The First Amendment Right to Free Exercise of Religion, Nondiscrimination Statutes Based on Sexual Orientation and Gender Identity, and the Free Exercise Claims of Non-Church-Related Employers

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In a number of recent political issue campaigns regarding the enactment of employment protections law based on sexual orientation and gender identity, opponents of such laws have often raised concerns about the infringement on the religious freedoms of business owners.[1] While there are often legislative exemptions for churches and other religious associations, ordinary business owners who happen to be religious are generally not exempted from the application of such statutes.[2] The legal status of a claim of exemption from employment discrimination laws comes under the Free Exercise Clause of the First Amendment;[3] however, it has rarely been addressed directly in court opinions or legal literature.[4] This Article addresses the right of a non-church-

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1 *See, e.g.*, Michael Foust, *Obama stands firm on 'gay rights' support*, Baptist Press, Dec. 1, 2008, http://www.bpnews.net/BPnews.asp?ID=29430 ("[T]he Employment Non-Discrimination Act [is] a bill that religious leaders fear would force Christian business owners and Christian organizations to hire people opposed to their religious beliefs. ENDA would treat 'sexual orientation' in similar fashion to other federally protected categories, such as race, gender, age and religion.").

2 *See* N.H. Rev. Stat. Ann. § 21:49 (2010) (stating no duty is imposed on a religious organization); N.J. Stat. Ann. § 10:5-12(a) (West 2010) (addressing exemption for religious associations or organizations, which is similar to Vermont's statute); Vt. Stat. Ann. tit. 21, § 495(e) (West 2010) (exempting "any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised, or controlled by or in connection with a religious organization[,]" for employment actions based on religious principles).

3 U.S. Const. amend. I.

4 *But see* Joanne C. Brant, *"Our Shield Belongs to the Lord": Religious Employers and a Constitutional Right to Discriminate*, 21 Hastings Const. L.Q. 275 (1994); Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. Rev. 391 (1987); Kristen Colletta & Darya Kapulina, Note, *Employment Discrimination and the First Amendment: Case Analysis of Catholic Charities*, 23 Hofstra Lab. & Emp. L.J. 189 (2005); David B. Cruz,

related employer—in a jurisdiction with a statute prohibiting discrimination based on sexual orientation or gender identity—to raise the First Amendment Free Exercise Clause as a defense to an application of the statute regarding discrimination against a gay or transgender employee.

Most jurisdictions in the United States do not prohibit employment discrimination based on sexual orientation or gender identity.[5] However, there are twenty-one states that prohibit sexual orientation discrimination in the workplace, twelve states that prohibit sexual orientation and gender identity discrimination,[6] as well as many local jurisdictions that prohibit one or both types of discrimination.[7] In addition, the workplace sex discrimination provisions of the Civil Rights Act of 1964 (Title VII), as well as various state sex or disability discrimination statutes, have been interpreted by some courts and commissions to prohibit workplace discrimination based on gender identity or expression.[8] This Article addresses whether an employer with such religious beliefs can successfully raise the First Amendment Free Exercise Clause as a defense to discrimination based on sexual orientation or gender identity.

This Article is specifically confined to examining the rights of non-church-related employers to raise a First Amendment free exercise defense in regard to hiring or firing employees based on their sexual orientation or gender identity. This Article examines employers with an

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Note, *Piety and Prejudice: Free Exercise Exemption from Laws Prohibiting Sexual Orientation Discrimination*, 69 N.Y.U. L. REV. 1176 (1994).

[5] *Recent Proposed Legislation: Employment Discrimination — Congress Considers Bill To Prohibit Employment Discrimination on the Basis of Sexual Orientation and Gender Identity. — Employment Nondiscrimination Act of 2009, H.R. 3017, 111th Cong. (2009)*, 123 HARV. L. REV. 1803, 1805 & n.21 (2010).

[6] HUMAN RIGHTS CAMPAIGN, STATEWIDE EMPLOYMENT LAWS & POLICIES, http://www.hrc.org/documents/Employment_Laws_and_Policies.pdf (2010).

[7] Keisha-Ann G. Gray, *Expanding Bias Laws*, HUM. RESOURCE EXECUTIVE ONLINE, Aug. 10, 2009, http://www.hreonline.com/HRE/story.jsp?storyId=240870061.

[8] *See* Smith v. Salem, Ohio, 378 F.3d 566, 572 (6th Cir. 2004) (finding discrimination based on Title VII); Enriquez v. W. Jersey Health Sys., 777 A.2d 365, 373 (N.J. Super. Ct. App. Div. 2001) (reasoning based on state disability statute); Buffong v. Castle on the Hudson, 824 N.Y.S.2d 752 (Sup. Ct. 2005) (deciding transgendered person's discrimination claim based on state sex discrimination statute); STATE OF CONN. COMM'N ON HUMAN RIGHTS & OPPORTUNITIES, CHRO DECLARATORY RULING ON BEHALF OF JOHN/JANE DOE (2000), *available at* http://www.ct.gov./chro/cwp/view.asp?a=2526&Q=315942.

explicitly nonreligious business purpose, such as a plumbing business whose owners have sincere religious beliefs militating against the employment of homosexual, bisexual, or transgender persons. In referring to non-church-related employers, this Article excludes employers that are affiliates of recognized churches. For example, the Christian Science Monitor is not a church but a secular newspaper business employing many people in nonreligious roles.[9] However, some courts have recognized it as being owned and operated by the Christian Science Church.[10] This status raises issues this Article will not review.[11] Also, this Article will not review related defenses, such as the *bona fide occupational qualification* defense or the *business necessity* defense.[12]

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[9] *See* Madsen v. Erwin, 481 N.E.2d 1160, 1164 n.2 (Mass. 1985) ("The affidavits in this action, however, establish 'that the Monitor is itself a religious activity of a religious organization, albeit one with a recognized position and an established reputation in the secular community.'" (quoting Feldstein v. Christian Sci. Monitor, 555 F. Supp. 974, 978 (D. Mass. 1983))). The court did not distinguish between the Christian Science Monitor and the Christian Science Church, and found the plaintiff was an employee of the church. *Id.* at 1163. The court also noted that requiring the church to pay damages for following its religious beliefs burdened its right to free exercise. *Id.* at 1166.

[10] *Id.* at 1163.

[11] Churches receive additional First Amendment protection through the *ministerial exception* doctrine, which "bars civil courts from reviewing decisions of religious organizations relating to the employment of their ministers." Hollins v. Methodist Healthcare, Inc., 379 F. Supp. 2d 907, 911 (W.D. Tenn. 2005), *aff'd*, 474 F.3d 223 (6th Cir. 2007). In addition, many nondiscrimination statutes, such as the Civil Rights Act of 1964 (Title VII), contain exemptions permitting religious corporations and schools to engage in discrimination based on religion. *See, e.g.*, 42 U.S.C. § 2000e-1 (2006); Richard R. Hammar, *The Civil Rights Act of 1964*, CHURCH L. & TAX REP. (1998), *available at* http://www.churchlawtoday.com/private/library/pcl/p11i.htm. Some of these exemptions are quite broad. *See, e.g.*, 42 U.S.C. § 2000e-1 (2006). For example, the Title VII exemption was amended in 1972 to cover *all* employees of religious corporations and schools, even those employees who are not involved in the propagation of religious doctrines. *See id.*; N.C. OFFICE OF STATE PERS., TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AS AMENDED BY THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, EFFECTIVE MARCH 24, 1972 (1989) [hereinafter N.C. OFFICE OF STATE PERS.], http://www.osp.state.nc.us/manuals/manual99/title7.pdf.

