CONTEXTUALIZING THE FREE EXERCISE OF RELIGION

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Abstract

The level of protection afforded to an individual's First Amendment right to freely exercise religion should depend upon the context within which it is exercised. Put differently, an individual's right to religious liberty should be balanced against other individuals' right to equal protection of the law, and the broader societal interest in protecting individuals from invidious discrimination. This Article proposes a multi-factor test that fully protects the right to freely exercise one's religion while simultaneously safeguarding equal protection and anti-discrimination guarantees. Specifically, the level of protection afforded to a free exercise claim should depend, among other things, on whether it occurs in the private or public sphere (e.g., in a house of worship or a business that provides goods or services to the general public), whether an individual asserting such a claim is acting on behalf of a governmental entity, and whether the protection of religious freedom would infringe on equal protection and anti-discrimination principles. Such a test is consistent with the text and original purpose underlying the Free Exercise Cause and with the guarantee of equal protection and liberty for all citizens.

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INTRODUCTION

"*[T]he character of every act depends upon the circumstances in which it is done*."[1]

1. Schenck v. United States, 249 U.S. 47, 52 (1919) (emphasis added) (citing Aikens v. Wisconsin, 195 U.S. 194 (1904)).

When Kim Davis defied the U.S. Supreme Court's ruling in *Obergefell v. Hodges*[2] and refused to issue marriage licenses to same-sex couples, some claimed that Davis's brief stint in a Kentucky jail after defying a district court's order to issue such licenses trampled on religious liberty.[3] After her release, Davis stood outside of a Kentucky courthouse with her arms raised toward the sky, brimming with the type of jubilation that typically occurs when some flamboyant televangelist miraculously "cures" a wheelchair-bound audience member simply by touching the person's forehead.[4] Some onlookers cheered for Davis, who claimed that she was acting "[u]nder God's authority."[5]

Not long before the Kim Davis fiasco, another bizarre episode occurred in neighboring and ultra-right-wing Indiana, which at the time was rightfully the laughingstock of the country after enacting a religious freedom law that was little more than a veiled license to discriminate against same-sex couples.[6] Indiana's "uncommonly silly"[7] law caused three states to *ban* state-funded travel to the state of Indiana, making Indiana appear to some outsiders as the West's version of ISIS.[8] Months after that debacle, the owners of an Indiana bakery, Melissa and Aaron

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2. 135 S. Ct. 2584 (2015).

3. *See, e.g.*, Ryan T. Anderson, *We Don't Need Kim Davis to Be in Jail*, N.Y. TIMES (Sept. 7, 2015), http://www.nytimes.com/2015/09/07/opinion/we-dont-need-kim-davis-to-be-in-jail.html?action=click&pgtype=Homepage&module=opinion-c-col-right-region&region= opinion-c-col-right-region&WT.nav=opinion-c-col-right-region&_r=1; Greg Botelho & Dominique Debucquoy-Dodley, *Kim Davis' Lawyers File New Appeal over Same-Sex Marriage License Order*, CNN (Nov. 4, 2015, 2:51 PM), http://www.cnn.com/2015/11/04/us/kim-davis-kentucky-appeal/ ("While Davis is lampooned by critics calling her a hypocrite who doesn't respect U.S. law, many supporters praise her for standing up to the courts and the powers-that-be.").

4. Amanda Terkel, *Kim Davis Released from Jail Before Defiant Crowd*, HUFFINGTON POST (Sept. 8, 2015, 3:28 PM), http://www.huffingtonpost.com/entry/kim-davis-jail-huckabee_us_55ef258be4b093be51bc5dcc.

5. Jack Jenkins, *The Religious Beliefs of Kim Davis, The Anti-Gay Clerk Who Refuses to Do Her Job, Explained*, THINKPROGRESS (Sept. 2, 2015), http://thinkprogress.org/lgbt/2015/09/02/3698100/kim-davis-hypocritical-theology/.

6. *See* Cara Anthony, *Thousands Protest 'Religious Freedom' Law in Indiana*, USA TODAY (Mar. 28, 2015, 11:29 PM), http://www.usatoday.com/story/news/nation/2015/03/28/thousands-protest-religious-freedom-law-indy/70596032/.

7. Similarly, Justice Potter Stewart found Connecticut's law forbidding the use of contraceptives by anyone to be "an uncommonly silly law." Griswold v. Connecticut, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting).

8. *See* Josh Feldman, *Washington Gov. Also Bans State-Funded Travel to Indiana*, MEDIAITE (Mar. 30, 2015, 8:53 PM), http://www.mediaite.com/online/washington-gov-also-bans-state-funded-travel-to-indiana/; Erica Orden, *Cuomo Bans New York State-Funded Travel to Indiana*, WALL ST. J. (Mar. 31, 2015, 8:48 PM), http://www.wsj.com/articles/new-yorks-cuomo-bans-state-funded-travel-to-indiana-1427849308; Ben Rooney, *Connecticut Bans State-Funded Travel to Indiana over Anti-Gay Law*, CNN: MONEY (Mar. 31, 2015, 9:54 AM), http://money.cnn.com/2015/03/30/news/indiana-religious-freedom-law/.

Klein, refused to bake a cake for a same-sex couple,[9] believing that doing so would be a commitment to sin.[10] Imagine if a business owner claimed that serving African-Americans, Hispanics, the disabled, or that woman in the wheelchair (who, it turns out, was never healed after all) was also a commitment to sin.[11]

That, in a nutshell, is the point—and the problem.

If the courts exempted individuals' conduct, such as Kim Davis's and the Indiana bakers', from generally applicable laws that do not substantially burden their religious liberty, some citizens would be permitted to exercise constitutional freedoms by infringing on an entire *group's* ability to invoke basic constitutional protections. That is a prescription for unequal protection of the law—and unequal liberty for all.

Fortunately, Kim Davis is now issuing marriage licenses, although Kentucky's legislature has changed the law to ensure that Davis does not have to put her name on these licenses.[12] The Indiana bakery is now closed.[13] Now Melissa and Aaron Klein can have their cakes—and eat

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9. *See* Aviva Shen, *This Bakery Refused to Serve a Same-Sex Couple and It May Cost Them $135,000*, THINKPROGRESS (Apr. 25, 2015), http://thinkprogress.org/lgbt/2015/04/25/3651276/sweet-cakes-settlement-order/.

10. Another Indiana bakery received criticism for refusing to make a cake for a gay couple's commitment ceremony. *See, e.g.*, Billy Hallowell, *Bakery That Ignited Controversy with Refusal to Bake Gay Wedding Cake Closes Up Shop: 'We Were Just Trying to Be Right with Our God*,*'* BLAZE (Mar. 2, 2015, 8:21 AM), http://www.theblaze.com/stories/2015/03/02/bakery-that-ignited-controversy-with-refusal-to-bake-gay-wedding-cake-closes-up-shop-we-were-just-trying-to-be-right-with-our-god/ ("As attendees of a Baptist church, the McGaths . . . explained they didn't want to be a part of the commitment ceremony, as they believed it reflected a 'commitment to sin . . . .'").

11. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2805 (2014) (Ginsburg, J., dissenting). Justice Ginsburg stated as follows:

> Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)?

Id.; *see* David J. Stewart, *Benny Hinn Is a Fake*, JESUS IS SAVIOR, http://www.jesus-is-savior.com/Wolves/benny_hinn-fake.htm (last visited Nov. 17, 2016) ("Another woman in a wheel-chair was wheeled up to the platform, allegedly crippled from diabetes, then she walked on stage. . . . Again, I ask, why doesn't Hinn ever use his alleged power to heal the sick people in hospitals? The reason is abundantly clear . . . Hinn is a fraud.").

12. Associated Press, *Kentucky Bows to Clerk Kim Davis and Changes Marriage License Rules*, L.A. TIMES (Dec. 23, 2015, 10:41 AM), http://www.latimes.com/nation/nationnow/la-na-nn-kentucky-kim-davis-20151223-story.html.

13. Sophia June, *Anti-Gay Gresham Bakery Sweet Cakes by Melissa Finally Closes*, WILLAMETTE WEEK (Oct. 6, 2016), http://www.wweek.com/news/2016/10/06/anti-gay-gresham-

them too. As they say, God works in mysterious ways.

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The above examples underscore one of the biggest controversies in American constitutional law today. To what extent should the right to freely exercise one's religion *require* federal and state legislatures to grant citizens exemptions from laws that neither target nor discriminate against religion? This Article answers that question and proposes a solution that is rooted in the *negative* right to equal liberty under the law, that contextualizes the free exercise of religion, and that considers the deleterious effects of certain religious liberty claims on the constitutional rights of those adversely affected by their exercise.

The text and purposes of the free exercise clause support such a framework.[14] The Founders drafted the free exercise clause to prohibit the government from substantially interfering with religious liberty, such as through laws that coerce individuals into violating their religious beliefs, target specific religions or religious practices, or question the sincerity of an individual's religious beliefs.[15] However, the Founders did *not* envision that the government was *required* to grant citizens exemptions from generally applicable laws.[16] The proposed standard in this Article furthers the original purposes of the free exercise clause *and* safeguards citizens from unequal protection of the law.

As discussed in Part IV, four factors should guide the Court when evaluating whether a law substantially burdens an individual's religious liberty and whether a countervailing state interest is sufficiently compelling.[17] *First*, the Court must consider the *role* of the individual who seeks protection under the blanket of religious liberty. For example, is the individual a pastor in a private church or a clerk in the county courthouse? *Second*, the Court should consider the *place* in which the right is exercised. Is the individual seeking to exercise this right in a church or synagogue, or in a classroom or a courthouse? *Third*, the Court should consider the *effects* on third parties of exercising religion,

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bakery-sweet-cakes-by-melissa-finally-closes/.

14. *E.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993) ("Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices."); Sherbert v. Verner, 374 U.S. 398, 404 (1963) (stating that "[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect" (alteration in original) (quoting Braunfeld v. Brown, 366 U.S. 599, 607 (1961))).

15. *See, e.g.*, *Church of the Lukumi Babalu Aye*, 508 U.S. at 547; *Sherbert*, 374 U.S. at 404.

16. *Cf.* Ellis M. West, *The Right to Religion-Based Exemptions in Early America: The Cause of Conscientious Objectors to Conscription*, 10 J.L. & RELIGION 367, 371 (1993–94) ("[T]hose who rely on the intentions of the founders to justify the argument for a right to religion-based exemptions can find very little historical evidence to substantiate their claim.").

