State RFRA Statutes and Freedom of Speech

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INTRODUCTION

Under current constitutional authority, courts will evaluate a content-neutral law regulating protected speech under one of two standards of review depending on the location of the property subject to the law. If the law regulates speech in a traditional public forum, such as a public street or park, or a designated public forum, in order for the law to withstand constitutional review it must be "'narrowly tailored to serve a significant government interest,' and . . . 'leave[] open ample alternative channels of communication.'"[1] If the law regulates speech in a nonpublic forum, such as an interior sidewalk or an airport, it will be upheld against constitutional challenge as long as the restriction on speech is "reasonable."[2] This "reasonableness" standard is substantially more deferential than the balancing test applied to speech regulations in a traditional public forum.[3]

State religious freedom restoration acts ("RFRA"), or state religious freedom protection acts as more recent bills may be titled,[4]

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[1] Frisby v. Schultz, 487 U.S. 474, 482 (1988) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)). This is also the standard of review for content-neutral regulations of speech that are not location specific and apply to expression even if it occurs on private property. *See* City of Ladue v. Gilleo, 512 U.S. 43, 56 (1994) (holding ordinance banning most residential signs unconstitutional because it did not leave open sufficient channels of communication).

[2] *See* International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992) (upholding regulation banning solicitation within airport terminal under reasonableness standard).

[3] *See, e.g.*, Chicago Acorn, SEIU Local No. 880 v. Metropolitan Pier & Exposition Auth., 150 F.3d 695, 701-03 (7th Cir. 1998) (distinguishing speech activities that must be permitted in traditional public forum from those state must allow in nonpublic forum); ISKCON of Potomac, Inc. v. Kennedy, 61 F.3d 949, 955-56 (D.C. Cir. 1995) (applying more rigorous review to park service regulation prohibiting in-person solicitation on National Mall, or other traditional public forums, than would be applied to nonpublic forum such as airport terminal).

[4] *See* Alabama Religious Freedom Amendment, S. 604, 1998 Reg. Sess. (Ala. 1998); New Jersey Religious Freedom Act, A. 903, 208th Leg., 1998 Sess. (N.J. 1998); New Jersey Religious Freedom Restoration Act, S. 321, 208th Leg., 1998 Sess. (N.J. 1998); Virginia Religious Freedom Protection Act, H.R. 668, 1998 Sess. (Va. 1998); Religious Freedom Protection Act, A. 1617, 1997-98 Reg. Sess. (Cal. 1997) (vetoed following enactment); Religious Freedom Restoration Act of 1998, H.R. 3201, 1998 Reg. Sess. (Fla. 1997); Religious Freedom Restoration Act, H.R. 2370, 90th Leg., 1997-98 Reg. Sess. (Ill. 1997); Religious Freedom Restoration Act, S. 1591, 90th Leg., 1997-98 Reg. Sess. (Ill. 1997); Michigan Religious Freedom Restoration Act, H.R. 4376, 89th Leg., 1997 Reg. Sess. (Mich. 1997); Religious Freedom, H.R. 1470, 155th Leg., 2d Sess. (N.H. 1997); Religious Freedom Restoration, S. 5673, 220th Leg., 1997-98 Reg. Sess. (N.Y. 1997); Religious Freedom Restoration Act, R.I. GEN. LAWS § 42-80.1-3 (R.I. 1997); South Carolina Religious Freedom Restoration Act, H.R. 5045, 112th Leg., 1997 Reg. Sess. (S.C. 1997).

provide that government may substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, only if government demonstrates that imposing such a burden on religiously motivated conduct is the least restrictive means of furthering a compelling governmental interest.[5] This standard of review is substantially more rigorous than the standards of review that courts apply to content-neutral speech regulations. Indeed, it is similar to the far more rigorous, generic standard of review applied to content and viewpoint discriminatory restrictions on speech.[6]

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[5] *See* S. 604, 1998 Reg. Sess. § 5 (Ala. 1998); A. 903, 208th Leg. § 4(b) (N.J. 1998); S. 321, 208th Leg. § 4(b) (N.J. 1998); R.I. GEN. LAWS § 42-80.1-3(2) (R.I. 1998); H.R. 668, 1998 Sess. § 57-2.6(B) (Va. 1998); A. 1617, 1997-98 Reg. Sess. § 6400(a), (b) (Cal. 1997); H.R. 3201, 1998 Reg. Sess. § 3(1) (Fla. 1997); H.R. 2370, 90th Leg., 1997-98 Reg. Sess. § 25(d) (Ill. 1997); S. 1591, 90th Leg., 1997-98 Reg. Sess. § 25(d) (Ill. 1997); H.R. 4376, 89th Leg. 1997 Reg. Sess. § 3 (Mich. 1997); H.R. 1470, 155th Leg. 2d Sess. § 2 (N.H. 1997); S. 5673, 220th Leg., 1997-98 Reg. Sess. § 328 (N.Y. 1997); H.R. 5045, 112th Leg. § 1-32-40 (S.C. 1997).

[6] While the statement in the text is correct, it should not be taken to suggest that the standards of review that the courts employ in constitutional cases describe a fixed formula that is always applied with the same degree of rigor. Each standard, strict scrutiny, intermediate level scrutiny, and the rational basis test, reflects a range of review that varies considerably depending on the context in which it is applied and the right or group that is being protected. Thus, for example, strict scrutiny is obviously the most rigorous standard of review the courts apply, but strict scrutiny does not always mean the same thing in every case. Strict scrutiny employed to evaluate the constitutionality of a law that materially disadvantages a racial minority is a more demanding standard than the strict scrutiny applied to benign racial classifications that are intended to remedy past discrimination. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 279-80 (1986) (explaining more stringent scrutiny applied to race-related law); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 267 (1978). Similarly, the strict scrutiny standard applied to the content-discriminatory law prohibiting political campaigning within 100 feet of a polling place on election day in *Burson v. Freeman*, 504 U.S. 191, 210-11 (1992), seemed far less rigorous than the stringent review applied to the viewpoint discriminatory subsidy program struck down in *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995), although both opinions employed the same compelling state interest — least restrictive alternative test.

