FREEING EXERCISE AT EXPRESSION'S EXPENSE: WHEN RFRA PRIVILEGES THE RELIGIOUSLY MOTIVATED SPEAKER

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Congress and more than a dozen states have statutorily expanded the scope of religious liberty beyond that provided for in the U.S. Constitution. These Religious Freedom Restoration Acts (RFRAs), modeled closely after the federal progenitor, afford heightened protection to religious objectors by mandating that laws substantially burdening religious exercise pass strict scrutiny. In this Comment, I analyze how courts should address claims for exemption under religious freedom statutes when the religious exercise to be accommodated is speech. When applied to laws that are otherwise valid under a less rigorous standard, RFRAs discriminate in favor of religiously motivated speech. The literature has largely focused on whether this privilege afforded to religious viewpoints violates establishment and free speech principles.

I aim to show that although RFRAs' speaker-based privilege is constitutionally defensible, the government nonetheless has a compelling interest in promoting equality in speech opportunities among speakers. In considering requests for accommodation of religiously motivated speech, the government should assert its countervailing interest in enforcing the law. However, not all religious exercise that can be conceptualized as speech would yield harms of speaker inequality and marketplace distortion if accommodated. I develop a heuristic to guide courts in applying the government's compelling interest in expressive equality by identifying situations in which accommodation would either advantage religious viewpoints in public debate or foster religious communities. The following discussion of these issues adds a new perspective to the debate concerning RFRAs' application to speech, and strikes a balance between religious liberty and expressive equality.

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INTRODUCTION

Exemptions for religiously motivated speakers facilitate the free exercise of religion, but not without a price. To what extent should these exemptions be tolerated when they sacrifice expressive equality in the interest of religious liberty?

Consider two brothers, Caleb and Adam. Caleb is a devout Christian and Adam is an agnostic, but the brothers share many viewpoints. The brothers assemble outside an abortion provider's home, carrying identical placards reading "Abortion is Murder!" Caleb, motivated by his religious convictions, is permitted to stay and demonstrate despite a ban on targeted residential picketing. On account of a statutory exemption for religiously

motivated speakers, the city yields its interest in preserving residential privacy to preserve Caleb's religious expression. Adam, on the other hand, is silenced and driven away by the sheriff.[1] Adam's speech is again frustrated when the sheriff disperses a weekly meeting Adam hosts to discuss the current presidential nominees. The assembly violates a city ordinance prohibiting regular residential gatherings of more than 25 people. The sheriff makes no mention of the ordinance to Caleb, who holds a weekly prayer gathering to pray for the return of Christian values to the White House.[2]

Are Adam's words any less valuable because they are not compelled by a commitment to God? His brother has been exempted from laws that burden his religious exercise, but the laws pose just as significant a burden on Adam's exercise of free speech. Though in *Employment Division v. Smith*[3] the Supreme Court made clear that religious exemptions from generally applicable laws are not constitutionally mandated, the government is nonetheless permitted some latitude in according heightened protection for religious exercise.[4] In this instance, the government's solicitude for religious liberty grants Caleb opportunities for self-expression denied to his secularly motivated brother.

The legislative response to *Smith* has created a potential for this disparate treatment of speakers, as discussed in Part I of this Comment. In response to what was seen as an abandonment of constitutional concern for the free exercise of religion, Congress passed the Religious Freedom Restoration Act of 1993 (RFRA).[5] Legislatures in Arizona, Connecticut, Florida, Idaho, Illinois, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Texas have followed suit, enacting state-level religious

1. *See* Frisby v. Schultz, 487 U.S. 474 (1988) (upholding under intermediate scrutiny a city ordinance banning all targeted residential picketing). Due to religious freedom legislation in many states, if a city wished to enforce this law against Caleb, notwithstanding the burden to his religious exercise, this same law would have to pass strict scrutiny. Unless the interest in residential privacy were compelling, the picketing ban would not survive this more rigorous standard of review.

2. *See* Murphy v. New Milford Zoning Comm'n, 402 F.3d 342 (2d Cir. 2005) (upholding an exemption for a weekly prayer meeting of over twenty-five people from a similarly structured residential zoning law under the Religious Land Use and Institutionalized Persons Act).

3. 494 U.S. 872, 879 (1990). The U.S. Supreme Court addressed the question of whether the Free Exercise Clause places religiously motivated conduct beyond the reach of the criminal law. That is, whether criminal law must past strict scrutiny when enforced against the religiously motivated actor, rather than the more deferential standard conventionally employed. *See id.* For a more detailed discussion of the Court's holding, see *infra*, Part I.A.

4. In *Cutter v. Wilkinson*, 544 U.S. 709 (2005), the Court upheld an exemption that exclusively benefited acts of religiosity, expressly reaffirming the principle that accommodation of religion need not come packaged with secular benefits. *Id.* at 724.

5. Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb (1993)).

exemption statutes modeled closely after the federal progenitor.[6] The state legislatures in New York and West Virginia will soon vote on their own version of RFRA.[7] These RFRAs exempt a person from generally applicable laws that substantially burden her religious exercise unless the government can prove that enforcing the law against the religious objector is the least restrictive means of furthering a compelling interest.[8] Courts in many other states have construed their constitutions to provide for compelling interest analysis;[9] Alabama amended its constitution to expressly include a similar provision.[10] The question of state constitutional interpretation is currently unsettled in California, Hawaii, and Utah.[11]

As a result of religious freedom legislation, a religiously motivated speaker like Caleb may be exempted from laws that fail strict scrutiny—even when the law validly applies to others. Content-neutral speech regulations,

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6. *See* ARIZ. REV. STAT. ANN. §§ 41-1493 to -1493.02 (West 2004); CONN. GEN. STAT. ANN. § 52-571b (West Supp. 2004); FLA. STAT. ANN. §§ 761.01–.05 (West Supp. 2004); IDAHO CODE §§ 73-401 to -404 (Michie Supp. 2004); 775 ILL. COMP. STAT. ANN. 35/1–99 (West 2001 & Supp. 2004); MO. ANN. STAT. §§ 1.302–.307 (West Supp. 2004); N.M. STAT. ANN. §§ 28-22-1 to 28-22-5 (Michie Supp. 2000); OKLA. STAT. ANN. tit. 51, §§ 251–258 (West Supp. 2004); 71 PA. CONS. STAT. ANN. §§ 2401–2407 (West Supp. 2008); R.I. GEN. LAWS §§ 42-80.1-1 to -4 (1998); S.C. CODE ANN. §§ 1-32-10 to -60 (West Supp. 2005); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001–.012 (Vernon Supp. 2004).

7. *See* H.B. 4571, 78th Leg., 2nd Sess. (W. Va. 2008); S.B. 629, 78th Leg., 2nd Sess. (W. Va. 2008); Assemb. B. 9235, 2007 Leg., 230th Sess. (N.Y. 2007). New York Assembly Speaker Sheldon Silver introduced a religious freedom bill in June 2007. The bill was scheduled for vote in early 2008, but has been met with attempts to scuttle its passage. *See* Samuel G. Freedman, *A Pragmatist and a Lobbyist on Atheism*, N.Y. TIMES, Feb. 23, 2008, at B5. A similar bill was introduced in New Hampshire, though it failed to pass a House vote in March of 2008. *See* H.B. 1185, 160th Sess. (N.H. 2007).

8. For simplicity, I use the term "RFRA" as inclusive of the federal and state versions of religious exemption statutes. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court held the federal RFRA to be an unconstitutional exercise of congressional power as applied to state law. RFRA remains applicable to federal law, however. *See* Gonzales v. O Centro Esperita Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006).

9. *See, e.g.*, Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 280–81 (Alaska 1994); City Chapel Evangelical Free, Inc. v. City of S. Bend, 744 N.E.2d 443, 450 (Ind. 2001); Fortin v. Roman Catholic Bishop, 871 A.2d 1208, 1227 (Me. 2005); Attorney Gen. v. Desilets, 636 N.E.2d 233, 235–36 (Mass. 1994); Reid v. Kenowa Hills Pub. Sch., 680 N.W.2d 62, 68–69 (Mich. Ct. App. 2004); State v. Hershberger, 462 N.W.2d 393, 398 (Minn. 1990); St. John's Lutheran Church v. State Comp. Ins. Fund, 830 P.2d 1271, 1277 (Mont. 1992); *In re* Browning, 476 S.E.2d 465, 467 (N.C. Ct. App. 1996); Humphrey v. Lane, 728 N.E.2d 1039, 1045 (Ohio 2000); Hunt v. Hunt, 648 A.2d 843, 852–53 (Vt. 1994); First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174, 187 (Wash. 1992); State v. Miller, 549 N.W.2d 235, 240–41 (Wis. 1996).

10. *See* ALA. CONST. amend. 622.

11. An act similar to RFRA was vetoed by California's governor in 1998. *See* Religious Freedom Protection Act, Assemb. B. 1617, 1997–98 Leg., Reg. Sess. (Cal. 1998) (vetoed); Governor's Veto Message for Assembly Bill No. 1617 (Sept. 28, 1998), 1997–98 Reg. Sess., 8 ASSEMBLY J. 9647, 9648 (Cal. 1998).

such as the residential picketing ban and the zoning ordinance, need only pass intermediate scrutiny when enforced against Adam. The more rigorous standard of review confers privileged status to both Caleb and his message—discrimination in favor of religiously motivated speech.

In this Comment, I argue that the government has a compelling interest in promoting equality in speech opportunities among speakers. Though the government is constitutionally permitted to exempt religious speakers through RFRAs, in many situations the advantage conferred to religious beliefs in the marketplace of ideas will burden the rights of others to expressive equality. It is the government's prerogative to avoid societal harms that would result from a requested accommodation.[12] In cases involving religiously motivated speech, the government should assert its countervailing interest in enforcing the law.

Part II discusses the constitutionality of granting exemptions exclusively on grounds of religiosity. *Smith* made clear that the Free Exercise Clause does not mandate religious exemptions. Nonetheless, legislatures are permitted to afford heightened protection to religious practices through exemptions. There is room for play between the religion clauses, allowing "legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause."[13] However, not all legislative action exclusively benefiting religion will fit within this margin. Courts "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries,"[14] wary not to yield all other interests to the interest of a religious objector.[15]

The argument for constitutional favoritism for religious beliefs is untenable: Such an imprimatur would essentially void the guarantees of nonestablishment and free speech. "What properly motivates constitutional solicitude for religious practices is their distinct vulnerability to discrimination, not their distinct value; and what is called for, in turn, is protection against discrimination, not privilege against legitimate governmental concerns."[16] If state and federal legislatures choose to statutorily privilege religion, these actions should accord with coexisting liberties. An exclusive exemption is justifiable only so

12. *Cf.* Cutter v. Wilkinson, 544 U.S. 709, 726 (2005) (noting that if a religious accommodation requested of a government facility would "impose unjustified burdens on other[s] . . . the facility would be free to resist the imposition" and refuse accommodation).

13. *Id.* at 719.

14. *Id.* at 720, 723.

15. *See, e.g.*, Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710–11 (1985) (invalidating an exemption granted exclusively to Sabbath observers where the exemption had the purpose and effect of advancing interests of one particular religion over others).

16. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1248 (1994).

long as religiously motivated individuals are relevantly distinguishable from secularly motivated individuals—for instance, if their burden is unique and not comparable to the burden of others. However, when the religiously motivated individual is a speaker, such as Caleb, the burden a law may pose to his freedom of expression is no greater than that borne by another similarly situated speaker, such as Adam.

Part III analyzes the general permissibility of speaker distinctions. While courts may not grant speech exemptions based on the content or viewpoint of speech, they may grant exemptions based on a speaker's identity.[17] Speaker-based laws are reviewed only for rationality unless "the legislature's speaker preference reflects a content preference."[18] The example of Caleb's and Adam's identical picketing signs illustrates the distinction between a speaker's motivation and message; one is not always ascertainable from the other.[19] If a speaker distinction is justifiable independent of the message's expected content, the privilege conferred to both speaker and message is presumed incidental to the government's actual purpose.[20] So long as the speaker distinction serves a legitimate government interest, it will withstand constitutional attack. RFRAs call for heightened scrutiny regardless of the content or viewpoint of the speaker. That is, the potential discriminatory effect to public discourse is incidental to the legislatures' purpose in protecting religious exercise.[21] Thus, RFRAs' application to religiously motivated speakers is a permissible speaker distinction.

Part IV defends the prudence of special consideration for those confronted with a violation of conscience. Though many people may prefer to act contrary to the law, this preference should not suffice to overcome the law's application to them. The enacting legislature already found that the value of regulation outweighed the inconvenience to citizens' preferences.

17. *See, e.g.*, Kucharek v. Hanaway, 902 F.2d 513, 521 (7th Cir. 1990) (upholding exemptions from an obscenity statute based on speaker identity; speaker identity is distinct from a line "drawn on a forbidden basis such as the political content" or viewpoint of the speech).

18. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 658 (1994). *But see* Note, *Speech Exceptions*, 118 HARV. L. REV. 1709, 1721 (2004) ("Due to their potential impact on content, there are inherent perils in speaker-based privileges, even when such privileges arguably enhance or expand the speech market. Government actions justified as efforts to protect or shield certain speakers and not others may 'stem partly from hostility or sympathy toward ideas' . . . .").

19. *Cf.* Alan E. Brownstein, *State RFRA Statutes and Freedom of Speech*, 32 U.C. DAVIS L. REV. 605, 634 (1999) ("For First Amendment purposes, the formal distinction between speech and the belief system that motivates a speaker should be of little importance.").

20. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.").

21. *Id.*

But a law that compels a violation of conscience produces a psychological burden distinct from that experienced by mere preference objectors, and may not have been anticipated by the legislature. Enforcement against the conscientious objector, including the religious objector, should be adequately justified by an overriding societal interest in the law.

In the realm of speech, the government's interest in affording all speakers equal liberty of expression is a compelling one, and justifies enforcement of a law notwithstanding a violation of conscience. When exemption from a law would confer an advantage to religious beliefs in the marketplace of ideas, accommodation of religious exercise contravenes the First Amendment principle that "[t]here is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard."[22] The social costs of such a result, sanctioned by government action, are considered in Part V.

Religious speakers with unencumbered access to forums denied to their secular counterparts receive a competitive edge in gaining adherents and influencing public debate on any number of civic issues of equal concern to the secular citizen.[23] Insulated from the challenge of competing ideologies, religious beliefs attain an artificial vitality in the marketplace. Enforcing RFRAs to this effect impinges on society's interest in free competition of ideas.[24] The government's tacit approval of public debate unjustifiably skewed in favor of religious viewpoints may be perceived as an endorsement of religious beliefs.[25]

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22. Police Dept. v. Mosley, 408 U.S. 92, 96 (1972) (quoting A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1948)).

23. *See* Kenneth Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 248 (1983) ("[I]mplicit in the values of citizenship—and especially the primary value of respect—is the notion of equal membership in the community. For it is precisely the denial of equal status, the treatment of someone as an inferior, that causes stigmatic harm.").

24. "[T]he free competition of faiths and ideas is expected to guarantee their excellence and vitality to the benefit of the entire society." Donald A. Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development*, 81 HARV. L. REV. 513, 517 (1968); *see also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (introducing the "marketplace of ideas" by suggesting that "the ultimate good desired is best reached by free trade in ideas"); *cf.* Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 170 (2002).

25. "A statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable." Tex. Monthly, Inc., v. Bullock, 489 U.S. 1, 28 (1989) (Blackmun, J., concurring); *see also* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309–10 (2000) ("[S]ponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.").

Given that much religious exercise is inherently expressive, the government interest in expressive equality might limit RFRAs' utility to a narrow set of conduct-intensive activities, such as adhering to dietary restrictions or grooming standards.[26] Part VI explores the implications of regarding religious conduct as symbolic speech. Religious symbolism that does not directly affect public debate, such as a yarmulke or a crucifix, nonetheless communicates an individual's religious identity. Acts of religiosity can influence social norms merely by being observed; a psychological bandwagon effect can dispose an observer to accept the veracity of an ideology to which she sees others adhering. Exposure to an increased audience can proportionally increase a religion's following, and these voices will have a measurable impact on the religion's ability to influence political outcomes.

In contrast, if the significance of a religiously motivated act is not readily apparent to an observer, then the motivating ideology does not enjoy an advantage in terms of proselytizing to nonbelievers or fostering a religious community. Exempting conduct that is not normally engaged in for the purpose of communicating an idea does not disadvantage the secular speaker in public debate, and thus does not yield the same harms of speaker inequality.