17. *See infra* Section IV.A.

particularly where such effects, if they had resulted from state action, would infringe on third parties' constitutional rights. *Fourth*, the Court should consider whether a religious liberty claim involves practices that are central to the individual's belief system. It is one thing for an Amish family to claim that a compulsory education law infringes on the fundamental tenets of their religious faith.[18] It is another thing for individuals to claim that issuing marriage licenses in their *public capacity as county clerks* infringes on their right to freely practice religion, to freely discriminate (which often coincides with such claims), or to express moral disapproval of a particular group.[19]

This test will appropriately balance the free exercise of religion with the guarantee that all citizens enjoy equal liberty, equal dignity, and equal protection of the law, and will further the broader purposes of the First Amendment.[20] Part II examines the original purpose of the free speech clause of the First Amendment and discusses how the Court has contextualized the right to freely express one's views, particularly when speech has a deleterious impact on third parties.[21] Part II concludes by arguing that this approach should be adopted in the free exercise context. Part III examines the original purpose of the free exercise clause and explains how the Court has failed to create a workable test to balance an individual's religious liberty with the rights of those who may suffer discrimination or other harms from the exercise of religious beliefs. Part IV introduces a new, context-based paradigm for adjudicating religious liberty claims under both the free exercise clause and the federal Religious Freedom Restoration Act of 1993[22] (and its counterparts at the state level) and analogizes to provisions in the Bill of Rights where the Court has adopted the same approach. Part IV also provides examples of how this test would apply to specific religious liberty claims. Ultimately, the Court should interpret the Constitution by recognizing the importance of "fair terms of social cooperation on the basis of mutual respect"[23] and of the need to embrace equality as the foundation of individual and collective liberty. After all, if liberty can find no refuge in a jurisprudence of doubt, it can find no salvation in a jurisprudence that countenances unequal protection of the law.[24]

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18. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 236 (1972).

19. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 582 (2003) ("Moral disapproval of this group [homosexuals] . . . is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause." (citing Dept. of Agriculture v. Moreno, 413 U.S. 528, 534 (1973))).

20. *See* U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion].").

21. *See id.* ("Congress shall make no law . . . 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.").

22. Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. § 2000bb (2012)).

23. James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 18 (1995).

24. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 901 (1992).

I. THE CONTEXTUAL ORIGINS OF THE FREE SPEECH CLAUSE

The text of the First Amendment's free speech clause and evidence from early debates in Congress reveal that the Founders intended the First Amendment to preserve federalism by limiting the federal government's ability to intrude on the states' authority to regulate speech.[25] Additionally, the Founders sought to facilitate a marketplace of ideas that welcomed unpopular, distasteful, or offensive speech and promoted a robust democratic process, but did *not* necessarily view the regulation—or outright prohibition—of some types of speech as inconsistent with this objective.[26] The interplay between these purposes demonstrates that the right to freely express one's ideas was never intended to be a vehicle by which citizens can evade legal responsibilities.

A. *The Right to Freely Express One's Views is Subject to Reasonable State Regulation*

Although freedom of speech is understood "as a cornerstone of individual liberty,"[27] it may be regulated in a variety of contexts. Dutch philosopher Benedict de Spinoza believed that although freedom of speech was based upon the "'indefeasible natural right' of individuals," in some circumstances "government could punish speech if a man spoke opinions 'which by their very nature nullify the [social] compact.'"[28] Spinoza's view, along with those of Sir William Blackstone, informed the Founders' view of free speech.[29] Although recognizing that "[e]very

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25. *See, e.g.*, John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1392–93 (1997) (stating that "the main purpose of the First Amendment and much of the Bill of Rights . . . simply was to deny the federal government power rather than to define the rights of the individual").

26. Snyder v. Phelps, 562 U.S. 443, 458 (2011) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989))).

27. Michael A. Henderson, *Today's Symbolic Speech Dilemma: Flag Desecration and the Proposed Constitutional Amendment*, 41 S.D. L. REV. 533, 535 (1996).

28. Michael Kahn, *The Origination and Early Development of Free Speech in the United States: A Brief Overview*, FLA. B.J., Oct. 2002, at 71, 71 (alteration in original).

29. *Id.* at 72. Blackstone stated as follows:

> [T]he liberty of the press . . . consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. . . . To subject the press to the restrictive power of a licensor [is] to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil

free man has an undoubted right to lay what sentiments he pleases before the public," Blackstone argued that some types of speech should not receive First Amendment protection, "including speech that was 'blasphemous, immoral, treasonable, *schismatical*, seditious, or scandalous libels.'"[30]

Influenced by these views, "The Founders' conception of free speech . . . was vastly different from contemporary versions," as they rejected the idea that "all points of view [must] have access to public debate."[31] Rather, the Founders embraced Blackstone's view that some types of speech could be restricted.[32] In fact, elected officials "from both major factions endorsed a quite different proposition: government, if not at the national then at the state level, had a positive responsibility to monitor—and, when necessary, to step in and moderate—political communication."[33]

B. *The Connection Between Liberty and Decentralization*

The Founders did not conceive of the First Amendment "as a guarantee of personal freedom nor even as a protection of democratic processes."[34] Instead, the Founders intended the First Amendment to preserve federalism, particularly decentralization:

> The core First Amendment concern was centralization. The Founders believed that they could ensure individual liberty by limiting the federal government's power, leaving as the domain of the states all but the categories of federal authority specifically enumerated in the Constitution. *They counted on the states to maintain this allocation—to combat centralization—through the political process*. The Framers of the Bill of Rights well understood that the states' ability to perform this role depended crucially upon First Amendment protection from federal government censorship.[35]

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liberty.

Id. (alterations in original) (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *151–52).

30. *Id.* at 71 (emphasis added) (quoting 2 BLACKSTONE, *supra* note 29, at *151).

31. David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1707 (1991).

32. *See id.*

33. NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL 100 (1986).

34. Yassky, *supra* note 31, at 1713 (finding instead that the First Amendment was "aimed at safeguarding the federal system").

35. *Id.* (emphasis added). Senator John Lansing reaffirmed this view, stating as follows:

> It has been observed, that, as the people must, of necessity, delegate essential powers either to the individual or general sovereignties, it is perfectly immaterial

Thus, "each state had to determine for itself how much speech to permit,"[36] which underscores the Founders' broader view that the Constitution's *structural* constraints were inextricably linked to achieving individual and collective liberty:

> From the Founding to the Civil War, the purpose and effect of the First Amendment was to leave regulation of speech to the states. This particular concern with the power of the central government reflected the larger theory of the Founders. In the original constitutional vision, *liberty was tied to the independence of the states*. This theory was embedded in the constitutional structure. The separation of powers, the enumeration of powers in Article I, Section 8, and the Bill of Rights all aimed at checking the federal government, thereby ensuring that states would remain the primary loci of lawmaking authority. The First Amendment was a central component of the federal structure. It protected not only the rights of individual citizens, but also the prerogatives of the states, and, most important, the vitality of the state-based political process.[37]

The movement by the southern states to prohibit literature that advocated for the abolition of slavery also supports this interpretation.[38] In response to this movement, President Andrew Jackson supported the states' position and proposed legislation to outlaw any discussion of slavery through the mails.[39] However, representatives from the southern states believed that the "injection of the federal government into the arena of slavery and speech directly contravened the South's commitment to principles of states' rights."[40] Specifically, Jackson's legislation authorized federal government censorship over the mails, which "would have rescinded one of the crucial constitutional protections of state independence, the First Amendment."[41] As a result, South Carolina Senator John Calhoun proposed alternative legislation, arguing that Jackson's proposal violated '"one of the most sacred provisions of the constitution, and [was] subversive of reserved powers essential to the

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> where they are lodged; but, as the state governments will always possess a better representation of the feelings and interests of the people at large, it is obvious that those powers can be deposited with much greater safety with the state than the general government.

Id. at 1708 (quoting 2 THE DEBATES IN THE SEVERAL STATE CONVETIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 217 (Jonathan Elliot ed., 2d ed. 1836)).

36. *Id.*
37. *Id.* at 1716–17 (emphasis added).
38. *See id.* at 1716.
39. *Id.* at 1714.
40. *Id.*
41. *Id.*

preservation of the domestic institutions of the slave-holding States, and, with them, their peace and security.'"[42] Put simply, the southern states' interest in abolishing abolitionist literature was secondary to ensuring a decentralized governance process.

Ultimately, the Founders likely intended that the First Amendment would be a limit on *federal* power and, consistent with the goal of decentralization, would enable states, including after the Supreme Court held in *Gitlow v. New York*[43] that the First Amendment was incorporated into the states via the Fourteenth Amendment, to regulate speech in gray areas where the Constitution's text and original meaning are indeterminate.[44] For example, states would likely have the authority to decide if a corporation was a "person" under the First Amendment and to limit the amount of money that individuals and groups can contribute to political candidates.[45] Of course, the First Amendment's role in promoting decentralization must not be interpreted to undermine its second purpose: facilitating robust public discourse on matters of social and political importance.

C. *A Robust Marketplace of Ideas*

The First Amendment furthers robust debate on matters of public import. In *Snyder v. Phelps*,[46] the Court emphasized that "[s]peech on 'matters of public concern' . . . is 'at the heart of the First Amendment's protection.'"[47] Writing for the majority, Justice Roberts

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42. *Id.* at 1715 (quoting 12 REGISTER OF DEBATES IN CONGRESS pt. 4, app. at 72 (1836)). Senator Calhoun further stated as follows:

> It would indeed have been but a poor triumph for the cause of liberty, in the great contest of 1799, had the sedition law been put down on principles that would have left Congress free to suppress the circulation, through the mail, of the very publications which that odious act was intended to prohibit. The authors of that memorable achievement would have had but slender claims on the gratitude of posterity, if their victory over the encroachment of power had been left so imperfect.

Id. (quoting 12 REGISTER OF DEBATES IN CONGRESS, *supra*, pt. 4, app. at 73).

43. 268 U.S. 652 (1925).

44. Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 525–26 (2003) ("During the ratification debates, Anti-Federalists complained that the Constitution's language was ambiguous and obscure. The Constitution's supporters responded that the document had been drafted with as much precision as possible, but they acknowledged that some indeterminacy was inevitable." (footnotes omitted)).

45. *See generally, e.g.*, Citizens United v. FEC, 558 U.S. 310, 318–19, 365 (2010) (invalidating a federal law that, among other things, banned corporations and labor unions from using general treasury funds to expressly advocate for political candidates within thirty days of a primary election).

46. 562 U.S. 443 (2011).

