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Tipped Scales: A Look at the Ever-Growing Imbalance of Power Protecting Religiously Motivated Conduct, Why That's Bad, and How to Stop It

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TIPPED SCALES: A LOOK AT THE EVER-GROWING IMBALANCE OF POWER PROTECTING RELIGIOUSLY MOTIVATED CONDUCT, WHY THAT'S BAD, AND HOW TO STOP IT

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ABSTRACT

This Note examines the current state of the law that seemingly allows individuals to harm and discriminate against others on the basis of their protected religious beliefs. This Note also explores how such a result has been made possible and how it may be stymied by judicial and legislative action.

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* J.D., Cleveland-Marshall College of Law, December 2017; B.A., The University of Akron, 2009. A very heartfelt thanks to my family and friends for their continuous support over the years.

> "'Raise your hand, Christian conservatives, everybody. Raise your hand if you're not a Christian conservative. I want to see this, right. Oh, there's a couple people, that's all right,' Trump said smiling, waving his hand in the air. 'I think we'll keep them. Should we keep them in the room? Yes? I think so.'"
>
> -The Washington Post quoting Donald J. Trump[1]

I. INTRODUCTION

On the morning of January 23, 2012, Paul Mathis and David Peppelman argued over Mathis's refusal to display a Christian mission statement on his employment identification badge, resulting in Mathis losing his job.[2] Mathis was not discharged because he was a bad employee or because he found a better job; he did not return to college or win the lottery.[3] Instead, Mathis argued that Peppelman, a born-again Christian, fired him because he was an atheist and because he refused to listen to Peppelman aggressively proselytize Christianity at work.[4] On that same day, Mathis discussed personal problems with his coworker. After overhearing that conversation, Peppelman proclaimed that "[Mathis] wouldn't have all those problems in [his] life if [he] went to church with [him]."[5]

After Mathis was discharged, he initiated an employment discrimination action with the Equal Employment Opportunity Commission ("EEOC") and, in defense to that suit, Peppelman maintained that "accommodating [Mathis] would substantially burden [his] sincerely held religious beliefs in violation of the Religious Freedom Restoration Act."[6] Individuals might find comfort in knowing Mathis does not win on this argument, but a lot has changed since 2012.[7] Taking the position that Peppelman's conduct was egregious is reasonable but then begs the question: how could Peppelman have felt his actions were legally justified based on his religious beliefs?[8]

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[1] President Trump speaking as a presidential candidate at a campaign rally in Iowa. Jose A. DelReal, *Trump Jokes About People Who Are Not Conservative Christians: "Should We Keep Them?"*, WASH. POST (Sept. 28, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/09/28/should-we-keep-them-trump-jokes-about-non-christian-conservatives-at-iowa-rally/?utm_term=.1c5ca69f58ce.

[2] *See* Mathis v. Christian Heating & Air Conditioning, Inc., 158 F. Supp. 3d 317, 323 (E.D. Pa. 2016).

[3] *See id.*

[4] *Id.*

[5] *Id.* at 322.

[6] *Id.* at 320.

[7] The federal law Peppelman cites, which will be discussed *infra*, does not generally allow suits between private parties, causing the argument to fail. *Id.* at 328.

[8] Others have felt that the nature of their religious freedom justified their questionable behavior. For example, in Indiana, a woman beat her child with a hanger and cited the Bible and religious freedom laws as justification. Vic Ryckaert, *Son Had 36 Bruises. Mom Quoted the Bible as Defense*, INDYSTAR (Oct. 4, 2016), http://www.indystar.com/story/news/crime/2016/08/31/son-had-36-bruises-mom-quoted-bible-defense/88998568/.

Peppelman might have felt justified because the United States chose a distinct route with how it balances the interests of individual religious beliefs within society—a route that strongly protects the religious believer.[9] The United States legal framework empowers the religious believer; from the very text of the Constitution, the First Amendment asserts that "Congress shall make no law . . . prohibiting the free exercise [of religion]."[10] What's more, the United States has enacted federal and state laws that increase the level of religious protection afforded by the Constitution, generally dubbed "Religious Freedom Restoration Acts" ("RFRAs").[11] The federal version of RFRA, the linchpin of this Note, uses a balancing test and proscribes the government from substantially burdening the free exercise of religion without a compelling reason, and even then, only by the least restrictive means.[12]

Federal and state RFRAs—the new norm—have proven to be highly controversial pieces of legislation,[13] undoubtedly because they address the most fervently disputed issue of human history: religious disputes.[14] Although the resolution of Paul Mathis's case may be a relief to those not wanting religion to be a permissible defense to discrimination, the era where similar resolutions are possible is ending, if not already over. In recent years, RFRAs undeniably have skewed too much protection in favor of the individual believer, allowing him in some circumstances to actively discriminate against others on the basis of a religious belief, thereby setting a bleak

[9] From the Hasidic Jewish population in Brooklyn to the Amish living in the heart of Ohio, we proudly see individuals practicing their religion free from fear of oppression. *See Inside the Community: A Holy Life*, PBS, http://www.pbs.org/alifeapart/intro_2.html (last visited Apr. 4, 2018); *Ohio America*, AMISH AM., http://amishamerica.com/ohio-amish/ (last visited Apr. 4, 2018).

[10] U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

[11] Currently twenty-one states have RFRAs with varying language, including: Alabama, Arizona, Arkansas, Connecticut, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia. *State Religious Freedom Acts*, NAT'L CONF. ST. LEGISLATORS (May 4, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

[12] Religious Freedom Restoration Act, 42 U.S.C. § 2000bb–1(a)–(b)(2) (1993).

[13] *See* Marci A. Hamilton, *The Case for Evidence-Based Free Exercise Accommodation: Why the Religious Freedom Restoration Act Is Bad Public Policy*, 9 HARV. L. & POL'Y REV. 129, 160 (2015) ("From the perspective of good public policy and especially transparency, RFRA fails at every level. Its misleading title, opaque content, and the deceptive practices of its promoters yielded a feel-good, but dangerous law that increases the odds that the vulnerable will be harmed and that powerful interests will turn it to ends previously unimagined.").

[14] The number of different viewpoints even within major religions is staggering. According to the Pew Research Center, active believers in the family of "Christianity" can be divided into Evangelical Protestant, Mainline Protestant, Historically Black Protestant, Catholic, Mormon, Orthodox Christian, Jehovah's Witness, and Other Christian with each one having its own sub-categories. *Religious Landscape Study*, PEW RES. CTR., http://www.pewforum.org/religious-landscape-study/ (last visited Mar. 31, 2018).

precedent for the future.[15] Because RFRA balancing tests are harming United States citizens, society must rethink the interpretation and application of these laws so that the balance of interests becomes more equitable and fair.

Judicial decisions and a misguided interpretation regarding these RFRA statutes lead to the harmful effects of RFRA legislation.[16] RFRA statutes protect the "exercise of religion," an overbroad and ambiguous term that the courts have never properly addressed or clarified.[17] Narrowing the definition of "exercise of religion" to exclude discriminatory conduct will help mitigate these statutes' discriminatory effects from which more vulnerable and minority populations suffer. Aside from a moral argument, to further illustrate that narrowing the purview of RFRA statutes is the correct course, constitutional principles support a revised interpretation of RFRAs. A constitutional violation occurs when a court adjudicates and decides a controversy under RFRA where an individual has discriminated against or refused service to another on the basis of a religious belief because the court is violating the Establishment Clause, which prohibits the government from favoring one religion over another.[18] Individual believers should not fear that a revised interpretation of RFRA statutes will transform the United States to one that discourages religion or violently opposes it. To the contrary, society will be working toward the delicate balance that reasonably protects individual religious beliefs and avoids the harmful discrimination and humiliation of others.