I conclude by advising legislatures to craft exemptions that preserve the interest in expressive equality. If a court finds that an accommodation for religious speech under a RFRA implicates this compelling interest, a legislative act specifically exempting the exercise would be problematic both from a nonestablishment and free speech perspective. Though RFRAs' speaker-based privilege is constitutional due to the breadth of the exemption, providing the same privilege under narrower laws with a targeted benefit to religious speech would create an undeniable risk of viewpoint discrimination.

Accommodation of the religious practice can still be achieved, however, if the legislature acts with a broader purpose, and encompasses secular speakers within the purview of the exemption. For instance, under Arkansas's conscientious objector statute, pharmacists may refuse to provide contraceptive information when the refusal is based upon religious or conscientious objection; Georgia has a similar pharmacist refusal clause premised on ethical or moral beliefs.[27] The unique burden created by a violation of conscience is equally relevant to conscience premised on nonreligious morals; religion has

26. *But see* Brownstein, *supra* note 24, at 182–83. ("Asking whether speech is a sufficient aspect of religion to justify treating religious activities as expression for constitutional purposes does not adequately resolve the problem of the place of religion in the constitutional scheme . . . . ").

27. ARK. CODE ANN. § 20-16-304(5) (2005); GA. COMP. R. & REGS. 480-5-.03(n) (2001).

"no monopoly on conscience."[28] If religious and nonreligious objectors are similarly burdened, then privileging claims of religious conscience impels parallel treatment for secular conscience.

I. THE ROAD TO RFRA

A. The Problem: *Employment Division v. Smith*

The respondents in *Employment Division v. Smith*[29] claimed that the government's penalization of their religiously motivated conduct, specifically the ingestion of peyote for sacramental purposes, violated their right to free exercise.[30] The Court's response was absolute: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law . . . ."[31] Under *Smith*, the government need only show the validity of a law in order to apply it to religious objectors.[32]

Smith held that the U.S. Constitution did not mandate religious exemptions from generally applicable laws, but did not rule out all avenues of accommodation.[33] In light of the value our society places on religious belief, the Court noted that it was "not surprising" that many states exempt use of sacramental

28. MILTON R. KONVITZ, RELIGIOUS LIBERTY AND CONSCIENCE 99 (1968). *See generally* Lisa Schultz Bressman, *Accommodation and Equal Liberty*, 42 WM. & MARY L. REV. 1007 (2000); Kent Greenawalt, *Moral and Religious Convictions as Categories for Special Treatment: The Exemption Strategy*, 48 WM. & MARY L. REV. 1605 (2006).

29. 494 U.S. 872 (1990).

30. *Id.* at 874. The respondents had been fired for using this drug, prohibited under state law, and were subsequently disqualified from receiving unemployment benefits. Both men were members of the Native American Church and had ingested the peyote during a religious ceremony. *Id.*

31. *Id.* at 878–79. The Court reached back to the first case addressing this issue, wherein a polygamist's claim to exemption from criminal prosecution was rejected despite the fact that the practice was mandated by his religion. The Court in *Reynolds v. United States*, 98 U.S. 145 (1878), noted that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." *Id.* at 166. In a pluralistic society such as ours, exempting all religiously motivated behavior from the general rule of law, barring a compelling interest, would be "courting anarchy." *Smith*, 494 U.S. at 888.

32. Of course, the validity of the law presumes that it is generally applicable and does not specifically target a religious practice or discriminate between religious groups. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 560 (1993).

33. The Court took care to limit the scope of previous opinions that had applied strict scrutiny to government actions substantially burdening religiously motivated conduct to situations in which the government had already created a system of individualized exemptions. *Smith*, 494 U.S. at 884. The Court distinguished a law already breached by exemptions from one with true general applicability. *Id.* at 884–85.

peyote from drug laws.[34] The Court's approval of "leaving accommodation to the political process"[35] armed *Smith*'s critics with a strategy to negate its effects.

B. The Solution: RFRA

1. Congress's Response to *Smith*

Congress acted swiftly to legislatively overturn *Smith* by enacting the Religious Freedom Restoration Act (RFRA).[36] RFRA prohibits the government from substantially burdening a person's religious exercise even if the burden results from enforcing a rule of general applicability. However, the government is permitted to enforce the law if it is the least restrictive means of furthering a compelling government interest.[37]

Congress's aim was to restore the status quo ante-*Smith*; namely, to reinstate the compelling interest test set forth by *Sherbert v. Verner*.[38] Congress's motivation was unrelated to purposeful discrimination against religions. A law that targets religion or discriminates among different religions already merits strict scrutiny.[39] And free exercise claims generally do not concern invidious discrimination—the claimant seeks exemption from a law that is valid, and will continue to be valid when applied against everyone but the claimant. Even so, Congress reasoned that laws "neutral" toward religion have the potential to burden exercise as much as those that intentionally interfere with religious exercise.[40] The appropriate approach, according to Congress, was embodied in Justice O'Connor's concurrence in *Smith*, which "respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by requiring the government to justify any substantial burden on religiously motivated conduct by a compelling State interest."[41]

34. *Id.* at 890.
35. *Id.*
36. Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb (1993)).
37. 42 U.S.C. § 2000bb-1(b).
38. 374 U.S. 398 (1963).
39. Nonetheless, support for RFRA was at times propelled by the mistaken notion that *Smith* had denounced the fundamental principle of religious liberty: nondiscrimination. Senator Bob Dole justified RFRA by declaring "[g]overnment too often views religion with deep skepticism and our popular culture too often treats religious belief with contempt." 139 Cong. Rec. S26, 411 (1993).
40. 42 U.S.C. § 2000bb.
41. S. REP. No. 103-111, at 7 (1993) (quoting Employment Div., Dept. of Human Res. v. Smith, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring)). The "compelling interest" standard is familiar from cases concerning the right to free speech. Yet generally applicable laws that place incidental burdens on expression do not warrant strict-scrutiny review. The absolutist language that "Congress shall make no law . . . abridging the freedom of speech" is in fact riddled with qualifications.

Congress's reference to *Sherbert*'s "compelling interest" standard was only nominal, and certainly misleading; in practice, something less than strict scrutiny had been applied to free exercise cases during this era.[42] As opposed to the conventional form of strict scrutiny, "strict in theory, but fatal in fact," the *Sherbert* standard has been described as "strict in theory, but ever-so-gentle in fact."[43] *Sherbert*-era jurisprudence employed a wide range of tests, depending on the circumstances of the claim.[44] Standards were often deferential when applied to cases where the government was acting as employer,[45] military commander,[46] prison administrator,[47] or even sovereign.[48]

2. Assessing Individual Burden and Government Interest

Applying RFRAs' standard to requests for exemption entails an assessment of both religious burden and government interest, but courts do not have clear guidelines on how to frame inquiries in individual cases.[49] Courts have been understandably reluctant to make judicial determinations about what is central to a particular faith. Doing so would involve inherently theological decisions about which parts of a belief system are most important,

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42. Whether or not Congress intended to reinstate this feeble conception of strict scrutiny, under RFRA courts must at least purport to apply a "compelling interest" standard to claims for religious accommodation.

43. Ira C. Lupu, *The Trouble With Accommodation*, 60 GEO. WASH. L. REV. 743, 756 (1992).

44. *See* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1494–98 (1999) [hereinafter Volokh, *Common-Law Model*] (noting that "the *Sherbert*-era constitutional exemption framework was a complex body of law, with not one but several tests" and providing examples of the range of approaches taken by courts in religious freedom cases).

The Senate committee asserted that "the compelling interest test generally should not be construed more stringently or more leniently than it was prior to *Smith*," S. REP. No. 103-111, at 9, yet this proves to be fruitless guidance given the confusion courts seemed to struggle with during this period. *See* Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 32 (1994) (arguing that the "compelling interest" test advocated by Congress "has failed to provide sufficient guidance for concrete decisions" and that it "seems to promise more than it can realistically deliver").

45. Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

46. Goldman v. Weinberger, 475 U.S. 503 (1986).

47. O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987).

48. Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (applying a deferential standard to a state fair's rule barring the sale or distribution of materials on fair grounds except from fixed locations).

49. Religious freedom legislation in Alabama, Connecticut, Missouri, New Mexico, and Rhode Island does not require a "substantial burden." KENT GREENAWALT, RELIGION AND THE CONSTITUTION 202 n.4 (2006).

The lack of independent criteria invites subjectivity into any judicial assessment of burden and interest, lending itself to arbitrary adjudication of claims. Subjectivity may also result in normatively biased results. If judges subconsciously discount the value of a minority practice due to its alien nature, decisions will unjustifiably favor the familiar practices of majority religions.

and which are somewhat more dispensable.[50] Accordingly, the federal RFRA broadly defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[51] A judicial determination of the value of a practice to a religion would not be useful in any event, because the assessment of burden is analyzed from the perspective of the individual claimant, based on personally held beliefs.[52]

If evaluating the centrality of a practice is a jurisprudential faux paus, then an evaluation of the extent of the burden can serve as a convenient proxy. A law that totally bans a practice of moderate importance to religious exercise may pose a much more substantial burden than a law that presents a minor inconvenience to a mandated practice.[53] While it is not within a court's power to say where on this hierarchy a particular practice falls, the value of the practice to the claimant will inevitably have some effect upon the perceived burden.

Wearing a yarmulke is not an obligatory practice of Judaism, though it is customary to cover one's head to show humility before God.[54] But the burden of being unable to wear a head covering is certainly much less than the burden of being forced to work on the Sabbath, conduct expressly prohibited by Jewish law.[55] Distinguishing between laws that force a direct violation of a central belief, and those that make religiously motivated conduct more

50. Dictating the contours of religious doctrine fosters the very entanglement between the government and religion that the Establishment Clause forbids. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1970). The definition of religion under RFRA is the same as under the First Amendment. S. REP. No. 103-111, at 4 (1993).

51. 42 U.S.C § 2000bb(2)(4) (2000) (referencing the definition under 42 U.S.C. § 2000cc-5(7)(A)).

52. In contrast to the prohibited practice of decreeing what is and is not central to a belief system, a court may determine whether the claimant's belief is sincerely held. Other members of a faith need not agree with the characterization of a belief as central to the religion, but the belief must still be a religious one. *See* Thomas v. Review Bd., 450 U.S. 707, 715–16 (1981) (Jehovah's Witness's refusal to engage in munitions production due to religious beliefs need not be corroborated by other Jehovah's Witnesses, so long as claimant's own belief was sincerely held). A court that concludes that a claimant sincerely believes a law burdens genuinely held religious convictions still has discretion to decide that the burden is not substantial as measured by legal standards.

53. GREENAWALT, *supra* note 49, at 204.

54. "Cover your head in order that the fear of heaven may be upon you." *Tractate Shabbat* 156b.

55. "You may do work during the six weekdays, but Shabbat is a sacred holy day to God, when you shall do no work." *Leviticus* 23:3.

However, even the value of obligatory practices may vary according to the individual: Driving a car on the Sabbath is a forbidden act, yet an individual who wishes to attend synagogue services may prefer to ignore this restriction if, due to zoning restrictions, the closest synagogue is miles away. Of course, for some individuals it may be difficult—if not impossible—to develop a hierarchy of practices according to importance if their ideology holds that every aspect of the religion is uncompromisable. *See, e.g.*, *Deuteronomy* 11:8 ("Therefore shall ye keep *all the commandments* which I command you this day, that ye may be strong, and go in and possess the land." (emphasis added)).

expensive in terms of inconvenience or the voluntary forfeiture of benefits, is wise when determining which religious practices should be accommodated, and which social burdens should be tolerated.[56]

Though RFRAs' text suggests separate inquiries into the substantiality of the religious burden and the strength of the government interest, in practice courts "assess one with an eye toward the other."[57] The government interest in a law that completely forecloses a religious practice will appear less compelling than one that only makes the practice more difficult. For example, viewed in isolation, the government has an equally compelling interest in uniformly enforcing tax laws and drug laws. However, the effect on religious exercise informs the determination of whether the interest is deemed compelling *enough* to justify the law. Paying taxes reduces the amount of money available to give to one's church, and certainly makes it more difficult to practice a religion that requires a 10 percent tithe. The government's interest nonetheless justifies the burden.[58] In contrast, an outright ban on peyote use precludes any ability to practice a sacramental element of the Native American Church. Here, the government's interest is not compelling when measured against the burden.

II. EXEMPTING THE RELIGIOUS

RFRAs' protections may only be invoked by those with religious motivations. Though this selective largess may be a permissible exercise of legislative power, affording heightened levels of protection based on religiosity does raise concerns. These concerns may be allayed after considering the purpose and effect of such protections, but this analysis will largely be informed by the context in which RFRAs are applied. As the following section illustrates, applying RFRAs to religiously motivated speech, as opposed to other conduct, provokes questions as to the prudence of RFRAs' function specifically in this context.

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56. Before RFRA was amended to reject inquiries into whether a practice is central or mandated, courts recognized the necessity of deferring to both the asserted importance of the practice and the degree to which the law burdened the practice. *See, e.g.*, Mack v. O'Leary, 80 F.3d 1175, 1179 (7th Cir. 1996) (stating that a substantial burden "is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to these beliefs").

57. GREENAWALT, *supra* note 49, at 214.

58. In considering a claim that the payment of social security taxes violated Amish religious beliefs, the Court remarked that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." United States v. Lee, 455 U.S. 252, 261 (1982).

A. Applying RFRAs to Religiously Motivated Speech

The formidable compelling interest standard has an established role in invalidating content- or viewpoint-discriminatory laws that violate free speech. However, not all laws that burden speech are subject to strict scrutiny. Content-neutral laws regulating the time, place, or manner of speech in a traditional or designated public forum are analyzed under a less stringent "intermediate" standard.[59] Intermediate scrutiny also applies to conduct regulations that incidentally burden symbolic expression.[60] In a nonpublic forum, the restriction need only be reasonable and viewpoint-neutral to be upheld.[61]

The compelling interest standard restored under RFRA, even in its meek *Sherbert* incarnation, is clearly more demanding than the standard otherwise applied to content-neutral speech regulations. Ordinarily, laws restricting targeted residential picketing, the posting of fliers on public property, or the erection of billboards, are constitutional when narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication. Under intermediate scrutiny, this is generally a less demanding form of narrow tailoring than what is provided for under strict scrutiny. A law that reasonably restricts solicitation at a county fair, a nonpublic forum, is also constitutional. When applied to a religiously motivated speaker in a state with its own version of RFRA, these same laws could only be justified if they were the least restrictive means of furthering a compelling government interest.

In some cases, RFRAs' more rigorous standard discriminates in favor of religiously motivated speech. The government's interest in preventing visual blight is sufficient to justify a regulation limiting the size of signs on private

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59. *See* Frisby v. Schultz, 487 U.S. 474, 482 (1988).

60. *See* Ward v. Rock Against Racism, 491 U.S. 781, 798–801 (1989); United States v. O'Brien, 391 U.S. 367, 376–77 (1968).

61. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 683–85 (1992) (upholding as reasonable a ban on solicitation within an airport terminal). The Court has declined to extend the conception of the traditional public forum beyond its historic confines of public streets and parks. *But see id.* at 698–99 (Kennedy, J., concurring) (stating that the traditional concept of the public forum should be expanded to include airport terminals where many people have extensive contact with other members of the public). The parameters of designated public fora hinge on government intent; designated public fora are only created by purposeful government action to open property for public discourse. Public property that has not been intentionally opened to a class of speakers for expressive activity "is either a nonpublic forum or not a forum at all." Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677–78 (1998). Broad discretion is granted in nonpublic fora; even content-based restrictions are upheld under the reasonableness standard. *See, e.g.*, United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 205–08 (2003) (internet terminals at public libraries); *Forbes*, 523 U.S. at 677–78 (public television station); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 585–86 (1998) (arts funding).

property,[62] but this interest in aesthetics is not a compelling one.[63] Under RFRAs' formulation, a church might be permitted to spread its message "Welcome to California—Home of Christian Values" on a much larger sign than would be permitted for a secular group, such as vegans sponsoring a sign reading "Cows are Not Happy to Make Cheese—Keep Californian Cows Happy."[64] The amplified religious message reaches far more passersby than the advocacy for ethical treatment of animals.

Or consider a law that limits solicitation at a county fair to fixed booths.[65] If an organization of Hare Krishnas is substantially burdened in its ability to practice religious solicitation, an activity central to its faith, it will be exempted from the restriction.[66] The greater freedom to engage in face-to-face solicitation will enhance the group's ability to raise money, proselytize, and disseminate its beliefs concerning any subject. The group is given a distinct advantage over secular counterparts in terms of money and influence, which translates to power in the political process and acceptance in the marketplace of ideas.