47. *Id.* at 451–52 (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985)).

explained that the right to freely express one's views reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[48] Justice Roberts also noted that "speech concerning public affairs is . . . the essence of self-government,"[49] "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection."[50] Thus, the government cannot "restrict expression because of its message, its ideas, its subject matter, or its content."[51] Additionally, and "[i]n light of the substantial and expansive threats to free expression posed by content-based restrictions," the Court has rejected "a 'free-floating test for First Amendment coverage . . . [based on] an ad hoc balancing of relative social costs and benefits.'"[52]

D. *The Slow but Steady Contextualization of Free Speech*

Notwithstanding the robust protections afforded to free speech, "[e]ven protected speech is not equally permissible in all places and at all times."[53] Provided that a law does *not* restrict speech on the basis of content, the analysis shifts to whether the speech's value outweighs competing societal values in its restriction. As one scholar notes, "[T]he Court has not hesitated to explore the limit of the right of freedom of speech as it interferes with competing constitutional values."[54] For example, states may regulate the "dangerous secondary effects" of speech and enact reasonable time, place, and manner restrictions on speech,[55] and afford some types of speech different levels of constitutional protection.[56] Furthermore, several categories of speech receive no

48. *Id.* at 452 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

49. *Id.* (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)).

50. *Id.* (quoting Connick v. Myers, 461 U.S. 138, 145 (1983)). In *Snyder*, the Court held that speech is considered a "matter[] of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'" *Id.* at 453 (citation omitted) (first quoting *Connick*, 461 U.S. at 146; then quoting San Diego v. Roe, 543 U.S. 77, 83–84 (2004)); *see also* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492–94 (1975) (noting the importance of public scrutiny of matters of public concern); Time, Inc. v. Hill, 385 U.S. 374, 387–88 (1967) (recognizing the importance of public matters).

51. United States v. Alvarez, 132 S. Ct. 2537, 2543 (2012) (quoting Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 573 (2002)).

52. *Id.* at 2544 (second alteration in original) (quoting United States v. Stevens, 130 S. Ct. 1577, 1585 (2010)) (stating that "the Constitution 'demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality'" (quoting *Ashcroft*, 535 U.S. at 660)).

53. *Snyder*, 562 U.S. at 456 (alteration in original) (quoting Frisby v. Schultz, 487 U.S. 474, 480 (1988)).

54. Justin Kirk Houser, Comment, *Is Hate Speech Becoming the New Blasphemy? Lessons from an American Constitutional Dialectic*, 114 PA. ST. L. REV. 571, 595 (2009).

55. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

56. *See, e.g.*, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 (1985) (finding

constitutional protection whatsoever.[57]

1. Examples of Regulating Protected Speech

The United States Supreme Court's jurisprudence demonstrates that, although among the highest of constitutional values, free speech can be regulated and, in some cases, prohibited based on the harmful *effects* and, implicitly, *value* of such speech.

a. The Secondary Effects Doctrine

The secondary effects doctrine permits the government to suppress speech because of its adverse side effects, which typically requires states to show that otherwise-protected speech is accompanied by conduct that the government may legally proscribe.[58] Put differently, states may regulate the "secondary effects" of speech provided that such regulation is not a veiled attempt to suppress speech on the basis of its content. As the Court has recognized, "municipalities must be given a 'reasonable opportunity to experiment with solutions' to address the secondary effects of protected speech."[59]

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that "'commercial speech' is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded to 'noncommercial speech'").

57. *Frequently Asked Questions–Speech*, FIRST AMEND. CTR., http://www.firstamendmentcenter.org/faq/frequently-asked-questions-speech/ (last visited Jan. 23, 2017) (including obscenity, defamation, child pornography, perjury, and blackmail in a list of types of speech not protected by the First Amendment).

58. David L. Hudson, Jr., *The Secondary Effects Doctrine: Stripping Away First Amendment Freedoms*, 23 STAN. L. & POL'Y REV. 19, 20 (2012); *see also* R.A.V. v. City of St. Paul, 505 U.S. 377, 383–84 (1992) (noting that some types of speech "can . . . be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.) . . . [but cannot] be made the vehicles for content discrimination unrelated to their distinctively proscribable content" (emphasis omitted)); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) ("We have often approved [time, place, and manner] restrictions . . . provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest . . . .").

59. City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 439 (2002) (quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41, 52 (1986)); *see also Renton*, 475 U.S. at 48 (upholding a law prohibiting adult theaters from operating in certain areas based on considerations such as crime rates, property values, and the quality of the city's neighborhoods); Christopher J. Andrew, Note, *The Secondary Effects Doctrine: The Historical Development, Current Application, and Potential Mischaracterization of an Elusive Judicial Precedent*, 54 RUTGERS L. REV. 1175, 1175 (2002) ("The secondary effects doctrine allows a court to characterize a speech regulation as content-neutral instead of content-based and apply intermediate scrutiny if the regulation is aimed at suppressing the 'secondary effects' of the speech and not the speech itself.").

b. Time, Place, and Manner Restrictions

In addition, states may enact reasonable time, place, and manner restrictions to further important governmental interests.[60] Such restrictions are permitted if they "are justified without reference to the content of the regulated speech, . . . narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information."[61] Laws satisfying this standard will be upheld "even if [they have] an *incidental effect* on some speakers or messages but not others."[62] This reflects the well-settled principle that "[t]he First and Fourteenth Amendments have never been treated as absolutes,"[63] and that the right to engage in protected speech must be weighed against the government's interest in regulating its dissemination.

c. Speech on Matters of Private Concern

Private speech does not implicate the core purposes of the First Amendment and therefore receives a lesser degree of constitutional protection.[64] As the Court explained in *Snyder*, when laws restrict private speech, "'[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas'; and the 'threat of liability' does not pose the risk of 'a reaction of self-censorship' on matters of public import."[65]

d. Commercial Speech

In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,[66] the Court created a distinction between

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60. *See Ward*, 491 U.S. at 791 ("[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech . . . .").

61. *Id.* (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

62. *Id.* (emphasis added); *see also Renton*, 475 U.S. at 47–48 (discussing how a legislative intent to suppress free speech will invalidate a law, but if there is no such intent and there is a substantial governmental interest, the law will be upheld); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647–48 (1981) ("We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information." (quoting *Va. State Bd.*, 425 U.S. at 771)).

63. Breard v. Alexandria, 341 U.S. 622, 642 (1951).

64. Snyder v. Phelps, 562 U.S. 443, 452 (2011) ("[W]here matters of purely private significance are at issue, First Amendment protections are often less rigorous. That is because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest . . . ." (citations omitted)).

65. *Id.* (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760 (1985)).

66. 447 U.S. 557 (1980).

commercial speech and other types of speech.[67] Commercial speech consists of "'speech proposing a commercial transaction [and] occurs in an area traditionally subject to government regulation.'"[68] Furthermore, "competing constitutional values," including the interest in protecting the public from misleading advertising, warrants a lesser degree of protection for commercial speech.[69] As a result, commercial speech that contains inaccurate representations to the public receives no constitutional protection.[70]

2. Banning Certain Types of Speech

Some types of speech garner no constitutional protection. In *R.A.V. v. City of St. Paul*,[71] the Court noted that

> [O]ur society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[72]

For example, obscenity, fighting words, and defamatory utterances receive no constitutional protection.[73]

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67. *Id.* at 562.

68. *Id.* (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978)).

69. Houser, *supra* note 54, at 595.

70. *See Cent. Hudson Gas & Elec.*, 447 U.S. at 563–64 (discussing that "[t]he government may ban forms of communication more likely to deceive the public than to inform it," although where "the communication is neither misleading nor related to unlawful activity . . . [t]he State must assert a substantial interest to be achieved by restrictions on commercial speech" (citing Friedman v. Rogers, 440 U.S. 1 (1979); *Ohralik*, 436 U.S. at 447). The Court created a four-part test to evaluate the constitutionality of laws restricting commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566.

71. 505 U.S. 377 (1992).

72. *Id.* at 382–83 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (noting that the right to free speech "does not include a freedom to disregard these traditional limitations").

73. *See Frequently Asked Questions*, *supra* note 57.

a. Obscenity

In *Miller v. California*,[74] the Court held that speech deemed legally obscene is entitled to no constitutional protection.[75] The *Miller* Court explained that "'[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.'"[76] This includes lewd and obscene language, as "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[77] In so holding, the Court adopted a four-part obscenity test, which examined

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[78]

b. Fighting Words

The Court affords no protection to "fighting words," which are defined as "advocacy intended, and likely, to incite imminent lawless action." Typically, fighting words consist of statements "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[79] Similarly, "epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."[80]

c. Defamatory Speech

Speech that harms an individual's reputation likewise warrants no First Amendment protection.[81] In fact, at common law, if a speaker's

74. 413 U.S. 15 (1973).

75. *Id.* at 23.

76. *Id.* at 20 (quoting *Chaplinsky*, 315 U.S. at 571–72).

77. *Id.* at 20–21 (quoting *Chaplinsky*, 315 U.S. at 571–72) (noting that obscenity was "utterly without redeeming social importance").

78. *Id.* at 24 (citations omitted) (quoting Kois v. Wisconsin, 408 U.S. 229, 230 (1972)).

79. Virginia v. Black, 538 U.S. 343, 359 (2003) (citing Watts v. United States, 394 U.S. 705 (1969)); *see also* Watts v. United States, 394 U.S. 705, 708 (finding that "political hyperbole" is not a true threat).

80. Cantwell v. Connecticut, 310 U.S. 296, 309–10 (1940).

81. R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992) (citing Beauharnais v. Illinois, 343 U.S. 250 (1952)).

opinions caused reputational damages, the speaker could be held liable for damages.[82] As the Court acknowledged in *Milkovich v. Lorain Journal Co.*,[83] "[t]his position was maintained even though the truth or falsity of an opinion—as distinguished from a statement of fact—*is not a matter that can be objectively determined* and truth is a complete defense to a suit for defamation."[84]

E. *Themes Emerging from the Court's Free Speech Jurisprudence*

The Court's jurisprudence is consistent with the Founders' vision that the First Amendment promote decentralization and robust public discourse.[85] The Court has held in a variety of contexts that the states may regulate the time, place, and manner in which speech is disseminated to further competing social, community, and constitutional interests.[86] Whether a law targets the deleterious secondary effects of speech (e.g., cross burning) or outlaws speech that has no value whatsoever, there can be no question that states play a significant role in defining the boundaries of permissible speech, and that countervailing societal community interests matter in shaping the scope of free speech rights. Indeed, individual liberty is "tied to the independence of the states" and depends "crucially upon First Amendment protection from federal government censorship."[87]

An approach that vests states with the authority to regulate speech in light of the competing interest of its citizenry, including avoiding the harms that some types of speech cause, makes eminent sense. For example, if the First Amendment were construed to permit individuals to manufacture and disseminate obscenity, such as depictions of child

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82. *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 13 (1990) (citations omitted) (stating that, at common law, "defamatory communications were deemed actionable regardless of whether they were deemed to be statements of fact or opinion").

83. 497 U.S. 1 (1990).

84. *Id.* at 13 (emphasis added) (quoting RESTATEMENT (SECOND) OF TORTS § 566 cmt. a (AM. LAW INST. 1977)).

85. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 451–52 (2011) ("[S]peech on 'matters of public concern' . . . is 'at the heart of the First Amendment's protection.'" (alteration in original) (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985))).