Intermediate level scrutiny cases also display a range of more or less rigorous applications of a common standard. Certainly the "exceedingly pervasive justification" that the Court required in *United States v. Virginia*, 518 U.S. 515, 515-16 (1996), a case involving a gender discriminatory college admissions policy that materially disadvantaged women, suggests a more demanding standard of review than the intermediate level scrutiny that the Court has applied in equal protection cases alleging discrimination against nonmarital children such as *Lalli v. Lalli*, 439 U.S. 259, 274-76 (1978). First Amendment cases reveal equivalent variation. The Supreme Court may claim to be applying the same standard of review to content-neutral regulations of speech that it employs when a neutral regulation of conventionally nonexpressive conduct, such as a law banning sleeping in a public park, is challenged on the grounds that it burdens symbolic speech. *See* Ward v. Rock Against Racism, 491 U.S. 781, 798-801 (1989); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 297-98 (1984). There seems to be little doubt, however, that intermediate level scrutiny has more bite to it in the former context.

The rational basis standard also fluctuates. In many cases, rational basis review re-

Accordingly, the question arises whether state RFRA legislation requires that individuals engaged in religiously motivated expression must be granted exemptions from content-neutral speech regulations that would be constitutionally applied to other speakers expressing secular messages.[7] For example, in *Frisby v. Schultz*,[8] the Supreme Court upheld a city ordinance banning all residential picketing in a community. If a similar ordinance was adopted by a city in a state that had enacted a RFRA statute, the law on its face would comply with the First Amendment.[9] A person picketing the residence of a physician who performs abortions might argue, however, that his expressive activities are religiously motivated. Therefore, his speech can not be restricted under state law unless the city's justification for doing so are far stronger than those the Court accepted in *Frisby*. The ban on residential picketing could be constitutionally applied to nonreligiously motivated persons picketing in front of the physician's home as long as the ordinance was narrowly tailored to serve a significant government interest and

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quires all but total deference to the legislative branches of government. *See* FCC v. Beach Communications, Inc., 508 U.S. 307, 313-14 (1993). Yet, on some occasions, the Court conducts a more searching inquiry into the purpose and effect of the challenged law and will strike a statute down on the grounds that it is not even minimally rational. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631-32 (1996); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446-48 (1985); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 881-83 (1985).

Indeed, there may be little difference between the most rigorous application of the rational basis test in a case like *Cleburne* and the least rigorous application of intermediate scrutiny in cases like *Lalli* and *Clark*. Similarly, it is hard to identify a difference between the most rigorous applications of intermediate level scrutiny in a case such as *United States v. Virginia* and the least rigorous application of strict scrutiny in cases like *Burson* or Justice Powell's opinion in *Bakke*.

[7] In some, and perhaps, many cases, an exemption from content-neutral speech regulations may not be required by state RFRA laws because the restriction of speech at issue will not be found to substantially burden religiously motivated expressive activities. In order to withstand constitutional review under the Free Speech Clause of the First Amendment, content-neutral speech regulations "must 'leave open ample alternative channels for communication.'" City of Ladue v. Gilleo, 512 U.S. 43, 56 (1994) (quoting *Community for Creative Non-Violence*, 468 U.S. at 293). Thus, any constitutional content-neutral speech regulation from which a religiously motivated speaker seeks an exemption by definition provides, for free speech purposes, "ample alternative" opportunities for individuals to communicate their messages. Under state RFRA laws, religiously motivated speakers will bear the burden of proving that such laws substantially burden the exercise of their faith when their messages can be communicated at other times and locations and through other mediums of expression.

[8] 487 U.S. 474, 488 (1988).

[9] This assumes that the residential picketing ban would be given the same limited construction as the ordinance at issue in *Frisby*. *See* Vittitow v. City of Upper Arlington, 43 F.3d 1100, 1110-11 (6th Cir. 1995) (striking down ordinance prohibiting residential picketing after refusing to provide law with kind of narrow construction needed if law was to comply with Court's analysis in *Frisby*).

left open ample alternative channels of communication. In contrast, pursuant to the state's RFRA statute, the same ordinance could be lawfully applied to religiously motivated persons engaged in picketing only if the state demonstrates that the law is the least restrictive means of furthering a compelling state interest. If the state's justification failed this higher standard of review, the religiously motivated speaker might argue that he must be permitted to engage in religiously motivated residential picketing notwithstanding the fact that other picketers are prohibited from doing so.

Similarly, in *International Society for Krishna Consciousness, Inc. v. Lee*,[10] the Supreme Court upheld a ban on speech soliciting contributions in a public airport terminal on the grounds that it was a reasonable response to legitimate concerns about congestion and the disruption of passenger traffic. A religiously motivated solicitor might insist that, pursuant to the requirements of a state RFRA statute, he or she could not be burdened by this regulation unless the airport authorities could justify their ban under strict scrutiny review.

The purpose of this Article is to evaluate these arguments to determine the probable impact of state RFRA laws on content-neutral speech regulations. The analysis presented below strongly suggests that state and federal courts will reject any contention by religiously motivated speakers that state RFRA laws require government to grant them exemptions from content-neutral speech regulations. Religiously motivated opponents of abortion will not be exempt from the requirements of a municipal ban on residential picketing nor will religiously motivated solicitors escape from the restrictions on soliciting imposed by airport authorities.

Exemptions will not be available because the granting of preferential dispensations to religious speech or religiously motivated speakers from content-neutral regulations would violate the Free Speech Clause and the Establishment Clause of the Constitution. Neither the state nor any of its agencies or political subdivisions can provide religious speech immunity from regulatory requirements that are applied to secular speakers and speech. Courts would strike down any attempt to do so pursuant to a state RFRA law as an unconstitutional application of the law.

Moreover, state officials and agencies may reject a religious speaker's claim for an exemption under the authority of the state

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[10] 505 U.S. 672 (1992).

RFRA law itself. Since the refusal to grant an exemption for religious speech or speakers furthers the compelling state interest of complying with federal constitutional guarantees, the state's actions would satisfy the strict scrutiny standard mandated by the statute. Indeed, if state courts follow the accepted convention that requires them to construe state statutes to be consistent with constitutional guarantees when it is possible to do so, RFRA laws should not be interpreted to provide for mandatory exemptions from content-neutral regulations of speech.