Section II of this Note discusses a short history of the First Amendment's Free Exercise Clause leading up to Religious Freedom Restoration Acts. Section II also includes an examination of both the real and possible harmful effects of RFRAs, current reactions to the application of these laws domestically, and interesting parallels internationally. Section III sets forth an argument that certain forms of harmful conduct, by nature of RFRAs' plain language or by explicit legislative enactment, can be excluded from RFRAs' application. Section III also argues that the government violates the Establishment Clause of the Constitution when it adjudicates religiously motivated discrimination between private parties.

II. BACKGROUND

A. A Brief History of Free Exercise

The First Amendment states that "Congress shall make no law . . . prohibiting the free exercise [of religion]."[19] Like many constitutional doctrines, the interpretation of this language evolved over time.[20] In the mid-twentieth century in *Sherbert v. Verner*,

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[15] *See, e.g.*, Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837, 841, 847–48 (E.D. Mich. 2016) (allowing a funeral home to fire a transgender employee and assert a religious belief as justification), *rev'd and remanded sub nom*. Equal Emp't Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018).

[16] *See* Hamilton, *supra* note 13, at 135–50.

[17] *See generally* Andrew Koppelman, *Corruption of Religion and the Establishment Clause,* 50 WM. & MARY L. REV. 1831 (2009).

[18] U.S. CONST. amend. I.

[19] *Id.*

[20] John Fahner, *Free Conscience in Decline: The Insignificance of the Free Exercise Clause and the Role of the Religious Freedom Restoration Act in the Wake of Hobby Lobby*, 2 BELMONT

the Supreme Court held that a balancing test applied to claims where the government allegedly intruded upon an individual's religious exercise, requiring that where the government substantially burdens the rights to exercise religion, the law or action had to further a compelling state interest by the least restrictive means.[21] This *Sherbert* test did not last; almost three decades later, the Supreme Court overruled the *Sherbert* balancing test when it held that the government is allowed to burden the free exercise of religion as long as the burden comes from a generally applicable law that only incidentally intrudes upon the exercise of religion.[22] In direct response, Congress passed the Religious Freedom Restoration Act of 1993 to restore the previous *Sherbert* balancing test.[23] The statute read:

> (a) In general
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception

L. REV. 185, 186 (2015) ("The current interpretation of the Free Exercise Clause is entirely severed from its historical moorings, and modern jurisprudence takes no account of the reverence to which its authors attributed it. There exists today only a disparate reflection of the traditional right of free exercise of religion under the First Amendment.").

[21] *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963). The Court seems to make this decision in reverence to the fact that there are legitimate competing interests. The Court stated:

> The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such . . . [but] [o]n the other hand, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for "even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions" . . . [when] [t]he conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order.

Id. at 402–03.

[22] Emp't Div. v. Smith, 494 U.S. 872, 892 (1990), *superseded by statute*, Religious Freedom Restoration Act, 42 U.S.C. § 2000bb–2000bb–4 (1993). The Court narrows the *Sherbert* test to its facts and denies a balancing test:

> The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself."

Id. at 885 (citations omitted).

[23] 42 U.S.C. §§ 2000bb–2000bb–4. Congress explicitly stated their intention was "to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, 406 U.S. 205 (1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened . . . ." *Id.* § 2000bb(b)(1).

> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.[24]

After the Supreme Court held that this act was unconstitutional as applied to the states,[25] individual states began passing their own RFRA legislation of the same name with similar language.[26] As a result, today the individual religious believer enjoys a patchwork of protection divided between the United States Constitution and federal and state legislation.

B. The Harmful Effect of RFRAs

The harmful effects of RFRAs are very real, but claiming that RFRAs have no benefit to both the individual and society would be both unfair and untrue. Recent examples of the federal RFRA's balancing test demonstrate the protection individuals of minority religions have from restrictive government regulation.[27] The examples of protection from government meddling illustrate the best of all possible outcomes of RFRA statutes. Of course, most Americans agree religious believers should be free from oppression, but what happens if the protected religious belief is oppressive to others?

While the broad language of RFRAs does not provide an individual an explicit carte blanche to discriminate, an individual may now use the statute to assert a religious belief even if that belief intrudes upon the life and belief system of someone else.[28] Although that position is not true, discussing RFRA legislation would be nearly

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[24] *Id.* § 2000bb–1(a)–(b)(2).

[25] City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

[26] *See State Religious Freedom Acts*, *supra* note 11.

[27] *See, e.g.*, McAllen Grace Brethren Church v. Salazar, 764 F.3d 465, 470 (5th Cir. 2014) (holding that the government had not met its burden of establishing that they did not violate the federal RFRA when they confiscated eagle feathers (used for religious ceremonial purposes) from a west Texas Native American tribe); Singh v. McHugh, 185 F. Supp. 3d 201, 232, 233 (D.D.C. 2016) (allowing a practicing Sikh to continue to wear his religious clothing while participating in his university's ROTC program).

[28] Another domain in which individuals have the religious right to discriminate to some extent is called the "Ministerial Exception," which generally immunizes faith-based organizations from employment suits by their ministers. *See* Dias v. Archdiocese of Cincinnati, No. 1:11–CV–00251, 2012 WL 1068165 (S.D. Ohio Mar. 29, 2012). The proper contours of the doctrine are somewhat disputed. *See generally* Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1 (2011). However, this system can be abused much like RFRA statutes. In Collette v. Archdiocese of Chi., 200 F. Supp. 3d 730, 732 (N.D. Ill. 2016), a parish asserted the ministerial exception when it fired its Director of Worship and Music, who may or may not technically be a minister, for intending to marry his same sex partner. Whether the parish will be deemed justified is unclear, as the case was only at the motion to dismiss phase. *Id.* at 735–36.

impossible without discussing *Burwell v. Hobby Lobby*.[29] In the federal RFRA's most infamous appearance, a for-profit corporation was able to deny contraceptive coverage—as mandated by the Affordable Care Act—to female employees on the basis of the corporation's religious belief.[30] The majority of the Court had little trouble reaching this decision; following the federal RFRA's balancing test, they determined the contraceptive mandate substantially burdened the corporation's sincerely held religious beliefs.[31] The corporation believed that "life begins at conception . . . . therefore object[ing] on religious grounds to providing health insurance that covers methods of birth control that . . . may result in the destruction of an embryo."[32] The Court applied the balancing test and found that the government had "not shown that it lacks other means of achieving its desired goal [of mandating contraception] without imposing a substantial burden on the exercise of religion by the objecting parties in these cases."[33] Thus, because the contraceptive mandate was not the least restrictive means of achieving the government's goal, the Court held the mandate violated the law.[34] Here, the corporation's[35] religious belief was protected, but this time other people were at the end of the belief rather than a pure government regulation.[36] The corporation effectively and categorically singled out and refused service to a class of individuals (women seeking contraceptives) on the basis of protecting an individual corporate believer.[37]

Intuitively, access to contraceptives is not the only issue that religious individuals can assert; a foray of differing claims may arise under this precedent. After *Hobby Lobby*, some commentators foresaw that the decision was the beginning of a new era that emboldens RFRA claims against anti-discrimination laws.[38] One such commentator said:

> A for-profit corporation can now seek such an exemption under RFRA if its owners have religious objections. To meet the "substantial burden" requirement, it appears that all a business's owners need to do is truthfully

[29] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

[30] *See id.* at 2759.

[31] *Id.* at 2779

[32] *Id.* at 2775.

[33] *Id.* at 2780.

[34] *Id.* at 2780, 2785.

[35] A source of controversy in this decision was that the court extended RFRA protections to closely held corporations. Eugene Volokh, *Hobby Lobby Wins Before the Supreme Court*, WASH. POST (June 30, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/30/scotusblog-reports-closely-held-corporations-cannot-be-required-to-provide-contraception-coverage/?utm_term=.4b06196e4fa2. The Court relied on the Dictionary Act to determine that a "person" for the purposes of the federal RFRA "include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2768.

[36] *Hobby Lobby*, 134 S. Ct. at 2785.