86. *See supra* text accompanying notes 60–61.

87. Yassky, *supra* note 31, at 1713, 1717. Senator John Lansing reaffirmed this view, stating as follows:

> It has been observed, that, as the people must, of necessity, delegate essential powers either to the individual or general sovereignties, it is perfectly immaterial where they are lodged; but, as the state governments will always possess a better representation of the feelings and interests of the people at large, it is obvious that those powers can be deposited with much greater safety with the state than the general government.

Id. at 1708 (quoting 2 DEBATES, *supra* note 35, at 217).

pornography, it would result in material and severe harm to the victims of child pornography. Similarly, if individuals were permitted to incite violence towards individuals and groups because of their race, ethnicity, or gender, many citizens would be subject to severe and possibly irreparable injury.

Put differently, the right to freely express one's views should not be construed merely as a shield from impermissible governmental regulation, but as a potential sword that can deprive other citizens of basic constitutional protections. States have the authority to enact reasonable restrictions on speech that account for the speaker's relationship *to other citizens*.[88] For this reason, laws regulating speech that further important community interests should not be construed as governmental intrusion on speech *per se*, but as content-neutral regulations that promote the equal liberties and protections of *all* citizens. Such an effects-driven approach to the First Amendment, which already permeates the Court's jurisprudence, underscores the principle that there are limited circumstances in which the exercise of an individual right can undermine collective liberty. Thus, provided that a law does not discriminate on the basis of content, the protection afforded to speech should depend in substantial part on a delicate balancing that considers utility, social value, and third-party harm. Indeed, "as has been seen in the case of obscenity, the desire for prohibiting speech to defend community ideals remains strong."[89]

The Court should adopt the same approach in the free exercise context because not all religious practices warrant the same degree of constitutional protection, and because the exercise of some religious beliefs can infringe on the equal rights and liberties of other citizens. An effects-driven framework would further a vital principle that lies at the heart of American constitutionalism: The right of all citizens to equal liberty and equal protection of the law must, in some circumstances, trump the *individual's* exercise of a fundamental constitutional right.

II. THE ORIGINAL PURPOSE OF THE FREE EXERCISE CLAUSE

The text and historical record of the free exercise clause's adoption demonstrate that, although religious liberty is among the most sacrosanct of constitutional rights, it does not require the government to grant citizens exemptions from generally applicable laws that further legitimate, secular government purposes.[90] Consequently, the Court has emphasized that the states may "by general and non-discriminatory

88. *See, e.g.*, Miller v. California, 413 U.S. 15, 24 (1973) (protecting citizens from speech that, among other things, appeals to the prurient interest and has no literary, scientific, or artistic value).

89. Houser, *supra* note 54, at 595.

90. *E.g.*, City of Boerne v. Flores, 521 U.S. 507, 555 (1997) (O'Connor, J., dissenting) ("[T]he right to free exercise was viewed as generally superior to ordinary legislation, to be overridden only when necessary to secure important government purposes.").

legislation . . . safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth [or First] Amendment."[91] As such, the free exercise of religion may experience "some slight inconvenience in order that the state may protect its citizens from injury."[92]

A. *Justice O'Connor's Correct View in* City of Boerne v. Flores*—With One Exception*

In *City of Boerne v. Flores*,[93] the Court held that the federal Religious Freedom Restoration Act could not be applied to the states through the Fourteenth Amendment.[94] Writing for the majority, Justice Kennedy held that "[i]f Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.'"[95]

Justice O'Connor dissented and articulated an interpretation of the free exercise clause that is arguably consistent with its original purpose.[96] O'Connor believed that the "drafters and ratifiers more likely viewed the Free Exercise Clause as a guarantee that government may not

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91. Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).

92. *Id.* at 306.

93. 521 U.S. 507 (1997).

94. *Id.* at 527, 536 ("Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law.").

95. *Id.* at 529. The Court's decision is beyond the scope of this Article and irrelevant to the issues addressed here.

96. *See id.* at 546–47 (O'Connor, J., dissenting). In her dissenting opinion, Justice O'Connor noted as follows:

> In *Smith,* five Members of this Court—without briefing or argument on the issue—interpreted the Free Exercise Clause to permit the government to prohibit, without justification, conduct mandated by an individual's religious beliefs, so long as the prohibition is generally applicable. Contrary to the Court's holding in that case, however, the Free Exercise Clause is not simply an antidiscrimination principle that protects only against those laws that single out religious practice for unfavorable treatment. Rather, the Clause is best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible governmental interference, even when such conduct conflicts with a neutral, generally applicable law. Before *Smith*, our free exercise cases were generally in keeping with this idea: where a law substantially burdened religiously motivated conduct—regardless whether it was specifically targeted at religion or applied generally—we required government to justify that law with a compelling state interest and to use means narrowly tailored to achieve that interest.

Id. (citation omitted); *see also* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 570–71 (1993) (Souter, J., concurring) (stating that it is "difficult to escape the conclusion that, whatever *Smith*'s virtues, they do not include a comfortable fit with settled law").

unnecessarily hinder believers from freely practicing their religion."[97] As such, the free exercise clause is "not simply an antidiscrimination principle that protects only against those laws that single out religious practice for unfavorable treatment."[98] Rather, the clause guarantees the "right to participate in religious practices and conduct without impermissible government interference, even when such conduct conflicts with a neutral, generally applicable law."[99] Accordingly, Justice O'Connor argued for a rule requiring the government "to justify any substantial burden on religiously motivated conduct by a compelling state interest and to impose that burden only by means narrowly tailored to achieve that interest."[100]

To support these conclusions, Justice O'Connor examined the historical development of the free exercise clause. Rhode Island's Charter of 1663, for example, used the term "liberty of conscience," and protected residents from being "molested, punished, disquieted, or called into question," for expressing their religious beliefs.[101] The Charter also stated that residents may "freely, and fully have and enjoy his and their own judgments, and conscience in matters of religious concernments," although residents *were* prohibited from "using this liberty to licentiousness and profaneness; nor to the civil injury, or *outward disturbance of others*."[102]

Additionally, Justice O'Connor relied on evidence immediately preceding ratification, noting that most provisions at the state level "guaranteed free exercise of religion or liberty of conscience, limited by particular, defined state interests."[103] For example, the New York Constitution of 1777 stated that "[t]he free exercise and enjoyment of

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97. *Flores*, 521 U.S. at 549 (O'Connor, J., dissenting).

98. *Id.* at 546.

99. *Id.* at 538 (Scalia, J., concurring); *see also* Mark David Hall, *Jeffersonian Walls and Madisonian Lines: The Supreme Court's Use of History in Religion Clause Cases*, 85 OR. L. REV. 563, 570 (2006) (noting that Justice O'Connor, in the *Flores* opinion, "offered a sweeping examination of Founding era history to support her thesis that the 'drafters and ratifiers more likely viewed the Free Exercise Clause as a guarantee that government may not unnecessarily hinder believers from freely practicing their religion'" (quoting *Flores*, 521 U.S. at 549 (O'Connor, J., dissenting)).

100. *Flores*, 521 U.S. at 548 (O'Connor, J., dissenting).

101. *Id.* at 551.

102. *Id.* at 551–52 (emphasis added). Justice O'Connor also relied on the first free exercise clause, which was drafted in 1649 and stated in relevant part that:

> [N]oe person . . . professing to beleive in Jesus Christ, shall from henceforth bee any waies troubled, Molested or discountenanced for or in respect of his or her religion nor in the free exercise thereof . . . nor any way [be] compelled to the beleife or exercise of any other Religion against his or her consent . . . .

Id. at 551 (alterations in original) (quoting Act Concerning Religion of 1649).

103. *Id.* at 553.

religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind."[104] Importantly, however, New York's Constitution mandated that the "liberty of conscience . . . *shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State*."[105] Similarly, the religious liberty clause of the Georgia Constitution of 1777, while providing that "[a]ll persons whatever shall have the free exercise of their religion," was not intended to proscribe laws that prohibited conduct "*repugnant to the peace and safety of the State*."[106]

Noting that "[t]hese state provisions . . . are perhaps the best evidence of the original understanding of the Constitution's protection of religious liberty," Justice O'Connor concluded that "it is reasonable to think that the States that ratified the First Amendment assumed that the meaning of the federal free exercise provision corresponded to that of their existing

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104. *Id.* (quoting N.Y. CONST. art. XXXVIII (1777)). Justice O'Connor also cited the New Hampshire Constitution of 1784, which stated:

> Every individual has a natural and unalienable right to worship GOD according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping GOD, in the manner and season most agreeable to the dictates of his own conscience, . . . *provided he doth not disturb the public peace, or disturb others*, in their religious worship.

Id. (quoting N.H. CONST. art. I, § 5 (1784) (emphasis added)). Additionally, the Maryland Declaration of Rights of 1776 provided that:

> [N]o person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless, under colour of religion, *any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others*, in their natural, civil, or religious rights.

Id. at 553–54 (alteration in original) (quoting MD. CONST. art. XXXIII (1776) (emphasis added)).

105. *Id.* at 553 (quoting N.Y. CONST. art. XXXVIII (1777) (emphasis added)). Justice O'Connor cited the Virginia Constitutional Convention, where in 1776 the first draft of the federal free exercise clause was completed:

> That religion, or the duty which we owe to our CREATOR, and the manner of discharging it, can be (directed) only by reason and conviction, not by force or violence; and therefore, *that all men should enjoy the fullest toleration in the exercise of religion*, according to the dictates of conscience, unpunished and unrestrained by the magistrate, *unless, under colour of religion, any man disturb the peace, the happiness, or safety of society.* And that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.

Id. at 555 (quoting COMMITTEE DRAFT OF THE VIRGINIA DECLARATION OF RIGHTS art. 18 (1776) (emphasis added)).

106. *Id.* at 554 (quoting GA. CONST. art. LVI (1777) (emphasis added)).

state clauses."[107] Furthermore, the manner in which conflicts between state and religious law conflicted "suggest that Americans in the Colonies and early States thought that, if an individual's religious scruples prevented him from complying with a generally applicable law, the government should, if possible, excuse the person from the law's coverage."[108] For example, "Quakers and certain other Protestant sects refused on Biblical grounds to subscribe to oaths or 'swear' allegiance to civil authority."[109] Absent such "accommodation, their beliefs would have prevented them from participating in civic activities involving oaths, including testifying in court."[110] Likewise, the practice of "excusing religious pacifists from military service demonstrates that, long before the First Amendment was ratified, legislative accommodations were a common response to conflicts between religious practice and civil obligation."[111] In addition, "[b]oth North Carolina and Maryland excused Quakers from the requirement of removing their hats in court; Rhode Island exempted Jews from the requirements of the state marriage laws; and Georgia allowed groups of European immigrants to organize whole towns according to their own faith."[112]

Finally, Justice O'Connor relied on the drafting history leading to the adoption of the federal free exercise clause, particularly James Madison's draft, which included the words "freedom of conscience":

> That religion, or the duty we owe our Creator, and the manner of discharging it, being under the direction of reason and conviction only, not of violence or compulsion, *all men are equally entitled to the full and free exercise of it, according to the dictates of conscience*; and therefore that no man or class of men ought on account of religion to be invested with peculiar emoluments or privileges, nor subjected to any penalties or disabilities, *unless under color of religion the preservation of equal liberty, and the existence of the State be manifestly endangered*.[113]

Additionally, Thomas Jefferson wrote that government could interfere in religious exercise when necessary to ensure peace and public safety.[114] George Washington expressed similar sentiments, stating that

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107. *Id.* at 553.