I. FEDERAL CONSTITUTIONAL CONSTRAINTS ON INTERPRETING STATE RFRA LEGISLATION TO REQUIRE CONTENT OR VIEWPOINT DISCRIMINATORY EXEMPTIONS FOR RELIGIOUS SPEECH

A. Substantive Limits on the Meaning of State RFRA Laws

1. Categorizing Religious Exemptions Under Free Speech Doctrine

In order to evaluate the constitutional legitimacy of exempting religiously motivated expression from content-neutral laws restricting speech, it is necessary, as an initial step, to identify the nature of the exemption in terms of the conventional First Amendment categories that the Court typically applies in free speech cases. In many cases, religiously motivated expression that arguably falls within the coverage of state RFRA laws will constitute religious speech. The subject of the speaker's message will be religion and the perspective or rationale reflected in whatever point of view the speaker endorses will be explicitly religious in nature. Religious proselytizing is an obvious example of religiously motivated expression that would properly be characterized as religious speech.

This equivalence of the speaker's motive and the content or viewpoint of the speaker's message may not always be the case, however. The statement, "Abortion is murder," might well be religiously motivated expression in a specific instance. Yet the content of the statement, "Abortion is murder," standing alone, would not be characterized as religious speech. Further, the normative perspective reflected in this message could be based on either religious or secular moral precepts or both. Accordingly, it may be argued that a law which permits certain speakers, but not others, to hold signs proclaiming that "Abortion is murder" in a particular

location, solely because of the favored speakers' religious motivation, does not classify on the basis of the viewpoint expressed in the speakers' message.[11]

More commonly, however, expression that is recognized as religiously motivated conduct for the purposes of state RFRA legislation, such as the religious proselytizing example mentioned above, will be explicitly religious in its subject matter or point of view. When this is the case, exempting religiously motivated conduct from neutral speech restrictions necessarily involves a clear regulatory preference for religious speech. Indeed, a state's decision to exempt speakers expressing religious messages from content-neutral regulations of speech, while denying exemptions to secular speakers who are similarly situated as to the time, place, and manner of their expression, would constitute a classic case of either content or viewpoint discrimination in favor of religion. An analysis of the case law in this area demonstrates persuasively that the state's decision to provide preferential, discriminatory exemptions of this kind to religious speakers and messages would violate both the Free Speech Clause and the Establishment Clause of the Constitution.

2. Free Speech and Establishment Clause Restrictions on Preferences for Religious Speech

A long line of United States Supreme Court authority from 1981 to the present repeatedly recognizes that states violate the free speech guarantees of the First Amendment if they regulate religious speech more or less favorably than secular speech. This same line of authority affirms that providing favorable regulatory treatment to private religious speech, but not similarly situated secular speech, violates the Establishment Clause of the First Amendment as well.

In *Heffron v. International Society for Krishna Consciousness, Inc.* ("ISKCON"),[12] ISKCON, an international religious society espousing the views of the Krishna religion, challenged Minnesota State Fair regulations that prohibited the sale, exhibition, or distribution of any materials, including expressive materials, from any locations other than fixed booths at the fairgrounds. ISKCON argued that

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[11] *See infra* notes 73-77 and accompanying text.

[12] 452 U.S. 640 (1981).

the Fair's regulation would prohibit its members from practicing Sankirtan, "one of its religious rituals which enjoins its members to go into public places to distribute or sell religious literature and to solicit donations for the support of the Krishna religion."[13] The Minnesota Supreme Court had ruled in favor of ISKCON. The Minnesota court acknowledged that the State Fair regulation served an important state interest in preventing the widespread disorder that the unrestricted distribution of materials would surely create. The court concluded, however, that "[m]embers of ISKCON . . . have a special claim to an exemption from [the speech regulation they challenged] on free exercise grounds."[14] Accordingly, in order for the State Fair to defeat ISKCON's challenge, the Fair "must establish the importance of the state's interest in avoiding whatever disorder is likely to result from granting members of ISKCON an exemption from compliance with the rule."[15] Since the State Fair could not do so, the application of the challenged rule to ISKCON was enjoined.

The United States Supreme Court reversed, ruling that the Minnesota Supreme Court had erred in its conclusion that religious expression should be exempt from speech regulations applied to nonreligious speech and speakers. The free speech and free exercise requirements of the First Amendment provided no support for such preferential treatment.

> None of our cases suggest that the inclusion of peripatetic solicitation as part of a church ritual entitles church members to solicitation rights in a public forum superior to those of members of other religious groups that raise money but do not purport to ritualize the process. Nor for present purposes do religious organizations enjoy rights to communicate, distribute, and solicit on the fairgrounds superior to those of other organizations having social, political, or other ideological messages to proselytize. Those nonreligious organizations seeking support for their activities are entitled to rights equal to those of religious groups to enter a public forum and spread their views, whether by soliciting funds or by distributing literature.[16]

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[13] *Id.* at 645.

[14] International Soc'y for Krishna Consciousness, Inc. v. Heffron, 299 N.W.2d 79, 83 n.7 (Minn. 1980).

[15] *Id.* at 83.

[16] *Heffron*, 452 U.S. at 652-53.

Since First Amendment guarantees did not provide for any preferential treatment of religious speech, any exemption for ISKCON would have to be extended to all other groups engaged in expressive activities. Accordingly, the question before the Court was not whether the state had a sufficiently important justification for refusing to grant an exemption to ISKCON alone, but rather whether the state's interest in maintaining order justified the challenged regulation in light of all the various groups seeking to distribute materials at the Fair who must be treated in an even handed way. In answering that question, the Court determined that the State Fair's crowd control justifications for restricting speech to designated booths was more than a sufficient basis for upholding the constitutionality of the challenged regulation.[17]

The impact of the Court's analysis in *Heffron* on the interpretation of state RFRA statutes, as well as more abstract questions involving the constitutionality of religious exemptions from content-neutral speech regulations, is arguably ambiguous in one respect. The Court was clear enough that the State Fair's crowd management justification for refusing to grant ISKCON an exemption for its religious solicitations should be evaluated in terms of the likely consequences that would result if the Fair's rules were modified for all the groups that sought to engage in expressive activities at the fairgrounds. Two alternative doctrinal arguments could be cited to support that conclusion, however, and the Court's opinion does not carefully distinguish between them.

