra* Part IV.C. However, for the purposes of this argument, assume this church does not use banned substances as part of a religious ritual.

238 The church's claim in this instance would not fall under RLUIPA, which expressly states that government may not impose a land use regulation that places a "substantial burden on the religious exercise of a *person* . . . ." 42 U.S.C. § 2000cc(a)(1) (2000) (emphasis added). The statute defines "land use regulation" as a zoning law that limits "a claimant's use . . . of land if the claimant has an ownership . . . or other property interest in the regulated land . . . ." 42 U.S.C. § 2000cc–5(5). Further, "claimant" is defined as "a *person* raising a claim . . . ." 42 U.S.C. § 2000cc–5(1) (emphasis added). However, this analysis may only hold water if a standing claim

Although not as imperative an interest as uniform tax, the local lawmakers surely have a recognizable interest in regulating their community against unwanted noise and traffic. To the contrary, easier transportation and access to the place of worship is not in and of itself central to the religious belief, but it is substantively related to the actual religious practice. In these contesting instances, the RFRA-type adoption could incorporate an intermediate scrutiny level of review,[239] leaving courts with the latitude and discretion to sharpen their focus on the presence of additional elements, such as the implications on nonbelievers and general community standards. Under this approach and context, the parking lot expansion may be allowed to trump zoning regulations through a religious exemption if the court finds that it will not further other realistic concerns within that community.[240]

An exemption-based approach through the courts is not airtight, and may produce difficulties in establishing scrutiny levels to cover every unique claim. However, relying on the institutional competence of the legislature to articulate more tailored exercise statutes to guide the courts[241]—while simultaneously avoiding judiciary probing into this area[242]—can lead to practical and functional results. Further, in light of the legal and policy-based reasons articulated, this approach attacks the fundamental issues, counterintuitive policies, and underlying dangers that inevitably flow from the universal "burden" statutes.

CONCLUSION

At first glance, statutes that broaden religious freedom appear to

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is raised. Federal courts have entertained claims challenging the application of land use regulations that are brought by those who had no property interest when the issue of whether the non-landowning plaintiff had standing to assert his claim under RLUIPA was not raised. *See, e.g.*, Congregation Kol Ami v. Abington Twp., 309 F.3d 120, 122–24 (3d Cir. 2002) (congregation that had entered into agreement to purchase property and rabbi brought action challenging zoning decision affecting property under RLUIPA).

239 *See supra* note 221.

240 It is important to understand that this hypothetical differs from that in Part IV.C., where the church in question used dangerous substances at the religious worship, introducing significant safety concerns. Without those concerns, the government interest in noise and traffic is not as strong in this hypothetical. One may also argue that this approach contradicts the Supreme Court's holding in *City of Boerne v. Flores*. 521 U.S. 507 (1997). However, *Boerne* turned on Congress's impermissible use of its lawmaking authority when it enforced Federal RFRA onto the states. Under this Note's proposal, the judiciary is given this discretion in close cases.

241 *See supra* note 222. To be sure, this Note addresses how and why lawmakers have enacted "burden" statutes that are arguably based on certain erroneous "findings" and deductions from the Court's free exercise precedent. *See supra* notes 62–67, 157 and accompanying text. However, this Note's proposal focuses on legislatures' competence to place certain religious claims within different scrutiny levels, instead of the hard and fast method of universal "burden" statutes. By providing legislatures with this controlled leeway and discretion, the "all-inclusive" nature of "burden" statutes will hopefully be avoided.

242 *See supra* note 227.

align with our country's historical respect for citizens' privacy and right to choose their beliefs. Yet, from the outset, it was determined that the freedom to practice could not be absolute, given the need for universal lawmaking and enforcement. Whether shaped on good intentions, or incepted as a way to further discriminatory motives, "burden" statutes present unintentional consequences that many citizens may not be presently aware of. By deftly eliminating the "substantial" modifier from state ballots, legislators are unconstitutionally creating ways for almost any religious belief to find exemption from crucial government regulation. Altogether, there is a dire need for a flexible method that allows courts to create narrow religious exemptions and strikes the best balance in a nation of ever-expanding and distinct religious affiliations.