[12] The *bona fide occupational qualification* defense is found in many nondiscrimination statutes, such as Title VII, and permits organizations to engage in otherwise prohibited discrimination, if they can demonstrate the discrimination is reasonably necessary to the normal operation of the organization; but, this defense is only applicable to religion, sex, and national origin, and it does not extend to race or color. N.C. OFFICE OF STATE PERS., *supra* note 11. The *business necessity* defense

These issues would likely arise in the context of employers that work with customers or foreign governments that prefer or require dealing with persons of certain religious backgrounds or levels of observance.[13] Finally, this Article excludes consideration of claims of hostile workplace environment based on sexual orientation, gender identity, or religion.[14]

I. The Convoluted History of Free Exercise Claims

In the early years of free exercise jurisprudence, there seemed to be a dividing line between the right to religious *beliefs*, which are absolutely protected, on the one hand, and, on the other, religious *practices*, which are not absolutely protected.[15] Despite this division, in the 1960s

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argues that businesses should not be required to conform to nondiscrimination law if the business will be destroyed because customers will cease their patronage as a result. *See* 42 U.S.C. § 2000e-2(k) (2006).

[13] *See, e.g.*, Kern v. Dynalectron Corp., 577 F. Supp. 1196, 1198 (N.D. Tex. 1983), *aff'd*, 746 F.2d 810 (5th Cir. 1984).

[14] Hostile workplace claims involve several complex side issues. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) (holding that employers can escape liability from a hostile workplace claim, if the employee has not availed himself or herself of employer grievance processes); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986) (holding that harassment must be severe and pervasive enough to alter the terms of employment); Goins v. W. Grp., 635 N.W.2d 717, 721 (Minn. 2001) (stating an employee used the doctrine of constructive termination to argue she was subject to a hostile workplace environment); N.Y. Tel. Co. v. Wethers, 317 N.Y.S.2d 119, 121 (App. Div. 1971) (holding an employee does not have a claim for racial discrimination when the employee has not met the employer's work performance standards).

[15] *See* Wisconsin v. Yoder, 406 U.S. 205, 219-20 (1972) ("Wisconsin concedes that under the Religion Clauses religious beliefs are absolutely free from the State's control, but it argues that 'actions,' even though religiously grounded, are outside the protection of the First Amendment. But our decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause. It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers."); Sherbert v. Verner, 374 U.S. 398, 403 (1963) ("'[E]ven when the action is in accord with one's religious convictions, (it) is not totally free from legislative restrictions.'" (quoting Braunfeld v. Brown, 366 U.S. 599, 603 (1961))); Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594-95, 599-600 (1940) (disallowing free exercise claim for pledge of allegiance in schools and distinguishing between political responsibilities in obedience to law versus belief); Davis v. Beason, 133 U.S. 333, 342, 346-47 (1890) (disallowing free exercise claim for required oath that one did

the Supreme Court of the United States began providing protections for religious practices and requiring the government to show a *compelling interest* for laws infringing on religious freedom.[16] It has often been assumed that this is the *strict scrutiny* test, found in due process and equal protection jurisprudence, which requires the government demonstrate a compelling interest that is narrowly tailored to achieve the result by the least restrictive means.[17]

"Strict scrutiny has had a troubled history in the area of religious liberty."[18] While strict scrutiny has been widely known as "strict in theory, fatal in fact," in regard to free exercise cases, it is known as "strict in theory, feeble in fact."[19] In the 1970s and 1980s, courts rarely used strict scrutiny to grant religion-based exemptions.[20] The federal appellate courts turned away slightly over eighty-seven percent of free exercise challenges between 1980 and 1990.[21] Between 1990 and 2003, "there were 73 applications of strict scrutiny in published final rulings pertaining to religious liberty . . . [and] the religious liberty category had the highest survival rate of any area of law in which strict scrutiny applies: 59 percent, more than double the mean of the other doctrinal categories."[22] Thus, there is something unusual about the application of strict scrutiny to free exercise cases.

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not belong to or adhere to a church advocating or practicing polygamy, and distinguishing between views of the Creator versus forms of worship of a particular sect); Reynolds v. United States, 98 U.S. 145, 164, 166 (1878) (disallowing free exercise claim for religious polygamy and distinguishing between thought and action).

16 *See Sherbert*, 374 U.S. at 406.

17 *See* Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (stating that government infringement on fundamental liberty interests must be narrowly tailored to serve a compelling state interest); Griswold v. Connecticut, 381 U.S. 479, 504 (1965) (defining strict scrutiny as requiring that the regulation is the least restrictive means for achieving a state's compelling interest).

18 Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 858 (2006).

19 Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247 (1994).

20 *See* Winkler, *supra* note 18, at 858-59.

21 *See* James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1416-17 (1992).

22 Winkler, *supra* note 18, at 809-10, 857-58.

In 1990, the Supreme Court exempted valid and neutral laws of general application from free exercise claims in the case of *Employment Division v. Smith*.[23] Because of the historical weakness of the strict scrutiny standard concerning religious liberty cases, *Smith* may be viewed as a *mercy killing*.[24]

Congress, however, was not willing to allow laws of general application to infringe on religious practices. Congress passed the Religious Freedom Restoration Act (RFRA) in 1993.[25] The RFRA subjects all laws that substantially infringe religious practices, even laws of general applicability, to strict scrutiny.[26] The Supreme Court declared the RFRA unconstitutional in 1997, as applied to state and local governments, on the grounds that it interfered with the Court's authority to determine how the Fourteenth Amendment should be enforced.[27] The Supreme Court specifically reaffirmed that, as stated in *Smith*, strict scrutiny could nevertheless be applied if there were a *hybrid* claim—a claim involving the Free Exercise Clause and other constitutional rights.[28] This ruling left untouched the RFRA's effect of requiring strict scrutiny with regard to federal law.[29] It also did not affect the principle of strict scrutiny in cases involving laws not neutral as to religion.[30] The application of the RFRA to a federal law that prohibits job discrimination is different from the application of the Free Exercise Clause and will not be addressed here. Also, a number of states have adopted similar laws under the authority of their state constitutions.[31] The constitu-

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[23] Emp't Div. v. Smith, 494 U.S. 872, 890 (1990).

[24] *See* Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 300 (1992).

[25] 42 U.S.C. § 2000bb (2006); Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[26] *Flores*, 521 U.S. at 515-16.

[27] *Id.* at 536.

[28] *See id.* at 513-14.

[29] *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 419-20 (2006).

[30] *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 521 (1993).

[31] *See, e.g.*, FLA. STAT. §§ 761.01-.05 (2008); 775 ILL. COMP. STAT. 35/1-30 (2010); TEX. CIV. PRAC. & REM. CODE ANN. § 110.003 (West 2010).

tionality and application of the federal RFRA and state *mini-RFRAs* are left for another time.

In summary, claims for exemptions based on the Free Exercise Clause invoke strict scrutiny under the Free Exercise Clause only if the law is not neutral toward religion, or if it is a hybrid claim involving both the Free Exercise Clause and another constitutional right.[32] It appears to be a fairly logical inference that a law prohibiting employment discrimination that generally applies to all commercial establishments would be considered a law of general applicability under *Smith* and therefore, would only require a compelling interest, if another constitutional right were at stake.

Whether or not a free exercise claim regarding employment discrimination statutes is judged under a compelling interest standard, presumptions about whether the Supreme Court will or will not be receptive to such a claim should be approached with caution. This is clearly an area in flux, and the Free Exercise Clause has recently been invoked across a broad range of concerns.[33] Any court decision on employer free exercise claims could have a big impact on many different types of claims, and courts are going to be especially cautious in such an environment.[34] These free exercise claims include: tax exemptions for clerical housing allowances,[35] prohibiting political advocacy by tax-exempt churches,[36] land use issues involving religious organizations,[37]

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[32] *See supra* notes 28, 30 and accompanying text.