On the one hand, the Court's rationale in *Heffron* arguably accepted as a general principle the free exercise framework established in *Sherbert v. Verner*,[18] which required government to justify the denial of requests for exemptions from neutral laws that substantially burdened religious beliefs or practices under strict scrutiny review. Accordingly, ISKCON would have been entitled to a regulatory exemption for any nonexpressive religious activities that its practitioners sought to perform at the Fair unless the State's need to further a compelling governmental interest required it to deny such a request. When religious expression was the subject of the regulation, however, free speech concerns about content and viewpoint discrimination limited the scope of free exercise entitlements. The Free Exercise Clause could not be interpreted to

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[17] *See id.* at 653-54.

[18] 374 U.S. 398 (1963).

require government to provide preferences for religious expression when the Free Speech Clause of the First Amendment had been repeatedly held to prohibit discriminatory regulations of speech.

Under this reading of the case, state RFRA laws could not constitutionally require government agencies to exempt religious expression from content-neutral speech regulations. If free exercise rights to religious exemptions were held to be subordinate to the First Amendment's doctrinal demand for content-neutrality in regulating speech, then surely a mere statutory mandate requiring government to grant exemptions for religious expression would also be superceded by free speech guarantees.

On the other hand, the decision in *Heffron* might be grounded not on the strength of free speech prohibitions against content and viewpoint discrimination, but rather on the Court's lack of commitment both to free exercise exemptions and to rigorous scrutiny of a state's refusal to provide reasonable accommodations of religious practice. If the *Heffron* Court concluded that there was no constitutional basis for granting ISKCON an exemption from the Fair's speech regulations, then ISKCON's claim was indistinguishable from that of any other secular or religious group that desired to engage in expressive activities on the fairgrounds. ISKCON's claim under this analysis constituted a free speech challenge to the Fair's regulations that might have been brought by any speaker seeking the opportunity to engage in expressive activities on any subject at the fairgrounds and nothing more. Accordingly, if ISKCON succeeded on the merits of its claim, the Fair's regulations would have to be struck down as unconstitutional abridgments of the free speech rights of everyone seeking access to the fairground for expressive purposes.

If this interpretation of *Heffron* is correct, when the Court evaluated the Fair's justification for its speech regulations, it may not have intended to suggest that the First Amendment requires the Fair to apply similar rules to religious and secular speakers and speech. The Court's statement, for example, that the appropriate constitutional "inquiry must involve not only ISKCON, but also all other organizations that would be entitled to distribute, sell or solicit if the booth rule may not be enforced with respect to ISKCON"[19] would not be grounded on any First Amendment pro-

[19] *Heffron*, 452 U.S. at 654.

hibition against content discrimination. It would simply recognize that a content-neutral regulation held to restrict speech in violation of the First Amendment can not be applied to anyone.

Similarly, the United States Supreme Court's criticism of the Minnesota Court's analysis under this interpretation of the case did not address the substantive meaning of the First Amendment. The Court did explain that "by focusing on the incidental effect of providing an exemption [from the Fair's speech regulations] to ISKCON, the Minnesota Supreme Court did not take into account the fact that any such exemption cannot be meaningfully limited to ISKCON, and as applied to similarly situated groups would prevent the State from furthering its important concern with managing the flow of the crowd."[20] But this statement did not mean that the Fair must treat all similarly situated speakers the same, without regard to whether they are engaged in secular or religious speech. Instead, it merely affirmed that if the Fair's regulations are constitutionally invalid restrictions on speech, they are constitutionally invalid for everyone.

In my judgment, the former understanding of *Heffron* is more plausible and persuasive than the latter. Because the Court repeatedly uses mandatory language in its analysis of the Fair's justification for its regulatory scheme, it is difficult to accept the contention that this choice of phraseology does not communicate anything substantive about the need to regulate all speakers under a common, content-neutral standard. Moreover, if the Minnesota Supreme Court's conclusion regarding ISKCON's free exercise entitlement to a religious exemption from the Fair's rules was not in error because it conflicted with the Free Speech Clause prohibition against content discrimination, we are left with no other explanation for the United States Supreme Court's apparent conclusion that no such exemption was required.[21]

Justice Brennan, in dissent, was clearly troubled by the lack of at-

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[20] *Id.*

[21] The Court does note in a footnote that "[r]espondents do not defend the limited approach of the Minnesota Supreme Court. They concede that whatever exemption they were entitled to under the First Amendment would apply to other organizations seeking similar rights to take part in certain protected activities in the public areas of the fairgrounds." *Id.* at 652 n.15. But this note does nothing to explain the justification for ISKCON's concession. Unless it was understood that Free Speech Clause or Establishment Clause requirements prohibited the state from granting discriminatory preferences to religious speech, it is difficult to understand why ISKCON would abandon the free exercise argument for a religious exemption accepted by the Minnesota Supreme Court.

tention to ISKCON's free exercise rights in the majority opinion. Brennan argued that the State Fair regulation was unnecessarily restrictive. He also emphasized, however, that the majority's language should not be taken to suggest that religious rituals do not receive independent free exercise protection in other circumstances. Rather, the majority's point was that the protection provided by the Free Exercise Clause had to be tempered by free speech guarantees. Thus, Brennan noted:

> Our cases are clear that government regulations which interfere with the exercise of specific religious beliefs or principles should be scrutinized with particular care. . . . I read the Court as accepting these precedents and merely holding that even if Sankirtan is "conduct protected by the Free Exercise Clause," it is entitled to no greater protection than other forms of expression protected by the First Amendment that are burdened to the same extent by [the challenged rule.][22]

Subsequent free speech cases involving religious expression after *Heffron* have repeatedly demonstrated the strength of the Court's commitment to neutrality in regulating expression and its opposition to discrimination for or against religious speech. In *Widmar v. Vincent*,[23] the Court made it clear that the same First Amendment principles that forbid content and viewpoint discrimination, and arguably repudiated the favoring of religious speech in *Heffron*, also protect religious speakers against state action that disfavors their expression. A public university in Missouri, acting under a general policy that prohibited the use of university buildings for religious worship or instruction while allowing the buildings to be used for numerous other student expressive activities, denied access to its facilities to a registered student group that wished to use the university facilities for religious worship and discussion. The Court held that the university's policies were unconstitutional because they violated "the fundamental principle that a state regulation of speech should be content neutral."[24]

The university attempted to justify its preferential policy by arguing that the Missouri Constitution required a more rigorous sepa-

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[22] *Id.* at 660 n.3 (Brennan, J., dissenting).
[23] 454 U.S. 263 (1981).
[24] *Id.* at 277.

ration of church and state than the Federal Constitution and that complying with the state's constitution constituted a compelling state interest. In rejecting this argument, the Court explained that state policies, even those enshrined in the state constitution, could not justify the violation of the First Amendment.