Of course, RFRAs' compelling interest standard does not apply if the religiously motivated speaker cannot demonstrate a substantial burden to religious exercise. The distinction between religiously motivated behavior and religiously compelled behavior is particularly significant in determining whether a content-neutral law constitutes a substantial burden. Taking into account the sliding scale between the importance of the practice to the individual and the degree of interference, it would make sense that time, place, and manner restrictions upon a practice that is only religiously motivated would not warrant strict scrutiny, because the law would never constitute a total ban on the practice.[67]

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62. *See* Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (finding aesthetic harms sufficient to justify restriction on expression under the *O'Brien* formula).

63. *See* City of Ladue v. Gilleo, 512 U.S. 43, 54 (1994).

64. For example, the court in *Trinity Assembly of God v. Baltimore County*, 178 Md. App. 232, 255 (2008), found that a similar request for a variance as to size limitations was a form of religious exercise protected under a federal religious freedom statute, but the regulation was not a substantial burden to the church's evangelical mission. The court based this finding in part on the relevance of the church's location to the religious exercise. The church's current sign could be seen from the adjoining highway, and thus the regulation did not prevent the church from recruiting eastbound travelers on I-695—its professed purpose for the variance request. *Id.*

65. *See* Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981).

66. *See* Murdock v. Pennsylvania, 319 U.S. 105 (1943).

67. For example, in *Trinity Assembly of God*, the court reasoned that the existing sign "is visible to the passing public and, while not as highly noticeable as the Church would like, serves the same purpose, just to a lesser degree." 178 Md. App. 232, 255 (2008). The denial of the church's size variance request thus did not render the use of the sign as "effectively impracticable" and the court failed to find a substantial burden to the church's ability to recruit new members.

For the ordinary speaker, the ample availability of alternative means of expression forestalls the claim that a content-neutral law poses a substantial burden to expression.[68] If a religiously motivated speaker could not demonstrate that the law created a substantial burden on expression of all speakers, the onus would be on the religious individual to show that, for her religious purposes, the available alternatives are inadequate or that her burden is unique. The argument could conceivably take several approaches—religious motives should be more valued than secular motives; the burden on religious expression is unique (something of a hybrid speech/exercise claim); or certain forms of religious exercise are not as readily susceptible to substitution in forms of expression.

This last argument addresses the possibility that what is adequate to a secular speaker is not adequate to a religious speaker. If holding midnight masses is extremely important to a church, a strict noise ordinance for nighttime hours will substantially burden the church's choir and organist from worshipping freely, notwithstanding the ability to assemble for daytime worship services. If a Native American group wishes to hold ceremonies on a parcel of land with sacred significance, it will not be satisfied to congregate at another location. If Hare Krishnas place particular value on peripatetic solicitation, confining solicitation to a fixed location prevents meaningful exercise. These same legal restrictions might be inconvenient to others, though seemingly would not prove a substantial burden to their ability to adequately express themselves.

During the *Sherbert* regime, it was unnecessary to analyze the viability of such arguments. Claims for exemption from content-neutral speech restrictions were analyzed under the conventional standard supplied by the Free Speech Clause.[69] Restoring *Sherbert* free exercise jurisprudence would presumably incorporate the caveat for content-neutral speech regulations. Some state constitutional provisions have been read to follow pre-*Smith* free exercise jurisprudence, and insofar as they deny strict scrutiny to religiously motivated speech, there's no need for the government to provide a compelling interest to override an exemption claim.

The Senate Judiciary Committee's report on the federal RFRA also supports this interpretation: "[W]here religious exercise involves speech, as in

68. This is not to say that even if they could make such a demonstration, that it would be constitutionally cognizable. In *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 435 (2002), the Court upheld a zoning ordinance targeting the secondary effects of adult businesses that prohibited multiple establishments within a single building—effectively eliminating all expression by businesses that could not operate independently. Purportedly applying intermediate scrutiny, the Court nonetheless held that the effect of the law did not unreasonably limit alternative avenues of communication. *Id.* at 443.

69. *See* Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640; *see also infra* Part II.A.

the case of distributing religious literature, reasonable time, place, and manner restrictions are permissible consistent with first amendment jurisprudence."[70] But as written, RFRA's strict scrutiny applies to all generally applicable laws, with no exception for reasonable time, place, and manner restrictions. Moreover, the stated intent of the Senate Judiciary Committee concerning the federal RFRA is "at most tenuously relevant to state RFRAs."[71]

B. Exemptions: Neither Constitutionally Mandated nor Prohibited

"[T]he free exercise clause ostensibly mandates that religion be singled out for favorable treatment while the establishment clause purportedly requires that religion be subject to special disability."[72] Despite this tension, "there is room for play in the joints" between the religion clauses, allowing for "legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause."[73]

The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) made use of this margin of latitude.[74] Like RFRA, RLUIPA was a Congressional response to *Smith*, though more limited in scope. *Cutter v. Wilkinson*[75] considered whether RLUIPA's application of strict scrutiny to laws substantially burdening the religious exercise of prisoners violated the Establishment Clause.[76] Prison regulations are otherwise evaluated under a deferential rational-relationship standard.[77] The Court found that RLUIPA "fit . . . within the corridor between the Religion Clauses" and was a permissible legislative accommodation of religion,[78] noting that such accommodations "need not come packaged with benefits to secular entities."[79] The act alleviated

70. S. REP. No. 103-111, at 13 (1993).

71. Eugene Volokh, *Intermediate Questions of Religious Exemptions—A Research Agenda With Test Suites*, 21 CARDOZO L. REV. 595, 611 n.45 (1999) [hereinafter Volokh, *Intermediate Questions*].

72. William P. Marshall, *Religion as Ideas: Religion as Identity*, 7 J. CONTEMP. LEGAL ISSUES, 385 (1996); *see also* Walz v. Tax Comm'n, 397 U.S. 664, 668–69 (1970) ("The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.").

73. Locke v. Davey, 540 U.S. 712, 718–19 (2004). *But see Matthew* 6:24 ("No one can serve two masters; for either he will hate the one and love the other, or he will be devoted to one and despise the other.").

74. *See* 42 U.S.C. § 2000cc-1 (2000).

75. 544 U.S. 709 (2005).

76. *Id.* at 713, 719–20.

77. *See* Turner v. Safley, 482 U.S. 78 (1987).

78. Cutter v. Wilkinson, 544 U.S. at 720.

79. *Id.* at 724 (internal quotation marks omitted).

government-imposed burdens in the form of exemptions, and was thus viewed as an accommodation of religion rather than a targeted benefit to religion.[80]

Of course, not all exemptions exclusively benefiting religion pass constitutional muster. Even if an exemption alleviates a government-imposed burden on religious exercise, courts must consider the context of countervailing government interests and "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries."[81] The Court contrasted *Cutter* with its opinion in *Estate of Thornton v. Caldor, Inc.*[82] *Caldor* invalidated an exemption granted exclusively to Sabbath observers. The statute armed Sabbath observers with "an absolute and unqualified right" to not work on the day of their choosing, "no matter what burden or inconvenience this impose[d] on the employer or fellow workers."[83] By commanding that religious concerns "automatically control over all secular interests at the workplace,"[84] the exemption "unyielding[ly] weight[ed] in favor of [the interests of] Sabbath observers over all other interests."[85]

In contrast, some burdens resulting from exemptions may be tolerated if due consideration is given to the countervailing interests of nonbeneficiaries. For example, *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*[86] concerned the exemption of religious organizations from antidiscrimination laws. This exemption had an "adverse effect on those holding or seeking employment with [the exempted] organizations (if not on taxpayers generally)."[87] Notwithstanding the acknowledged burdens imposed upon nonbeneficiaries, the exemption was justified because it prevented "potentially serious encroachments on protected religious freedoms" by the government.[88]

80. *Id.* at 720.
81. *Id.* at 720, 723. For a more detailed discussion of this principle, see *infra* Part V.A.
82. 472 U.S. 703 (1985).
83. *Id.* at 708–09.
84. *Id.* at 709.
85. *Id.* at 710 (quoted in *Cutter*, 544 U.S. at 722). In the context of combat exemptions for conscientious objectors, Justice Harlan denounced attempts to distinguish religious objectors from those whose convictions emanate from purely moral, philosophical, or ethical sources. Welsh v. United States, 398 U.S. 333, 358 (1970) (Harlan, J., concurring).
86. 483 U.S. 327 (1987).
87. Tex. Monthly, Inc., v. Bullock, 489 U.S. 1, 18 n.8 (1989); *see also Amos*, 483 U.S. at 337 n.15 ("Undoubtedly, [the employee's] freedom of choice in religious matters was impinged upon . . . ".).
88. *Texas Monthly*, 489 U.S. at 18 n.8.

C. The Religious: Not Constitutionally Privileged

In justifying religious exemptions, many scholars rely on the assumption that "religion is esteemed by the Constitution in a way that most other human commitments, however intense or laudable, are not."[89] But simply because the religious have been identified by the Constitution as deserving some protection from government interference is not to say that the religious deserve more protection than other people who can likewise be categorized and discriminated against by some defining characteristic.

The reason for religion's unique status in the Constitution is not that religion is of unique constitutional value. Other rights are specifically reserved in the Constitution without warranting such a conclusion. For instance, under the Fourteenth Amendment right to equal protection, citizens of different races secure not privilege, but parity. "[R]acial status is constitutionally distinct in the sense that it marks [a person] as vulnerable to injustice, to treatment as other than an equal; [the] claim is for protection from that injustice."[90] Similar to race, religion has historically been used in justifying the discrimination and persecution of particular groups.[91]

Understood as an antidiscrimination norm, the religion clauses reinforce government neutrality by excluding religion as a relevant factor in distinguishing among citizens.[92] The most defensible "conception of religious liberty is [thus] founded upon protecting religious exercise against persecution, discrimination, insensitivity, or hostility."[93] In contrast, privileging religious groups is odious to the notion of the Constitution as a social contract between equal citizens.[94]

Placing a constitutional imprimatur on religious beliefs would make nonestablishment and equal liberty of expression vestigial guarantees. Yet none "of the great liberties insured by the First [Amendment] can be given

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89. Eisgruber & Sager, *supra* note 16, at 1253.

90. *Id.* at 1251.

91. *See* Bressman, *supra* note 28, at 1019 ("Consideration of religion alone, like race, rarely furnishes justification for differential treatment and almost always reflects invidious discrimination.").

92. The Constitution's prohibition on using religion as a qualification for public office supports the appropriateness of this characterization. *See* U.S. CONST. art. VI, cl. 3. Conceptualizing religious liberty as an antidiscrimination norm is a classic understanding. *See* Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255, 2265–66 (1997).

93. Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After* City of Boerne v. Flores, 1997 SUP. CT. REV. 79, 104.

94. "[T]he social compact establishes among the citizens such an equality that they all pledge themselves under the same conditions and ought to enjoy the same rights." JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT, book II, ch. IV (Paris 1792), *reprinted in* F. COKER, READINGS IN POLITICAL PHILOSOPHY 646–47 (rev. ed. 1938).

higher place than the other,"[95] and since "the law cannot promote orthodoxy in the truth of belief, so it would seem, the law should not support orthodoxy in the type of belief."[96] Though some states have interpreted their own constitutions to be more protective of religious liberty, assertions in favor of constitutionally compelled religious exemptions run afoul of establishment, speech, and equal protection principles. In similar spirit, if state and federal legislatures choose to privilege religion, then blindly granting such privilege without carefully considering important countervailing policies is unwise.

III. EXEMPTING SPEAKERS GENERALLY

Analyzing an exemption for religious speakers requires consideration of both the permissibility of giving special protections to religious individuals and to particular speakers in general. This Part addresses the latter factor and concludes that RFRAs provide the same type of speaker-based exemption that the Court has consistently upheld as a content-neutral speaker distinction in nonreligious contexts.

A. Legislative Ability to Distinguish Among Speakers

In theory, speech exemptions accord with the free speech archetype of unfettered public discourse. When legislatures carve out exemptions from speech restrictive laws, they preserve speech that would otherwise be suppressed.[97] "The state will *always* be able to invoke a constitutionally powerful interest in support of the exemption . . . as an exemption expands the sphere of permissible speech."[98] By salvaging First Amendment expression, an exemption is thus not only defensible, but apparently commendable.

But there is also an inherent danger in the ability to selectively grant immunity to speech regulations. Restricting speech based solely on disagreement with the message is impermissible. This principle generally prohibits a legislature from enacting content or viewpoint discriminatory laws. The same discrimination could be achieved by providing exemptions to content-neutral laws exclusively for favored messages—giving them an artificial vitality in the marketplace through the continued regulation of competing

95. Prince v. Massachusetts, 321 U.S. 158, 164 (1944).
96. William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 394 (1989).
97. *See* Note, *Speech Exceptions*, 118 HARV. L. REV. 1709, 1710–11 (2004).
98. Walsh v. Brady, 927 F.2d 1229, 1238 (D.C. Cir. 1991) (Williams, J., concurring).

viewpoints.[99] Recognizing the potential for underinclusive laws to undermine foundational First Amendment principles, the Court has been wary of exemptions drawn along content or viewpoint lines.

> [A]n exemption from an otherwise permissible regulation of speech may represent a governmental "attempt to give one side of a debatable public question an advantage in expressing its views to the people." Alternatively, through the combined operation of a general speech restriction and its exemptions, the government might seek to select the "permissible subjects for public debate" and thereby to "control . . . the search for political truth."[100]

Nonetheless, courts have upheld exemptions when the speaker distinction is reasonably related to a legitimate government interest, and actually serves that interest. Unless the underinclusiveness of a law represents the impermissible intent to censor content, speaker-based exemptions are not constitutionally suspect.[101] If an exemption is justifiable on some basis distinct from the expected content of the exempted speech, the incidental privilege accorded to both speaker and message is presumed tangential to the government's legitimate purpose.[102]

For example, in *Turner Broadcasting System, Inc. v. FCC*,[103] the Supreme Court upheld a provision requiring cable television operators to carry local broadcast stations. Notwithstanding the distinctions it made between speakers in the television programming market, the provision was deemed content-neutral.[104] The purpose of access privileges given to over-the-air broadcasters was to ensure widespread availability of free television programming.[105] Favored speaker status was conferred without regard to the views or content of a station's programming,[106] but the result of the speaker

99. *See* Carey v. Brown, 447 U.S. 455, 460–61 (1980) (holding that an exemption from a residential ban on picketing provided exclusively to labor picketers limited public discussion to labor issues, and thus impermissibly "accord[ed] preferential treatment to the expression of views on one particular subject . . . .").

100. City of Ladue v. Gilleo, 512 U.S. 43, 51 (1994) (citations omitted).

101. *See, e.g.*, Alter v. Armstrong, 961 F.2d 1224, 1230 n.5 (6th Cir. 1992) ("Unless a prohibition is content based, we examine the legislature's motive for prohibiting the forms of conduct it chooses to prohibit, not its motive for excepting other forms of conduct from the prohibition.").

102. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.").

103. 512 U.S. 622 (1994).

104. *Id.* at 652.

105. *Id.* at 662.