[33] *See infra* notes 35-48 and accompanying text.

[34] Winkler, *supra* note 18, at 862 ("[C]ourts are justifiably worried that they will be overwhelmed by litigants demanding religious exemptions to every law that might inadvertently interfere with the great diversity of Americans' religious practices.").

[35] *See, e.g.*, John R. Dorocak, *The Income Tax Exclusion Of The Housing Allowance For Ministers Of The Gospel Per I.R.C. Section 107: First Amendment Establishment Of Religion Or Free Exercise Thereof—Where Should The* Warren *Court Have Gone?*, 54 S.D. L. Rev. 233 (2009).

[36] *See, e.g.*, Lloyd Hitoshi Mayer, *Politics At The Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. Rev. 1137 (2009).

[37] *See* Tyler F. Mark, Note, Rocky Mountain *Shootout: Free Exercise & Preserving the Open Range*, 98 Geo. L.J. 1859 (2010); Fiona McCarthy, Note, *Church Property and Institutional Free Exercise: The Constitutionality Of Virginia Code Section 57-9*, 95 Va. L. Rev. 1841 (2009); Ruth Stoner Muzzin, Comment, *Seeing the Free Exercise Forest for the Trees: NEPA, RFRA and* Navajo Nation, 16 Hastings W.-Nw. J. Envtl. L. & Pol'y 277 (2010).

healthcare worker and organizational rights to refuse patient treatment contravening religious principles,[38] and the right to refuse treatment for one's self or one's children based on religious grounds.[39] It also includes parents' rights to object to school curricula addressing issues affecting religious beliefs;[40] marriage rights, including same-sex marriage, polygamy, and plural cohabitation;[41] religious considerations in child custody determinations;[42] criminal profiling based on religious behaviors;[43] prison restrictions on religious worship, diet, and groom-

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[38] *See* Kurt Van Sciver, *To Strict Scrutiny and Beyond! Interpreting California's Free Exercise Clause*, 38 Sw. U. L. Rev. 395 (2009); Kelleen Patricia Forlizzi, Note, *State Religious Freedom Restoration Acts as a Solution to the Free Exercise Problem of Religiously Based Refusals to Administer Health Care*, 44 New Eng. L. Rev. 387 (2010); *Constitutional Law — Free Exercise Clause — Ninth Circuit Rejects Strict Scrutiny for Pharmacy Dispensing Requirement. —* Stormans, Inc. v. Selecky*, 571 F.3d 960 (9th Cir. 2009).*, 123 Harv. L. Rev. 596 (2009); *First Amendment — California Supreme Court Holds That Free Exercise Of Religion Does Not Give Fertility Doctors Right To Deny Treatment To Lesbians. —* North Coast Women's Care Medical Group, Inc. v. San Diego County Superior Court*, 189 P.3d 959 (Cal. 2008).*, 122 Harv. L. Rev. 787 (2008).

[39] *See* Stamford Hosp. v. Vega, 674 A.2d 821, 823-24 (Conn. 1996) (finding a constitutional right for a person to refuse life-saving treatment for themselves based on religious grounds); Marci A. Hamilton, God vs. the Gavel: Religion and the Rule of Law 31-39 (2005) ("[R]oughly 30 states plus the District of Columbia now have exemptions for religious parents from the medical neglect laws.").

[40] *See, e.g.*, Darryn Cathryn Beckstrom, Abstract, *Balancing Civic Values and Parents' Free Exercise Rights*, 45 Gonz. L. Rev. 149 (2010).

[41] *See* Mark Strasser, *Marriage, Free Exercise, and The Constitution*, 26 Law & Ineq. 59, 59 (2008) ("[A] strong case can be made for the proposition that polygamy is constitutionally protected."); Kristen A. Berberick, Comment, *Marrying Into Heaven: The Constitutionality of Polygamy Bans Under the Free Exercise Clause*, 44 Willamette L. Rev. 105, 105-06 (2007) (stating, "if the Court were to determine the constitutionality of the nineteenth-century anti-polygamy statutes today, it would conclude that those laws violate the Free Exercise Clause of the U.S. Constitution because those laws specifically targeted the Mormon Church").

[42] *See, e.g.*, Ariana S. Cooper, Note, *Free Exercise Claims in Custody Battles: Is Heightened Scrutiny Required Post-*Smith*?*, 108 Colum. L. Rev. 716, 717 (2008) (arguing that in custody disputes, state courts should recognize hybrid rights but not apply strict scrutiny if only one parent can exercise a right he is fighting for).

[43] *See, e.g.*, Murad Hussain, Note, *Defending The Faithful: Speaking the Language of Group Harm in Free Exercise Challenges to Counterterrorism Profiling*, 117 Yale L.J. 920, 929 (2008) (arguing that plaintiffs can challenge cultural profiling through hybrid free exercise claims).

ing;[44] the right of a bankrupt to donate to religious organizations;[45] residency restrictions on religious sex offenders;[46] torts committed for religious purposes;[47] and photograph requirements for identity documents.[48] Each of these areas has very different legal and political landscapes, and a Supreme Court free exercise decision in a different area could change everything for the employment nondiscrimination area.

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[44] *See* Robert J. D'Agostino, *The Religious Rights of Incarcerated Persons: The Georgia Clergy Privilege, RLUPIA, and the Free Exercise Clause*, 1 J. MARSHALL L.J. 91, 93 (2008) (arguing the Georgia Clergy Privilege is superfluous because RLUIPA and the Free Exercise Clause provide prisoners with an outlet to challenge prison policies); Ian J. Silverbrand, Baranowski v. Hart*: Limitations on Jailhouse Religion Despite the Free Exercise Clause and RLUIPA*, 85 U. DET. MERCY L. REV. 587, 588-89 (2008) (arguing the government should not restrict a prisoner's ability to "freely exercise his religious practice"); Melissa R. Johnson, Note, *Positive Vibration: An Examination of Incarcerated Rastafarian Free Exercise Claims*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 391, 392 (2008) ("[R]eligious minorities are not treated equally under the law with regard to prison regulations that restrict religious exercise.").

[45] *See, e.g.*, Nicholas C. Rigano, *Fraudulent Conveyance Law: Destroying Free Exercise Rights at a Church Near You*, 17 AM. BANKR. INST. L. REV. 165 (2009) (arguing the federal statute that limits the amount a bankrupt can donate to a place of worship violates the Free Exercise Clause).

[46] *See, e.g.*, Amol N. Sinha, Note, *Sects' Offenders: The Inefficacy of Sex Offender Residency Laws and Their Burdens on the Free Exercise of Religion*, 16 CARDOZO J.L. & GENDER 343 (2010) (arguing that laws restricting where sex offenders live are ineffective, and subsequently, they place a high burden on how sex offenders can exercise their religion).

[47] *See, e.g.*, William Drabble, Note and Comment, *Righteous Torts:* Pleasant Glade Assembly of God v. Schubert *and the Free Exercise Defense in Texas*, 62 BAYLOR L. REV. 267, 268 (2010) ("[T]he Free Exercise Clause generally should not act as a defense to tort liability."); Mark Sauter, Note, *The Devil Is in the Details: The Free Exercise Clause's Unwarranted and Unprecedented Protection of Religiously Motivated Assault and False Imprisonment*—Pleasant Glade Assembly of God v. Schubert, 78 U. CIN. L. REV. 805 (2009) (arguing the Texas Supreme Court failed to follow the Supreme Court of the United State's free exercise precedent).