> On the one hand, [the students'] First Amendment rights are entitled to special constitutional solicitude. Our cases have required the most exacting scrutiny in cases in which a state undertakes to regulate speech on the basis of its content. On the other hand, the state interest asserted here — in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution — is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well. In this constitutional context, we are unable to recognize the State's interest as sufficiently "compelling" to justify content-based discrimination against respondents' religious speech.[25]

Placed together, and *Widmar* was decided only six months after *Heffron*, the Court's decisions in these two cases would seem to directly control the review of state RFRA laws as they pertain to claims for exempting religious expression from content-neutral regulations of speech. The First Amendment's prohibition against content and viewpoint discrimination precludes the state's legislature or executive officials from providing special treatment to religious expression. Government can neither favor nor disfavor private religious speech. Granting an exemption from speech regulations to religious expression that is unavailable to secular speech clearly constitutes the kind of content and viewpoint discrimination that the First Amendment forbids.

Further, courts will almost certainly reject out of hand any state's contention that its statutory attempt to extend free exercise protection beyond that provided by the Federal Constitution justifies content and viewpoint discrimination in favor of religious speech. The Court in *Widmar* ruled that compliance with a state constitutional provision attempting to extend Establishment Clause requirements beyond what was required by the Federal Constitution does not constitute the kind of compelling state interest that would justify violating free speech principles. There is no reason to believe that

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[25] *Id.* at 276 (citations omitted).

a similar argument grounded only on a state statute attempting to extend protection beyond that provided by the other religion clause, the Free Exercise Clause, would receive any greater respect as a justification for violating First Amendment requirements.

Creating an exemption for religious expression from content-neutral laws that directly burden or regulate speech would violate the Establishment Clause of the First Amendment as well as the Free Speech Clause. In *Texas Monthly, Inc. v. Bullock*,[26] the Court struck down a Texas law exempting from its sales and use tax any "periodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith."[27] Five Justices concluded that the challenged law violated the Establishment Clause. A sixth Justice, Justice White, concluded that the law was unconstitutional because it discriminated on the basis of the content of speech in violation of free speech and freedom of the press principles.

Of those Justices holding that the tax exemption for religious periodicals violated the Establishment Clause, Justice Brennan and two others applied conventional Establishment Clause doctrine to the law in striking it down. They concluded that the tax exemption was unconstitutional because it "lacks a secular objective that would justify this preference [for religious expression] along with similar benefits for nonreligious publications or groups, and because it effectively endorses religious belief."[28]

Justice Brennan recognized that legislatures were entitled to adopt laws that provided incidental benefits to religion. A statute conferring incidental benefits on religion would withstand constitutional review if it was sufficiently broad in its scope, and inclusive of nonreligious as well as religious beneficiaries, to avoid any inference that it was intended to support or sponsor religion. The Texas tax exemption under review in *Texas Monthly*, however, was directed exclusively "at writings that *promulgate* the teachings of religious faiths."[29] As such, the exemption was too narrow in its purpose and effect to be construed as "anything but state sponsorship of religious belief."[30]

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[26] 489 U.S. 1 (1989).
[27] *Id.* at 5.
[28] *Id.* at 17.
[29] *Id.* at 15 (emphasis added).
[30] *Id.*

Brennan also understood that laws exclusively advantaging religion might be upheld in certain circumstances, even when such benefits were not required by the Free Exercise Clause. Accommodations of religion of this kind, however, must not "impose substantial burdens on nonbeneficiaries while allowing others to act according to their religious beliefs."[31] Alternatively, accommodations would satisfy Establishment Clause requirements if they "were designed to alleviate government intrusions that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause."[32] The Texas tax exemption could not be upheld under either theory. Tax exemptions for certain periodicals inevitably shifted the cost of government to other taxpayers, thereby burdening nonbelievers. Further, there was no showing that the payment of a sales tax substantially precluded individuals from engaging in religiously mandated practices.[33]

Justice Blackmun's concurrence, joined by Justice O'Connor, viewed the issue in broader terms. From their perspective, the Texas tax preference for religious speech challenged the very core of the Establishment Clause.

> [B]y confining the tax exemption exclusively to the sale of religious publications, Texas engaged in preferential support for the communication of religious messages. Although some forms of accommodating religion are constitutionally permissible, this one surely is not. A statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable.[34]

Both the plurality and the concurring opinions in *Texas Monthly* strongly suggest that exemptions for religious speech from content-neutral time, place, and manner regulations applicable to secular expression would violate the Establishment Clause. Under Justice Brennan's analysis, providing preferential access to certain speakers and messages will obviously distort debate in a competitive marketplace of ideas to the disadvantage of other, perhaps conflicting, subjects and viewpoints. Nor can one argue that compliance

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[31] *Id.* at 18 n.8.
[32] *Id.*
[33] *See id.*
[34] *Id.* at 28 (Blackmun, J., concurring) (citation omitted).

with reasonable time, place, and manner speech regulations will be substantially burdensome to religious practices protected against interference by the Free Exercise Clause. In most cases such an argument would be difficult to sustain.[35] The unconstitutionality of providing preferential exemptions for religious speech is even more explicitly recognized in Justice Blackmun's concurring opinion.