106. *Id.* at 643–44.

distinction clearly discriminated in favor of the messages the broadcasters would not otherwise be able to transmit. "So long as they are not a subtle means of exercising a content preference, speaker distinctions of this nature are not presumed invalid under the First Amendment,"[107] and are appropriately analyzed under intermediate scrutiny.[108]

The Court has demonstrated a willingness to uphold speaker-partial laws under less than strict scrutiny in other areas as well. *Regan v. Taxation With Representation*[109] concerned a tax provision that subsidized political lobbying by veterans, but not lobbying by other charities. Without any "indication that the statute was intended to suppress any ideas or any demonstration that it [had] had that effect,"[110] the Court deferred to Congress's selective distribution of its largesse as a matter of policy.[111]

A law is not subjected to strict scrutiny even when its speaker distinction has the effect of suppressing a particular viewpoint. In *Madsen v. Women's Health Center, Inc.*,[112] the Court upheld a speaker-based injunction that restricted only the speech of antiabortion protesters. Though the injunction functioned to suppress only antiabortion messages, it was treated as viewpoint and content neutral since the government purpose was aimed at the *conduct* of people with a particular viewpoint—the prevention of trespass and obstruction of access to medical clinics.[113] The Court deemed the injunction's inevitable suppression of the anti-abortion viewpoint ancillary to the government's legitimate purpose. It is the purpose, not the effect, of the discrimination that determines the standard of scrutiny employed.[114]

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107. *Id.* at 645.
108. *Id.* at 662.
109. 461 U.S. 540 (1983).
110. *Id.* at 548.
111. *Id.* at 549.
112. 512 U.S. 753 (1994).
113. *Id.* at 763.
114. The Court's focus on government purpose in determining the legitimacy of speaker distinctions is echoed in lower court decisions. For example, the Seventh Circuit in *Kucharek v. Hanaway*, 902 F.2d 513 (7th Cir. 1990), considered the constitutionality of Wisconsin's exemption of libraries and schools from a statutory ban on the sale of obscene material. Though the statute was underinclusive in the amount of obscenity it could prohibit, the exemption of particular speakers was not invidious. The court noted that statutory exemptions were common, rarely invalidated, and in this case, merely a compromise negotiated between the legislature and the "political muscle" of educational and charitable interests. *Id.* at 518. An exemption was likewise granted to contract printers. The court found it reasonable for the legislature to shield contract printers from what could potentially be a particularly heavy burden of criminal liability. *Id.* at 520. The purpose of the exemption was thus deemed rational and upheld. *Id.* at 520–21. The court did not see any need to closely scrutinize the drawing of statutory lines unless the line was drawn on a "forbidden basis," such as the content or viewpoint of the exempted speech. *Id.* at 521.

Given that First Amendment interests hinge on the legitimacy of government motive, any ability to craft speaker-partial laws unquestionably has potential for abuse. Evidence that a speaker's identity is not simply being used as a proxy to censor the content of her speech is a judicious precaution against covert censorship. The Court has therefore on occasion subjected content-neutral, speaker-partial laws to strict scrutiny. Clearly the Court is willing to accept speaker-distinctions that serve important interests. Its decisions in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*[115] and *Greater New Orleans Broadcasting Ass'n v. United States*[116] merely stand for the complementary proposition that drawing lines between speakers merits strict scrutiny when the government offers "no sound reason why such lines bear any meaningful relationship to the particular interest asserted."[117]

Minneapolis Star invalidated a tax imposed on only a small fraction of newspapers. The tax "targeted a small number of speakers and thus threatened to 'distort the market for ideas.' Although there was no concrete evidence that an illicit governmental motive was behind" the tax, it was "structured in a manner that raised suspicions that [the] objective was, in fact, the suppression of ideas. But such heightened scrutiny is unwarranted when the differential treatment is 'justified by some special characteristic of' the particular medium being regulated."[118]

The government claimed that the purpose of the tax was to raise revenue, but did not explain why this purpose was furthered by selectively burdening a small number of newspapers. An equally effective, as well as constitutionally sound, alternative would be to "raise the revenue by taxing businesses generally, avoiding the censorial threat implicit in a tax that singles out the press."[119] The tax was subjected to strict scrutiny, then, not in spite of a legitimate rationale for the speaker distinction, but for the suspicious lack of one. Without any legitimate rationale for the distinction, there could be no assurance that the legislature had not been motivated by an impermissible desire to censor certain speakers.

The casino advertising ban struck down in *Greater New Orleans Broadcasting* also suffered a disconnect between the asserted government interest and the distinction among speakers. The ban sought to alleviate the social costs of gambling. Since advertising increases demand for a commodity, limiting

115. 460 U.S. 575, 591 (1983).
116. 527 U.S. 173 (1999).
117. *Id.* at 193.
118. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 660–61 (1994) (citations omitted).
119. *Minneapolis Star*, 460 U.S. at 586.

advertising would presumably limit demand.[120] State-run and tribal casinos were exempted. The speaker-based exemption did not advance the government's interest; the gambling occurring in the exempted casinos was just as socially harmful as gambling occurring in any other location.[121]

The irrationality of a law "permitting a variety of speech that pose[d] the same risks the Government purport[ed] to fear"[122] signaled to the Court that the true motive of the law may have been invidious to First Amendment principles.[123] The government's asserted interest, though legitimate, could not provide any convincing basis for the exemptions.[124] Aside from the lack of any distinction between gambling occurring in private versus tribal casinos, the government noted that the exemption benefited Native Americans generally: Revenues generated by tribal casinos were dedicated to the welfare of their members.[125] While the Court recognized "the special federal interest in protecting the welfare of Native Americans," and even the possibility of valid reasons for imposing different regulations on tribal businesses, it rejected the argument that "those differences also justif[ied] abridging non-Indians' freedom of speech more severely than the freedom of their tribal competitors."[126] The speaker-distinction may well have advanced the welfare of Native Americans, but this interest was independent from the interest in the advertising ban, and the speaker-distinction had to be justifiable based on its relationship to the interest in alleviating the social costs of gambling.

The importance of showing a meaningful relationship between the exemption and the particular interest in the regulation is highlighted by contrasting *Minneapolis Star* and *Greater New Orleans Broadcasting* with speaker-partial laws that are justified by a special characteristic of a speaker's identity.[127] For example, the must-carry provision upheld in *Turner Broadcasting* was warranted by the "bottleneck monopoly power exercised by cable operators

120. *Greater New Orleans*, 527 U.S. at 188–89.

121. *See id.* at 191–92. In fact, the government's attempt to reduce the social costs of gambling was subverted by the "simultaneous encouragement of tribal casino gambling, which may well [have been] growing at a rate exceeding any increase in gambling or compulsive gambling that private casino advertising could produce." *Id.* at 189.

122. *Id.* at 195.

123. *Id.* at 194 ("[D]ecisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment.").

124. *Id.* at 194–95 ("Congress' choice here was neither a rough approximation of efficacy, nor [ ] reasonable . . . . Considering the manner in which [the regulation] and its exceptions operate and the scope of the speech it proscribes, the Government's second asserted interest provides no more convincing basis for upholding the regulation than the first.").

125. *Id.* at 191.

126. *Id.* at 193.

127. This special characteristic must, of course, be unrelated to the content of the speech.

and the dangers this power pose[d] to the viability of broadcast television."[128] The government's asserted interest in preventing these harms—an interest unrelated to the suppression of ideas and concededly "important in the abstract"[129]—did not "present such potential for censorship or manipulation" as the suspiciously arbitrary speaker lines drawn in *Minneapolis Star* or *New Orleans Broadcasting*.[130]

Applying intermediate scrutiny, the *Turner Broadcasting* Court noted that "[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms . . . [i]t must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[131] The favored status given to broadcasters directly promoted their survival and so was of course related to the government's purpose. Still, the Court acknowledged that a "regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist,"[132] and hence remanded with instructions for the lower court to determine whether the vitality of local broadcasting stations was truly in jeopardy.[133]

B. Why RFRAs Provide Speaker-Based Exemptions

1. RFRAs Are Content-Neutral

The fact that RFRAs' application to speech regulations discriminates in favor of religiously motivated speech does not automatically render the exemption unconstitutional; by definition all underinclusive laws discriminate in favor of the exempted speech. As the previous section illustrates, if the basis for the discrimination is content neutral and is reasonably related to a legitimate government interest, the Court will uphold the speaker-distinction. In every respect, RFRAs provide for just such a speaker-distinction.

RFRAs' preference is not content based, since the heightened standard applies regardless of whether the speech is religious in nature. So long as the speaker is religiously motivated, the subject matter of the speech could concern national politics, animal rights, hemlines, or something as American

128. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 661 (1994).
129. *Id.* at 664.
130. *Id.* at 661.
131. *Id.* at 664.
132. *Id.* (quoting Home Box Office, Inc. v. FCC, 567 F.2d 9, 36 (D.C. Cir. 1977)).
133. *Id.* at 668. On remand, the district court found that "the must-carry rules are necessary to protect the viability of the broadcast industry" and upheld the regulation. Turner Broad. Sys., Inc. v. FCC, 910 F. Supp. 734, 740 (D.D.C. 1995).

as apple pie and motherhood. Nor do RFRAs purport to exempt speech that does not represent the government's interest in the challenged regulation. Such was the case in *Greater New Orleans* and the fruitless attempt to distinguish social costs of gambling based on the identity of the casino owner. Finally, the law is not aimed at the suppression of ideas. Rather, the purpose of the law is to protect religious liberty by preventing substantial burdens on religiously motivated acts.

RFRAs' structure contains safeguards against the fears that the Court has expressed when confronting speaker-based laws defended as a means to redress past harms or prevent anticipated harms. Under RFRAs, a claimant must demonstrate that the challenged law operates as a substantial burden to her religious exercise. The substantial burden requirement ensures that the problem is real; the government is not "simply posit[ing] the existence of the disease sought to be cured."[134] By declining to enforce the law against the claimant, the government removes the source of the burden. A more direct connection to the proffered interest could not be found.

2. RFRAs Protect Religious Liberty, Not Religious Ideology

Many critics of RFRAs characterize its speech exemption as facially viewpoint discriminatory. Alan Brownstein contends that even if, "[a]s a technical matter, it is possible to argue that the state is not engaged in content or viewpoint discrimination," the beliefs motivating speech are inextricably intertwined with the viewpoint of speech such that the two should be evaluated under the same strict standard of review.[135] Brownstein's claim is nearly categorical: "For First Amendment purposes, the formal distinction between speech and the belief system that motivates a speaker should be of little importance."[136]

Brownstein cites cases in which he contends that the Court has conflated the viewpoint of speech with its animating beliefs. For instance, the Court has stated that "[t]he Government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[137]

134. *Turner Broadcasting*, 512 U.S. at 664 (internal quotations omitted).
135. Brownstein, *supra* note 19, at 634.
136. *Id.*
137. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) (invalidating a forum access scheme which discriminated against religious viewpoints); Brownstein, *supra* note 19, at 635. *Rosenberger* involved facial discrimination based on the content and viewpoint of the speech of a religious publication. The Court acknowledges the possibility of using ideology for the purpose of viewpoint discrimination, but does not go so far as to equate viewpoint with motivation—especially when the purpose of the law is unconcerned with speech per se.

The Court's reference to "motivating ideology" must be considered in context. Use of speaker motivation is impermissible only when its purpose is to serve as proxy for discrimination among ideologies. The law at issue in this particular case did discriminate based on content. RFRAs' speaker distinction would be unjustifiable if its aim was to advantage the motivating ideology of the religious speaker. But any advantage to ideology is incidental, even if foreseeable, to the legislature's actual purpose: increasing liberty for religious exercise.

Laws based on speaker identity inevitably advantage the viewpoints of some speakers over others. The controlling consideration is the government's purpose. A law that results in advantage to a particular viewpoint warrants searching review only if the government cannot show that the distinction serves a viewpoint-neutral purpose. If the government offered no basis for RFRAs' speaker distinction, the Court would likely analogize to the suspect speaker distinctions in *Minneapolis Star* and invalidate the law. The clearly articulated reason for applying strict scrutiny to religiously motivated speech shields RFRAs from successful attack under this approach. The incidental effect upon the marketplace of ideas is not enough to render RFRAs unconstitutional. The Court's chief concern is deliberate distortion of the marketplace by the government.

3. RFRAs Are an Unlikely Device for Deliberate Market Distortion

Addressing the Court's predominant concern with the government's intentionality, Brownstein maintains motive is a ready and likely facade for impermissible discrimination. By using motive as proxy for content of speech (on the premise that motive usually predicts the message) the government can effectively circumvent constitutional limits on its power to discriminate among viewpoints: "The practical effect of a constitutional rule that allows government to discriminate on the basis of the motivational beliefs of speakers . . . is easy to predict and directly in conflict with the goal of public discourse that is free from government manipulation."[138]

Within the context of Brownstein's own argument, this claim is entirely defensible—his argument presumes that the government's purpose in discriminating between motivating ideologies is to discriminate in favor of a particular motivating ideology, and therefore is an impermissible distinction.

138. Brownstein, *supra* note 19, at 638; *see also* Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests*, 29 U.C. DAVIS L. REV. 553, 562–63 (1996).

But Brownstein's approach essentially begs the question, and is unconvincing given that the government's purpose in enacting RFRAs was not to privilege a favored ideology.

If the government's purpose were to prejudice the marketplace toward a favored ideology, RFRAs are a blunt and unreliable tool to do so. For example, RFRAs cannot reasonably be seen as a government attempt to advance Judeo-Christian ideals, because RFRAs can be invoked by adherents of any religious persuasion—including religions inconsistent with Judeo-Christian beliefs. RFRAs can also be invoked by Christian groups whose views are inconsistent with core government interests in advancing equality, such as Christian White Supremacists advocating overthrow of the secular government and racial purification,[139] or the Westboro Baptist Church whose members picket the funerals of soldiers, believing God is punishing the sin of homosexuality by killing Americans.[140] The claim that the government intended the certain effect of RFRAs to privilege favored messages is further belied by RFRAs' focus on the sincere religious beliefs of the individual claimant. The messages disseminated by those whose conception of Christianity is unique, founded on a personal interpretation of scripture, are not predictable.[141]

The broadly inclusive protections of RFRAs would be an inept means of advancing a single preferred belief system, unless applied to just a certain subset of religions with even nominally the same viewpoint (say, all religions that believe Jesus Christ to be the Savior). Consider the Court's finding in *Turner Broadcasting* that the must-carry provision did not pose a danger of manipulation of the marketplace. Contributing to this decision was the fact that

139. *See* BRUCE HOFFMAN, INSIDE TERRORISM 108–09 (2006). Hoffman uses Christian White Supremacists as one of many examples of when religiosity is perverted into a call to terrorist acts of violence, seen as a "sacramental act or divine duty." *Id.* at 88. Advocacy of such unpopular ideas that does not reach the level of incitement or actual acts of violence, however, is a protected category of expression.

140. The petitioner in *Phelps-Roper v. Nixon*, 509 F.3d 480 (8th Cir. 2007), believed that as part of her religious duties she must protest military funerals to publicize God's message that Americans have been condemned for the sin of homosexuality. *Id.* at 483. She claimed a statute criminalizing picketing "in front or about" funeral locations failed to afford adequate alternative channels for dissemination of her message to military funeral attendees. *Id.* at 488. Though her defense was premised on free speech grounds, *id.* at 483, this could easily be conceptualized as a free exercise claim under RFRA as well.

141. *See* United States v. Zimmerman, 514 F.3d 851 (9th Cir. 2007) (holding that a petitioner's rights may have been violated under RFRA by forcing him to provide blood for a DNA sample). Though the claimant was raised as a Roman Catholic, and the resistance to giving blood is not a common tenet of that faith, his belief was based on a personal interpretation of the Bible. *Id.* at 853. He cited Biblical passages to support the foundation of this belief: "Whosoever sheds the blood of man, by man shall his blood be shed; for in the image of God has God made man." *Id.* at 854 (quoting *Genesis* 9:16).

the regulation was "broad based, applying to almost all cable systems in the country, rather than just a select few."[142] The same principle holds with respect to RFRAs.

Nor is it convincing to characterize RFRAs as covertly injecting a widely conceived religious perspective into the marketplace. There is no single one religious perspective, just as there is no single one political perspective (for example, the viewpoints of a Democrat and Libertarian are very different, though both could be characterized as political perspectives). It is no more reasonable to assert that the perspectives of a Muslim and a Buddhist comprise a single viewpoint simply because each is religious in nature.

Granted, the Court has characterized religion as providing a specific "perspective, a standpoint from which a variety of subjects may be discussed and considered."[143] Rather than subsuming all religious perspectives within a single identifiable viewpoint, this statement responds to the argument that no viewpoint discrimination occurs when a law "discriminate[s] against an entire class of viewpoints."[144] Insofar as religion informs a speaker's perspective, the Court's statement acknowledges the many and divergent viewpoints silenced by regulations that facially exclude all religious viewpoints.[145]

In contrast to a facially viewpoint discriminatory law, RFRAs' protection maps onto speaker motivation, not speech content, and is viewpoint neutral. The incidental advantage conferred under RFRAs does not advance any particular religious viewpoint, a fact supported by the Court's acknowledgement of the multitude of religious viewpoints.[146]

There is no consensus among religions on all subject matters, or even on the topic of morality.[147] Religious beliefs, between religions and among adherents of the same religion, are inconsistent and do not agree on what constitutes the Truth. The foundational beliefs of some religions are inimical to the very existence of others. The myriad viewpoints comprising an inclusive notion of religious perspective do not even draw a consensus as to whether there is

142. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 661 (1994).

143. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 831 (1995).