[48] *See, e.g.*, Paul E. McGreal, *The Unpublished Free Exercise Opinion in* Jensen v. Quaring, 33 S. ILL. U. L.J. 1 (2008) (discussing an unpublished Supreme Court opinion regarding the constitutionality of laws requiring photo identification); Lauren N. Harris, Comment, *You Better Smile When You Say "Cheese!": Whether the Photograph Requirement for Drivers' Licenses Violates the Free Exercise Clause of the First Amendment*, 61 MERCER L. REV. 611 (2010) (discussing laws which require photo identification and the interaction with the Free Exercise Clause).

II. Strict Scrutiny and the Free Exercise Clause

A review of free exercise jurisprudence, particularly with regard to the imposition of strict scrutiny, reveals something startling. The Supreme Court has never said that the First Amendment requires the strict scrutiny standard in regard to neutral and generally applicable laws. It has said that the First Amendment requires a *compelling interest* to overcome a free exercise claim,[49] but the strict scrutiny standard requires quite a bit more than that. As found in the jurisprudence of due process and equal protection claims, strict scrutiny requires not only a compelling governmental interest, but also a finding that the law is narrowly tailored to achieve the result, and the law is the least restrictive means possible.[50] The Supreme Court has never said that a free exercise claim requires these last two findings.

It seems unclear how the strict scrutiny test's requirement of narrow tailoring would work with regard to a free exercise claim. Many free exercise claims come up in the context of a law of general applicability that is alleged to infringe on religious liberty, but such laws are by design not created to address religion at all. For example, in *Stormans, Inc. v. Selecky*,[51] a pharmacy and individual pharmacists brought a free exercise claim against the Washington State Board of Pharmacy. The Board's rule required pharmacies to deliver lawfully prescribed, Federal Drug Administration-approved medications and prohibited discrimination against patients. In *Quaring v. Peterson*,[52] a driver's license applicant brought a free exercise claim on the basis of a state law requiring a photograph for issuance of a driver's license. In neither these, nor many other cases, do the free exercise claims involve statutes or regulations that explicitly mention any religion. Should legislatures therefore include religious exemptions in all laws of general applicability, examining each law to determine how it might infringe on any one of thousands of religious practices, and review the purpose of the law to determine whether it is sufficiently compelling for the legislature to im-

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[49] *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963).

[50] *See* Fullilove v. Klutznick, 448 U.S. 448, 480 (1980); Procunier v. Martinez, 416 U.S. 396, 413-14 (1974).

[51] Stormans, Inc. v. Selecky, 571 F.3d 960 (9th Cir. 2009).

[52] Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984).

pose on those religions? Trying to do so, however, would clearly violate the Establishment Clause.[53]

In fact, the Supreme Court has never imposed the full strict scrutiny standard on free exercise claims. To the extent the RFRA imposes such a standard on federal law, it is often ignored as a practical matter. The only cases to which the Supreme Court has applied the full strict scrutiny test are those that are not neutral and generally applicable.[54]

Because the doctrine is so convoluted and unclear, there are lower federal courts that have said in dicta, incorrectly in my opinion, that even neutral and generally applicable state laws must be determined under the full strict scrutiny test.[55] However, when examined closely, the citations employed to back up this supposed doctrine do not support it.[56]

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[53] *See, e.g.*, Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710-11 (1985) (holding statutes that allow workers to not work on their Sabbath day violate the Establishment Clause).

[54] *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-32 (1993) ("Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.").

[55] *See, e.g.*, St. John's United Church of Christ v. City of Chi., 502 F.3d 616, 644 (7th Cir. 2007) (Ripple, J., concurring in part and dissenting in part) ("Second, a facially-neutral law that 'imposes a substantial burden on religion' offends the Free Exercise Clause and likewise is subject to strict scrutiny." (quoting Vision Church v. Vill. of Long Grove, 468 F.3d 975, 996 (7th Cir. 2006))).

[56] In *St. John's*, for example, Judge Ripple, in his concurring in part and dissenting in part opinion, stated that facially neutral laws are subject to strict scrutiny under the Free Exercise Clause, and he cited to another opinion that does not, in fact, say that. *Id.* at 644. He cited to *Vision Church v. Village of Long Grove*, which stated, "'[A] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion,' in which case there must be 'a compelling governmental interest justif[ying] the burden.'" Vision Church v. Vill. of Long Grove, 468 F.3d 975, 996 (7th Cir. 2006) (quoting Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 384-85 (1990)). There is no mention of either the narrow tailoring or least restrictive means parts of the strict scrutiny test. *See St. John's United Church of Christ*, 502 F.3d at 616; *Vision Church*, 468 F.3d at 975. Additionally, *Jimmy*

Since the types of employment laws addressed in this Article are neutral and generally applicable, courts would not apply the full strict scrutiny test as to the Free Exercise Clause. This means the Free Exercise Clause would not require employment nondiscrimination laws to be subject to strict scrutiny.

III. The Free Exercise Clause and the Compelling Interest Standard—Not Strict Scrutiny

A major turning point in the history of the Free Exercise Clause was the 1963 decision in *Sherbert v. Verner*.[57] The Supreme Court held that a free exercise claim would be subject to a compelling interest standard.[58] In addition, it rejected the idea that the Free Exercise Clause protected only beliefs, and not actions.[59] The case involved an employer who dismissed an employee for not being able to work on the Sabbath.[60] The South Carolina Employment Security Commission then denied the employee's benefits because of her *willful* (i.e., self-imposed) termination.[61]

In *Sherbert*, the Supreme Court held the State would need to show a "compelling state interest" in order to support its scheme, and the State failed to meet this standard.[62] The Court did not mention narrow tailoring or least restrictive means, but instead stated:

> We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "(o)nly the gravest abuses, en-

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Swaggart Ministries nowhere mentions narrow tailoring or least restrictive means. *See Jimmy Swaggart Ministries*, 493 U.S. 378.

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

58 *Id.* at 406.

59 *Id.* at 402-03.

60 *Id.* at 399.

61 *Id.* at 401.

62 *Id.* at 406-07.

> dangering paramount interest, give occasion for permissible limitation[.]"[63]

Interestingly, in support of its proposition that the State would need to show a "compelling state interest," the Court cited to a free speech case, *Thomas v. Collins*,[64] which did not mention "compelling state interest."[65] Instead, *Thomas* refers to overriding public interest and clear and present danger.[66] *Thomas* involved a Texas statute that prohibited union organizers from asking workers to join a union unless they obeyed onerous filing provisions and carried an organizer's card issued by the Secretary of State.[67] The *Thomas* Court stated the legal standard for judging such a law is as follows: "For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger."[68]

Obviously, the *Sherbert* Court was not suggesting that all laws infringing on religion need to present a clear and present danger as in *Thomas*, but that the government interest in infringement must meet a heightened standard in such cases.[69] However, there is no discussion in *Sherbert* of narrow tailoring or least restrictive means.

The 1972 case of *Wisconsin v. Yoder* confirmed the *Sherbert* doctrine and declared that even the State's interest in education could not overcome the respondents' free exercise claims.[70] In that case, a group of Amish citizens, who preferred to educate their children at home after the eighth grade, appealed their convictions on the grounds that Wisconsin's compulsory school attendance law was unconstitutional as applied to them.[71] In regard to the State's interest in education, the Court recognized the interest as a strong one and acknowledged:

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63 *Id.* at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

64 *Thomas*, 323 U.S. 516.

65 *Sherbert*, 374 U.S. at 406.

66 *Thomas*, 323 U.S. at 530.

67 *Id.* at 518-19.

68 *Id.* at 530.

69 *See Sherbert*, 374 U.S. at 403, 406.

70 Wisconsin v. Yoder, 406 U.S. 205, 234 (1972).

71 *Id.* at 207.