Indeed, the impact of the *Texas Monthly* holding on attempts to use state RFRA legislation to exempt religious speech from neutral regulations is also demonstrated in unmistakable terms by Justice Scalia's dissent which Justice Kennedy and Chief Justice Rehnquist joined. To Justice Scalia, the tax exemption for religious periodicals was a clearly permissible accommodation of religion, although it may not have been required by free exercise principles. That the exemption constituted content discrimination in favor of religious speech was largely irrelevant to the constitutional inquiry. Thus, Justice Scalia wrote,

> Just as the Constitution sometimes *requires* accommodation of religious expression despite not only the Establishment Clause, but also the Speech and Press Clauses, so also it sometimes *permits* accommodation despite all these Clauses. Such accommodation is unavoidably content-based — because the Freedom of Religion Clause is content based. It is absurd to think that a State which chooses to prohibit booksellers from making stories about seduction available to children of tender years cannot make an exception for stories contained in sacred writings . . . . And it is beyond imagination that the sort of tax exemption permitted . . . [by earlier cases] would have to be withdrawn if door-to-door salesmen of commercial magazines demanded equal treatment with Seventh-day Adventists on Press Clause grounds. And it is impossible to believe that the State is constitutionally prohibited from taxing *Texas Monthly* magazine more heavily than the Holy Bible.[36]

As part of a majority opinion, Justice Scalia's analysis would provide persuasive support for arguments supporting the constitutionality of a legislature's decision to grant exemptions to religious

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[35] The Court's decision in *Heffron* would seem to establish this point. *See supra* notes 12-22 and accompanying text.

[36] *Texas Monthly*, 489 U.S. at 45 (Scalia, J., dissenting) (emphasis added).

speech from general regulations and taxes. As a dissenting opinion, it conveys exactly the reverse message. Under the plurality and concurring opinions in *Texas Monthly*, it is impossible to believe that discriminatory preferences in favor of religious speech are constitutionally permissible except, perhaps, in those narrow circumstances when they may be constitutionally compelled.

More recent Supreme Court cases affirm that regulatory favoritism for or against religious speech violates both the Free Speech Clause and the Establishment Clause of the First Amendment. While these cases all involve discrimination against religious speech, the language and reasoning of the Court leaves no doubt that discrimination in favor of religious speech would be equally impermissible. In *Lamb's Chapel v. Center Moriches Union Free School District*,[37] the Court held that it violated the Free Speech Clause of the First Amendment for a school district to deny church groups access to school facilities after hours for the purpose of engaging in religiously oriented expressive activities when those same facilities were made available to a wide variety of secular groups for similar, but nonreligious, activities. The basis for the Court's holding was clear and explicit. "'[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'"[38]

The Court's decision in *Capital Square Review and Advisory Board v. Pinette*,[39] is even more explicit and to the point. At issue was a Municipal Board's refusal to allow a private group to erect a cross on a publicly owned plaza in front of the Ohio statehouse that had been used in the past by private groups for expressive purposes. Previous uses had included the placement of other unattended expressive structures in the plaza. The Board justified its refusal on the ground that allowing the cross to be located in the plaza would violate the Establishment Clause.

Justice Scalia, writing for a four Justice plurality, ruled that the Board's discriminatory decision could not be justified on Establishment Clause grounds. No Establishment Clause violation occurs, he concluded, when permission is granted to individuals or groups to use a public forum for religious expression through the same process and on the same terms available to other speakers.

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[37] 508 U.S. 384 (1993).

[38] *Id.* at 394 (quoting City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984)).

[39] 515 U.S. 753 (1995).

Justice Scalia emphasized, however, that his decision was predicated on the principle of equality of access and fair treatment for all speakers, religious or otherwise. A policy providing special privileges to religious speech would also be unacceptable because "giving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate the Establishment Clause (as well as the Free Speech Clause, since it would involve content discrimination)."[40]

It is important to note that Justice Scalia and the plurality's position that government favoritism toward religious speech will violate the Establishment Clause reflects the position on the Court that is most protective of private religious speech. Justices O'Connor, Souter, and Breyer concurred in the judgment in *Pinette*, but pointedly noted the basis for their disagreement with the plurality. To the concurring Justices, even a neutral governmental policy regulating speech that is devoid of favoritism may violate the Establishment Clause if it has the effect of endorsing religion. They argued that "[w]here the government's operation of a public forum has the effect of endorsing religion, even if the government actor neither intends nor actively encourages that result, the Establishment Clause is violated."[41] Justice Stevens and Justice Ginsburg dissented on the grounds that allowing the cross to be erected in the statehouse plaza violated the Establishment Clause because of its effect — notwithstanding the government's lack of intent to endorse the cross or the religious beliefs it symbolizes.[42]

The relevance and importance of the *Pinette* decision to the interpretation of state RFRA statutes in the context of claims for exemption from content-neutral speech regulations can not be overstated. Every Justice on the Court recognizes that explicit favoritism for private religious speech violates the Establishment Clause of the First Amendment. A five Justice majority would find a violation of the Establishment Clause if even neutral speech regulations resulted in a perceived endorsement of religion. Under this authority, it is difficult to understand how anyone might maintain that state RFRA laws could be applied constitutionally to exempt religious speakers or speech from content-neutral time, place, and manner regulations.

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[40] *Id.* at 766.

[41] *Id.* at 777 (O'Connor, J., concurring) (citation omitted).

[42] *See id.* at 797-815 (Stevens, J., dissenting); *id.* at 817-18 (Ginsburg, J., dissenting).

The Court's decision in *Rosenberger v. Rector and Visitors of the University of Virginia*[43] is fully consistent with the precedent discussed above. In *Rosenberger*, the Court held that it violated the First Amendment's prohibition of viewpoint discrimination for a public university to use student fees to subsidize a wide range of student initiated and edited periodicals, while denying comparable support to a student run religious journal. Once again the Court made it clear that government could neither favor nor disfavor religious speech. As Justice Kennedy's majority opinion explained, "the neutrality commanded of the State by the separate Clauses of the First Amendment was compromised by the University's course of action."[44]

For Free Speech Clause purposes, the fact that cases such as *Lamb's Chapel*, *Pinette*, and *Rosenberger* all involved discrimination against religious speech is entirely irrelevant to the constitutional analysis. It is simply far too late in the day to maintain that laws privileging favored messages are somehow less offensive to First Amendment requirements than laws restricting unpopular speech. The Court has emphasized this point on numerous occasions. Most recently in *City of Ladue v. Gilleo*,[45] Justice Stevens explained that

> [w]hile surprising at first glance, the notion that a regulation of speech may be impermissibly underinclusive is firmly grounded in basic First Amendment principles. Thus, an exemption from an otherwise permissible regulation of speech may represent a governmental "attempt to give one side of a debatable public question an advantage in expressing its views to the people." Alternatively, through the combined operation of a general speech restriction and its exemptions, the government might seek to select the "permissible subjects for public debate" and thereby to "control . . . the search for political truth."[46]

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[43] 515 U.S. 819 (1995).