144. *Id.*

145. *Id.* ("[E]xclusion of several views on [a] problem is just as offensive to the First Amendment as exclusion of only one.").

146. *Id.* at 831–32 (noting that when "multiple [religious] voices are silenced . . . the debate is skewed in multiple ways").

147. *But see* Brownstein, *supra* note 19, at 641 ("Motivational beliefs reflect specific viewpoints especially when, as is the case with regard to religion, the direct expression of those beliefs would be held to constitute a viewpoint for First Amendment purposes."). Brownstein uses his theory of motive as proxy for viewpoint discrimination to support the government's compelling interest in avoiding Establishment Clause violations caused by the application of RFRA to speech exemptions. *Id.* at 625.

a Supreme Being.[148] Nontheistic religions, such as Buddhism and Taoism, do not embrace the existence of God.[149]

IV. PRIVILEGING RELIGIOUS OBJECTORS IS PROPER—SOMETIMES

To say that a legislature is not obliged to provide especially favorable treatment for religious objectors is not to say that a preference for religious motivations is not prudent—or at least tolerable—in some circumstances. To warrant such consideration, exemption claims based on religious beliefs must be distinguishable from claims based on strong preferences.[150] In many instances, the unique burden upon the religious objector justifies an exemption for religious objectors. This act of legislative grace does not aim to privilege acts with religious significance, but rather seeks to avoid unnecessary violations of conscience.

A. The Burden of Being Law-Abiding

The mere preference of some people to act contrary to the rule of law should not suffice to overcome its application to them. A law is not unjust simply because it has a disparate impact on people; laws by their very nature will burden some more than others.[151] The notion that an individual could secure an exemption from a law due to a strong preference to engage in the prohibited behavior can summarily be renounced as impracticable.[152]

148. In *Torasco v. Watkins*, 367 U.S. 488 (1961), the Court held that the Establishment Clause prevents the state from discriminating among "those religions based on a belief in the existence of God as against those religions founded on different beliefs," noting Buddhism, Taoism, Ethical Culture, and Secular Humanism as examples of such. *Id.* at 495 & n.11.

Following *Torasco*, the Court in *United States v. Seeger*, 380 U.S. 163 (1965), took broad liberties with the conventional understanding of a "Supreme Being" to include Buddhists and Taoists within the scope of religious beliefs arising "in relation to a Supreme Being." *Id.* at 191. However, the Court essentially redefined the word God to avoid imputing Congress with an impermissible intent to discriminate against nontheistic religions—even admitting that "if 'God' is taken to mean a personal Creator of the universe, then the Buddhist has no interest in the concept." *Id.* The Court's motive in constructing a plastic notion of God was transparent; the exemption statute at issue would be unsalvageable if it drew a line between theistic and nontheistic beliefs.

149. This point is furthered still by the inclusion of Wiccans, pagan practitioners of witchcraft and magic, among the religious. *See generally* SCOTT CUNNINGHAM, WICCA: A GUIDE FOR THE SOLITARY PRACTITIONER (1993).

150. Greenawalt, *supra* note 28, at 1618.

151. For example, a noise ordinance is more onerous to a host of a late night party than to a worker on the swing shift.

152. Yet, this is conceptually in step with the contention that religious objectors deserve special treatment on the basis of their beliefs. "To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." Reynolds v. United States, 98 U.S. 145, 166–67 (1879); *see also*

In granting exemptions, a legislature's decision to value religious motivations over nonreligious claims of preference would be principled only if religious objectors are not similarly situated. Selectively providing exemptions to objectors who are relevantly distinguishable from others does not violate the maxim that alike people be treated alike.[153] However, the notion that equality entails equal treatment of equals is tautological and, standing alone, "is insufficient to resolve moral and legal controversies."[154] The rub is in determining whether religious objectors can be legitimately distinguished from mere preference objectors in such a way as to be more deserving of an exemption.

B. Religious Motivation versus Personal Preference: More Than a Difference of Degree

Mandatory jury duty is a prime example to contrast the disparate burdens upon the sincere religious objector and the objector who would sincerely prefer to do almost anything but serve. An Amish religious objector forced to serve on a jury would be committing a religious transgression that reverberates far beyond the hours lost in the courtroom. Having passed judgment on a fellow man—seen by the Amish as the realm of God alone—the act is one of eternal consequence.[155] Contrast the Amish objector to a secular objector who has no moral objections to serving on a jury, but simply wants to avoid the personal inconvenience. The act of jury service does not hold deep meaning for this secular objector, which justifies compelling her to serve against her wishes. Of course, religion does not have a monopoly on conscience; being forced to contravene sincerely held moral or ethical beliefs can likewise violate secular conscience.[156]

Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 885 (1990) (noting that such a result "contradicts both constitutional tradition and common sense").

153. Doing so would even serve the logical correlation that people who are unalike be treated unalike. ARISTOTLE, ETHICA NICOMACHEA, at V.3.1131a–1131b (W. Ross trans., 1925).

154. Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575, 576 (1983) (emphasis removed from original); *cf.* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 547 (1982) (arguing that "equality" is empty of content insofar as it depends on underlying substantive judgments as to relevant similarities).

155. In recognition of the Amish religion's shunning judgment of others, and also the amount of effort courts spend in individually excusing these potential jurors, Ohio has amended its state code to specially exempt the Amish. OHIO REV. CODE ANN. § 2313.16(A)(7) (West Supp. 2008). *See generally* DONALD B. KRAYBILL & MARC ALAN OLSHAN, THE AMISH STRUGGLE WITH MODERNITY 201 (1994).

156. Equal consideration should indeed be given to a conscientious objector based upon a moral or ethical belief "that is sincere and meaningful [and] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption" as a religious objector. *See* United States v. Seeger, 380 U.S. 163, 166 (1965). This argument is given more attention *infra* Part VI.D.

In the mind of the religious objector, religious canons are ascendant to the laws of man, and where civil and religious duties conflict, civil disobedience is likely.[157] The decision to avoid a religious transgression carries the high price of criminal sanctions.[158] If exempting a conscientious objector from a burdensome law would not compromise society's moral interest in preventing bad acts, then the interest in enforcement against a particular individual is not persuasive when measured against the psychological harm that would result.

If regulatory noncompliance results only in the forfeiture of a benefit, the burden on the religious objector would appear proportionate to the burden of an objector acting on preference.[159] A secular objector is deterred only to the extent that the burden of compliance outweighs the benefit of participation in the activity. Similarly, a religious person has the opportunity to take part in the desired activity, but need not do so if the burden of religious recrimination outweighs that desire. A grooming policy requiring all officers to be clean-shaven applies to beards worn for aesthetic reasons as well as religious ones; a regulation requiring hard-hats in construction zones constrains the preference for the shade of a cowboy hat as well as the traditional Amish wide-brimmed hat.[160] A military regulation prohibiting headgear prohibits baseball caps as well as yarmulkes;[161] so too with laws prohibiting headgear worn while playing high school basketball games.

All of these regulations force an objector to prioritize her interests. But temporal pleasures and eternal consequences are incommensurable, and the religious objector is effectively denied opportunities enjoyed by the rest of society. Without an accommodation, Muslims would be barred from a livelihood in law enforcement, the Amish from working in construction, and Orthodox Jews from serving in the military or playing on their high school's

157. *See* John H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779, 795–96 (1985) (characterizing the social interest in recognizing religious exemptions as prevention of the same harms engendered by Prohibition: "widespread disobedience; disproportionate investment of enforcement resources; and loss of respect for the law").

158. The Jury Patriotism Act, a model statute which has been adopted by several states, makes absence from jury duty a Class A misdemeanor, punishable by up to one year in jail. The drafter of the model statute, the American Legislative Exchange Council, provides the text of the statute on its website. *See* Victor E. Schwartz, Mark A. Behrens & Cary Silverman, *The Jury Patriotism Act: Making Juring Service More Appealing and Rewarding to Citizens*, STATE FACTOR, Apr. 2003, at 10, *available at* http://www.alec.org/am/pdf/ALEC-State-Factor-Jury-Patriotism.pdf.

159. *See Smith*, 494 U.S. at 898–99 (O'Connor, J., concurring) ("A neutral criminal law prohibiting conduct that a State may legitimately regulate is, if anything, more burdensome than a neutral civil statute placing legitimate conditions on the award of a state benefit." (emphasis omitted)).

160. Schwartz, Behrens & Silverman, *supra* note 158.

161. Goldman v. Weinberger, 475 U.S. 503 (1986).

basketball team. Although the government does not attach criminal penalties to these religious practices, it does create an incentive to disregard them.[162] As a result, a religious objector must endure the subtle undermining of her moral obligations by the government.[163] Conditioning a benefit on a violation of conscience, as with compelled violations that lack sufficient justification, is an injudicious use of government authority. "Free exercise of religion does not mean costless exercise of religion, but the state may not make the exercise of religion unreasonably costly."[164]

Laws may provide for facially equal treatment, but a religious objector is subjected to a greater burden, and more than one of degree.[165] The burden is wholly different from that experienced by an objector of preference, and may not have been anticipated by the legislature. When the challenged law was originally crafted, the value of regulating a specific act was determined to outweigh the value of allowing citizens to act without restraint. A law serving interests of administrative convenience or aesthetic uniformity is weighed against the inconvenience to the average citizen, and the balance does not presuppose the violation of a belief structure. Rules restraining individual preferences are necessary to maintaining an ordered society, but the government should avoid compelling people to violate their conscience absent adequate justification.

C. Violating Conscience in the Interest of Others

The Supreme Court has acknowledged that "[a] way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different."[166] Given the expectation of legislative

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162. *See* Bowen v. Roy, 476 U.S. 693, 706 (1983) ("We conclude . . . that government regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons. Although the denial of government benefits over religious objection can raise serious Free Exercise problems, these two very different forms of government action are not governed by the same constitutional standard.").

163. It is worth noting that some individuals might actually prize this subtle undermining, because it provides them the opportunity to display their religious devotion—a kind of religious growth through adversity.

164. Menora v. Ill. High Sch. Ass'n, 683 F.2d 1030, 1033 (7th Cir. 1982) (addressing a player's free exercise claim to wear a yarmulke during high school basketball games despite a rule prohibiting headgear). In this case, Judge Posner crafted his own condition that the yarmulke could be worn in a way that did not present a safety risk from falling off during play, stating there was "no constitutional right to wear yarmulkes insecurely fastened by bobby pins." *Id.* at 1035.

165. The same is true of all conscientious objectors.

166. Wisconsin v. Yoder, 406 U.S. 205, 224 (1972).

sensitivity to the concerns of citizens, some contend that if dominant Christian tradition called for the wearing of yarmulkes or the ingestion of peyote, regulations burdening these activities would not have been enacted in the first place.[167]

This is a sensible claim, but it would be irrational to accord the sincere religious beliefs of all faiths equal respect if their religious practices conflicted with the moral beliefs of the majority. It is perfectly permissible for the state to refuse to sanction polygamous marriages based on its belief that such acts are morally wrong. Besides, the former approach would rationalize any exemption—a society whose dominant religion called for human sacrifice would likely tolerate this type of killing.[168] When a practice impinges on the interests of others, the refusal to grant an exemption does not represent an indifference to the individual's religious burden, only a refusal to burden others with the religious obligations of the minority.

However, if a religious practice does not "have a potential for significant social burdens,"[169] the government should adequately justify forcing a violation of conscience—cautious not to disregard the religious burden simply because the practice is unfamiliar. In *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*,[170] Judge Samuel Alito, then on the Third Circuit, held that it was unconstitutional for a police department to provide medical exemptions from a grooming policy requiring officers to be clean shaven while simultaneously refusing to allow a religious exemption for Muslims. The department's purpose in having a grooming standard did not warrant distinguishing between officers based on their motivations; aesthetic uniformity among officers is disrupted by a beard worn by an officer with a skin condition just as much as one worn by a Muslim. The differential treatment indicated that the department "made a value judgment that secular (i.e., medical) motivations for wearing a beard [were] important enough to overcome its general interest in uniformity but that religious motivations [were] not."[171]

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167. *See* CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 106 (2007) (positing that if a law would not have been adopted but for legislators' insensitivity to the religious practices of a minority, a court can ask "the counterfactual question of whether more mainstream concerns would have been treated more favorably").

As a comparative example of the influence of dominant cultural norms, the Israeli Defense Force permits service members to don a skullcap. *See* Steven Erlanger, *Israeli Army, a National Melting Pot, Faces New Challenges in Training Officers*, N.Y. TIMES (Dec. 31, 2007) (noting that 30 to 40 percent of volunteer combat units are Zionists who tend to wear skullcaps).

168. *See* Volokh, *Common-Law Model*, *supra* note 44, at 1543–44.

169. *Yoder*, 406 U.S. at 234.

170. 170 F.3d 359 (3d Cir. 1999).

171. *Id.* at 366.

Formal neutrality forbids religious persecution, but it does not scrutinize whether burdensome laws, while not rooted in hostility toward a religion, nonetheless reflect insensitivity to religious practices. The decision to give special consideration for religiously motivated objectors in certain instances need not be characterized as privileging the religious act itself, but rather as a move to preserve equality and neutrality.

D. Respecting an Act of Faith as an Act of Legislative Grace

In a diverse pluralistic society, nearly any law will burden someone's religious exercise. Various religious beliefs are offended by requiring a photo for a valid driver's license, requiring a social security number, providing a DNA sample, or requiring employers to pay minimum wage. The legislature has already found value in regulating the act, and the external consequences of an unregulated act are the same, irrespective of the beliefs animating the act.[172] The intrinsic meaning of the conduct is in the eyes of the religious objector, not the state, and an exemption is an act of grace in recognition of the importance of the conduct to the believer.[173]

By exempting some forms of religious exercise, a legislature does not value religious beliefs in a sense that civil law is subordinate to the divine. Rather, it is acting out of pragmatic considerations having to do with accommodating the strongly held beliefs of its citizens. Religious practices represent adherence to moral and spiritual truth; conduct that appears trivial to those who are not members of a faith often has deep meaning for the faith's adherents.[174] In this respect, some religiously motivated conduct does not have a secular counterpart—even when a secular actor superficially engages in the same act. Yet it would be impossible for the legislature to exempt all religious beliefs on the basis that they represent ultimate truth; some religions exclude the viability of other beliefs.[175] Furthermore,

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172. "Therefore, it is not anti-religious secularism to contend that the Constitution protects only *freedom* of religion and that the protection of religion itself, like the protection of any belief system, religious or secular, true or false, is only derivative." Marshall, *supra* note 96, at 411.

173. *See* Greenawalt, *supra* note 28, at 1632 ("Many people perceive *their religion* as involving relations with a transcendent God. Whether they are wise or foolish, the government should not demand that they do what they believe God forbids them from doing, or does not want them to do.").

174. This is not to say that all conduct that represents adherence to moral truth need be religiously motivated. Secularly motivated vegetarianism may represent either a food preference or a belief in the sanctity of all life. But in contrast, the wearing of a beard for secular reasons is either one of aesthetic preference or for a medical need, and is unlikely to represent any sort of moral truth.

175. Indeed, some versions of Islam and Christianity insist that other faiths be proscribed. Some religions view others as not being completely false, but rather incomplete in certain crucial respects. In any event, a government decree as to the truth of a particular religion would clearly be

religious liberty presumes liberty for adherents of all religious beliefs, and cannot be perversely understood to guarantee the liberty of one particular faith to the exclusion of others. Neither biblical law nor the law of the Quran is enforceable in American courts.[176] If the legislature were to adopt the perspective of the believer, then no interest, no matter how compelling, would ever warrant the subjugation of religious duties. But if our democracy is to function, the rule of God cannot be made superior to the rule of law. The mutuality of social obligations binds the religious and irreligious alike.

V. THE COMPELLING INTEREST IN NOT PRIVILEGING RELIGIOUS SPEAKERS: LIMITING RFRAS' SCOPE

RFRAs' speaker-based privilege is constitutionally defensible, but providing the same privilege to religious speakers under narrower laws would be unconstitutional. Notwithstanding this admittedly important distinction, the government should take into account the social costs of discriminating among classes of speakers and the incidental distortion of the marketplace. The government's interest in promoting the principle of equality inherent in speech clause doctrine is a compelling one, and should be asserted to justify enforcing the law despite RFRAs' invocation by an objector. A motherly rejoinder provides sound counsel: "Just because you can, doesn't mean you should."