[37] *Id.* at 2759.

[38] Alex J. Luchenitser, *A New Era of Inequality? Hobby Lobby and Religious Exemptions from Anti-Discrimination Laws*, 9 HARV. L. & POL'Y REV. 63, 71 (2015).

> assert that they believe that their faith calls on them not to employ persons who have certain characteristics or engage in certain conduct. Once the owners do so, the anti-discrimination prohibition at issue must meet an "exceptionally demanding" "least-restrictive means standard."[39]

Unfortunately, it seems this position is becoming a reality.

A striking 2016 case seemed to extend *Hobby Lobby* in the way many had feared, but a recent reversal on appeal suggests that courts may have begun to recognize the harmful effects of RFRAs. In *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*, a federal district court applied the federal RFRA balancing test and allowed a funeral home to assert RFRA as a defense when the funeral home fired a transgender employee for violating the company dress code.[40] The defendant funeral home's sincere religious belief went undisputed; the district court found that the "[defendant] believes that the 'Bible teaches that a person's sex (whether male or female) is an immutable God-given gift and that it is wrong for a person to deny his or her God-given sex.'"[41] The district court determined that the employee was not a protected class under Title VII, and the decision of this case was in part because of the narrow nature of the discrimination.[42] Accordingly, the defendants succeeded on the merits of their RFRA claim and were not liable for their religiously motivated termination because, like in *Hobby Lobby*, the substantial burden[43] imposed on the funeral home's religious belief was not the least restrictive means of achieving the government's substantial interest.[44] However, in March of 2018, the Sixth Circuit Court of Appeals reversed that decision in part, ruling that "a religious claimant cannot rely on customers' presumed biases to establish a substantial burden under RFRA."[45] Both the district court and appellate court cases illustrate the challenge that the federal RFRA's "least restrictive means" requirement presents. Because of that challenge, many more instances of discrimination may be allowed because of narrow factual circumstances, as evidenced by this district court's decision.[46]

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[39] *Id.*

[40] Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837, 840 (E.D. Mich. 2016), *aff'd in part, rev'd in part*, 884 F.3d 560, 568 (6th Cir. 2018).

[41] *Id.* at 848.

[42] *Id* at 861–63.

[43] The court assumed this fact without deciding. *Id.* at 859.

[44] *Id.* at 860. With an emphasis that each RFRA analysis is fact specific to the individual case, the district court asserted that "the EEOC has not provided a focused 'to the person' analysis of how the burden on the Funeral Home's religious exercise is the least restrictive means of eliminating clothing gender stereotypes at the Funeral Home under the facts and circumstances presented here." *Id.*

[45] *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 568 (6th Cir. 2018).

[46] In a concurring opinion, Justice Blackmun observed that "'least drastic means' is a slippery slope . . . [a] judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down." Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 188–89 (1979) (Blackmun, J., concurring).

To further illustrate the discriminatory effect of RFRA legislation, states without enacted RFRA statutes do not have such an effect. In two recent instances, courts in Colorado and New York have deflated businesses' attempts to discriminate against LGBT customers.[47] In the New York case, *Gifford v. McCarthy*, owners of a wedding venue did not wish to hold a same-sex wedding despite a human rights law mandating the contrary.[48] Much like the instances above, the defendants in this case had an indisputable religious belief.[49] However, because the court was not bound by a RFRA statute's balancing test, the court relied on the Free Exercise Clause of the federal Constitution.[50] The court reasoned that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his [or her] religion prescribes (or proscribes).'"[51] In both *Gifford* and *Masterpiece Cakeshop*, the Colorado case, neither defendant won the right to discriminate.[52] As a consequence, because of the lack of influence by a RFRA balancing test, the courts seem to have an easier time quelling discriminatory conduct.

C. The Increasing Discriminatory Potential of RFRAs

The discriminatory incidents thus far involve the federal RFRA, but as discussed *supra*, the federal act is one of many. The enacting of state RFRAs has become a fruitful endeavor because the Supreme Court held the original federal RFRA unconstitutional as applied to the states.[53] Since that decision, twenty-one state legislatures have enacted RFRAs,[54] and as the years progress, the statutes are beginning to diverge in language. Some states have a standard RFRA that mirrors the federal version and employs the same standard balancing test.[55] Other states have subtly changed the language of the balancing standard to arguably strengthen the objecting believer's position.[56] More recently, some RFRA statutes expand the law to allow suits between private parties,[57] which the federal RFRA was not designed to

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[47] *See* Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015), *cert. granted sub nom*. Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017); Gifford v. McCarthy, 23 N.Y.S.3d 422 (N.Y. App. Div. 2016).

[48] *Gifford*, 23 N.Y.S.3d at 426.

[49] *Id.* at 429.

[50] *Id.* at 429–31.

[51] *Id.* at 430 (quoting Emp't. Div. v. Smith, 494 U.S. 872, 879 (1990)).

[52] *Id.* at 431; *Masterpiece Cakeshop*, 370 P.3d at 283.

[53] City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

[54] *State Religious Freedom Acts*, *supra* note 11.

[55] *See, e.g.*, FLA. STAT. § 761.03(1)(a)–(b) (2018).

[56] For example, in Missouri, the state legislature has modified the standard RFRA language that the government may not "substantially burden" a person's free exercise with language that the government may not "restrict" a person's free exercise of religion without a compelling interest, arguably weakening the strict balancing test. *See, e.g.*, MO. REV. STAT. § 1.302 (2018).

[57] IND. CODE § 34–13–9–9 (2018). The statute does not explicitly assert that it applies to suits between private parties; however, it states:

do.[58] In 2016, twelve states had pending RFRAs, indicating the potential for similar legislation in the future.[59] The increasing number of jurisdictions with RFRAs along with weakening judicial standards create prime conditions for more religiously imposed discrimination.[60]

The foundation is laid for legislators to pass even more ambitious statutes. In 2016, the Mississippi legislature crossed the boundary between enacting a seemingly well-meaning RFRA statute that may have a discriminatory effect and passing a law with an explicit discriminatory intent.[61] The Mississippi bill would protect the religious beliefs of those who do not believe in same-sex marriage and allow them to discriminate against the LGBT community.[62] However, that bill did not take effect because a federal district court intervened and granted an injunction based on the Establishment Clause that will be discussed in Section III of this Note.[63]

Lastly, the executive branch has thrown its hat into the ring. The climate surrounding the 2016 presidential election can be most optimistically described as charged, and the Trump administration can be described as controversial, at best. Donald Trump indicated that he seeks to embolden the position that religious believers deserve an increased right to act according to their beliefs. For example, he endorses

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> A person whose exercise of religion has been substantially burdened, or is likely to be substantially burdened, by a violation of this chapter may assert the violation or impending violation as a claim or defense in a judicial or administrative proceeding, regardless of whether the state or any other governmental entity is a party to the proceeding.

Id. The key language is "whether the state or any other governmental entity is a party to the proceeding . . . ." *Id.*

[58] *See, e.g.*, Mathis v. Christian Heating & Air Conditioning, Inc., 158 F. Supp. 3d 317, 328 (E.D. Pa. 2016); *see also* Sara Lunsford Kohen, *Religious Freedom in Private Lawsuits: Untangling When RFRA Applies to Suits Involving Only Private Parties*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 43, 45 (2011) (discussing that the circuits are split as to whether even the federal RFRA applies to suits between private parties).

[59] *See Anti-LGBT Religious Exemption Legislation Across the Country,* ACLU, https://www.aclu.org/other/anti-lgbt-religious-exemption-legislation-across-country#rfra16 (last visited Apr. 9, 2018).

[60] For example, the employer in *Mathis* might have an actual defense to his termination suit if the altercation took place in a jurisdiction that supported RFRA suits between private parties.