> The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. We can accept it as settled, therefore, that, however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests.[72]

Thus, while the State's interest in education was acknowledged to be *strong*, it was not considered *absolute*.[73] The Court mentioned that the State claimed its interest to be *compelling*,[74] but noted:

> It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith.[75]

There was, as in *Sherbert*, no mention of narrow tailoring or least restrictive means.

Less than ten years after *Yoder*, the Court addressed a slightly different type of case in *Thomas v. Review Board*.[76] There, Thomas, a Jehovah's Witness, was transferred to a department that fabricated turrets for military tanks.[77] He quit, asserting that his religious beliefs prevented him from participating in the production of weapons, and he was denied unemployment compensation benefits.[78] The Supreme Court held that the State's denial of unemployment compensation benefits violated his First Amendment right to free exercise.[79] The Court specifi-

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[72] *Id.* at 215.
[73] *Id.*
[74] *Id.* at 221.
[75] *Id.* at 222.
[76] Thomas v. Review Bd., 450 U.S. 707, 709 (1981).
[77] *Id.*
[78] *Id.*
[79] *Id.* at 720.

cally overturned the Indiana Supreme Court's grounds for ruling against Thomas.[80] The Indiana Supreme Court noted Thomas was unable to *articulate* his belief precisely, and another Jehovah's Witness, with whom Thomas had consulted, had no scruples about working on tank turrets.[81] The Supreme Court of the United States held:

> [T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. . . . The narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that petitioner terminated his work because . . . such work was forbidden by his religion.[82]

The reviewing court is not permitted to inquire into the clarity, correctness, or prevalence of the belief.[83] It is enough that the claimant holds such a belief.[84]

Again confirming that the voluntary nature of the act does not remove it from protection, the Supreme Court said "a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program."[85] While the unemployment compensation law does not compel a violation of conscience, the State may not condition laws to put substantial pressure on an adherent to modify his or her behavior in violation of his or her beliefs.[86]

The Supreme Court again found the State's interest in burdening religion was not compelling:

> There is no evidence in the record to indicate that the number of people who find themselves in the predicament of choosing between benefits and religious beliefs is large enough to create "widespread unemployment,"

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80 *Id.* at 715-16.
81 *Id.* at 715.
82 *Id.* at 715-16.
83 *Id.* at 714.
84 *Id.*
85 *Id.* at 716.
86 *Id.* at 717-18.

> or even to seriously affect unemployment-and no such claim was advanced by the Review Board. Similarly, although detailed inquiry by employers into applicants' religious beliefs is undesirable, there is no evidence in the record to indicate that such inquiries will occur in Indiana, or that they have occurred in any of the states that extend benefits to people in the petitioner's position. Nor is there any reason to believe that the number of people terminating employment for religious reasons will be so great as to motivate employers to make such inquiries.
>
> Neither of the interests advanced is sufficiently compelling to justify the burden upon Thomas' religious liberty.[87]

Since the Supreme Court found the State's interest was not compelling, it ruled for Thomas.[88] The *Thomas* opinion does mention, in dicta, that a least restrictive means test would be appropriate:

> The mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted. The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. However, it is still true that "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion."[89]

Because this reference to "least restrictive means" is found in dicta, it is not part of the law of the case. Pertinent too, is the fact that no Supreme Court majority opinion has ever put such a principle in operation, nor cited to it—except once, five years later, in *Bowen v. Roy*.[90]

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[87] *Id.* at 719.

[88] *Id.*

[89] *Id.* at 718 (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).

[90] Bowen v. Roy, 476 U.S. 693, 707 (1986).

In *Bowen*, the parents of a Native American child "contended that obtaining a Social Security number for their 2-year-old daughter . . . would violate their Native American religious beliefs."[91] A statute required any person seeking benefits under the federal food stamp and Aid to Families with Dependent Children programs to provide their social security number to the state welfare agency.[92] In holding the statutory requirement did not violate the Free Exercise Clause, the Supreme Court noted, "Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family."[93] The Court referenced the "least restrictive means" concept, saying it was *not* an appropriate test: "The Government should not be put to the strict test applied by the District Court; that standard required the Government to justify enforcement of the use of Social Security number requirement as the least restrictive means of accomplishing a compelling state interest."[94]

Interestingly, the Supreme Court clearly explained in a footnote to this passage why the full strict scrutiny test as applied by the district court to a generally applicable law was inappropriate:

> It is readily apparent that virtually *every* action that the Government takes, no matter how innocuous it might appear, is potentially susceptible to a Free Exercise objection. For example, someone might raise a religious objection, based on Norse mythology, to filing a tax return on a Wednesday (Woden's day). Accordingly, if the dissent's interpretation of the Free Exercise Clause is to be taken seriously, then the Government will be unable to enforce any generally applicable rule unless it can satisfy a federal court that it has a "compelling government interest." While libertarians and anarchists will no doubt applaud this result, it is hard to imagine that this is what the Framers intended.[95]

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[91] *Id.* at 695.

[92] *Id.*

[93] *Id.* at 699.

[94] *Id.* at 707.

[95] *Id.* at 707 n.17.

The "least restrictive means" concept was never again mentioned by the Supreme Court in enforcing a free exercise claim as against a neutral and generally applicable law.

A year after *Thomas*, the Supreme Court again held against a free exercise claim, citing the importance of not undermining the federal social security system.[96] In *United States v. Lee*, a member of the Old Order Amish failed to withhold social security taxes for his employees.[97] In fact, the Internal Revenue Code exempted payment of social security taxes by self-employed Amish.[98] Even though self-employed Amish were not obligated to pay social security taxes, "[t]he Amish believe that there is a religiously based obligation to provide for their fellow members the kind of assistance contemplated by the social security system."[99] There was, however, no exemption for Amish employers of Amish employees.[100]

The Supreme Court accepted as true the petitioner's contention that the social security system violated the Amish faith, refusing to consider the government's argument that supporting its own members was not mutually exclusive to paying into the federal social security system.[101] As in *Thomas*, the clarity, correctness, or prevalence of the belief could not be reviewed by a court.[102] Unlike *Thomas*, however, the Court held that the federal government's interest in collecting social security taxes was *overriding*.[103] What made this claim *overriding*, unlike Indiana's interest in its unemployment system and Wisconsin's interest in its educational system, was the fact that it was a large federal program.[104]

> Because the social security system is nationwide, the governmental interest is apparent. The social secur-

96 United States v. Lee, 455 U.S. 252, 259-60 (1982).
97 *Id.* at 254.
98 *Id.* at 255.
99 *Id.* at 257.
100 *Id.* at 256.
101 *Id.* at 257.
102 *Id.*; *see also* Thomas v. Review Bd., 450 U.S. 707, 716 (1981) ("Courts are not arbiters of scriptural interpretation.").
103 *Lee*, 455 U.S. at 257-58.
104 *Id.* at 258.

> ity system in the United States serves the public interest by providing a comprehensive insurance system with a variety of benefits available to all participants, with costs shared by employers and employees. The social security system is by far the largest domestic governmental program in the United States today, distributing approximately $11 billion monthly to 36 million Americans. The design of the system requires support by mandatory contributions from covered employers and employees. This mandatory participation is indispensable to the fiscal vitality of the social security system. "[W]idespread individual voluntary coverage under social security . . . would undermine the soundness of the social security program." Moreover, a comprehensive national social security system providing for voluntary participation would be almost a contradiction in terms and difficult, if not impossible, to administer. Thus, the Government's interest in assuring mandatory and continuous participation in and contribution to the social security system is very high.[105]

It is interesting that the *Lee* opinion never referred to a *compelling* interest; instead, the opinion referred to a *very high* interest.[106] In its citation of cases to justify this conclusion, the Court went back to its pre-*Sherbert* jurisprudence, where no balancing of interests test was employed.[107] The *Lee* Court cited *Braunfeld v. Brown*, a case from more than twenty years earlier, in which the Court found that Saturday Sabbath observers—in that case, Orthodox Jews rather than Jehovah's Witnesses—had no claim as against a law that prohibited opening businesses and working on Sundays.[108]

> To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that

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105 *Id.* at 258-59 (footnotes and citation omitted) (quoting S. REP. NO. 89-404, pt. 1, at 116 (1965)).