The right to free speech is both a substantive right, restraining the government from restricting speech absent adequate justification,[177] and a comparative right, prohibiting the government from selecting among favored viewpoints and messages, even when acting within permissible regulatory power.[178] Though a preference for religious motivations may

invidious to the guidance provided by the "fixed star in our constitutional constellation" that government cannot prescribe religious orthodoxy. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

176. Adopting this approach would lead to the kind of theocratic government in Saudi Arabia, which uses the Quran as its Constitution. (Or, for a less alarming example, Vatican City). *See* U.S. DEP'T OF STATE, Saudi Arabia: International Religious Freedom Report, *available at* http://www.state.gov/g/drl/rls/irf/2002/14012.htm (stating that the Saudi Arabia "Government has declared the Holy Koran and the Sunna (tradition) of the Prophet Muhammad to be the country's Constitution. . . . Neither the Government nor society in general accepts the concepts of separation of religion and state, and such separation does not exist."); *Theocracy*, *in* 2 ENCYCLOPEDIA OF POLITICS AND RELIGION 877, 878 (Robert Wuthnow ed., 2d ed. 2007).

177. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 522 (1981) (Brennan, J., concurring).

178. *See id.* at 513 (plurality opinion). An example of comparative equality rights is the Privileges and Immunities clause of Article IV: The clause does not provide any independent entitlements to citizens from other states, only assuring that right to be treated equally to the state's own citizens. *See* Westen, *supra* note 154, at 555.

generally be tolerable as to conduct under the Free Exercise Clause, the parallel Free Speech Clause protects speech—for *all* speakers.[179]

A. Preserving Equality of Status Among Ideas

Speech rights do not entail a substantive judgment as to the relative value of different messages. Such a determination is antithetical to the notion of a single guarantee of free speech, relied upon in equal measure by religious and secular speakers.[180] The Constitution renders the government institutionally incompetent to make such value judgments, and accordingly handicaps it from privileging favored viewpoints or suppressing disfavored ones.[181] The only relevant inquiry in determining whether people are sufficiently alike to merit alike treatment under the Free Speech Clause is whether they are speakers engaged in protected expression.[182] In light of the constitutional value of both communicating and receiving ideas, apportioning speech opportunities based on whether the speaker's motivation is religious or secular is not a sound use of legislative power.

The government's inability to discriminate based on the message conveyed underscores an important corollary: Religious speech is not distinctive from other speech under the First Amendment. This conclusion is supported by cases such as *Rosenberger v. Rectors and Visitors of the University of Virginia*[183] and *Good News Club v. Milford Central School*,[184] where the Court relied on the Free Speech Clause in holding that the government may not deny equal speech rights to religious speakers.

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179. *See* Volokh, *Intermediate Questions*, *supra* note 71, at 612.

180. Differential treatment of speakers cannot be claimed to promote equality. This is in contrast to the viability of a claimed proportionality right with respect to religiously motivated conduct. *See* Kenneth W. Simons, *Equality as a Comparative Right*, 65 B.U. L. REV. 387, 437 (1985) ("Proportionality rights are claims that *equal* (or disproportionate) treatment is unjustified, and that unequal (or proportionate) treatment is required.").

181. "[T]he government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace. The First Amendment presumptively places this sort of discrimination beyond the power of the government." Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) (citations omitted); *see also* Cohen v. California, 403 U.S. 15, 24 (1971) (stating that the freedom of speech "is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us").

182. Expression categorically unprotected under the First Amendment constitutes "no essential part of any exposition of ideas" and has "slight social value as a step to the truth," such as obscenity, defamation of private figures, fighting words, and true threats. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). Commercial speech has also been afforded a lesser level of protection. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980).

183. 515 U.S. 819 (1995).

184. 533 U.S. 98 (2001).

While those particular cases benefited religious speech, the function of equality within the Free Speech Clause operates as just as strong of a countervailing force against providing exemptions that are targeted to exclusively benefit religious speech. In *Texas Monthly, Inc. v. Bullock*,[185] the Court invalidated a sales tax exemption granted exclusively for literature published by religious organizations. A targeted exemption benefiting only religious beliefs and that "cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion . . . cannot but convey a message of endorsement to slighted members of the community."[186] Without even a modicum of evidence demonstrating that imposing sales tax upon purchasers of religious literature would either offend religious beliefs or inhibit religious exercise, the Court found the exemption unnecessary for the protection of free exercise in even a single instance, much less as an institutional precaution.[187]

Notwithstanding the lack of a significant burden, the tax exemption for religious literature would still facilitate religious exercise. This expansion of religious liberty would not itself violate constitutional principles, but it could not justify an increased tax burden on nonbeneficiaries. *Texas Monthly*'s plurality contrasted other exemptions, likewise conferred exclusively to religious groups, which passed constitutional muster. Each case involved exemptions that did not "impose substantial burdens on nonbeneficiaries while allowing others to act according to their religious beliefs, *or* that were designed to alleviate government intrusions that might significantly" burden religious exercise.[188]

Evidence that an exemption imposes burdens upon nonbeneficiaries is not dispositive of unconstitutionality; the exemption is redeemed if it acts to lift a regulation that burdens religious exercise. Recent precedent is consistent with this standard. In *Cutter v. Wilkinson*,[189] the Court found RLUIPA facially "compatible with the Establishment Clause because it alleviate[d] exceptional government-created burdens on private religious exercise."[190] Still, the Court noted that lower courts must "take adequate

185. 489 U.S. 1 (1989).
186. *Id.* at 15 (internal quotation omitted).
187. *Id.* at 18.
188. *Id.* at 18 n.8 (emphasis added). During its discussion of the rule for religion-exclusive benefits, the Court referred to the impermissibility of an exemption that either burdened nonbeneficiaries or did not remove a significant government-imposed burden. *Id.* at 15. This language invites a contradictory interpretation, since the logical corollary is that, to be constitutional, an exclusively religious exemption *both* must not burden nonbeneficiaries *and* must remove a government-imposed burden on exercise. However, this interpretation is untenable given the Court's analysis of Texas's tax exemption and cases involving constitutional religion-only exemptions.
189. 544 U.S. 709 (2005).
190. *Id.* at 720.

account of the burdens a requested accommodation may impose on nonbeneficiaries" in applying RLUIPA's strict scrutiny standard.[191] Context matters when considering the countervailing government interests implicated by a requested accommodation—if an accommodation would "impose unjustified burdens on other[s] . . . the [government] would be free to resist the imposition" and refuse accommodation.[192]

Consideration of requested accommodations under RFRAs should be no less sensitive to the rights and interests of similarly situated speakers. The constitutional principles precluding an exemption exclusively benefiting religious speech should be considered when a broadly granted exemption constructively achieves the same result. As the Court cautioned in *Cutter*, "context matters" in the application of the compelling interest standard.[193] In the realm of free speech, the Constitution blindly affords the same guarantee of liberty to all speakers. When the application of RFRAs would afford superior speech rights to religiously motivated speakers, lower courts should be wary not to contravene the First Amendment principle that "[t]here is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard."[194]

The principle of expressive equality "assumes that both religion and society will be strengthened if spiritual and ideological claims seek recognition on the basis of their intrinsic merit . . . . [T]he free competition of faiths and ideas is expected to guarantee their excellence and vitality to the benefit of the entire society."[195] This statement would be little more than an empty platitude if the government afforded certain beliefs a material advantage in influencing listeners and gaining adherents. An accommodation that undermines expressive equality handicaps others' ability to successfully disseminate ideas and impinges on society's interest in the free competition of ideas. The government's countervailing interest in resisting this imposition is compelling.

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191. *Id.*

192. *Id.* at 726.

193. *Id.* at 723 (quoting Grutter v. Bollinger, 539 U.S. 306, 327 (2003)).

194. Police Dept. v. Mosley, 408 U.S. 92, 96 (1972) (quoting ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (Harper & Bros. 1960) (1948)); *see also* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 23 (1975) ("The principle of equal liberty of expression underlies important purposes of the first amendment.").

195. Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 517 (1968) (citation omitted); *see also* Wallace v. Jaffree, 472 U.S. 38, 54 (1985) ("[R]eligious beliefs worthy of respect are the product of free and voluntary choice by the faithful . . . ." (citation omitted)).

B. Preserving Equality of Status Among Citizens

The legitimizing element of a democratic government is that all citizens have an equal opportunity to participate in the political process. Equality of the status of speakers is a necessary precondition to achieving this end. Of course, not every person is guaranteed equal influence over political outcomes.[196] For example, an individual's wealth may enhance her ability to influence the political process, but an unequal distribution of resources does not deny the individual equal participation as a citizen. In the market of ideas, the ability to speak with eloquence and sincerity and to appeal to the audience's convictions is likewise a legitimate source of influence. Though the strength of a speaker's beliefs may well inspire that belief in others, the Constitution does not afford greater opportunities for influence based on an individual's motivation for speaking.

Some scholars defend a constitutional preference for religious pursuits by asserting that "religion is unlike other human activities."[197] If this is true—and it may be in terms of the comprehensive nature of religion as a belief system—then it is similarly true that *speech* is unlike other human activities. The capacity for communication is a defining characteristic of the human species, and "it is the opportunity for the use of speech, both as speakers and listeners" that engages the individual in a process of self-realization.[198]

Questions concerning man's purpose, good and evil, morals, and virtuous living are not answered by religion alone; these existential issues concern all people. Religion may provide a comprehensive and seemingly authoritative set of answers, but nonreligious people derive their own answers through the process of self-realization. Concepts of morality and fairness color many issues of civic concern to all citizens—religion cannot boast an exclusive claim on answers to these issues. Withholding the opportunity for speech denigrates an individual as less deserving of respect as a citizen.[199] Thus, applying different

196. *See, e.g.*, RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 364 (Harvard Univ. Press 2000). The focus on equalizing political influence was one of the conceptual flaws of the campaign expenditure limits at issue in *Buckley v. Valeo*, 424 U.S. 1 (1976). The government's attempt to "restrict the speech of some elements of our society in order to enhance the relative voice of others" was directly related to the communicative impact of the speech. *Id.* at 48–49.

197. Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 16.

198. *See* John M. Blim, *Undoing Our Selves: The Error of Sacrificing Speech in the Quest for Equality*, 56 OHIO ST. L.J. 427, 453 (1995).

199. Respecting the personhood of every citizen is a perplexingly vague, but important, constitutional ideal:

> Human beings are of course the intended beneficiaries of our constitutional scheme. . . . [Y]et [the Constitution] contains no discussion of the right to be a human being; no definition of

legal standards to speech may be even more invidious than applying different legal standards to similarly situated people in other circumstances.

In *Heffron v. International Society for Krishna Consciousness, Inc.*[200] the Supreme Court upheld the enforcement of a state fair rule regulating the distribution of literature against religious objectors as a legitimate time, place, and manner regulation.[201] Followers of the Krishna religion asserted that the limitation interfered with a fundamental religious ritual, Sankirtan, which required followers to enter public places to distribute religious literature and solicit donations.[202] The Court addressed the claim under the traditional intermediate standard applied to content-neutral laws, rather than the then-prevailing strict scrutiny standard applied to substantial burdens on religious exercise.

The Court flatly stated that the religious significance of the regulated act did not afford the Krishnas "rights in a public forum superior to those of . . . other [secular] organizations having social, political, or other ideological messages to proselytize."[203] In his dissent, Justice Brennan argued that the majority opinion was consistent with the Court's precedent regarding religious conduct. What made the opinion notable was its conclusion that religiously impelled speech or expressive conduct "is entitled to no greater protection than other forms of expression protected by the First Amendment that are burdened to the same extent" by a law.[204]

Though the majority opinion did not explain why nonreligious speakers are entitled to speech rights equal to those of religious speakers who may have an additional claim of religious exercise, surely the nature of the requested accommodation figured prominently in its reasoning. "The First Amendment protects the right of every citizen to reach the minds of willing listeners and to do so there must be opportunity to win their attention."[205]

> a person; and, indeed, no express provisions guaranteeing to persons the right to carry on their lives protected from the "vicissitudes of the political process" by a zone of privacy or a right of personhood. Nor, apart from the obviously incomplete listing in the Bill of Rights, does the document enumerate those aspects of self which must be preserved and allowed to flourish if we are to promote the fullest development of human faculties . . . .

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-3, at 1308 (2d ed. 1988) (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).

200. 452 U.S. 640 (1981).

201. *Id.* at 654–55.

202. *Id.* at 645.

203. *Id.* at 652–53.

204. *Id.* at 659 n.3 (Brennan, J., concurring in part and dissenting in part); *see also* Brownstein, *supra* note 24, at 132.

205. Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. at 655 (quoting Kovacs v. Cooper, 336 U.S. 77, 87 (1949)).

An unyielding pursuit of religious liberty by the government could proportionately undermine expressive equality. All speakers subject to a content-neutral law such as the one at issue in *Heffron* are subject to similar burdens with respect to the time, place, and manner of their speech. These burdens are not heightened by application to religious speech; the motivation of the speaker is tangential to an assessment of First Amendment interests.

Privileging religious liberty in the context of expressive liberty is no more appropriate when done by statue. A religiously motivated individual cannot claim to be relevantly distinguishable from a secularly motivated individual when the challenged law imposes the same burdens on each person's speech. The law was enacted in full consideration of the potential burden to speakers, and the religious are no more deserving of exemption than other similarly situated speakers. Though RFRAs' largesse may be justifiable in some instances, in this context it surely is not. Given that the application of RFRAs to religiously motivated speech is not warranted by either a heightened or unanticipated burden, the government should resist such accommodations when doing so would result in inequitable speech opportunities.

C. Avoiding the Perceived Endorsement of Ideas

The foregoing discussion concerns the relationship between the individual and the state, counseling against unequal treatment of speakers regardless of the individual's reasons for wanting to speak. But RFRAs' application to speech is even less wise given that the privileged speech is religiously inspired.

Though speech regulations generally may not be justified by the goal of shielding the sensibilities of listeners,[206] the perceived endorsement of particular religious beliefs by the government may be unconstitutional under the Establishment Clause. "[S]ponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[207]

Laws that operate to relieve a government-imposed burden on religious exercise are more likely to be perceived by the reasonable observer "as an accommodation of the exercise of religion rather than as a Government

206. *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000).

207. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309–10 (2000) (citations omitted) (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)); *see also* McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005).

endorsement of religion."[208] While accommodating some forms of religious conduct may be tolerated, a "statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable."[209]

On their face, RFRAs do not violate nonestablishment because they are content- and viewpoint-neutral and act with the proper purpose of expanding religious liberty. Knowledge of these qualities would be attributed to the reasonable observer, who is expected to be "acquainted with the text, legislative history, and implementation of the statute"[210] when analyzing its constitutionality. RFRAs are capable of implementation in many contexts, and thus not targeted at religiously motivated speech, but the reasonable observer would likely be more sensitive to government action that advances religious beliefs.[211]

Courts must adjudicate RFRA claims on a case-by-case basis. The government thus has the opportunity to assert countervailing interests against accommodation in particular instances, and as the *Cutter* Court advised, lower courts must consider these asserted interests in the context of individual requests. When a requested accommodation would give religion favored status in the dissemination of ideas, the government's lack of action effectively sanctions the imposition upon the expressive rights of others.[212] This is especially true since the government has a legitimate compelling interest that, if asserted, would override RFRAs' invocation.

Because claims under RFRAs are individually considered, the reasonable observer can evaluate the government's response to each request, rather than assessing RFRAs in the abstract. Still, this does not mean that any exemption actually granted under RFRAs—including for conduct—might be perceived as an endorsement of the exempted religious practice, even under Justice

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208. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 349 (1987) (O'Connor, J., concurring); *accord* Cutter v. Wilkinson, 544 U.S. 709, 720 (2005). *But cf*. Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 658 (1991) ("From the perspective of the audience, the relevant question concerning discrimination is whether the impact of the regulation falls evenly across the speech marketplace or disproportionately on one part of it.").

209. Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 28 (1989) (Blackmun, J., concurring).

210. *Amos*, 483 U.S. at 348 (O'Connor, J., concurring).

211. *Id*. ("The necessary first step in evaluating an Establishment Clause challenge to a government action lifting from religious organizations a generally applicable regulatory burden is to recognize that such government action *does* have the effect of advancing religion.").

212. "The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbour to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg." THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (1784), *reprinted in* THOMAS JEFFERSON: WRITINGS, at 123, 285 (Merrill D. Peterson ed., 1984). In contrast, RFRAs create situations where the expression of beliefs creates a distinct harm to slighted speakers in the community.