[61] The bill lists three "sincerely held religious beliefs or moral convictions" entitled to protection. They are:

> (a) Marriage is or should be recognized as the union of one man and one woman;
>
> (b) Sexual relations are properly reserved to such a marriage; and
>
> (c) Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth.

H.B. 1523, 2016 Leg., Reg. Sess. (Miss. 2016).

[62] *Id*.

[63] Barber v. Bryant, 193 F. Supp. 3d 677, 693–94 (S.D. Miss. 2016), *rev'd*, 860 F.3d 345 (5th Cir. 2017).

the destruction of the Johnson Amendment, which prohibits religious organizations from making political endorsements.[64] Trump stated:

> Freedom of religion is a sacred right, but it is also a *right under threat all around us* . . . . That is why I will get rid of and totally destroy the Johnson Amendment and allow our representatives of faith to speak freely and without fear of retribution.[65]

Of course, President Trump would need congressional support, and like many presidents, he may simply be pandering to his base. But, ignoring such a statement is impossible when said in a climate of judicial decisions and legislative enactments that tend to rigorously protect certain religious individuals' conduct even if that conduct infringes upon another.[66] Thus, the third and last branch of government has entered the debate and effectively has said that religious individuals are not protected enough.[67] If society at large follows this viewpoint, then the balance of interests will further skew in favor of the religious believer, threatening the dignity of United States citizens targeted by discriminatory religious beliefs.

D. Reactions to RFRAs

While courts have trouble applying RFRAs in a way that does not allow discrimination, some of the political reactions to the discriminatory effects of RFRAs are poignant. The governor of Georgia recently vetoed a Religious Liberty Bill that would have allowed "pastors to opt out of performing same-sex weddings and would have given religious organizations the ability to refuse certain services, including charitable services, if doing so clashed with their religious beliefs."[68] The governor decided to veto the bill, explaining, "'I do not think we have to discriminate against anyone to protect the faith-based community in Georgia, which I and my family have been a part of for generations . . . .'"[69]

The fight against religiously motivated harm has made rounds in the legislative branch as well. Proposed federal legislation called the "Do Not Harm Act" would protect individuals who are discriminated against on the basis of religion.[70] The intent of the law is to clarify that the federal RFRA "should not be interpreted to authorize

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[64] Mark Landler & Laurie Goodstein, *Trump Vows to 'Destroy' Law Banning Political Endorsements by Churches*, N.Y. TIMES (Feb. 2, 2017), https://www.nytimes.com/2017/02/02/us/politics/trump-johnson-amendment-political-activity-churches.html?_r=0.

[65] *Id.* (emphasis added).

[66] *See, e.g.*, FLA. STAT. § 761.03(1)(a)–(b) (2018); MO. REV. STAT. § 1.302 (2018); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014).

[67] *See* Landler & Goodstein, *supra* note 64.

[68] Sandhya Somashekhar, *Georgia Governor Vetoes Religious Freedom Bill Criticized as Anti–Gay*, WASH. POST (Mar. 28, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/03/28/georgia-governor-to-veto-religious-freedom-bill-criticized-as-anti-gay/?utm_term=.bc1cf5e67ad7.

[69] *Id.*

[70] *See* Do Not Harm Act, H.R. 5272, 114th Cong. (2016), https://www.congress.gov/bill/114th-congress/house-bill/5272/text.

an exemption from generally applicable law that imposes the religious views, habits, or practices of one party upon another" or to authorize "an exemption from generally applicable law that imposes meaningful harm, including dignitary harm, on a third party . . . ."[71]

These reactions imply that change may be waiting down the road, but United States citizens are in danger of discrimination today. It would be foolhardy to assume that twenty-one states and the federal government are going to change the language or overturn their own bills, as RFRAs do have some inherent value.[72] The course to change need not be political; the legal community should take a good hard look at how it interprets these statutes in a way that avoids blatant and absurd discriminatory effects.

E. RFRA-Like Disputes from Around the World

The United States is not isolated in its efforts to promote religious harmony among its population; other western states must also balance the diverse needs of individual religious groups. This Section looks at illustrations of nuanced religious disputes in modern foreign states, some of which mirror exactly the delicate issues facing the United States. These cases shine as examples where a modern state has settled a religious dispute in a manner that benefits society as a whole rather than any unique individual.

The first example comes from the sunny paradise of the French Riviera that started as a response to recent terror attacks,[73] a result of state endorsed secularism,[74] or both. Certain towns along the French Riviera had infamously decided to ban the Islamic women's full-bodied swimsuit dubbed the "Burkini."[75] In effect, a woman who chose

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[71] *Id.* § 2. Exact language in the bill is as follows:

> It is the sense of Congress that—
>
> (1) the Religious Freedom Restoration Act of 1993 should not be interpreted to authorize an exemption from generally applicable law that imposes the religious views, habits, or practices of one party upon another;
>
> (2) the Religious Freedom Restoration Act of 1993 should not be interpreted to authorize an exemption from generally applicable law that imposes meaningful harm, including dignitary harm, on a third party; and
>
> (3) the Religious Freedom Restoration Act of 1993 should not be interpreted to authorize an exemption that permits discrimination against other persons, including persons who do not belong to the religion or adhere to the beliefs of those to whom the exemption is given.

Id.

[72] *See, e.g.*, *id.*

[73] *See France Burkini: Highest Court Suspends Ban*, BBC NEWS (Aug. 26, 2016), http://www.bbc.com/news/world-europe-37198479.

[74] *See id*. "The 1905 constitution aims to separate Church and state. It enshrines secularism in education but also guarantees the freedom of religion and freedom to exercise it. The original text made no reference to clothing." *Id.*

[75] Ben Quinn, *French Police Make Woman Remove Clothing on Nice Beach Following Burkini Ban*, GUARDIAN (Aug. 23, 2016),

to don the Burkini was subject to a fine and removal from a public beach simply for wearing clothing of their choice and exercising[76] her religion.[77] To the chagrin of many French citizens, the ban went into effect and the fine was imposed.[78] The French justified their ban of the religious swimwear because they believed that women wearing Burkinis were not wearing "'an outfit respecting good morals and secularism.'"[79] Ultimately, the ban did not last, as a constitutional court overturned it.[80] The Burkini Ban is an excellent example of the type of regulation the United States' own RFRAs may have been intended to protect, and the result is a happy one. An observer can be satisfied with a result like this because the women exercising their religion and wearing Burkinis at the beach were harming absolutely no one. This is a fine example of a state using its judicial power to protect an individual from government overreach.[81] But if all cases were as easy as this one, this Note would be unnecessary.

Next, in Northern Ireland, a case arose involving incidents that were strikingly like those seen in the United States. A local couple working as bakers refused to serve a cake for a same-sex wedding on the grounds that it violated their religious beliefs and freedoms.[82] When challenged in court, the couple lost their original case and their subsequent appeal.[83] The appellate court stated that "the original judgment had been correct in finding that 'as a matter of law' [the bakers] had 'discriminated against the respondent directly on the grounds of sexual orientation contrary to [local law].'"[84] This decision did not question the trial court's opinion that held, despite the bakers'

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https://www.theguardian.com/world/2016/aug/24/french-police-make-woman-remove-burkini-on-nice-beach.

[76] The use of "exercise" is poignantly chosen and relates to the argument proposed in Section III.

[77] *See* David Gauthier-Villars et al., *France Reveals Details on Attacker in Nice*, WALL ST. J. (July 15, 2016), http://www.wsj.com/articles/terror-attack-in-nice-on-bastille-day-kills-dozens-1468569739.

[77] Quinn, *supra* note 75.