106 *Id.*

107 *Id.* at 259-60 (citing *Braunfeld v. Brown*, 366 U.S. 599 (1961), a pre-*Sherbert* case, in support of its holding).

108 Braunfeld, 366 U.S. at 599.

> some religious practices yield to the common good. Religious beliefs can be accommodated, but there is a point at which accommodation would "radically restrict the operating latitude of the legislature."[109]

Yes, that is true—accommodation of all religious faiths could restrict the operating latitude of the legislature. But, was the restriction in *Lee* any more *radical* than those imposed on the Wisconsin legislature in *Yoder*, or the Indiana and South Carolina legislatures in *Sherbert* and *Thomas*? The *Lee* Court held, indeed, the restriction was more radical. The reason appears to be a practical one. *Yoder*, *Sherbert*, and *Thomas* allowed relatively few Amish youngsters to skip high school, gave unemployment benefits to Saturday Sabbath observers in the few jurisdictions with all employers requiring Saturday work, and gave unemployment compensation benefits to religious war objectors in the few jurisdictions with only defense plant work.[110] These few exceptions were not going to subvert the national system, as much as they might cause some headaches to state administrators. But, to allow people to skip out on tax payments based on religious beliefs, so long as they are sincerely held, would clearly subvert the national system. This system was held to be more important to the Court than the state systems affected in *Sherbert* and *Yoder*.

> Unlike the situation presented in *Wisconsin v. Yoder*, it would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs. The obligation to pay the social security tax initially is not fundamentally different from the obligation to pay income taxes; the difference-in theory at least-is that the social security tax revenues are segregated for use only in furtherance of the statutory program. There is no principled way, however, for purposes of this case, to distinguish between general taxes and those imposed under the Social Security Act. If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related

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109 *Lee*, 455 U.S. at 259 (citations omitted).

110 *See supra* notes 57-89 and accompanying text.

> activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief. Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.[111]

The Court probably could have distinguished the social security payments, which are more of an insurance scheme designed to provide specific kinds of benefits,[112] from general tax assessments, but I can understand the concern that led it not to. Social security withholding payments are not insubstantial, as are several other similar types of social insurance under our system of laws, such as disability insurance taxes and unemployment taxes.[113] Had the Court decided differently, I believe it would be likely to have seen a number of churches spring up with a reinterpretation of "render therefore unto Caesar."[114] My supposition is the reinterpretation would be favorable neither to Caesar nor to the U.S. government. The Court chose to keep the social security system and the federal tax system intact and call it a *very high* interest.

Is a generally applicable law regarding workplace nondiscrimination similar to a comprehensive system of taxation and social security payments? The following passage from *Lee* seems to suggest that there is a valid comparison.

> When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept

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111 *Lee*, 455 U.S. at 259-60 (citations omitted).

112 *Cf.* Memorandum from John J. Corson, Dir., Bureau of Old-Age and Survivors Ins., to personnel of the Bureau of Old-Age and Survivors Insurance (Jan. 10, 1940), *available at* http://www.socialsecurity.gov/history/reports/1939no3.html (referring to social security as social insurance).

113 *See id.* (explaining the types of social insurance available).

114 *Cf. Matthew* 22:21 (King James). "Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's." *Id.* This statement by Jesus was in response to a question of whether it was lawful for Jews to pay taxes to Caesar. *See Matthew* 22:17 (King James).

> 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. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees. Congress drew a line in § 1402(g), exempting the self-employed Amish but not all persons working for an Amish employer. The tax imposed on employers to support the social security system must be uniformly applicable to all, except as Congress provides explicitly otherwise.[115]

While I am not currently aware of religions that discriminate based on race or ethnic origin, those types of religions certainly would be possible, given that the courts would not be permitted to inquire into the clarity, correctness, or prevalence of the beliefs.[116] New religions might spring up with all sorts of restrictions on employment, and the only question the court would be permitted to ask is whether the belief held is sincere.[117]

IV. The *Smith* Doctrine: Neutral, Generally Applicable Laws are not Subject to the Free Exercise Clause

After the 1990 case of *Employment Division v. Smith*, it is impossible to claim that under the Free Exercise Clause the government needs a compelling interest—or any interest at all—in order to fight off a free exercise claim concerning a neutral and generally applicable law.[118] In *Smith*, a private employer fired two employees for ingesting peyote, a criminal offense in Oregon, as part of a ceremony at a Native American church of which they were members.[119] The State denied the employees unemployment benefits pursuant to work-related misconduct.[120] The Supreme Court of the United States upheld the denial of

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115 *Lee*, 455 U.S. at 261.

116 *See* Thomas v. Review Bd., 450 U.S. 707, 715 (1981).

117 *See id.* at 716. It is not too hard to think of a few, such as The Church of the Super-Competent Employee, or a church that prohibits employment of those who take too many personal days, join unions, or file lawsuits against their employers.

118 Emp't Div. v. Smith, 494 U.S. 872, 885-86 (1990).

119 *Id.* at 874.

120 *Id.*

the unemployment compensation claim on the grounds that religiously motivated actions do not receive Free Exercise Clause protection when they violate a neutral and generally applicable statute, such as the drug laws of Oregon.[121]

In *Smith*, the asserted government interest was in the prohibition of criminal acts.[122] But, the *Smith* opinion never discussed whether that interest was *compelling*.[123] Instead, the Court dismissed the use of a balancing test that required a compelling government interest for fear of creating a "private right to ignore generally applicable laws."[124] Reviewing the case law, the Court cabined its prior free exercise decisions by stating, "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[125] Thus, under *Smith*, in regard to a generally applicable law, a discussion of the nature of the government interests, and whether they are compelling or not, is not in order.[126] Justice Antonin Scalia referred to Justice John Paul Stevens's rearticulation and expansion of the case law in his concurring opinion in *Lee*, wherein Justice Stevens stated:

> Today's holding is limited to a claim to a tax exemption. I believe, however, that a standard that places an almost insurmountable burden on any individual who objects to a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes) better explains most of this Court's holdings than does the standard articulated by the Court today.[127]

Justice Stevens's explanation cited to pre-*Sherbert* law, with one exception. He cited to the 1971 decision in *Gillette v. United States*, which upheld the military selective service system as against free exercise challenges by conscientious objectors whose claims were denied

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121 *Id.* at 890.
122 *Id.* at 878-79.
123 *Id.* at 885.
124 *Id.* at 886.
125 *Id.* at 878-79.
126 *Id.* at 885-86.
127 United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring).

because they objected only to the Vietnam War as unjust, whereas the selective service law made exception only for those who objected to all wars.[128] Interestingly, *Gillette* completely omitted the *Sherbert compelling interest* test, instead suggesting that *Sherbert* stands for the proposition that "even as to neutral prohibitory or regulatory laws having secular aims, the Free Exercise Clause may condemn certain applications clashing with imperatives of religion and conscience, when the burden on First Amendment values is not justifiable in terms of the Government's valid aims."[129] Thus, the majority opinion in *Smith* clearly provided a new direction for free exercise claims involving neutral and generally applicable laws. The majority opinion more precisely explained its interpretation of prior case law, noting the *Sherbert* standard was more often honored in the breach:

> Although we have sometimes purported to apply the *Sherbert* test in contexts other than that, we have always found the test satisfied. In recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all. In *Bowen v. Roy*, we declined to apply *Sherbert* analysis to a federal statutory scheme that required benefit applicants and recipients to provide their Social Security numbers. The plaintiffs in that case asserted that it would violate their religious beliefs to obtain and provide a Social Security number for their daughter. We held the statute's application to the plaintiffs valid regardless of whether it was necessary to effectuate a compelling interest. In *Lyng v. Northwest Indian Cemetery Protective Assn.*, we declined to apply *Sherbert* analysis to the Government's logging and road construction activities on lands used for religious purposes by several Native American Tribes, even though it was undisputed that the activities "could have devastating effects on traditional Indian religious practices[.]" In *Goldman v. Weinberger*, we rejected application of the *Sherbert* test to military dress regulations that forbade the wearing of yarmulkes. In *O'Lone v. Estate of Shabazz*, we sustained, without mentioning the

[128] *Id.*; Gillette v. United States, 401 U.S. 437, 443 (1971).
[129] *Gillette*, 401 U.S. at 462.