O'Connor's liberal application of endorsement in *Estate of Thornton v. Caldor*.[213] In her concurrence, Justice O'Connor found a message of endorsement conveyed by an exemption that guaranteed Sabbath observers an absolute right not to work on their chosen day.[214] Though the exemption was for religious conduct, she nonetheless found that the benefit endorsed a particular belief, since all employees would value the right to select their preferred day off. However, the statute in *Caldor* lifted a burden imposed by private employers, not the government, and thus could not properly be characterized as accommodation.[215] Furthermore, the exemption was an absolute and unqualified right; RFRAs' privilege yields to more compelling interests.[216]

The text and legislative history of RFRAs do not support a claim of endorsement, and since RFRAs' protections depend on the initiative of a claimant, the government is not actively implementing the statute to endorse religious speech. Even so, accommodations that directly afford religious ideology an advantage in terms of "worldly influence" subject the reasonable observer's own ideology to a competitive disadvantage.[217] This is much more akin to statutes that convey a message of endorsement. The concern with merely a perceived imprimatur is an important policy consideration that should prevent applying RFRAs in a manner that advantages religiously motivated speakers.[218]

D. Avoiding Incidental Marketplace Distortion

The government is free to inject its own ideology into the marketplace on a vast array of civic issues concerning its citizens. The government may communicate an official view on teen pregnancy, obesity, gambling, civil rights, gun control, violence on T.V., and national pride. Indeed, inculcation

213. 472 U.S. 703 (1985).
214. *Id.* at 711 (O'Connor, J., concurring).
215. *Id.* at 712.
216. *Id.*
217. *See* King's Garden, Inc. v. FCC, 498 F.2d 51, 55 (D.C. Cir. 1974) ("[S]ponsorhip is what this exemption accomplishes. It is a sure formula for concentrating and vastly extending the worldly influence of those religious sects having the wealth and inclination . . . ."); *id.* at 60 ("A religious group, like any other, may buy and operate a licensed radio or television station. But, like any other group, a religious sect takes its franchise 'burdened by enforceable public obligations.'" (quoting Office of Commc'n of United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1996))).
218. *See Amos*, 483 U.S. at 334–35 (majority opinion); *see also* William P. Marshall & Douglas C. Blomgren, *Regulating Religious Organizations Under the Establishment Clause*, 47 OHIO ST. L.J. 293, 329 (1986) ("[I]n some circumstances exemptions can raise establishment concerns, especially with respect to those regulations affecting the political process, the media, and other avenues for the dissemination of ideas.").

of state-sponsored values is one purpose of public schools.[219] While the government is virtually unrestrained in its ability to socialize citizens with an authoritative selection of social, moral, and political values, the voice of the state may not speak with authority on matters of religion.

Public policy is expected to be based on reason and yield measurable results. In contrast, religious principles are not always founded on reason or results, and cannot be tested for their truth—"[m]en may believe what they cannot prove."[220] The Constitution in no way restrains the government from "promulgating secular 'truths,'"[221] but the merit of those truths must be verified independent of religious ideas.[222]

The potential for the government to dominate debate on public issues is not without its own dangers. Justice Stevens has fittingly emphasized the "quality of the interest in maintaining government neutrality in the free market of ideas."[223] As noted previously, any underinclusive speech exemption also has the potential to distort public debate. But RFRAs apply so broadly that exemptions may be granted in every context and every medium, in contrast to an exemption limited to a narrow set of circumstances or perhaps even a single medium. The incidental privilege afforded to the religiously motivated message is pervasive and the effects cannot be contained. In any issue of debate, RFRAs promote the side favored by the religious speaker.

All religiously motivated speakers will not predictably support the same side of a debate, even when the subject matter clearly implicates moral or "religious" norms. For instance, while some religions condemn homosexuality as an abomination,[224] others are neutral on the matter,[225] and still others advocate

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219. *See* Wooley v. Maynard, 430 U.S. 705, 717 (1977) ("The State is seeking to communicate to others an official view as to proper appreciation of history, state pride and individualism. Of course the State may legitimately pursue such interests in any number of ways."); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 631 (1943).

220. United States v. Ballard, 322 U.S. 78, 86 (1944). As Deists, this incongruence between faith and reason would not have been a problem for many of the drafters of the Constitution. Deists believe reason is the basis for all knowledge.

221. MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 17 (Univ. Cal. Press 1983) (citation omitted).

222. *Ballard*, 322 U.S. at 87 ("The Fathers of the Constitution . . . fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state.").

223. FCC v. League of Women Voters of Cal., 468 U.S. 364, 409 (1984) (Stevens, J., dissenting).

224. Catholicism, Orthodox Judaism, Islam, and Pat Robertson fall into this category.

225. Confucianism accepts homosexuality so long as it does not interfere with the reproductive duties of its followers. Many Hindu deities are androgynous, intersex, or transform between genders. Some deities were born from either two males or two females.

gay marriage rights.[226] Nonetheless, certain religions are more outspoken than others in propagating their viewpoint, and only those speakers who take advantage of their special status will glean the competitive edge in the marketplace. Although the specific message given special status in the marketplace is not foreseeable in all circumstances, in the aggregate these exemptions may operate to skew the content of public discourse toward the viewpoints of religious speakers just as much as a content-based regulation would. Religiously motivated speech, as distinguished from religiously motivated conduct, has the unique capacity to influence public debate.

This systematic privilege is especially problematic given that religious beliefs color many political issues. Religion informs the social and moral norms from which "issues as diverse as capital punishment, abortion, animal rights, the environment, and foreign policy will be resolved."[227] By virtue of the institutionalized advantage conferred by RFRAs, social norms espoused by religion are given a "false vitality"[228] in the marketplace and unwarranted influence over political outcomes in relation to competing beliefs.[229] "Whether a religious organization invests in a business, seeks legislative action, or promotes the candidacy of particular individuals for public office, it is engaging in an activity in direct competition with secular individuals and organizations."[230]

Unencumbered by regulations, a religious organization has the ability to solicit funds in forums unavailable to secular counterparts, and then utilize those funds to disseminate its ideas in forums also unavailable to secular counterparts. Exemption from laws banning solicitation, copyright infringement, residential picketing, or discriminatory advertising allows religious organizations to exert undeserved influence over the political process and the minds of individuals. By invoking the protection of religious freedom laws, a religious speaker might use her residence as a meeting

226. The Unitarian Universalist congregations bless same-sex marriages. *See* Unitarian Universalist Association of Congregations, *Advancing Toward Equality in Marriage*, *available at* http://www.uua.org/leaders/leaderslibrary/leaderslibrary/22688.shtml (last visited Aug. 9, 2008).

227. William P. Marshall, *Correspondence on Free Exercise Revisionism: In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 322 (1991).

228. *Id.*

229. *See* Wallace v. Jaffree, 472 U.S. 38, 52 (1985) ("Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority.").

230. William P. Marshall & Douglas C. Blomgren, *Regulating Religious Organizations Under the Establishment Clause*, 47 OHIO ST. L.J. 293, 324 (1986).

house[231] or a daycare center,[232] providing a unique forum to disseminate religious ideas otherwise denied to secular speakers.

In order to compensate for a disadvantage in access to willing listeners, the secularly motivated speaker would be forced to raise more money and support than the religiously motivated speaker. Such an outcome is inimical to the democratic value of free discussion and equal opportunity to influence political outcomes.[233] As a nation, we are committed to robust debate on public issues and the notion that "right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."[234]

The artificial vitality RFRAs give to religious beliefs in the marketplace also handicaps individual freedom of conscience. "[R]eligious beliefs worthy of respect are the products of free and voluntary choice by the faithful,"[235] yet genuinely voluntary religious choice cannot be achieved when the truth of religious beliefs has not been challenged by competing ideologies. "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market."[236] As with any ideology striving to gain acolytes, religion should withstand this crucible.

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231. A homeowner reached a settlement with the city of Los Angeles to utilize his residence as essentially a full-service synagogue by invoking the then newly enacted RLUIPA. The city abandoned adjudication under RLUIPA, even though it had successfully defended its position in the Ninth Circuit previously. *See* Congregation Etz Chaim v. City of L.A., 371 F.3d 1122 (9th Cir. 2004). Neighbors subsequently brought a lawsuit against the city, alleging the city violated state law and their due process rights by entering into a settlement agreement with the synagogue without providing notice and hearing to the affected community. *See* Leaugue of Residential Neighborhood Advocates v. City of L.A., 498 F.3d 1052, 1054 (9th Cir. 2007). The Ninth Circuit agreed, stating that a "settlement agreement cannot be a means for state officials to evade state law." *Id.* at 1055.

232. *See* Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643 (10th Cir. 2006). Under RLUIPA, a church claimed the religious right to operate a 100-child daycare center in a residential neighborhood, despite a regulation barring any organization or individual from operating a daycare center in residential zones whether for secular or religious reasons. The court remanded the case due to an erroneous jury instruction stating that the religious exercise had to be "fundamental."

233. *See* DWORKIN, *supra* note 196, at 366 ("We must permit every citizen whom we claim bound by our laws an equal voice in the process that produces those laws . . . or we forfeit our right to impose our laws upon him. Freedom of speech enforces that principle, and so protects citizen equality."); *see also* Stromberg v. California, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.").

234. United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943); *accord* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

235. Wallace v. Jaffree, 472 U.S. 38, 53 (1985) (citation omitted).

236. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

VI. BALANCING RFRAS WITH FREE SPEECH PRINCIPLES IN PRACTICE: THE CASE OF RELIGIOUS SYMBOLISM

A. Religiously Motivated Conduct as Symbolic Speech

The government's compelling interest in avoiding the social costs of expressive inequality is conceptually sound. But acknowledging this interest and applying it are two very different things. Since a great deal of religiously motivated conduct is also speech, the interest is not implicated only by exemptions from laws that target speech. Likewise, myriad laws regulating conduct indirectly affect the religious individual's ability to effectively communicate: Zoning requirements are an obstacle to congregational prayer; federal taxes reduce the monies available for a 10 percent tithe to support a congregation's speech; employment antidiscrimination laws limit parochial schools' power to select who will inculcate its values; compulsory education laws limit parents' power over what values are inculcated to their children.[237] Exemption from any law could conceivably enhance a person's ability to communicate a religious message.

If the government's compelling interest in avoiding expressive inequality is triggered whenever the religiously motivated person is engaged in some form of expression, then the utility of RFRAs would likely be limited to a narrow set of nonexpressive practices, such as following a kosher diet, ingesting peyote, or wearing a beard. Arguably, even conduct-intensive actions such as these may be characterized as having a communicative aspect for the purposes of the First Amendment. Engaging in these practices "affirm[s] to co-religionists and outsiders the religious identity and commitment of the person engaging in the religiously motivated activity."[238] Yet, if all religiously motivated conduct communicates the actor's religious viewpoint, then the legislature would be effectively precluded from granting conduct preferences to the religious.[239] Just as the Supreme Court does not "accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea,"[240] the government's compelling interest should be limited to situations in which

237. For more examples, see Volokh, *Intermediate Questions*, *supra* note 71, at 614–15 (positing the effect of an exemption from bankruptcy laws, child labor laws, compelled testimony laws, and minimum wage laws).

238. Brownstein, *supra* note 24, at 121.

239. *See id.* at 164 ("[C]onceptualizing religion as speech, and as a viewpoint of speech at that, creates a particularly difficult issue for legislative accommodations and exemptions of religious practice.").

240. United States v. O'Brien, 391 U.S. 367, 376 (1968).

accommodation would burden the rights of others to an equal opportunity for expression and society's interest in vetting ideas through competition.

B. Lack of an Expressive Secular Analog

It is not clear that exemptions for all religious activities that can be conceptualized as speech would yield the harms of speaker inequality outlined in the preceding section. Certainly, the government should avoid allowing a religiously motivated individual to picket, post fliers, or hold political rallies under circumstances where a secular speaker is denied such an opportunity. But allowing an Orthodox Jew to wear a yarmulke or a Roman Catholic to don a crucifix,[241] both symbols of religiosity, when the ordinary citizen is precluded from wearing a Yankees cap is not likely to skew the content of political debate or undermine government's perceived neutrality.

But religious symbolism and nonideological fashion choices are not an apt comparison. There is a marked difference between a red ribbon tied in the hair and a red ribbon pinned to the chest. The symbolic function of the act is dependent upon the context in which it occurs. A black swath of fabric is not inherently political, but when tied around one's arm during a divisive war it becomes a strong protest against government action.[242]

Even if it seems unlikely that an increased prevalence of yarmulkes will result in any sort of persuasive advocacy for one side of a particular debate, it may advocate on behalf of Judaism in general. Jews don't proselytize outside of the ethnically Jewish community, but exposing a secular Jew to overt signs of religiosity may affect his personal decision to return to the religion.[243] In *Goldman v. Weinberger*,[244] Justice Stevens characterized the yarmulke in terms of its expressive effect on observers: the wearer's "devotion to his faith is readily apparent. . . . In addition to its religious significance for the wearer, the yarmulke may evoke the deepest respect and admiration—the symbol of a distinguished tradition and an eloquent rebuke to the ugliness of

241. *See* Sasnett v. Sullivan, 908 F. Supp. 1429 (W.D. Wis. 1995), *aff'd*, 91 F.3d 1018 (7th Cir. 1996), *vacated and remanded*, 521 U.S. 1114 (1997) (involving a challenge by a prisoner wishing to wear a crucifix to a prison-wide ban on all jewelry, claiming that wearing the religious symbol advanced his faith and brought him closer to God).

242. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (discussing black armbands exhibiting disapproval of Vietnam War).

243. The projected impact of religious symbolism is especially true with respect to a crucifix, symbolic of a religion that actively proselytizes to nonbelievers.

244. 475 U.S. 503 (1986).

anti-Semitism."[245] Inspired by manifestations of faith in others, an already-religious individual might be emboldened to express her faith in a more visible manner.

Religious symbolism, even if limited to its traditional purpose of reinforcing the faith of an individual, will nonetheless communicate the individual's religious identity to an observer. Merely by associating others with a particular belief, an observer will be more inclined to accept that belief himself. The bandwagon effect is a social phenomenon with a well-documented impact in politics.[246] Beliefs spread among people, with "the probability of any individual adopting [a particular belief] increasing with the proportion who have already done so."[247] Just as an "I Back Barack" bumper sticker is persuasive advocacy for a presidential candidate, a crucifix necklace is persuasive advocacy for an eternal savior.

If a faith can increase its following, its ability to exert influence in the market of ideas will proportionally increase in turn by the body of devotees disseminating the religion's beliefs. In isolation, a religious act might not affect the content of public discourse, but certainly other speech by the actor will. Gaining adherents is the first and essential step in later achieving victories in the political process and other areas of secular concern, a goal that is facilitated by insulating religious beliefs from challenge by competing ideologies.[248] After considering the ultimate potential to directly influence the marketplace, it becomes clear that "a preference for religiously motivated speech that helps foster the growth of religious ideological communities and not secular ones may be as troublesome as a preference that more directly affects public debate."[249]

However, if the secularly motivated speaker is not disadvantaged in public debate by a certain form of religious conduct, and the religious beliefs that animate the conduct do not enjoy an advantage in terms of proselytizing to nonbelievers or fostering a religious community, then a label of unfair

245. *Id.* at 510–11 (Stevens, J., concurring) (citations omitted); *see also* Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 244 n.61 (1989) ("Most religious rituals . . . are likely to be recognized and protected as symbolic conduct.").

246. *See generally* Robert K. Goidel & Todd G. Shields, *The Vanishing Marginals, the Bandwagon, and the Mass Media*, 56 J. POL. 802 (1994) (documenting the effects of opinion polls on political decisions); Albert Mehrabian, *Effects of Poll Reports on Voter Preferences*, 28 J. APPLIED SOC. PSYCHOL. 2119 (1998) (same).

247. Andrew M. Colman, A DICTIONARY OF PSYCHOLOGY 77 (Oxford Univ. Press 2001).

248. *Cf.* Wisconsin v. Yoder, 406 U.S. 205, 218 (1972) ("[S]econdary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child . . . contravenes the basic religious tenets and practice of the Amish faith . . . .").

249. Volokh, *Intermediate Questions*, *supra* note 71, at 616.

advantage is misplaced. Feasting and fasting, growing long hair or dreadlocks,[250] or dressing modestly[251] are not inherently expressive of the actor's ideological beliefs. This is especially true when there is no expressive secular analog to the religiously motivated conduct. "[V]irtually *every* law restricts conduct, and virtually *any* prohibited conduct can be performed for an expressive purpose,"[252] but when the only communicative use of the conduct is for religious purposes, the nonreligious person is not denied an opportunity for expression.