[78] *Id.*

[79] *Id.*

[80] *See* Aurelien Breeden & Lilia Blaise, *Court Overturns "Burkini" Ban in French Town*, N.Y. TIMES (Aug 26, 2016), https://www.nytimes.com/2016/08/27/world/europe/france-burkini-ban.html. "In its ruling, the court, known as the Council of State, found that the ban in the town of Villeneuve-Loubet violated civil liberties, including freedom of movement and religious freedom, and that officials had failed to show that the swimwear posed a threat to public order." *Id.*

[81] *See id.*

[82] Claire Williamson, *Ashers Bakery Same-Sex Cake Appeal Loss: McArthurs Say Case "Undermines Free Speech"—Gay Activist Gareth Lee Breaks Silence*, BELFAST TELEGRAPH (Oct. 24, 2016), http://www.belfasttelegraph.co.uk/news/northern-ireland/ashers-bakery-samesex-cake-appeal-loss-mcarthurs-say-case-undermines-free-speech-gay-activist-gareth-lee-breaks-silence-35154967.html.

[83] *Id.*

[84] *Id.*

"genuine and deeply held" religious views, the business was not above the law.[85] This case illustrates the importance of enacting laws that do not allow certain harmful conduct even if motivated by a religious belief.[86] Secondly, this case illustrates that no individual should be exempt from laws or general standards because of their religious beliefs. Northern Ireland provides an example demonstrating that a society, even one with a deep history of religious confrontations, should not tolerate religiously motivated conduct that is harmful to a third party.[87]

Finally, the limitation on conduct motivated by religious beliefs finds relevance in another realm of life: public health. For decades, parents in Australia were exempted from vaccinating their children because of their religious beliefs.[88] In 2015, the government removed this exemption, leaving medical grounds the sole exemption from vaccination.[89] Rather than an outright ban, the Australian government decided to narrow welfare eligibility for those who do not vaccinate their children.[90] In justifying the government's decision, the Health Minister stated, "I believe most parents have genuine concerns about those who deliberately choose not to vaccinate their children and put the wider community at risk . . . ."[91] This justification is enlightening because the health minister is implying—as will be argued *infra*—that the harm caused to others by not vaccinating a child is more important than the underlying religious belief.[92] While vaccines are not necessarily within the purview of this Note, they hold relevance to the United States because all states except Mississippi and West Virginia

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[85] *"Gay Cake" Row: Judge Rules Against Ashers Bakery*, BBC NEWS (May 19, 2015), http://www.bbc.com/news/uk-northern-ireland-32791239.

[86] This Note further discusses this idea in Section III, *infra*.

[87] *See "Gay Cake" Row*, *supra* note 85.

[88] *See* Elahe Izadi, *Religious Vaccination Exemptions Will Completely End in Australia*, WASH. POST (Apr. 20, 2015), https://www.washingtonpost.com/news/acts-of-faith/wp/2015/04/20/religious-vaccination-exemptions-will-completely-end-in-australia/?utm_term=.64bf80ed98ad. "'It's up to each person who practices Christian Science to choose the form of health care he or she wants,' reads the official Web site of Christian Science. 'Many Christian Scientists decide to pray first about every challenge—including health issues—and find it effective.'" *Id.*

[89] Shalailah Medhora, *Vaccination Crackdown: Australia Announces End to Religious Exemptions*, GUARDIAN (Apr. 18, 2015), https://www.theguardian.com/society/2015/apr/19/vaccination-crackdown-australia-announces-end-to-religious-exemptions.

[90] *Id.*

[91] *Id.*

[92] *See id.* This idea is based on the concept of community or "herd" immunity. See *Community Immunity*, FFF ENTERPRISES (Oct. 3, 2016), http://www.fffenterprises.com/news/articles/article-2016-10-03.html, which states:

> When a critical portion of a community is immunized against a contagious disease, most members of the community are protected against that disease because there is little opportunity for an outbreak. Even those who are not eligible for certain vaccines—such as infants, pregnant women, or immunocompromised individuals—get some protection because the spread of contagious disease is contained.

Id.

allow religious exemptions to vaccinations.[93] Australia's justification strikes at the heart of this Note's theme: some conduct is so detrimental to others in society that it should not be protected conduct under religious freedom justifications that benefit just one party.

These three examples are not binding precedent and do not necessarily represent a worldwide trend. However, these examples of how other western countries handle religious disputes offer an image of the balance that should be the ideal goal of the United States. The French Burkini example demonstrates that countries are capable of protecting the individual expressing her religion in a way that is not harmful for anyone else. Both the Australia and Northern Ireland examples provide a limited scope of what can be considered protected Religious Freedom rights when that conduct embodies harm to another citizen.

III. ARGUMENT

The legal framework in the United States too strongly favors protecting individual religious rights, and therefore cases like Paul Mathis's might not end with the same result. The United States needs action to quell this resurgence and shift the balance of interests to a more moderate position. Although there is no right way to take such action, below are a few possible paths.

A. Rethinking the "Exercise of Religion"

1. Excluding Harmful Conduct from the "Exercise of Religion" by Judicial Interpretation of Its Plain Language

At least in some part, an overly broad interpretation of RFRA statutes is to blame for some of the laws' harmful and discriminatory effects.[94] Like other statutes, RFRAs employ ambiguous language, specifically grounded in the term "exercise of religion."[95] To illustrate the ambiguity, the Arkansas legislature defines the exercise of religion in its RFRA as "mean[ing] religious exercise."[96] The federal RFRA defines

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[93] Hope Lu, Note, *Giving Families Their Best Shot: A Law-Medicine Perspective on the Right to Religious Exemptions from Mandatory Vaccination*, 63 CASE WESTERN RES. L. REV. 869, 886 (2013); *States with Religious and Philosophical Exemptions from School Immunization Requirements*, NAT'L CONF. ST. LEGISLATORS (Dec. 20, 2017), http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx. For an example of a state that provides for religious exemptions, see OHIO REV. CODE ANN. § 3313.671(B)(4) (West 2018) ("A pupil who presents a written statement of the pupil's parent or guardian in which the parent or guardian declines to have the pupil immunized for reasons of conscience, including religious convictions, is not required to be immunized.").

[94] *See* Travis Gasper, *A Religious Right to Discriminate:* Hobby Lobby *and* "*Religious Freedom*" *as a Threat to the LGBT Community*, 3 TEX. A&M L. R. 395, 410 (2015). In discussing the majority's approach allowing the exemption in *Hobby Lobby*, the author states that "[t]he majority takes a subjective approach to the question of substantial burdens on sincerely held beliefs: if a corporation says it is a substantial burden, it is a substantial burden. No judicial inquiry is required. Essentially, this amounts to a 'grant of exemption without real examination.'" *Id.*

[95] *See, e.g.*, Erin McClam, *Religious Freedom Restoration Act: What You Need to Know*, NBC NEWS (Mar. 30, 2015), https://www.nbcnews.com/news/us-news/indiana-religious-freedom-law-what-you-need-know-n332491.

[96] ARK. CODE ANN. § 16–123–403(2) (2018).

the term slightly more narrowly: "[t]he term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[97] While statutory language often needs a level of flexibility, RFRAs tend not to place any restraint on what type of conduct may be considered a religious exercise.[98] Albeit flexible, these broad definitions give little guidance to courts on how to apply the statutes with any sort of reservation. These statutes render almost any conduct to be considered a protected religious exercise, even if it is harmful to another citizen.[99]

The judicial system compounds this problem because courts seem to think that anything but broad deference to an individual's religious[100] belief is bad policy.[101] In her dissent in *Hobby Lobby*, Justice Ginsburg asserted that "[t]here is an overriding interest, I believe, in keeping the courts 'out of the business of evaluating the relative merits of differing religious claims.'"[102] Thus, when the federal courts analyze a RFRA claim, they defer broadly to the statutory definition that the term "'exercise of religion' include[s] 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'"[103] Scholars, particularly those who believe that courts should evaluate certain beliefs if they cause harm to others, have challenged this stance.[104] Although the notion that courts should assess certain religious beliefs is worthy of thought, that notion seems to bypass the idea that the United States should allow beliefs, even harmful ones, to be held freely.[105] Assessing the belief is not

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[97] 42 U.S.C. § 2000cc–5(7)(A) (2018).