> *Sherbert* test, a prison's refusal to excuse inmates from work requirements to attend worship services.[130]

Justice Scalia specifically rebutted Justice Sandra Day O'Connor's attempt to argue that *Smith* is a departure from the doctrine found in case law involving discrimination:

> Justice O'Connor suggests that . . . "the First Amendment unequivocally makes freedom of religion, like freedom from race discrimination and freedom of speech, a 'constitutional nor[m],' not an 'anomaly.'" But this comparison with other fields supports, rather than undermines, the conclusion we draw today. Just as we subject to the most exacting scrutiny laws that make classifications based on race, or on the content of speech, so too we strictly scrutinize governmental classifications based on religion. But we have held that race-neutral laws that have the *effect* of disproportionately disadvantaging a particular racial group do not thereby become subject to compelling-interest analysis under the Equal Protection Clause; and we have held that generally applicable laws unconcerned with regulating speech that have the *effect* of interfering with speech do not thereby become subject to compelling-interest analysis under the First Amendment. Our conclusion that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest is the only approach compatible with these precedents.[131]

Thus, the Supreme Court held that a free exercise claim may not be brought based on a neutral, generally applicable law.[132]

There is a passage in *Smith* that suggested that a free exercise claim against a neutral, generally applicable law could be successful if it involved another constitutional protection:

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[130] *Smith*, 494 U.S. at 883-84 (citations omitted).

[131] *Id.* at 886 n.3 (citations omitted).

[132] *Id.* at 890.

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the right of parents, acknowledged in *Pierce v. Society of Sisters*, to direct the education of their children.[133]

This passage did not specify exactly what would constitute such a *hybrid* claim. The rights specifically mentioned in the passage were freedom of speech, freedom of the press, and "the right of parents . . . to direct the education of their children."[134] A few sentences later, the opinion also mentioned freedom of association as a right that could be buttressed by a free exercise claim.[135] What other types of constitutional claims, if any, would constitute such a *hybrid* claim? It would not appear very difficult for a claimant to invoke another constitutional right in the context of an employment nondiscrimination suit, such as the Fifth Amendment Takings Clause,[136] the Due Process Clause,[137] or the Equal Protection Clause.[138] The Supreme Court has not resolved these questions. The hybrid rights doctrine has frequently been criticized as illogical and untenable by commentators and lower courts, although a few have embraced the idea.[139]

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[133] *Id.* at 881 (citations omitted).

[134] *Id.*

[135] *Id.* at 882.

[136] U.S. CONST. amend. V.

[137] U.S. CONST. amend. XIV, § 1.

[138] *Id.*

[139] Robin Cheryl Miller, Annotation, *What constitutes "hybrid rights" claim under* Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876*, 163 A.L.R. FED. 493, § 3 (2000); *see also* Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception,"* 108 PENN ST. L. REV. 573, 587-88, 602 (2003); Ryan M. Akers, *Begging the High Court for Clarification: Hybrid Rights Under* Employment Division v. Smith, 17 REGENT U. L. REV. 77 *passim* (2004-2005); Roy Whitehead, Jr., Walter Block & Patrick C. Tinsley, *Christian Landlords and the Free Exercise Clause: An Economic and Philosophical Analysis of Discrimination*, 33 OKLA. CITY U. L. REV. 115, 122-24, 127, 130 (2008); James R. Mason, III, Comment, Smith's *Free-Exercise "Hybrids" Rooted in Non-Free-Exercise Soil*, 6 REGENT U. L. REV. 201, 204 (1995); Timothy J. Santoli, Note, *A*

In response, Congress passed the RFRA in 1993.[140] The RFRA prohibits federal and state governments from substantially burdening a person's exercise of religion, even if the burden results from a rule of general applicability, unless the government can demonstrate the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that . . . interest."[141] It rested its authority over the states on the Fourteenth Amendment, which prohibits the states from denying life, liberty, or property to U.S. citizens.[142]

The Court's next chance to interpret the Free Exercise Clause came that same year, when in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* the Court reaffirmed *Sherbert's compelling interest* test, where a statute is not neutral and generally applicable.[143] In *Church of Lukumi Babalu Aye*, after a Santeria church leased land in the city and announced plans to establish a house of worship and other facilities there, the city council held an emergency public session and passed enactments designed to single out the Santeria practice of animal sacrifice as one of its principal forms of devotion.[144] The animals were killed by cutting their carotid arteries and were cooked and eaten.[145] These resolutions included Ordinance 87-52, which defined *sacrifice* as

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Decade After Employment Division v. Smith*: Examining how Courts are Still Grappling with the Hybrid-Rights Exception to the Free Exercise Clause of the First Amendment*, 34 SUFFOLK U. L. REV. 649 *passim* (2001); Peter M. Stein, Case Note, *Smith v. Fair Employment and Housing Commission: Does the Right to Exclude, Combined with Religious Freedom, Present a "Hybrid Situation" Under* Employment Division v. Smith*?*, 4 GEO. MASON L. REV. 141, 172 (1995); Kyle Still, Comment, Smith's *Hybrid Rights Doctrine and the* Pierce *Right: An Unintelligent Design*, 85 N.C. L. REV. 385, 409-10, 412 (2006); John L. Tuttle, Note, *Adding Color: An Argument for the Colorable Showing Approach to Hybrid Rights Claims Under* Employment Division v. Smith, 3 AVE MARIA L. REV. 741 *passim* (2005).

140 42 U.S.C. §§ 2000bb to 2000bb-4 (2006).

141 *Id*. § 2000bb-1(b).

142 U.S. CONST. amend. XIV, § 1.

143 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993). The RFRA was not involved because it was passed after *Church of the Lukumi Babalu Aye, Inc*. For a review of these temporal aspects, compare *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. 520, 520 (1993) (decided on June 11, 1993), with Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (passed on Nov. 16, 1993).

144 *Church of the Lukumi Babalu Aye*, 508 U.S. at 525-27.

145 *Id.* at 525.