108. *Id.* at 557.

109. *Id.*

110. *Id.* at 558.

111. *Id.* at 559.

112. *Id.*

113. *Id.* at 555–56 (quoting Gaillard Hunt, *James Madison and Religious Liberty*, 1 ANN. REP. AM. HIST. ASS'N 163, 166–67 (1901) (emphasis added)).

114. *See id.* at 562 (quoting 11 THE WRITINGS OF THOMAS JEFFERSON 428–29 (Andrew A. Lipscomb ed., 1905)).

> [i]n my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit.[115]

Thus, for Justice O'Connor the right to freely exercise one's religion was an "essential liberty," and government could only interfere in religious matters "when necessary to protect the civil peace or to prevent 'licentiousness.'"[116] Put differently, the free exercise clause "is properly understood as an affirmative guarantee of the right to participate in religious activities without impermissible governmental interference, even where a believer's conduct is in tension with a law of general application."[117] Justice O'Connor stated as follows:

> Foremost, these early leaders accorded religious exercise a special constitutional status. The right to free exercise was a substantive guarantee of individual liberty, no less important than the right to free speech or the right to just compensation for the taking of property. . . .
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> . . .
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> Second, all agreed that government interference in religious practice was not to be lightly countenanced. Finally, all shared the conviction that "true religion and good morals are the only solid foundation of public liberty and happiness."[118]

Moreover, "[g]iven the centrality of freedom of speech and religion to the American concept of personal liberty, it is altogether reasonable to conclude that both should be treated with the highest degree of respect."[119]

Justice O'Connor's interpretation is arguably consistent with the text and purpose of the free exercise clause, but with one important exception: the drafters did *not* believe that the clause *required* the government to

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115. *Id.* (quoting Letter from George Washington to the Religious Soc'y Called Quakers (Oct. 13, 1789)).

116. *Id.* at 552 (stating that "when religious beliefs conflicted with civil law, religion prevailed unless important state interests militated otherwise").

117. *Id.* at 564. "It is reasonable to presume that the drafters and ratifiers of the First Amendment—many of whom served in state legislatures—assumed courts would apply the Free Exercise Clause similarly, so that religious liberty was safeguarded." *Id.* at 560.

118. *Id.* at 563–64 (citation omitted) (quoting THOMAS J. CURRY, THE FIRST FREEDOMS 219 (1983)).

119. *Id.* at 564–65.

accommodate the free exercise of religion.[120] To begin with, the state provisions upon which Justice O'Connor relied expressly permitted restrictions on the free exercise of religion when necessary to protect peace and safety. Additionally, although James Madison proposed two amendments that contained language protecting the "equal rights of conscience,"[121] later revisions eliminated this language.[122] The penultimate revision stated as follows:

> Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion, or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and petition to the government for the redress of grievances.[123]

Thus, even though the drafters did not articulate a precise definition of "the phrases 'free exercise' or 'rights of conscience,'"[124] the elimination of the latter phrases intimates that conscientious objections to civil laws were not considered a part of the free exercise of religion:

> [S]ome members of the House might have thought that these two phrases denoted different types of protection, because they included both phrases in their versions of the amendment. If so, the record does not include their explanations of what the differences were. And if such differences did exist, the Senate may have made the point moot by quickly eliminating the text "rights of conscience."[125]

As one scholar explains, the First Congress' deliberations and the final version of the free exercise clause "strongly suggests that the . . . First Congress did not understand the Free Exercise Clause to [include a right to religious] exemptions from generally applicable laws."[126]

In addition, the history of the Second Amendment's drafting process, which occurred at the same time, underscores this view. Although early

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120. *See* Vincent Phillip Muñoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 HARV. J.L. & PUB. POL'Y 1083, 1109 (2008).

121. *Id.* at 1105–07. The first of these, which was directed at the federal government, provided that "[t]he civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." *Id.* at 1102–03 (quoting 1 ANNALS OF CONG. 451 (Joseph Gales ed., 1834)). The second was directed at the states and stated that "[n]o State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." *Id.* at 1103 (quoting 1 ANNALS OF CONG. 452).

122. *Id.* at 1107.

123. *Id.* at 1108 (quoting S. JOURNAL, 1st Cong., 1st Sess. 77 (1789)).

124. *Id.* at 1109.

125. *Id.* (footnote omitted).

126. *Id.* at 1086.

drafts exempted religious objectors from military service, subsequent drafts began to qualify the scope of such exemptions, and the ensuing debate among members of Congress confirms that the conscientious objector provision was limited in scope.[127] Representative Egbert Benson moved to eliminate the conscientious objector provision entirely, believing that it was not "part of the natural right to religious liberty," and that, with the exemption, the "rights of conscience could not be balanced against other competing governmental interests."[128] Instead, Benson believed that the judiciary and legislative branches would "always possess humanity enough to indulge this class of citizens in a matter they are so desirous of."[129] In a compromise amendment stating that "no person religiously scrupulous shall be compelled to bear arms *in person*,"[130] the words "in person" indicated that the state could impose alternative obligations on citizens who received exemptions from particular laws on religious grounds:

> [M]any of those who opposed bearing arms were equally scrupulous of getting substitutes or paying an equivalent. If religious individuals were understood to possess a right not to serve in the military on account of conscientious objection, then for the same reason they also would seem to possess an equal right not to pay for an equivalent. The reinsertion of "in person" suggests that the House understood conscientious objection not to override a citizen's civil obligations. *Stated differently, "in person" indicates that the House thought the state legitimately could demand some actions that burdened religious individuals' consciences.* By restoring the words "in person," the House rejected Boudinot's hope that they "show the world that

127. *See id.* at 1102–03 ("The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person." (quoting 1 ANNALS OF CONG. 451 (Joseph Gales ed., 1834)).

128. *Id.* at 1113–14. Some members of the House disagreed with Benson's position, and the division over the conscientious objector provision resulted in a compromise amendment stating that "no person religiously scrupulous shall be compelled to bear arms *in person*." *Id.* at 1115 (emphasis added).

129. *Id.* at 1114 (quoting 1 ANNALS OF CONG. 780). Benson stated as follows:

> No man can claim this indulgence of right. It may be a religious persuasion, but it is no natural right, and therefore ought to be left to the discretion of the Government. If this stands part of the constitution, it will be a question before the Judiciary on every regulation you make with respect to the organization of the militia, whether it comports with this declaration or not. It is extremely injudicious to intermix matters of doubt with fundamentals.

Id. at 1113 (quoting 1 ANNALS OF CONG. 780).

130. *Id.* at 1115 (emphasis added).

> proper care is taken that the Government may not interfere with the religious sentiments of any person."[131]

As one scholar observes, "The concurrent . . . discussions . . . over . . . exemptions from military service . . . and . . . religious free exercise . . . suggest that the House did not understand religious free exercise to include exemptions from generally applicable laws."[132]

B. *The Court's Jurisprudence in Light of the Free Exercise Clause's Original Purposes and RFRA*

As a general matter, the Court's jurisprudence strongly suggests that the Free Exercise Clause was not meant to excuse individuals, based on religious belief, from complying with generally-applicable laws deemed constitutional. Additionally, several themes emerge from this jurisprudence that can guide the Court's and lower courts' analysis in future cases.

1. The Applicable Standard

For much of its history the Court has analyzed laws allegedly infringing on the free exercise clause by inquiring whether it "impose[s] a substantial burden on the practice of religion, and . . . whether it [is] needed to serve a compelling government interest."[133] Under the federal Religious Freedom Restoration Act (and its state counterparts), laws must not "substantially burden" the free exercise of religion.[134]

In *Employment Division v. Smith*,[135] however, the Court altered this standard when upholding a law prohibiting "the knowing or intentional possession of a 'controlled substance' unless the substance has been prescribed by a medical practitioner."[136] The Respondents, members of a Native American Church, were fired from their jobs after ingesting peyote at a religious ceremony.[137] They contested the law, arguing that it violated the free exercise clause.[138] In an opinion by Justice Scalia, the

131. *Id.* at 1115–16 (emphasis added) (footnote omitted) (quoting 1 ANNALS OF CONG. 796).

132. *Id.* at 1118. Also stating that the drafters of the free exercise clause did not likely intend for it to encompass a right "to be exempt from civic obligations on account of their incompatibility with an individual's religious beliefs." *Id.* at 1117.

133. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2760 (2014); *see also* Sherbert v. Verner, 374 U.S. 398, 400–01, 410 (1963) (holding that an employee who was fired for refusing to work on her Sabbath could not be denied unemployment benefits); Wisconsin v. Yoder, 406 U.S. 205, 209 (1972) (holding that Amish children were not required to comply with state law mandating that they remain in school until the age of sixteen).

134. *Hobby Lobby*, 134 S. Ct. at 2761 (quoting 42 U.S.C. § 2000bb-1(a) (2012)).

135. 494 U.S. 872 (1990).

136. *Id.* at 874 (quoting OR. REV. STAT. § 475.992(4) (1987)).

137. *Id.*

138. *Id.* at 878.

Court upheld the law.[139] Noting that the free exercise clause "obviously excludes all 'governmental regulation of religious *beliefs* as such'"[140] the Court held that the right to freely exercise one's religion did not place Respondents "beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons."[141] Justice Scalia emphasized that:

> It is a permissible reading of the text, in the one case as in the other, to say that if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.[142]

As a result, the Court reaffirmed the rule 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 religion prescribes (or proscribes).'"[143] In so holding, the Court reasoned that the balancing test used in prior cases "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."[144]

In response, Congress enacted the Religious Freedom Restoration Act, which effectively overruled *Smith* and provided that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."[145] If a law substantially burdens religion, individuals are entitled to "an exemption from the rule unless the Government '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.'"[146] In essence, Congress re-instated the pre-*Smith* standard. Thus, the question now becomes whether Justice Scalia correctly predicted that the pre-*Smith* balancing test will require exemptions for the vast majority of citizens who object to a law on religious grounds. Given the free exercise clause's original purpose, the themes that emerged from the Court's pre-*Smith* jurisprudence, and the competing constitutional values of other citizens,

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139. *Id.* at 890.