[98] *See id.* The idea that the federal definition protects "any" religious exercise seems to imply that it is all-encompassing, but that cannot be a workable situation.

[99] *But see* Idaho v. Cordingley, 302 P.3d 730, 745–46 (Idaho Ct. App. 2013). The court here had no problem saying that smoking marijuana is not an exercise of religion for the Church of Cognitive Therapy. *Id.* The court seemed to rely on the "religion" aspect of his claim. *Id.* However, when reading between the lines of the opinion, one gets the sense that what the court really does not like is the conduct of smoking marijuana. *See id.* It is hard to say that the court would come to a different conclusion if the religious exercise or religion was a tattoo of a marijuana leaf.

[100] Even the definition of "religion" is hotly contested. Some commentators have said that the courts should not, or even cannot, define religion. *Compare* Jeffrey Omar Usman, *Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, the Arts, and Anthropology*, 83 NORTE DAME L. REV. 123, 145 (2007), *with* Jane M. Ritter, *The Legal Definition of Religion: From Eating Cat Food to White Supremacy*, 20 TOURO L. REV. 751, 757 (2004) ("The Supreme Court has held that a belief system need not have a concept of a Supreme Being or afterlife. Moreover, the Supreme Court has held that purely 'ethical or moral' beliefs can be religious if held with the strength and fervor of religious convictions.").

[101] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2805 (2014) (Ginsburg, J., dissenting).

[102] *Id.* (quoting United States v. Lee, 455 U.S. 252, 263 (1982)).

[103] *Id.* at 2762 (quoting 42 U.S.C. § 2000cc–5(7)(A)).

[104] *See, e.g.*, Gasper, *supra* note 94, at 416 ("Congress should amend RFRA so that courts are permitted to assess the belief being asserted and contrast it with the potential harm if an exemption is allowed. In doing so, RFRA can return to its purpose of protecting religious freedom, while not being used as a tool to perpetuate discrimination.").

[105] Usman, *supra* note 100, at 146.

necessary because analyzing conduct is the point. This Note proposes that no matter the belief, certain *conduct* should be excluded as a protected "exercise" of that belief when that conduct harms a third party.

This argument proposes that certain conduct motivated by a religious belief should not always constitute a protected "exercise"[106] of religion regardless of whether the motivating belief is sincerely held or central to a belief system. The courts have yet to properly address the plain language and dictionary definition of the word "exercise." One of the definitions Merriam-Webster offers for the word "exercise" is "a performance or activity having a strongly marked secondary or ulterior aspect."[107] This common definition implies that to "exercise" something, a link between the conduct and the secondary or ulterior aspect must exist. Thus, by adhering to its plain language, certain conduct—even if religiously motivated—will not meet the criteria for the "exercise of religion" because the conduct is missing a traditional and fundamental connection with the secondary aspect (religion). Recent relevant examples might include a for-profit corporation firing or hiring an individual.[108] For-profit corporations hire and fire individuals all the time, and the central purpose of that conduct is for the employees to act as agents and help the company earn revenue. With these practices, the link between religion and conduct is so attenuated that it should not be seen as connected, even if the hiring or firing is motivated by a religious belief. And because it is not connected, it should not be protected.

Admittedly, it is wholly possible that a religious observer would say that his entire life is devoted to religion and his daily conduct is nothing but an embodiment of that devotion.[109] That position may be true for some people, and while such a position should not necessarily be discouraged, a society cannot *legally* protect all religiously motivated conduct without question. Evaluating a person's conduct rather than the belief to which the conduct is associated is intrinsically fair. With such a view, religious beliefs would be treated equally because courts would focus on external manifestations toward third parties, not the motivating belief itself.

This Note has already touched on the theory that religiously motivated conduct does not automatically equate to a religious "exercise."[110] In her dissent in *Hobby Lobby*, Justice Ginsburg alludes to this idea: "I would confine religious exemptions under that Act to organizations formed 'for a religious purpose,' 'engage[d] primarily in carrying out that religious purpose,' and not 'engaged . . . substantially in the

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[106] This would not be the first time a single word upended a legal theory. In an opinion by Justice Scalia, the jurisprudence of the Confrontation Clause was dramatically changed simply by rethinking the word "testimonial." *See* Crawford v. Washington, 541 U.S. 36 (2004).

[107] *Definition of Exercise*, MERRIAM-WEBSTER (Mar. 1, 2018), https://www.merriam-webster.com/dictionary/exercise.

[108] An exception would be eating, as many major religions impose dietary restrictions. *See, e.g.*, Laura Clark, *People Ate Pork in the Middle East Until 1,000 B.C.—What Changed?*, SMITHSONIAN (Mar. 18, 2015), https://www.smithsonianmag.com/smart-news/people-ate-pork-middle-east-until-1000-bcwhat-changed-180954614/. However, such mundane acts are moot because they pose no external harm to others.

[109] *See* Ross Douthat, *Defining Religious Liberty Down*, N.Y. TIMES (July 28, 2012), http://www.nytimes.com/2012/07/29/opinion/sunday/douthat-defining-religious-liberty-down.html.

[110] *See supra* notes 23–24 and accompanying text.

exchange of goods or services for money beyond nominal amounts.'"[111] Justice Ginsburg seems to indicate that certain conduct without a religious "purpose" should not be exempted.[112] Her language is another way of stating that some conduct simply is not an "exercise" of religion. This method of thinking is not the *most* effective way to quell discrimination and harmful conduct because the discretion of an individual judge still governs. However, by rethinking the approach, as well as the plain language and the dictionary definition of "exercise," a court does not need to wait for the legislature to enact an amendment to quell discrimination.

The justification for limiting what the United States should define as the "exercise" of religion parallels the jurisprudence surrounding the regulation of speech, another prong of the First Amendment. As even laypeople know, the First Amendment protects the freedom of speech.[113] What is less widely known, even among lawyers, is how rigidly those protections extend into conduct (commonly referred to as "expressive conduct").[114] The protection of conduct through the Speech Clause of the First Amendment has been summed up nicely:

> The First Amendment protects far more than the spoken and written word. In fact, the Supreme Court has long recognized that the expression of an idea through conduct is entitled to the protection of the First Amendment if the conduct is "sufficiently imbued with elements of communication". . . the Court has found that activities such as burning a flag as a form of political protest, attaching a peace sign to an American flag, and wearing a black armband to protest the Vietnam War are all constitutionally protected.[115]

Though expressive conduct is protected through the First Amendment, those protections are not limitless, allowing the government to regulate that conduct even if the conduct contains significant elements of expression like those actions quoted above.[116] If a government regulation "is not targeted at the expression conveyed, but at the conduct associated with the expression, then the regulation is considered content-neutral and something less than 'full First amendment protection' is afforded the expressive activity."[117] In *United States v. O'Brien*, the Supreme Court formulated a test that illustrates when expressive conduct may be regulated.[118] The test lists four elements:

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[111] Burwell v. Hobby Lobby Stores, Inc. 134 S. Ct. 2751, 2805–06 (2014) (Ginsburg, J., dissenting) (quoting Spencer v. World Vision Inc., 633 F.3d 723, 748 (9th Cir. 2011) (Kleinfeld, J., concurring)).

[112] *See id.*

[113] Peter Moore, *First Amendment Is the Most Important, and Well Known, Amendment*, YOUGOV (Apr. 12, 2016), https://today.yougov.com/news/2016/04/12/bill-rights/.

[114] Jane R. Bambauer, *The Relationships Between Speech and Conduct*, 49 U.C. DAVIS L. REV. 1941, 1941, 1943 (2016).

[115] Kevin Case, "*Lewd and Immoral*"*: Nude Dancing, Sexual Expression, and the First Amendment*, 81 CHI.–KENT L. REV. 1185, 1187 (2006) (internal citations omitted).

[116] *Id.*

[117] *Id.* at 1188.