"to unnecessarily kill . . . an animal in a . . . ritual . . . not for the primary purpose of food consumption,"[146] and prohibited the "possess[ion], sacrifice, or slaughter" of an animal if it is killed in "any type of ritual" and there is an intent to use it for food, but exempted "any licensed [food] establishment" if the killing is otherwise permitted by law.[147] The specific ordinances enacted were: Ordinance 87-71, which prohibits the sacrifice of animals, and defines *sacrifice* in the same manner as Ordinance 87-52; and Ordinance 87-72, which defines *slaughter* as "the killing of animals for food" and prohibits slaughter outside of areas zoned for slaughterhouses, but includes an exemption for "small numbers of hogs and/or cattle" when exempted by state law.[148] While the ordinances did not mention Santeria by name, the Court noted the record showed that "suppression of the central element of the Santeria worship service was the object of the ordinances."[149] The Court reaffirmed the viability of *Smith*,[150] and it also reaffirmed the *Sherbert* compelling interest test where a law is not neutral or generally applicable.[151]

As much as Congress disapproved of the *Smith* doctrine, the Supreme Court disapproved of the RFRA. In 1997, the Court declared the RFRA unconstitutional as applied to state law in *City of Boerne v. Flores*.[152] In *City of Boerne*, the Catholic Archbishop of San Antonio applied for a building permit to enlarge a church in Boerne, Texas.[153] Local zoning authorities denied the permit, relying on an ordinance governing historic preservation.[154] The Court noted that Congress relied on the Fourteenth Amendment, and said that its power *to enforce* is only preventive or *remedial*.[155] Finding the RFRA altered the Free Exercise Clause's meaning, the Court held the RFRA could not enforce the Free Exercise Clause.[156] The Court held there must be a congruence

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146 *Id.* at 527.
147 *Id.* at 536.
148 *Id.* at 528.
149 *Id.* at 534.
150 *Id.* at 531-32.
151 *Id.*
152 City of Boerne v. Flores, 521 U.S. 507, 536 (1997).
153 *Id.* at 511-12.
154 *Id.* at 512.
155 *Id.* at 519.
156 *Id.*

and proportionality between the injury to be prevented or remedied, and the means adopted.[157]

The Court held the RFRA was not a proper exercise of Congress's enforcement power, because the RFRA's legislative record lacked examples of any instances of generally applicable laws passed in response to religious bigotry in the past forty years.[158] Rather, the emphasis of the RFRA was on laws that place incidental burdens on religion.[159] It appeared to attempt a substantive change in constitutional protections, proscribing state conduct that the Fourteenth Amendment itself does not prohibit.[160] The Court also objected to its sweeping coverage. The Court said that the RFRA ensured intrusion at every level of government, displacing laws and prohibiting official actions, noting that such claims would be difficult to contest.[161]

Most significantly, for our purposes, the Court explicitly noted the "least restrictive means" requirement was not used in the pre-*Smith* jurisprudence and had no place in free exercise claims.[162] "In addition, the Act imposes in every case a least restrictive means requirement—a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify—which also indicates that the legislation is broader than is appropriate if the goal is to prevent and remedy constitutional violations."[163] This statement makes it abundantly clear that free exercise claims against neutral and generally applicable laws are never to be judged under a traditional strict scrutiny test.[164] When a free exercise claim properly invokes the *Sherbert* test, the court must look to see if there is a compelling governmental interest.[165] There is no requirement the law be narrowly tailored to meet those objectives using the least restrictive means possible.[166]

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157 *Id.* at 520.

158 *Id.* at 530.

159 *See id.* at 534.

160 *See id.* at 519-20.

161 *Id.* at 534.

162 *Id.* at 535.

163 *Id.*

164 *See id.*

165 *Id.* at 515.

166 *See id.*

Almost ten years later, the Court finally had a case in which it was required to apply the RFRA.[167] Although consideration of the RFRA's application is outside the scope of this Article, it is useful to see how differently the RFRA operates from the principles enunciated in *Smith*. The case of *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* (UDV) involved members of a church who received communion by drinking *hoasca*, a tea brewed from plants unique to the Amazon Rainforest that contains DMT, a hallucinogen regulated under Schedule I of the Controlled Substances Act.[168] After U.S. Customs Inspectors seized a *hoasca* shipment to the UDV and threatened prosecution, the UDV filed a suit alleging that applying the Controlled Substances Act to the UDV's sacramental *hoasca* use violated the RFRA.[169] The Supreme Court agreed with the UDV.[170]

Following the RFRA, the Court held, unlike in *Smith*, that exceptions are required under the RFRA even to valid and neutral laws of general applicability.[171] The federal government itself attempted desperately to get around the RFRA, pointing to the Controlled Substances Act's description of Schedule I substances as having "a high potential for abuse," "no currently accepted medical use" in treatment in the United States, and "a lack of accepted safety for use . . . under medical supervision."[172] The government argued there would be no way to cabin religious exceptions once recognized.[173] But, the Court shunted aside the government's argument.[174]

The Court said that the RFRA, and the strict scrutiny test it adopted, constituted a rejection of the categorical approach under *Smith*.[175] The Court pointed to the provisions for exception within the Controlled Substances Act itself, suggesting that these vitiated the argument that no individualized assessments or exceptions could be made.[176]

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167 Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).
168 *Id.* at 425.
169 *Id.* at 425-26.
170 *Id.* at 439.
171 *Id.* at 434.
172 *Id.* at 433.
173 *Id.* at 433-34.
174 *Id.*
175 *Id.* at 424-26.
176 *Id.* at 433-34.

The Act contained a provision authorizing the Attorney General to "waive the requirement for registration of certain manufacturers, distributors, or dispensers if he finds it consistent with the public health and safety."[177] The Act also specifically noted that exempting certain people from its requirements would be "consistent with the public health and safety."[178] In addition, there was a regulatory exemption for use of peyote—also a Schedule I substance—by the Native American Church,[179] which Congress had extended to all members of every recognized Indian Tribe.[180] Lastly, the Court appeared to tweak Congress's nose a bit, by adverting very obliquely to the irony that Congress's rejection of *Smith* has resulted unexpectedly in holes in the congressional drug laws.[181]

> The Government repeatedly invokes Congress' findings and purposes underlying the Controlled Substances Act, but Congress had a reason for enacting RFRA, too. Congress recognized that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise," and legislated "the compelling interest test" as the means for the courts to "strik[e] sensible balances between religious liberty and competing prior governmental interests."
>
> We have no cause to pretend that the task assigned by Congress to the courts under RFRA is an easy one. Indeed, the very sort of difficulties highlighted by the Government here were cited by this Court in deciding that the approach later mandated by Congress under RFRA was not required as a matter of constitutional law under the *Free Exercise Clause*. But Congress has determined that courts should strike sensible balances, pursuant to a compelling interest test that requires the Government to address the particular practice at issue. Applying that test, we conclude that the courts below did

177 21 U.S.C. § 822(d) (2006).
178 *Gonzales*, 546 U.S. at 432.
179 21 C.F.R. § 1307.31 (2005).
180 42 U.S.C. § 1996a(b)(1) (2006).
181 *Gonzales*, 546 U.S. at 439.

> not err in determining that the Government failed to demonstrate, at the preliminary injunction stage, a compelling interest in barring the UDV's sacramental use of *hoasca*.[182]

It may be that, in time, Congress will come to agree with the Court that permitting exceptions in neutral and generally applicable laws is difficult to apply and, perhaps, even unworkable.

V. CONCLUSION

As this review of the precedent shows, a claim based on the Free Exercise Clause for an exception to a neutral and generally applicable law, such as a law prohibiting employment discrimination, will not lie. Laws which single out religious beliefs or religious practices will be judged, pursuant to a free exercise claim, under a *compelling interest* standard of review, but will not be reviewed for the narrowness of the remedy, or whether it is the least restrictive means possible. While the RFRA attempts to subject all laws that infringe religious practices, even laws of general applicability, to a full strict scrutiny review, this is separate from a Free Exercise Clause defense and should be judged under different standards. Furthermore, the Supreme Court has declared the RFRA unconstitutional as applied to state and local governments, and thus, the RFRA would be inapplicable to a suit claiming the unconstitutionality of an antidiscrimination statute applicable to state and local governments.

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[182] *Id.* (quoting 42 U.S.C. § 2000bb(a)(2), (5) (2006)).