140. *Id.* at 877 (quoting Sherbert v. Verner, 374 U.S. 398, 402 (1963)).

141. *Id.* at 878.

142. *Id.*

143. *Id.* at 872 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

144. *Id.* at 888.

145. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2761 (2014) (quoting 42 U.S.C. § 2000bb-1(a) (2012)).

146. *Id.* (quoting 42 U.S.C. § 2000bb-1(b)).

including equal liberty and protection under the law, the answer is no.

2. The Court's Pre- and Post-*Smith* Jurisprudence—Five Themes Emerge

In a manner that is strikingly similar to its free speech jurisprudence, the Court has afforded varying protections under the free exercise clause based on the context in which it has been exercised. Although the Court's version of contextualization has not resulted in workable rules to guide legislatures regarding the scope of the free exercise right, several themes have emerged from this jurisprudence that provide a foundation upon which to develop a cohesive jurisprudence.

The first theme concerns the distinction between religious beliefs and practices. In *Reynolds v. United States*,[147] the Court distinguished between religious beliefs and practices, holding that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, *they may with practices*."[148]

The second theme involves laws that, by design or effect, exact too significant a burden on individuals' ability to practice their religious beliefs or discriminate among religions. In *Sherbert v. Verner*,[149] the Court invalidated a law that penalized a Seventh-day Adventist for violating an employer's six-day work week policy by refusing to work on Saturdays in accordance with his religion.[150] The Court reasoned that laws infringing on religious beliefs are typically upheld only where they are designed to prevent "some substantial threat to public safety, peace or order."[151] Similarly, in *Wisconsin v. Yoder*,[152] the Court held that Amish children were exempt from a state's compulsory education law, which required children to attend public schools until the age of sixteen.[153] The Court emphasized that the law "affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at

147. 98 U.S. 145 (1878).

148. *Id.* at 166 (emphasis added). The Court reasoned as follows:

> Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

Id.

149. 374 U.S. 398 (1963).

150. *Id.* at 399, 410.

151. *Id.* at 403 (citing Cleveland v. United States, 329 U.S. 14 (1946); Prince v. Massachusetts, 321 U.S. 158 (1944); Jacobson v. Massachusetts, 197 U.S. 11 (1905); *Reynolds*, 98 U.S. 145).

152. 406 U.S. 205 (1972).

153. *Id.* at 207, 235–36.

odds with fundamental tenets of their religious beliefs."[154] Notably, however, in *Sherbert* the Court held that generally-applicable laws, even if incidentally burdening the free exercise of religion, are constitutionally permissible.

The third theme relates to the state's involvement in assessing the *validity* of religious beliefs. In *United States v. Ballard*,[155] the Court held that juries may not make judgments regarding the sincerity of an individual's religious belief.[156] The Court explained that, "if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect."[157] Similarly, in *Cantwell v. Connecticut*,[158] the Court invalidated a law criminalizing solicitation for religious, charitable, or philanthropic purposes because solicitation permits were based on a state official's determination of whether a cause was sufficiently "religious."[159]

A fourth theme involves laws that *coerce* individuals into acting contrary to their religious beliefs. In *Lyng v. Northwest Indian Cemetery Protective Ass'n*,[160] the Court upheld a law that permitted road construction in areas that were used for religious purposes by a Native American tribe.[161] The Court placed heavy emphasis on the fact that the tribe was not "coerced by the Government's action into violating their religious beliefs,"[162] and found that the law did not "penalize religious activity by denying any person *an equal share of the rights, benefits, and privileges enjoyed by other citizens*."[163] As the Court held, states "may make it more difficult to practice certain religions" so long as the laws "have no tendency to coerce individuals into acting contrary to their religious beliefs."[164]

The fifth theme concerns laws that impermissibly *target* specific religions or religious tenets. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[165] the Court invalidated a law banning ritual animal sacrifice because the record underlying its enactment suggested that it was targeted at the "suppression of the central element of the Santeria

154. *Id.* at 218.

155. 322 U.S. 78 (1944).

156. *Id.* at 87–88.

157. *Id.* at 87. "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Id.* at 86 (quoting Watson v. Jones, 80 U.S. 679, 728 (1871)).

158. 310 U.S. 296 (1940).

159. *Id.* at 307 (holding that "to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to . . . burden . . . the exercise of liberty protected by the Constitution").

160. 485 U.S. 439 (1988).

161. *Id.* at 441–42.

162. *Id.* at 449.

163. *Id.* (emphasis added).

164. *Id.* at 450.

165. 508 U.S. 520 (1993).

worship service."[166] In so holding, the Court explained that, "if the object of a law is to infringe upon or restrict practices because of their religious motivation," it is invalid absent a compelling state interest.[167] Writing for the majority, Justice Kennedy held that "[l]egislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices."[168]

The Court's most recent jurisprudence does not fall neatly into any of these categories and underscores the need for a workable standard to guide the Court in future cases. In *Burwell v. Hobby Lobby*,[169] the most recent post-*Smith* decision, the Court granted a religious accommodation to a closely-held corporation that refused to comply with a provision in the Affordable Health Care Act requiring employers to provide contraception coverage to female employees.[170] Notably, however, the Court ruled on narrow grounds, holding that the contraception mandate was invalid only because the Department of Health and Human Services has alternative and less restrictive means at its disposal to achieve its stated objectives.[171] Thus, although the Court held that the contraception mandate substantially burdened the corporation's religious freedom, one passage in the majority opinion strongly suggests that the Court would not, in future cases, embrace religious accommodations on the scale that Justice Scalia predicted in *Smith*:

> The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. *Our decision today provides no such shield*. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.[172]

Thus, if anything, *Hobby Lobby* supports the proposition, as discussed below, that a context-based and effects-driven framework will strike the

166. *Id.* at 534, 547.

167. *Id.* at 533 (holding that the compelling interest must be "narrowly tailored to advance that interest").

168. *Id.* at 547. "Although the practice of animal sacrifice may seem abhorrent to some, 'religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.'" *Id.* at 531 (quoting Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 714 (1981)).

169. 134 S. Ct. 2751 (2014).

170. *Id.* at 2786.

171. *Id.* at 2780 (stating that "[t]he most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections").

172. *Id.* at 2783 (citation omitted).

proper balance between religious freedom and equal liberty for all citizens.

Ultimately, the themes that emerge from the Court's free exercise jurisprudence are consistent with Justice O'Connor's interpretation of the free exercise clause.[173] However, as evidenced in *Hobby Lobby*, these broad proscriptions do not, by themselves, provide answers to the more difficult questions that are posed when individuals, such as Kim Davis and the Indiana bakers, refuse to issue a marriage license to gay couples in violation of Court precedent or turn away a same-sex couple because of moral disapproval of homosexuality. This is particularly true where the conduct for which an individual seeking protection involves disregarding the law and actively discriminating against third parties. In such circumstances, the government's interest in requiring Davis to issue marriage licenses is unquestionably compelling.

In these situations, the Court's jurisprudence provides little, if any, guidance. After all, is the state substantially burdening Kim Davis's ability to freely exercise her religion by requiring her to issue marriage licenses *in her capacity as a state actor*? Is the state impermissibly coercing the Indiana bakers to act contrary to their religious beliefs by prohibiting them from discriminating against individuals or groups *in their capacity as a provider of goods and services to the public*?

The answer to these questions should be no, and it should be influenced, at least in part, by the fact that protecting religious liberty in this context would result in third parties (e.g., same-sex couples) being denied equal protection of the law. In such cases, the Court should not, as it has in prior cases, interpret the free exercise clause by balancing a citizen's interests in religious liberty against the government's interest in regulating its exercise. Such an *ad hoc* balancing has resulted in a muddled jurisprudence that fails to properly guide lower courts, legislatures, and citizens concerning the scope of religious liberty, and neglects to consider the relationship, for purposes of protecting constitutional rights, *between* citizens.

An effects-based framework would fill the gaps in the Court's current free exercise jurisprudence, recognize that *all* citizens should be afforded equal dignity and protection under the law, and further the interest in achieving collective, not merely individual, liberty. Free exercise claims (and those under RFRA) would be analyzed not merely by evaluating the government's asserted interest, but by considering whether the exercise of religion in particular contexts results in constitutional harms to other citizens. As discussed below, in conducting this analysis, four factors should guide the Court's analysis: (1) the role within which the individual seeks to exercise religious beliefs; (2) the place where the exercise of such beliefs will occur; (3) the effects on third parties; and (4) whether the religious practice for which an individual seeks protection is central to their belief system (not whether the belief is objectively valid).[174]

173. *See supra* Section III.A.

174. *See infra* Section IV.A.

III. CONTEXTUALIZING THE FREE EXERCISE OF RELIGION IN A MANNER CONSISTENT WITH ITS ORIGINAL PURPOSES AND THE COURT'S JURISPRUDENCE

For too long, the Court has analyzed religious liberty claims by virtue of the relationship between the religious believer and the government and *not* by considering the effects of religious practices on third parties. Without that inquiry, an individual's free exercise of religion may become a sword that is used to undermine liberty and equality for those affected by its exercise (e.g., same-sex couples), rather than a shield against "impermissible governmental interference."[175] Simply put, protecting religious freedom for the few should not be permitted if it compromises liberty and equality for an entire group. The importance of linking equality to liberty in this context cannot be overstated:

> A denial of liberty often contains within it the seeds of a denial of equality. The government denies a marginalized or disfavored group the full exercise of liberty to express a judgment of that group's inferiority and to prescribe the proper roles and expected behavior of members of that group. Likewise, a denial of equality often contains within it the seeds of a denial of liberty. Discriminatory laws often force the members of a marginalized or disfavored group to forfeit their liberty to conform to majority assumptions about their proper roles and expected conduct.[176]

A contextual framework that focuses not simply on the asserted governmental interest in restricting religious liberty, but on the *effects* that the exercise of religion has on other citizens would bring balance and cohesion to free exercise jurisprudence.

In conducting this inquiry, four factors should drive the Court's analysis. *First*, regarding the individual who asserts a religious liberty claim, courts should consider the individual's *role*. *Second*, the Court should consider the *place* within which the religious liberty claim is asserted. *Third*, and as discussed above, the Court should consider the *effects* of a religious liberty claim on third parties. *Fourth*, the Court should examine whether the practice is, as in *Yoder*, integral to the individual's religious beliefs.[177] Of course, the government's interests will always be relevant, but the effect of exercising religious practices on

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175. *See* City of Boerne v. Flores, 521 U.S. 507, 546 (1997) (O'Connor, J., dissenting) (stating that the Clause is best understood as protecting from "impermissible governmental interference, even when such conduct conflicts with a neutral, generally applicable law").