[44] *Id.* at 845.

[45] 512 U.S. 43 (1994).

[46] *Id.* at 51 (citations omitted); *see also* Carey v. Brown, 447 U.S. 455, 460-61 (1980) (explaining that law exempting labor picketing from ban on residential picketing violates First Amendment and equal protection principles because it "accords preferential treatment to the expression of views on one particular subject"); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972) (striking down law exempting labor picketing from regulation prohibiting picketing near school on the grounds that selective favoritism in allowing speakers access to public property for expressive purposes fundamentally undercuts First Amendment and equal protection requirement that "government must afford all points of view an equal

Exempting religious speech from content-neutral speech regulations would obviously "advantage" one side in a range of public debates, so much so that it would violate the Establishment Clause as well as the Free Speech Clause of the First Amendment.

B. *Interpreting State RFRA Laws in Light of First Amendment Constraints*

1. Justifying the Denial of Religious Exemptions Under State RFRA Laws — Constitutional Compliance as a Compelling State Interest

If a state actor grants an exemption to religious speakers or speech under the authority of a state RFRA law, that discriminatory preference will be subject to constitutional challenge. As explained above, such an application of a state RFRA statute would violate both the Free Speech Clause and the Establishment Clause of the First Amendment. But state actors would not be required to grant unconstitutional exemptions of this kind. State RFRA laws permit government to substantially burden a person's exercise of religion if it is necessary to do so in order to further a compelling governmental interest. That states are required to comply with the Federal Constitution and that compliance with constitutional obligations constitutes a compelling governmental interest should be apparent and needs little justification. Certainly, the United States Supreme Court has stated this point clearly on several occasions in cases dealing with discrimination for or against religious speech.

In *Widmar v. Vincent*, for example, in reviewing the University's contention that allowing a religious group to use university facilities would violate the Establishment Clause, the Court noted that "[w]e agree that the interest of the University in complying with its constitutional obligations may be characterized as compelling."[47] Similarly, in *Pinette*, Justice Scalia explained that "[t]here is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech."[48] Thus, it seems clear that if a religiously motivated

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opportunity to be heard"); Cox v. Louisiana, 379 U.S. 536, 581 (1965) (Black, J., concurring) (characterizing as "censorship in a most odious form" state's attempt "to pick and choose among the views it is willing to have discussed on its streets" by providing labor picketing preferential treatment).

[47] Widmar v. Vincent, 454 U.S. 263, 271 (1981).

[48] Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761-62 (1995).

person seeks exemption from a content-neutral speech regulation for religious expression, the state or city enforcing the regulation can justify refusing to grant the exemption on the ground that doing so would violate the Free Speech Clause and Establishment Clause of the Federal Constitution. A court interpreting a state RFRA law should rule correctly that this justification constitutes a compelling governmental interest.

2. Federal RFRA Cases Evaluating the Denial of Exemptions for Religiously Motivated Expression

There are not many Federal RFRA cases dealing with exemptions from speech regulations and none that deal explicitly with the application of RFRA to a conventional time, place, and manner regulation. A few cases deal with the regulation of unprotected expressive activities, typically in the context of protests outside of clinics providing abortion services. In these decisions, the courts determined either that the petitioner's religious practices were not substantially burdened by the challenged law or that the offending statute was narrowly tailored to serve a compelling state interest.[49] Accordingly, the RFRA claims were rejected. There is also at least one case involving content and viewpoint discrimination in which the court concluded that the government's restrictions on speech violated both the Free Speech Clause of the First Amendment and RFRA.[50] None of these cases provide an analysis that is directly responsive to the issue addressed in this Article.

Several RFRA speech cases also arise in the context of prison regulations limiting religious expression, and here one decision comes close to being directly on point. In *Haff v. Cooke*,[51] plaintiff, a prison inmate, claimed to be a member of an Identity Christian religion, more specifically the Church of Jesus Christ Christian, Aryan Nation ("CJCC"). Plaintiff's faith espouses white supremacist and anti-Semitic beliefs. After prison authorities confiscated

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[49] In the abortion protest context, both First Amendment and RFRA challenges were brought against the Freedom of Access to Clinic Entrances Act of 1994 ("FACE"). Courts generally rejected both claims. The RFRA challenge was typically rejected either on the ground that FACE did not substantially burden petitioner's religious practices, *see, e.g.*, Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995), or because FACE was held to be a narrowly tailored regulation furthering a compelling state interest, *see, e.g.*, American Life League, Inc. v. Reno, 47 F.3d 642 (4th Cir. 1995).

[50] *See* Rigdon v. Perry, 962 F. Supp. 150, 160-65 (D.C. 1997) (enjoining ban on military chaplains encouraging congregants to contact Congress on pending legislation).

[51] 923 F. Supp. 1104 (E.D. Wis. 1996).

Aryan Nation materials, plaintiff brought suit in federal court alleging that the prison's actions violated his First Amendment rights of freedom of speech and association and his right to religious liberty protected by the Federal RFRA statute.

The district court had little difficulty in rejecting plaintiff's free speech claims. Under *Turner v. Safley*,[52] prison regulations burdening free speech rights will be upheld as long as they are rationally related to a legitimate penological objective. The court concluded that the confiscation of the Aryan Nation literature was clearly related to prison security concerns because the racist and violent content of the material might incite violence and disorder.[53] Plaintiff's RFRA claim required additional analysis, however.