[118] United States v. O'Brien, 391 U.S. 367 (1968).

> (1) [T]he regulation is "within the constitutional power of the government"; (2) the regulation "furthers an important or substantial governmental interest"; (3) "the governmental interest is unrelated to the suppression of free expression"; and (4) the incidental restrictions on First Amendment freedoms are no greater than is essential to the furtherance of that interest.[119]

This Note does not focus on the Speech Clause of the First Amendment, but it is illustrative that the Court has discussed the concept of conduct as an element apart from a First Amendment right and found a means through the *O'Brien* test to explicitly limit that conduct.[120] This Note is not proposing that the *O'Brien* test is or should be applicable to conduct motivated by religious beliefs. The relevance of the Speech Clause is to demonstrate that American jurisprudence will not be venturing into uncharted waters for simply limiting conduct, even if an individual constitutional right—or even the First Amendment—protects the underlying motivation for that conduct.[121]

2. Excluding Harmful Conduct from the "Exercise" of Religion by Legislative Enactments

Although federal courts have ruled in favor of arguments based on RFRAs, with aging justices, new justices may soon bring to the Court a different view. Additionally, some states with RFRA legislation that have yet to see a case decided could quash discrimination with existing RFRA language.[122] None of that is certain, though, and until such changes occur, states with RFRA legislation on the books can reasonably amend them.[123] Some jurisdictions have statutory language supporting the proposition that the "exercise of religion" is not all-encompassing and therefore can be limited. For example, the Indiana RFRA has a section called "Anti-Discrimination Safeguards" which reads:

> This chapter does not:
>
> (1) authorize a provider to refuse to offer or provide services, facilities, use of public accommodations, goods, employment, or housing to any member or members of the general public on the basis of race, color, religion,

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[119] Case, *supra* note 115, at 1189 (quoting *O'Brien*, 391 U.S. at 376–77).

[120] *Id.* at 1191.

[121] Interestingly, the *O'Brien* test regulating speech is merely an intermediate scrutiny test, *id.* at 1188, which is an easier burden for the government to meet rather than the blanket strict scrutiny test set forth in RFRA legislation explained above. *See supra* note 24 and accompanying text.

[122] *See* Jeff Guo, *Here's How to Use Religious Freedom Laws to Fend Off a Gay Discrimination Suit*, WASH. POST (Apr. 3, 2015), https://www.washingtonpost.com/blogs/govbeat/wp/2015/04/03/heres-how-to-use-religious-freedom-laws-to-fend-off-a-gay-discrimination-suit/?utm_term=.43bc0f839893.

[123] The "Anti-Discrimination Safeguards" listed below were an amendment to Indiana's RFRA after backlash and fears that the RFRA could permit discrimination. Tony Cook et al., *Indiana Governor Signs Amended 'Religious Freedom' Law*, USA TODAY (Apr. 2, 2015), http://www.usatoday.com/story/news/nation/2015/04/02/indiana-religious-freedom-law-deal-gay-discrimination/70819106/.

> ancestry, age, national origin, disability, sex, sexual orientation, gender identity, or United States military service;
>
> (2) establish a defense to a civil action or criminal prosecution for refusal by a provider to offer or provide services, facilities, use of public accommodations, goods, employment, or housing to any member or members of the general public on the basis of race, color, religion, ancestry, age, national origin, disability, sex, sexual orientation, gender identity, or United States military service . . . . [124]

This safeguard notably applies to a "provider," i.e. "one (1) or more individuals, partnerships, associations, organizations, limited liability companies, corporations, and other organized groups of persons."[125] This amendment is an excellent illustration that the definition of "exercise of religion" can be limited by the legislature to exclude certain conduct, especially discriminatory conduct by individuals and commercial organizations.[126] Even though the Indiana legislature does not address the *Hobby Lobby* issue of access to contraceptives, such a definition is a major step in the right direction.

Anti-discrimination safeguards are not the end of legislative enactments, and other jurisdictions have safeguards against frivolous claims. In Tennessee's RFRA provision, the Tennessee legislature provided a section that reads:

> Any person found by a court with jurisdiction over the action to have abused the protections of this section by filing a frivolous or fraudulent claim may be assessed the government entity's court costs, if any, and may be enjoined from filing further claims under this section without leave of court.[127]

This exclusion implies that "religious exercise" does not always include such broad deference to religious beliefs as seen in the cases above.[128] If a court can find a religious claim frivolous, then the court is permitted to balk on giving broad deference to every claim the religious believer asserts in court.[129] This sort of enactment, at the very least, allows a court to inquire into the facts of a case to see whether the religious observer's conduct is a pretext for other motives.

Thus, the trend has already begun; the reactions in the cases previously mentioned show a political backlash to RFRAs, and legislatures are narrowing the definition of RFRAs. This trend should continue, and legislatures should include language in RFRA statutes protecting religious beliefs while excluding harmful conduct to protect minority and vulnerable populations.

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124 IND. CODE. § 34–13–9–0.7(1)–(2) (2018).

125 *Id.* at § 34–13–9–7.5.

126 *See id.* at § 34–13–9–0.7.

127 TENN. CODE. ANN. § 4–1–407(f) (2018).

128 *See, e.g.*, Burwell v. Hobby Lobby Stores Inc., 134 S. Ct. 2751, 2756 (2014).

129 *See Indiana Prisoner's First Amendment Religion Claim Dismissed as Frivolous*, PRISON LEGAL NEWS (May 15, 2007), https://www.prisonlegalnews.org/news/2007/may/15/indiana-prisoners-first-amendment-religion-claim-dismissed-as-frivolous/.

B. Courts Adjudicating Religious Discrimination Claims Between Private Parties Violates the Establishment Clause of the Constitution

The conclusion that the United States protectionist RFRA scheme has gone too far has ties with other clauses of the Constitution. When a court rules in favor of a religious believer in a suit between private parties (such as the district court decision in *R.G. & G.R. Funeral Home*[130]) rather than against a government regulation, that court necessarily is valuing one religious belief over another.[131] Preferential treatment to beliefs and values contravenes another prong of the First Amendment that forbids the government from "respecting an establishment of religion."[132] Under the Establishment Clause of the First Amendment, the state "'may not aid, foster, or promote one religion or religious theory against another.'"[133] Generally, when the court values a religious belief against a law or regulation, it will not run into the issue of favoring a religious belief over another because the law or regulation is in theory neutral and secular.[134] However, in a discrimination or a refusal of service suit motivated by religion, the nature of the suit in fact makes it a controversy between two parties and their ideals. If the court rules in favor of the religious discriminator, then the court has valued the religious discriminator's religious belief as holding more weight and value than the victim and his beliefs.

Striking down a law based on the Establishment Clause is nothing new. The court in *Barber v. Bryant*[135] grounded its decision in the Establishment Clause to hold unconstitutional the Mississippi law that protected discriminatory religious beliefs.[136] The court held that the discriminatory law "violates the Establishment Clause because it chooses sides in this internal debate . . . the [s]tate is inserting itself into any number of intrafaith doctrinal disputes, tipping the scales toward some believers and away from others. That is something it cannot do."[137] The court goes on to say that "'[t]he people's religions must not be subjected to the pressures of government,'"[138] and even though the court acknowledged an overwhelming majority of Christians in

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[130] Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837 (E.D. Mich. 2016), *aff'd in part, rev'd in part*, 884 F.3d 560 (6th Cir. 2018). The EEOC was the other party to the litigation, but this does not distract from the fact that the ultimate dispute was between the transgender employee and the employer-funeral home. *See id.*

[131] *See id.* at 841.

[132] U.S. CONST. amend. I.

[133] Barber v. Bryant, 193 F. Supp. 3d 677, 687 (S.D. Miss. 2016) (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)). The court also states that "[t]he Establishment Clause is violated because persons who hold contrary religious beliefs are unprotected—the State has put its thumb on the scale to favor some religious beliefs over others. Showing such favor tells 'non-adherents that they are outsiders, not full members of the political community . . . .'" *Id.* at 688 (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309–10 (2000)).