176. David H. Gans, *The Unitary Fourteenth Amendment*, 56 EMORY L.J. 907, 926–27 (2007).

177. Wisconsin v. Yoder, 406 U.S. 205, 235 (1972) (finding that "the Amish in [that] case [had] convincingly demonstrated . . . the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization").

third parties is the best evidence of whether those interests are constitutionally permissible.[178]

A. *The Four-Factor Test*

In evaluating religious liberty claims under either the free exercise clause or RFRA, the Court should consider: (1) the individual's role; (2) the place in which the religious liberty claim is asserted; (3) the effect the conduct has on third parties; and (4) the centrality of the practice to that individual's religious belief system.

1. The Individual's Role

The courts should consider the specific role within which an individual seeks to exercise religious practices because it will impact the strength of a religious liberty claim. For example, is the individual a pastor in the Catholic Church and seeking an exemption from laws requiring performance of same-sex marriage ceremonies, or a county clerk who is charged with issuing marriage licenses in accordance with the law? Is the individual seeking to exercise his or her religion in a private church or in a public business that provides services to the public?

The difference is significant because it has a direct impact on the *targeting* and *coercion* aspects of the Court's free exercise determination. If a law prohibits *all* businesses from discriminating on the basis of race, ethnicity, and sexual orientation, it is highly unlikely that the law is directly or indirectly targeting specific religions or religious practices. Rather, the purpose of such law—to protect citizens from unequal treatment—is not related to religious beliefs or practices, similar to the way that time, place, and manner restrictions on speech are not related to the content of speech. In such circumstances, it would be difficult to argue that the government is discriminating against particular religious beliefs, or that the interests it seeks to further are not compelling. The Court in *United States v. Lee*,[179] held that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."[180]

On the other hand, if the claimant is a pastor in a Catholic Church, the analysis changes and the arguments for impermissible targeting are more persuasive. In *Church of the Lukumi Babalu Aye*, the law at issue, although facially neutral, prohibited conduct that was considered a sacred

178. This is not to say that the law should never try to accommodate religious groups. To the contrary, government should make every attempt to do so, but when the accommodation at issue results in discrimination, unequal treatment, or other legal harms to third parties, the government's interest in regulating such conduct outweighs the strength of a religious liberty claim.

179. 455 U.S. 252 (1982).

180. *Id.* at 261.

ritual in the Santeria religion.[181] Coupled with the fact that the record underlying the law's passage contained text that made it clear that the Santeria religion was being targeted, the Court correctly determined that it violated the free exercise clause.[182] Put differently, the use of a facially neutral law to *target* the Santeria religion offended one of the original purposes of the free exercise clause, which was to prohibit government from invidiously discriminating against particular religions or religious practices.[183]

The individual's role also implicates the concept of *coercion*. Although a credible argument can be made that an anti-discrimination law coerces individuals into acting contrary to their religious beliefs, the alleged coercion is, at best, indirect. Moreover, the coercive aspect of such a law applies to the individual in his or her *public* role as an employee of the government,and has no effect on the individual's right to *privately* exercise her religious beliefs. Under this logic, the state may compel Kim Davis to issue marriage licenses, but it could not compel Davis to marry a same-sex couple in her place of worship. Perhaps most importantly, an anti-discrimination law is an equality-enhancing function that protects citizens from discriminatory conduct while simultaneously not denying people of religious faith the equal protection of the law. As the Court stated in *Lyng*, such a law does not "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."[184] Thus, although the coercion in this context is indirect, the *effects* on other citizens (e.g., same-sex couples) is direct in every sense.

This approach is not foreign to the Court's broader First Amendment jurisprudence. For example, when a plaintiff seeks damages for allegedly false and defamatory statements, the burden of proof depends on the status of the plaintiff. If the plaintiff is a public figure, he must demonstrate the speaker made the statement with actual malice.[185] Conversely, if the plaintiff is a private figure, the standard is lowered and he must demonstrate that the statement was negligently made.[186] The purpose of heightening the burden of proof for public-figure plaintiffs was to ensure that individuals could criticize public officials without fearing that they could be hauled into court and held liable for damages.[187] In other words, the different burdens of proof are directly

181. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534, 538 (1993).

182. *See id.* at 534–35.

183. *See id.* at 542.

184. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 449 (1988).

185. *See, e.g.*, Herbert v. Lando, 441 U.S. 153, 159 (1979) (stating "public officials and public figures who sue for defamation must prove knowing or reckless falsehood in order to establish liability").

186. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 343, 347 (1974).

187. *Id.* at 348.

related to the original purpose of the First Amendment: to facilitate a robust marketplace of ideas.

2. The Place

The place where a religious liberty claim is asserted implicates the same considerations as the individual's role. If a state passed a law outlawing the ritualistic sacrifice of animals, one could not credibly argue that the law would offend the free exercise clause in every context. In *Lukumi Babalu Aye*, for example, the ban on animal sacrifices applied disproportionately to the Santeria religion and prohibited its members from practicing their religion in a *private* place of worship.[188] In this way, the law both targeted the Santeria religion *and* substantially interfered with its members' ability to freely exercise their religious beliefs.

On the other hand, if the law in question prohibited the ritualistic sacrifice of animals on a public street between the hours of 9:00 a.m. and 5:00 p.m., the argument for targeting would be meritless. In this situation, the law regulates the context within which ritualistic animal sacrifice may occur to further secular interests—public order and peace—that are unrelated to the *religious* character of this practice. For this reason, the law would not violate the free exercise clause, just as the prohibition on cross-burning in *Virginia v. Black*[189] did not violate the free exercise clause because it furthered secular interests—prohibiting harassment and intimidation—that were unrelated to the *content* of the speech.[190]

Again, this approach is not foreign to the Court's jurisprudence. As Justice Ginsburg recognized in *Hobby Lobby*, "For many individuals, religious activity derives meaning in large measure from participation in a larger religious community," and "furtherance of the autonomy of religious organizations often furthers individual religious freedom as well."[191] Conversely, "[n]o such solicitude is traditional for commercial organizations," and "religious exemptions had never been extended to any entity operating in 'the commercial, profit-making world.'"[192] The reason for such a distinction is that "for-profit corporations . . . use labor to make a profit, rather than to perpetuate [the] religious value[s] [shared by a community of believers]."[193] As such, the free exercise clause "shelter[s] churches and other nonprofit religion-based organizations," not corporations or other public entities.[194]

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188. *Church of the Lukumi Babalu Aye*, 508 U.S. at 535.

189. 538 U.S. 342 (2003).

190. *See id.* at 344.

191. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2794 (2014) (Ginsburg, J., dissenting) (quoting Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring)).

192. *Id.* at 2795 (quoting *Amos*, 483 U.S. at 337).

193. *Id.* at 2796–97 (alterations in original) (quoting Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1242 (D.C. Cir. 2013)).

194. *Id.* at 2794. Justice Ginsburg further stated:

By way of analogy, in the Fourth Amendment context, the Court has afforded citizens varying degrees of privacy protections—and shifted law enforcement's evidentiary burden—based on the place in which an alleged Fourth Amendment violation occurs. Privacy rights receive the highest level of protection in the home, where law enforcement is required to have probable cause and a warrant before conducting a search.[195] When citizens travel in automobiles, however, their privacy protections are diminished, and law enforcement need only possess reasonable suspicion of criminal activity to detain a motorist.[196] Finally, when citizens walk on a public street or place objects in an open field, they have no expectation of privacy and law enforcement may observe them without justification.[197] As with outlawing animal sacrifice on a public street, the relationship between the strength of citizens' privacy rights and their location is based on the governmental and societal *interest* in protecting public safety.

3. The Effects on Third Parties

In the free speech context, when considering the validity of regulations that impact free speech rights, the Court has upheld legislation restricting speech because of its deleterious secondary effects. The Court should adopt the same approach in free exercise cases because, in limited circumstances, community values outweigh individual values.

In *Hobby Lobby*, the Court acknowledged that it "*must* take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries."[198] The "effects" prong fundamentally alters the relational aspect of the free exercise and RFRA inquiries. Rather than simply focusing on the relationship between the individual and government, this prong requires the Court to consider the relationship between *citizens* and to evaluate whether the exercise of an individual's religious liberty denies other individuals "an equal share of the rights, benefits, and privileges enjoyed by other citizens."[199] In conducting this

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> Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations. Workers who sustain the operations of those corporations commonly are not drawn from one religious community. Indeed, by law, no religion-based criterion can restrict the work force of for-profit corporations. The distinction between a community made up of believers in the same religion and one embracing persons of diverse beliefs, clear as it is, constantly escapes the Court's attention. One can only wonder why the Court shuts this key difference from sight.

Id. at 2795–96 (footnote omitted) (citations omitted).

195. *See* Griffin v. Wisconsin, 483 U.S. 868, 873 (1987).

196. *See* Navarette v. California, 134 S. Ct. 1683, 1687 (2014).

197. *See* Oliver v. United States, 466 U.S. 170, 179 (1984).

198. *Hobby Lobby*, 134 S. Ct. at 2781 n.37 (emphasis added) (quoting Cutter v. Wilkinson, 544 U.S. 709, 720 (2005)).

199. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 449 (1988).

inquiry, the Court should focus on whether the conduct for which a citizen seeks constitutional protection (e.g., the right to refuse to issue marriage licenses to same-sex couples), *if engaged in by the government*, would have the effect of violating other citizens' legal and constitutional rights.

Perhaps most importantly, an effects-driven inquiry would ensure that the free exercise of religion does not subject other citizens to discrimination on the basis of, among other things, race and ethnicity. In *Hobby Lobby*, Justice Ginsburg stated:

> Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)? According to counsel for Hobby Lobby, "each one of these cases . . . would have to be evaluated on its own . . . apply[ing] the compelling interest-least restrictive alternative test." Not much help there for the lower courts bound by today's decision.[200]

Thus, defining the scope of religious liberty in part based on its third-party effects would avoid these problems, promote equality under the law, and further a collective view of liberty. Justice Ginsburg endorsed this approach in *Hobby Lobby*, stating that "[n]o tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others."[201] It would also enable the Court to identify circumstances in which citizens are merely expressing moral disapproval of a particular group rather than exercising a religious belief.[202] If the government cannot enact laws driven by moral disapproval of a group of citizens, as the Court held in *Lawrence*, then in some situations, citizens should not be permitted to base religious freedom claims on that same disapproval. As the Court held in *Prince v. Massachusetts*,[203] the "limitations [that] bound religious freedom . . . begin to operate whenever activities begin to affect or collide with liberties of others or of the public."[204]

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200. *Hobby Lobby*, 134 S. Ct. at 2805 (Ginsburg, J., dissenting) (footnote omitted) (citation omitted) (Justice Ginsburg also noted that "approving some religious claims while deeming others unworthy of accommodation could be 'perceived as favoring one religion over another,' the very 'risk the Establishment Clause was designed to preclude.'" (quoting United States v. Lee, 455 U.S. 252, 263 n.2 (1996))).