This conclusion must be qualified, however. As Justice Scalia noted, engaging in prohibited conduct may be "expressive [if nothing else] of the fact that the actor disagrees with the prohibition."[253] Even so, the impetus for this type of expression is the existence of the law itself, and the conduct by a secular actor would not be conventionally expressive but for this fact. A useful heuristic for determining whether exemption from a speech-neutral law would materially advantage religious viewpoints is asking whether the religious practice is "conduct that is normally engaged in for the purpose of communicating an idea."[254]

For example, in *Rumsfeld v. Forum for Academic and Institutional Rights*[255] the Court held that law schools' disagreement with military policy was not "overwhelmingly apparent" by the schools' denial of equal access to military recruiters, and thus the exclusion of recruiters was not protected as expression.[256] The Court remarked that the schools' conduct was not inherently expressive, and only gained an expressive component by virtue of speech explaining the significance of the military recruiters' absence:

> An observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else.[257]

250. *See* Warsoldier v. Woodford, 418 F.3d 989 (9th Cir. 2005) (holding that a grooming policy requiring prisoners to maintain hair no longer than three inches substantially burdened a Native American inmate's sincere religious belief that he may only cut his hair upon the death of a loved one).

251. Mitchell v. McCall, 143 So. 3d 629 (Ala. 1962).

252. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 576 (1991) (Scalia, J., concurring).

253. *Id.*

254. *Id.* at 578 n.4.

255. 547 U.S. 47 (2006).

256. *Id.* at 66 (citation omitted).

257. *Id.*

Similarly, if the significance of a religiously motivated act is not readily apparent to an observer, then the motivating religious ideology is not materially advantaged by the benefits of the bandwagon effect.

C. Applying the Government's Compelling Interest

Framing religious practice in this way gives courts latitude to accommodate conduct that would otherwise be distinguished by its expressive element. If the motivation for an act would conventionally be perceived as nonideological, it may be exempted from burdensome laws if done for religious reasons. This is certainly true of religious rituals that have been integrated into secular society and therefore stripped of any distinctive religious connotation to the ordinary citizen. Dancing first developed as a religious ritual, and is still an integral practice for many of the world's religions.[258] Whereas Shakers dance to shake out sin and carnal desire, for many dancing is a prelude to the very same. Yoga is a Hindu religious ritual, but its benefits as a meditative and physical exercise have garnered it widespread popularity.[259] Similarly, Tai-chi is both a Taoist ritual and a trendy afterschool activity.

It is even harder to claim that *lack* of certain conduct communicates ideology. An individual who forgoes pork, work on Saturdays, or jury duty could be avoiding either sin or simply a disfavored activity.[260] Fear of pain is a more common reason for refusing surgery than religious objection.[261]

In contrast, some acts cannot be divorced from their religious significance. A yarmulke is instantly recognizable as a symbol of Judaism, and a cross a symbol of Christianity, just as a red ribbon pinned to the chest is a familiar sign of support for the fight against AIDS (and implicit support of the gay community).[262] The communicative effect of these symbols triggers the government's compelling interest in expressive equality just as surely as

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258. *See* Nicholas Wade, *7,000 Years of Religious Ritual Is Traced in Mexico*, N.Y. TIMES, Dec. 21, 2004, at F4 (describing the excavation of a 7000-year-old site used for ritual dancing).

259. Some Hindus have expressed astonishment at Christianity's attempt to appropriate a practice that already had religious significance. *See* Posting of Yogi Baba Prem, *There Is No Christian Yoga*, CONVERSION AGENDA, Oct. 23, 2006, http://conversionagenda.blogspot.com/2006/10/there-is-no-christian-yoga.html.

260. Likewise, for some, celibacy represents religious virtue, not a lack of opportunity.

261. Christian Scientists oppose medical treatment due to religious beliefs. The Medicare and Medicaid Acts exempted Christian Scientists, and others who object to medical treatment for religious reasons, from contributing to a healthcare system that would not benefit them. 42 U.S.C. § 1395x(ss)(1) (2000).

262. Contrast the Druze religion, a sect of Shia Islam, that keeps religious practices esoteric if not secret. Followers of the religion thus cannot be easily identified by outsiders. *See generally* NISSIM DANA, THE DRUZE IN THE MIDDLE EAST: THEIR FAITH, LEADERSHIP, IDENTITY AND STATUS (2003).

exempting religious literature from copyright laws,[263] religious protesters from a ban on picketing, or religious landlords from a fair housing prohibition on communicating preferences concerning race, religion, or sexual orientation.[264]

Even if a law grants exemptions for secular reasons, such as the medical exemption to the grooming policy at issue in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*,[265] a religious claimant should not necessarily be entitled to accommodation. Consider a Mormon student who receives a full scholarship from a prestigious state university. The scholarship board provides leaves of absence for military, medical, and family reasons, but does not allow the Mormon student to serve on a two-year proselytizing mission without forfeiting the scholarship. The student claims that refusing to grant leave for religious purposes while simultaneously granting leave for secular purposes amounts to religious discrimination.[266]

The current exemptions to the scholarship policy do not facilitate secular speech, whereas granting the Mormon student's request would directly promote proselytizing. The policy would deny leave for the purpose of political campaigning or educating African villagers about safe sex practices. Accommodating religious speech without an equal opportunity for the secular speaker is an unwarranted extension of the narrow leave policy. In the case of a Muslim student who requests leave for a pilgrimage, the government interest in expressive equality is not as clearly implicated. The purpose of the pilgrimage is unrelated to proselytization, and the religious significance of the student's travel would not be readily apparent to an observer.

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263. Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110 (9th Cir. 2000).

264. In *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692 (9th Cir. 1999), *rehearing granted and opinion withdrawn by* 192 F.3d 120 (9th Cir. 1999), *on rehearing dismissed for lack of ripeness*, 220 F.3d 1134 (9th Cir. 2000), a Christian landlord claimed a religious exemption from a statute prohibiting discrimination based on marital status in housing, as well as prohibiting the landlord from publishing any communication indicating such a preference. The claimant believed that facilitating cohabitation between "fornicators" in any way facilitated sin, and thus refused to rent to unmarried couples. *Id.* (accepting the claim under strict scrutiny triggered by the hybrid rights claim of Free Exercise Clause and Free Speech Clause).

265. 170 F.3d 359 (3d Cir. 1999).

266. The facts of this scenario are taken from a lawsuit filed in July 2007 by the ACLU on behalf of a Mormon student at the University of West Virginia. *See* Press Release, Am. Civil Liberties Union of W. Va., ACLU Champions Religious Freedom of Mormon College Student (July 19, 2007), *available at* http://www.acluwv.org/Newsroom/PressReleases/07_19_07.html. In response to the suit, the state scholarship board reinstated the student's scholarship and voted to change its leave policy. The policy, as amended, provides leave of absence for medical reasons, military service, or to any student who "has demonstrated a compelling reason requiring a leave of absence," but expressly excludes leaves related to volunteerism. *See* W. VA. HIGHER EDUC. POLICY COMM'N, WEST VIRGINIA PROVIDING REAL OPPORTUNITIES FOR MAXIMIZING IN-STATE STUDENT EXCELLENCE (PROMISE) SCHOLARSHIP PROGRAM § 10.7, *available at* http://wvhepcdoc.wvnet.edu/resources/133-7_2007rev.pdf (last visited Sept. 8, 2008).

If an exemption facilitates conventionally expressive conduct then the exemption would, at least theoretically, deny the secular speaker an equal opportunity for expression. Even when the secular speech counterpart is no more than a hypothetical, the exemption has potential to create the social burdens underlying the government's compelling interest in expressive equality.

Consider a state that has 500 privately run halfway houses serving as residential facilities for drug and alcohol users. The centers promote sobriety with the aim of rehabilitating residents and reintegrating them into society. However, halfway houses are generally unwelcome additions to residential communities and most cities in the state have passed zoning ordinances limiting their location. If a city's ordinance precludes a church from operating a halfway house on its premises, substantially burdening its religious obligation to aid the wayward, should a court grant an exemption?

The exemption would give the church's halfway houses and their religiously imbued messages an advantage over halfway houses operated by secular entities for altruistic, but not religious, reasons. But what if *all* of the halfway houses are operated by religious institutions? The exemption would only provide a theoretical advantage to the dissemination of religious viewpoints, and would not actually change the composition of the marketplace. Would the expected distortion of the marketplace be worrisome if all but two of the centers were operated by religious institutions? Such inquiries are shortsighted and do not contemplate the impact of the law beyond present circumstances. The law would obviously affect the location of future halfway houses, and therefore limit their ability to compete. Furthermore, such ad hoc decisionmaking invites either deliberate or subconscious viewpoint discrimination, and should be avoided.

D. Crafting Specific Exemptions for Burdens on Conscience

Requests for accommodation that would not appropriately be granted under RFRAs may still find success in the political process, but expressive equality should not be sacrificed in the interest of religious liberty.

In *Employment Division v. Smith*, Justice Scalia deferred the issue of religious accommodation to the political process.[267] But RFRAs' broad formulation essentially punts the issue back to the courts and saddles them with the initial inquiries into religious burden and government interest.[268]

267. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 890 (1990).

268. "It is a parade of horribles because it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice." *Id.* at 889 n.5.

These inquiries may be no more nebulous than what courts have long done in defining a balance of interests in developing common-law tort, contract, and property rules,[269] but legislatures are more institutionally competent to craft *specific* exemptions for *specific* practices by engaging in a precise consideration of the social importance of the law as a matter of policy. RFRAs force courts to struggle with defining the scope of government interest, but they do not suffer from the finality of a decision premised on a constitutionally mandated exemption. If legislatures don't like the momentum of court decisions, they are free to respond accordingly by crafting specific exemptions for exercise that does not harm their conception of a compelling government interest.[270]

Generally, this opportunity for legislative response legitimizes RFRAs' lack of precision, rather than undermining it. But when a court determines that the interest in expressive equality overrides a request for accommodation, a legislature's decision to carve out an exemption for the practice would be substantively unsound. Following a judicial determination that some form of religious exercise constitutes speech, a legislative act specifically exempting that exercise would pose the risk of being motivated by a desire to advantage a particular viewpoint. The breadth of RFRAs' potential applications avoids the risk of impermissible government purpose, but an accommodation that privileges speech exclusively on the basis of religiosity is a clear problem both from an establishment perspective and from a free speech perspective.

A legislature can still facilitate religious liberty by acting more broadly. Nothing prevents a legislature from crafting an exemption that treats religious and nonreligious claimants alike. Such an exemption demonstrates a commitment to equal liberty and dispels any notion that the government favors religious beliefs. Even if the exemption was motivated by the legislature's concern for the burden on the religiously motivated speaker, the exemption itself is neutral "so long as [it] is tailored broadly enough that it reflects valid secular purposes."[271]

A legislature could provide an exemption accommodating objectors with sincerely held ethical, moral, or religious beliefs. As with claims appropriately resolved under RFRAs, courts could evaluate a conscientious objector claim without engaging in a subjective analysis about the merit of a particular philosophy. For example, Arkansas has enacted a conscientious objector statute that permits pharmacists to refuse to provide contraceptive information

269. *See* Volokh, *Common-Law Model*, *supra* note 44, at 1471.
270. *See generally id.* at 1474–76.
271. Gillette v. United States, 401 U.S. 437, 454 (1971).

"when the refusal is based upon religious or conscientious objection."[272] Georgia's Rules and Regulations allow pharmacists to refuse to fill *any* prescription based on ethical or moral beliefs.[273]

Specially crafted exemptions will often be more responsive to the particular interests at stake. When the Supreme Court held that the Free Exercise Clause did not obligate the Air Force to exempt an Orthodox Jew from a dress regulation that prevented him from wearing a yarmulke,[274] Congress enacted a statute with its own obligations. The statutory exemption provided that "a member of armed forces may wear an item of religious apparel while wearing the uniform" if the religious apparel does not interfere "with the performance of the member's military duties" and is "neat and conservative."[275]

Congress was able to balance the interests of the military and the religious needs of its service members with a compromise beyond the institutional role of the Court. The effectiveness of military operations would not be forfeited in deference to religious service members, but neither would religious observance that did not disrupt military operations. Yarmulkes are now a common sight in the military; unobtrusive and compact, a yarmulke is not a disruptive modification to the typical military uniform. A Sikh turban, however, would prevent a service member from wearing a helmet, and in this instance the Navy was permitted to refuse accommodation in the interest of safety.[276]

On the other hand, by focusing only on religious interests threatened by a ban on uniform modifications, Congress made short shrift of the interests of other service members. Had the protection of the statute reached items "with religious or moral significance," Congress would have achieved the same result in a more equitable fashion. Broadening the scope of the statute would not unduly encumber the military, either. The military would be free to deny an accommodation request for a morally significant item if it interfered with military duties. Though a black armband is unlikely to physically interfere with a service member's duties, the divisiveness of the message in this context would be particularly disruptive to the maintenance of solidarity among troops and the military's ability to achieve its objectives.

With a broader exemption Congress would realize true neutrality without necessarily increasing deviations from the dress code. It is debatable whether

272. ARK. CODE ANN. § 20-16-304(5) (2005).

273. GA. COMP. R. & REGS. § 480-5-.03(n) (2001). Mississippi and South Dakota have enacted similar conscientious objector statutes. *See* Mississippi Health Care Rights of Conscience Act, MISS. CODE ANN. §§ 41-107-5, 41-107-7 (2004); S.D. CODIFIED LAWS § 36-11-70 (2005).

274. Goldman v. Weinberger, 475 U.S. 503 (1986).

275. 10 U.S.C. §§ 774a–b (2000).

276. Sherwood v. Brown, 619 F.2d 47, 48 (9th Cir. 1980) ("Absence of a helmet poses serious safety problems both for the unprotected sailor and for the crew that depends on him.").

someone could demonstrate a piece of clothing was meaningful to a moral philosophy in the way a yarmulke is to Judaism. Justice Harlan also mused about this possibility after opining that the government could only accommodate Sabbatarians so long as the accommodation was "sufficiently broad to be religiously neutral."[277] Whether "it would be possible to demonstrate a basis in conscience for not working Saturday is quite another matter."[278] A vegetarian service member could conceivably object to wearing standard-issue leather boots on moral grounds, but would the provision of alternative footwear actually burden the government? Whether made of patent leather or the real thing, the military would be supplying the same number of boots, and likely at less expense.

The justifications for affording privilege to claims of religious conscience compel parallel treatment for analogous claims of secular conscience.[279] As with religious motivations, secular conscience can be relevantly distinguished from personal preference, a fact acknowledged by the Supreme Court:

> If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from [contrary acts], those beliefs certainly occupy in the life of that individual "a place parallel to that filled by God" in traditionally religious persons.[280]

The principle that the government should avoid compelling people to violate their conscience holds irrespective of the ideological basis of the claim.[281] If a legislature could reasonably determine that an exemption for religiously motivated conduct would not contravene moral norms or burden the rights and interests of others, then surely the anticipated harms are no greater simply because the actor's motivation is nonreligious in nature. If claimants are similarly situated in terms of

277. Welsh v. United States, 398 U.S. 333, 358 n.9 (1970) (Harlan, J., concurring).

278. *Id.*

279. "[C]laims of secular conscience may be perfectly coincidental psychologically with claims of religious conscience. It seems constitutionally wise to treat all such claims with the same presumptive respect." Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357, 384 (1996).

280. Welsh v. United States, 398 U.S. 333, 340 (1970) (interpreting the conscientious objector exemption to military service as encompassing individuals with ethical and moral objections to participating in a war).

281. "There is no relevant difference—no difference relevant to legitimate public policy concerns—between act of conscience self-understood in religious terms and acts of conscience self-understood in nonreligious terms." Michael J. Perry, *Freedom of Religion in the United States*: Fin De Siècle *Sketches*, 75 IND. L.J. 295, 314 (2000).

the psychological burden that would result from compliance with a law, then religious conscience should not be preferred over secular conscience.[282]

CONCLUSION

Burdening expressive equality so that religious liberty may be unencumbered turns the First Amendment on its head. Though accommodation under RFRAs may be tolerable in some contexts, privileging religiously motivated speakers is unjustifiable when doing so would either advantage religious viewpoints in public debate or foster religious communities. In considering requests for religious accommodation, courts should acknowledge the compelling interest in expressive equality and strike the appropriate balance.

282. Greenawalt, *supra* note 28, at 1635 (discussing accommodations for religious and nonreligious beliefs and practices).