[134] *See, e.g.*, Religious Freedom Restoration Act, 42 U.S.C. § 2000bb–2000bb–4 (1993).

[135] *Barber*, 193 F. Supp. 3d 677.

[136] *Id.* at 719.

[137] *Id.*

[138] *Id.* (quoting Engel v. Vitale, 370 U.S. 421, 430 (1962)).

Mississippi, the law could not stand.[139] This reasoning is relevant when thinking about the implications of courts sanctioning religiously motivated discrimination. Because RFRAs revolve around the sincerely held belief of the religious believer and the substantial burden placed upon that belief, the court can lose sight of the other beliefs that others may hold.[140] If the legal system can recognize that the victim of religiously motivated discrimination may have a belief system of his own (even if dormant), the courts may have an easier time shutting down harmful RFRA claims.

Some commentators have argued RFRAs do not violate the Establishment Clause of the Constitution.[141] This conclusion relies on the fact that RFRAs in general do not violate the Establishment Clause because the government is not endorsing religion as a whole even if religion may benefit through such legislation.[142] The argument provides that "[w]hile it is true that religion may profit from [RFRAs,] . . . the Court on numerous occasions has confirmed that a law does not violate the Establishment Clause merely because it has the net result of benefiting religion."[143] In following, and distinguishing, that principle, RFRAs do not violate the Establishment Clause on their face; however, they could in some circumstances because courts become intolerant of legislation "where the government has exhibited hostility toward a specific religious group or has favored or promoted religion . . . ."[144] As applied to certain situations, the government, through the courts and legislation, is favoring one religious belief over another. [145] In *R.G. & G.R. Funeral Home*, the employer believed "the Bible teaches that a person's sex (whether male or female) is an immutable God-given gift and that it is wrong for a person to deny his or her God-given sex."[146] Presumably, the Plaintiff-employee believed the exact opposite because he was living his life accordingly. Ultimately, when ruling that the employer was entitled to its RFRA defense, the district court decided that the employer's belief prevailed. There, we can say that the district court decision offended the Establishment Clause not simply because it

[139] *Id.* at 712. The court explains that some Mississippians might believe that, because of their Christian majority, it might be fitting to have Christian polices and that "the Establishment Clause is a technicality" to allow atheists to thwart that effort. *Id.* However, the true intention of the Establishment Clause was not to protect minority faiths; it was to protect Christians from other Christians, and minority faiths were added later. *Id.* at 712–13.

[140] *Id.* at 717 (acknowledging that the belief system integrated in "HB 1523 favors Southern Baptist over Unitarian doctrine, Catholic over Episcopalian doctrine, and Orthodox Judaism over Reform Judaism doctrine, to list just a few examples.").

[141] *See, e.g.*, Gary S. Gildin, *A Blessing in Disguise: Protecting Minority Faiths Through State Religious Freedom Non-Restoration Acts*, 23 HARV. J. L. & PUB. POL'Y 411, 469 (2000).

[142] *Id.* at 472.

[143] *Id.*

[144] *Id.* at 469.

[145] *See generally* Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837 (E.D. Mich. 2016), *aff'd in part, rev'd in part*, 884 F.3d 560 (6th Cir. 2018). Once again, the definition of "religion" is very broad. "[T]o be a religion, a belief system need not have a concept of a God or a Supreme Being, or afterlife. Purely 'moral and ethical beliefs' can be a religion, provided that 'they are held with the strength of religious convictions.'" Bernard E. Jacques, *Discrimination on the Basis of Religion Is Prohibited! But What Is Religion?*, 82 CONN. B.J. 365, 370 (2008) (internal citations omitted).

[146] *R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d at 848.

afforded a net benefit to religion, but because the court gave preference to one particular religious viewpoint over another, which is an act that any branch of the government should not be able to do. What is more, even allowing business organizations to assert RFRAs as a defense violates Establishment Clause principles because when courts allow business entities to assert RFRAs as a defense to their own actions, courts allow one belief to prevail over another.[147] Even if an organization is organized as a small partnership or the most closely held corporation, individuals holding directorships or shares of the entity may possess different religious views. Thus, allowing certain businesses to assert these claims may run afoul of Establishment Clause principles because the court is assuming, presuming, allowing to prevail, or favoring one religious view held by certain individual parties within the group while silencing the others.

Courts should use the Establishment Clause reasoning in *Bryant*[148] when deciding cases like *Hobby Lobby* and *R.G & G.R. Funeral Home*. These cases follow as a logical outgrowth of *Bryant*: if a United States District Court can hold a law invalid for violating the Establishment Clause due to its potential harm, then it certainly can do so as applied when the harm is actual. Despite RFRA text saying otherwise,[149] when applied to certain situations, the state favors a certain religious belief over another when it sanctions religiously motivated discrimination. When confronted with a case like this, the court should hold that RFRA is unconstitutional.

In sum, courts need to be mindful of the Establishment Clause when reviewing a RFRA claim. If the suit involves an actor who has discriminated against another on the basis of a religious belief, it is a truism that the victim of discrimination is also acting in accordance with her beliefs. In other words, a wedding cake baker who decides to deny service to an LGBT customer on the basis of religion is acting in accordance with his own belief that same-sex marriage is wrong. However, the LGBT customer who wishes to buy the cake is also acting in accordance with her belief (and likely religious belief) that same-sex marriage is not wrong, and these two individuals could be members of the same religion or even the same sect. When a court decides a case like this, it favors one belief system over the other and offends the Constitution. Therefore, allowing someone to discriminate based on a religious belief is not only immoral, but is necessarily unconstitutional.

IV. CONCLUSION

As a society, the United States can do a better job of balancing a religious believer's rights with the rights and dignities of third parties who are undeniably harmed by certain beliefs. While staying true to the tradition of freedom of conscience,[150] the United States can allow beliefs to be held, expressed, and debated

147 *See id.* at 841.

148 Barber v. Bryant, 193 F. Supp. 3d 677, 688 (S.D. Miss. 2016).

149 The federal RFRA states that "[n]othing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause")." Religious Freedom Restoration Act, 42 U.S.C. § 2000bb–4 (1993).

150 *See* Charles C. Haynes, *History of Religious Liberty in America*, NEWSEUM INST. (Dec. 26, 2002), http://www.newseuminstitute.org/first-amendment-center/topics/freedom-of-religion/religious-liberty-in-america-overview/history-of-religious-liberty-in-america/.

without question. But what we cannot and should not allow for is a society to be inclusive to some individuals and exclusive to others. This Note proposes that the answer is to restrict the instances in which the United States allows discriminatory religious beliefs to manifest into *conduct* that harms others. In allowing someone to quote a Bible verse as justification for a discriminatory termination, our society is treading dangerously toward theocracy.

However, all is not lost. The United States can achieve a level of fairness for all citizens through reasonable means. The law can limit what qualifies as a protected "exercise" of religion by judicial interpretation of its plain language, by enacting reasonable laws and amendments excluding discriminatory conduct from the federal RFRA's purview, or some combination of the two. In addition, society must recognize that when an individual asserts a religious right in a way that harms another, the harmed party may hold conflicting or directly opposing views. Accordingly, a judicial decision on these sorts of facts contravenes the Establishment Clause of the Constitution, and thus courts should not decide these cases because they will inevitably favor one belief system over another. These methods are sensible ways to assure that the religious believer cannot hijack the legal system as a means to use his sincere religious beliefs to create his own law.

The United States is not shackled to the idea that an individual's religiously motivated conduct enjoys unfettered deference, and the government will not contravene statutory law or the Constitution if it denies the right to harm others based upon a religious belief. It is quite the contrary: it will be defending the institutional integrity of the United States along with the dignity of all citizens.