201. *Id.* at 2801.

202. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 582 (2003) (O'Connor, J., concurring).

203. 321 U.S. 158 (1944).

204. *Id.* at 177.

Of course, religious liberty proponents would likely argue that they are not infringing on the rights of any citizen but merely seeking a religious accommodation for their deeply held beliefs. Even if the free exercise clause's original purposes supported this argument, the Court should not embrace it as a normative matter. If the Court protected religious freedom regardless of the fact that an individual was acting in a *public role*, in a capacity as a *public official*, and in a manner that would cause constitutional harm to third parties, religious accommodations would become a prescription for inequality of a very undemocratic kind.

In other contexts, the analysis would likely differ. As discussed above, in *Hobby Lobby*, the Court accommodated the religious beliefs of a closely held corporation primarily because the government had *less intrusive means* by which to achieve its objective (contraception coverage for female employees).[205] However, even if the Court had ruled that the government must make an exception for closely held corporations *in all cases*, it would be consistent with an effect-based approach to free exercise claims. Specifically, unlike Davis, who would have deprived same-sex couples of their fundamental right to marriage, the closely held corporation will not deprive female employees of a constitutional right or protection. Although it will likely be an inconvenience to some employees to purchase contraception from a store or through a physician, those individuals are not the victims of unlawful discrimination nor are they being denied equal protection of the law. Simply put, the effects prong is not intended to prohibit the free exercise of religion in all cases and contexts but merely to strike a better balance in favor of citizens' collective constitutional rights.

4. Whether the Practice Is a Central Component of an Individual's Religious Beliefs

The final prong of this test involves a careful inquiry into whether a religious liberty claim involves practices that are central to the individual's religious beliefs. To be clear, this does not—and cannot—permit the Court to assess the *validity* of a particular religion or, in violation of *Ballard*, the *sincerity* of an individual's beliefs. Such a subjective inquiry would place the Court in a position to implicitly value certain religious beliefs over others, in violation of the Establishment Clause.[206] Instead, under this prong the Court would evaluate the *objective* reasonableness of an individual's free exercise claim by examining the centrality of particular conduct to a religious belief.

Including an objective reasonableness inquiry in the free exercise context is consistent with the Court's precedent. For example, the Court has stated that "[t]he free exercise inquiry asks whether government has

205. *See Hobby Lobby*, 134 S. Ct. at 2780–81.

206. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

placed a substantial burden on the observation of a *central* religious belief or practice and, if so, whether a compelling governmental interest justifies the burden."[207] By way of analogy, in the Fourth Amendment context, the Court protects an individual's privacy rights only if they are *objectively reasonable.*[208] In fact, in *Yoder*, the Court emphasized the objective reasonableness of the Amish parents' free exercise claim:

> [T]he impact of the compulsory-attendance law [is not] confined to grave interference with important Amish religious tenets *from a subjective point of view*. It carries with it precisely the kind of *objective danger to the free exercise of religion* that the First Amendment was designed to prevent. As the record shows, compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region.[209]

This approach makes eminent sense. After all, it is one thing to allow Amish families to educate their children in accordance with their basic religious values, but it is quite another to allow individuals to refuse to issue marriage licenses or bake wedding cakes in violation of the law, and at the expense of other citizens' constitutional protections. Unlike in *Yoder,* where the Amish asserted a religious liberty claim that was "not simply a matter of theocratic belief," but rather one that "pervades and determines virtually their entire way of life,"[210] refusing to issue

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207. Hernandez v. C.I.R., 490 U.S. 680, 699 (1989) (emphasis added).

208. Oliver v. United States, 466 U.S. 170, 177 (1984) ("The Amendment does not protect the merely subjective expectation of privacy, but only those 'expectation[s] that society is prepared to recognize as "reasonable."'" (alteration in original) (quoting Katz v. United States, 389 U.S. 347, 361 (1967))).

209. Wisconsin v. Yoder, 406 U.S. 205, 218 (1972) (emphasis added).

210. *Id.* at 216. The Court stated as follows:

> [T]he record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living. That the Old Order Amish daily life and religious practice stem from their faith is shown by the fact that it is in response to their literal interpretation of the Biblical injunction from the Epistle of Paul to the Romans, 'be not conformed to this world . . . .' This command is fundamental to the Amish faith. Moreover, for the Old Order Amish, religion is not simply a matter of theocratic belief. As the expert witnesses explained, the Old Order Amish religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community.

Id.

marriage licenses or bake a cake for a same-sex couple has no *direct* impact on an individual's ability to freely practice his *religious* beliefs. Furthermore, the Amish family's claim in *Yoder* did not result in unlawful discrimination against other citizens or unequal treatment under the law.[211] In short, the Amish family's right to freely exercise their religion was objectively reasonable. And reasonableness, not a categorical accommodation for religious liberty claims, would produce "a coherent scheme of equal basic liberties, or fair terms of social cooperation on the basis of mutual respect and trust, for our constitutional democracy."[212] After all, it is "the entitlement of each constituent to have his or her interest taken into account, on equal footing with those of all others."[213]

B. *Ensuring Consistency with the Original Purpose of the Free Exercise Clause and the Court's Jurisprudence*

A context-centered framework is consistent with the original purposes of the free exercise clause and the Court's jurisprudence and harmonizes the right to freely practice one's religion with citizens' competing right to equal protection of the law.

1. The Original Purpose of the Free Exercise Clause

The historical record, particularly at the time the free exercise clause was drafted, demonstrates that the drafters intended to prohibit the government from "unnecessarily hinder[ing] believers from freely practicing their religion."[214] In other words, the clause proscribes "impermissible governmental interference, even when such conduct conflicts with a neutral, generally applicable law."[215] Thus, Justice O'Connor was correct, and *Smith* was wrongly decided.

However, this does not end the constitutional inquiry. Before the free exercise clause was drafted, Thomas Jefferson wrote that the government could restrict religious liberty to preserve "peace and good order."[216] In addition, the Court has repeatedly acknowledged that the states may lawfully regulate religious practices to "safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth [or First] Amendment."[217] Tellingly, the Court has employed nearly identical language in its free speech cases,

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211. *See id.* at 224.

212. James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211, 290 (1993).

213. Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1558 (2002).

214. City of Boerne v. Flores, 521 U.S. 507, 549 (1997) (O'Connor, J., dissenting).

215. *Id.* at 546.

216. *Id.* at 562.

217. Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).

holding that an individual's free speech right may be restricted when it is "outweighed by the social interest in order and morality."[218]

This language suggests that neither the drafters nor the Court view the free exercise clause as requiring the states to categorically accommodate religious liberty claims and therefore exempt citizens from generally applicable laws. The Court's narrowly crafted decision in *Hobby Lobby*, particularly the passage intimating that religious liberty claims could *never* be used to sanction racial (and likely other) forms of discrimination, supports this conclusion.[219] By considering factors such as an individual's role, the place of religious exercise, the effect on third parties, and the centrality of a religious claim to the core religious beliefs, the Court would ensure the "peace, good order and comfort of the *community*"[220] by protecting *all* citizens from invidious discrimination and *un*equal protection of the laws. In doing so, the Court would also safeguard the free exercise of religion from arbitrary laws that seek to accomplish precisely what the free exercise clause forbids: targeting specific religious beliefs and practices, discriminating against particular religions, and coercing individuals to act contrary to *core* religious beliefs. Put simply, this test would promote social order through equal liberty while simultaneously prohibiting impermissible governmental interference through laws that, by design or effect, substantially burden the free exercise of religion.

2. The Court's Jurisprudence

The proposed standard in this framework is consistent with the Court's pre- and post-*Smith* jurisprudence, and would provide adequate guidance to lower courts and lawmakers in future cases. In *Sherbert*, the law at issue *penalized* an employee for adhering to a religiously mandated day of rest, even though it had no effect on third parties and was central to the employee's religious beliefs.[221] In *Yoder*, the state *compelled* Amish children to attend public schools in violation of their religious beliefs, even though these beliefs were exercised in a private role and place, had no effect on third parties, and were central to the Amish belief system.[222] Similarly, in *Church of the Lukumi Babalu Aye*, the law prohibiting animal slaughter, albeit well-intentioned, directly targeted the Santeria faith and impermissibly interfered with a religious practice in a private place of worship.[223] The proposed standard in this Article would lead to the same results—with one exception. If this standard were applied to the facts in *Smith*, the result would have been different. The

218. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

219. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2783 (2014).

220. *Cantwell*, 310 U.S. at 304 (emphasis added).

221. Sherbert v. Verner, 374 U.S. 398, 409–10 (1963).

222. Wisconsin v. Yoder, 406 U.S. 205, 218 (1972).

223. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534, 546–47 (1993).

law in *Smith*, although generally applicable, enabled precisely the type of governmental interference with religion that the Court invalidated in *Church of the Lukumi Babalu Aye*: interference with ceremonial religious practices at private places of worship.

Furthermore, this standard not only fits well with the Court's prior jurisprudence, it also gives the Court a path by which to specifically define what it means to "substantially burden[] a person's exercise of religion"[224] under RFRA and thus facilitates the development of workable rules to apply in future cases. Currently, it is difficult to identify with precision laws that would substantially burden religion, which invariably necessitates the *ad hoc,* case-by-case approach that is characteristic of the Court's pre- and post-*Smith* jurisprudence. By defining this phrase with clarity and specificity, the Court can import predictability, fairness, and balance into the free exercise—and public—arena.

CONCLUSION

The Court should evaluate religious liberty claims with the understanding that "it is only in an egalitarian society that full and extensive liberty is possible."[225] At bottom, the free exercise of religion is an expression of liberty itself, and it would be quite ironic if the protections for religious liberty resulted in a constitutional hierarchy of values that undermined the very egalitarianism upon which liberty is predicated. Evaluating religious liberty claims through the proposed framework in this Article yields no less protection for religious freedom than the Founders envisaged but no more protection than is needed to ensure that religious liberty is exercised in a manner consistent with equal protection of the law. Although this does not mean that "freedom or equality must be somehow traded off against itself,"[226] it does require an appreciation that a "constitutional democracy cannot allow for a graded hierarchy of the basic dignity of persons."[227] And dignity, not discrimination, is the foundation of a liberty-based constitutional democracy. After all, if citizens dare to claim that they are acting under "God's authority," those who will most likely benefit from God's good graces should embrace dignity over discrimination and equality over ecclesiasticism.

224. *Hobby Lobby*, 134 S. Ct. at 2761.

225. KAI NIELSEN, EQUALITY AND LIBERTY 302 (1985).

226. R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 SAN DIEGO L. REV. 527, 560 (2006).

227. *Id.* at 557.