The court recognized that the compelling state interest and least restrictive means test required by RFRA was substantially more "stringent" than the rational basis analysis that satisfies the *Turner v. Safley* standard.[54] That disparity in the rigor of review suggested that prison authorities must treat secular and religious reading material differently. Secular reading material that promoted and incited violence might lawfully be confiscated whenever doing so was reasonably related to prison security, but religious reading material that promoted and incited violence to the same degree could only be confiscated if the state could demonstrate that doing so was the least restrictive means of furthering its compelling security concerns. The court held, however, that RFRA could not be interpreted to require such a preference for religious expression because both the Establishment Clause and the Free Speech Clause of the First Amendment prohibited content or viewpoint discrimination favoring religious speech. Indeed, the court's analysis tracks the arguments presented in this Article almost point by point. Thus, the district court concluded:

> RFRA cannot provide special protection to material because of its religious content; to do so would violate the Establishment Clause and discriminate based on the content of the material (violating the Free Speech Clause). In other words, if the government substantially burdens the practice of religion when it obeys the Establishment or Free Speech Clause, that mandate is a compelling in-

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[52] 482 U.S. 78, 89 (1987).

[53] *See Haff*, 923 F. Supp. at 1112.

[54] *See id.* at 1114.

> terest, and the burden is the least restrictive means of meeting that interest. If [prison authorities] had returned the material solely because CJCC is a religion, [they] would have been favoring religious expression over secular expression in violation of the First Amendment.[55]

After citing Supreme Court cases such as *Rosenberger*, *Widmar*, and *Texas Monthly* among others to support its Establishment Clause analysis, the court explained,

> If this court applied a RFRA test more stringent than the Turner test, this court would force prisons to favor prisoners' religious material over their secular material because prisons would need a better justification to confiscate religious material than political material. [The prison official's] decision has survived the *Turner* test — the confiscation was rationally related to a legitimate penological objective. If [the prisoner] was not a member of the CJCC, the confiscation would have been unquestionably legal; if RFRA forbids the confiscation, [the prisoner] would possess the white supremacist material solely because of its relation to exercising his religion, as opposed to his political rights. The government would be granting a forum to religious expression that it denies to secular views. . . .
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> . . . .
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> Moreover, if prison officials used different standards when confiscating religious, white supremacist material than when confiscating political, white supremacist material, the officials would violate the Free Speech Clause as well. In a nonpublic forum, the state may discriminate based on the viewpoint or identity of the speaker only if the control is reasonable in light of the purpose of the forum and is viewpoint neutral. . . . The prison would be discriminating based on viewpoint if it allowed material that advocated white supremacy from a religious viewpoint but banned material that advocated white supremacy from a political viewpoint. The Establishment Clause and the Free Speech Clause required [prison officials] to treat religious material no worse and no better than secular material. As long as [the official's] confiscation passes the *Turner* test, it must also, in this case, pass

[55] *Id.* at 1115 (citations omitted).

RFRA's requirements.[56]

While the decision in *Haff v. Cooke* does not focus directly on a claim that religious expression must be exempt from content-neutral speech regulations, the Court's analysis strongly suggests that the Federal RFRA statute was not understood to require exemptions in such circumstances.

3. The Least Restrictive Means of Avoiding Content and Viewpoint Discrimination

While the above analysis should permit state actors to deny requests for exemptions for religious speech from content-neutral regulations without violating state RFRA laws, there may be an additional argument that complicates an official's attempt to satisfy strict scrutiny review by asserting the state's constitutional obligation to avoid content or viewpoint discrimination in regulating speech. State RFRA legislation imposes two burdens on a state's justification for denying religious exemptions from laws that substantially burden religious beliefs and practice. The denial of the exemption must further a compelling state interest and it must be the least restrictive means of accomplishing the state's objective.

With regard to the least restrictive means prong of the test, a religious claimant may argue that government has an alternative means available to it to remove a burden on religious practice imposed by time, place, and manner regulations. Rather than providing religious expression an exemption to the speech regulation at issue, which would constitute a constitutionally prohibited preference for religious speech, the government might repeal the speech regulation for everyone. This nondiscriminatory response to the requirements of a state RFRA law would relieve religious expressive activity from the substantial burdens allegedly imposed on it by content-neutral speech regulations without violating First Amendment mandates.

In a sense, the religious claimant would be arguing that the least restrictive, indeed, the only constitutionally permissible way in which a state can comply with both the First Amendment and state RFRA statutes with regard to religious speech would be to repeal or invalidate a challenged content-neutral speech regulation unless

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[56] *Id.* at 1115-16 (citation omitted).

that law could be justified under strict scrutiny. Thus, for example, with regard to the ban on residential picketing discussed previously, a person engaged in communicating overtly religious messages while picketing outside the home of a doctor who performs abortion services would make the following argument. The content-neutral ban on residential picketing need only be narrowly tailored to serve a significant state interest and leave open ample alternative channels of communication in order to be upheld under federal constitutional review. If the law substantially burdens the practice of religion, however, state RFRA legislation requires the law to be repealed by the legislature or determined to be unenforceable by the courts unless it is the least restrictive means of furthering a compelling state interest, a much more rigorous standard of review. The state can not grant the religious picketer an exemption from the ban because doing so would violate the First Amendment prohibition against content or viewpoint discrimination in a traditional public forum. But there is nothing facially unconstitutional about repealing or prohibiting the enforcement of the state's law against residential picketing. Therefore, unless the content-neutral ban on residential picketing can independently satisfy the strict scrutiny standard imposed by the state RFRA statute on laws that substantially burden religious activities, the ban on picketing must be rejected on statutory grounds.

While this argument is logically consistent with federal free speech doctrine and the language of state RFRA laws, I believe it would be emphatically rejected by state courts. If the argument is accepted, state RFRA laws would have the unintended effect of transforming the way in which speech regulations in a state are reviewed. All content-neutral speech regulations that substantially burden religious speech (a class which in practical terms might include virtually all content-neutral speech regulations that apply to religiously motivated expression) would now receive strict scrutiny review, the standard of review previously applied only to content or viewpoint discriminatory regulations.

Subjecting many or most content-neutral laws to strict scrutiny review would impose an intolerable burden on society. It is simply inconceivable that state courts would interpret state RFRA laws to require such an unacceptable result. To put the matter another way that comports with the statutory language employed in state RFRA laws, the state has a compelling governmental interest in not subjecting content-neutral speech regulations to strict scrutiny

review.

Professor Geoffrey Stone, Provost of the University of Chicago and a pre-eminent First Amendment scholar, explained the reasons why content-neutral speech regulations can not be subjected to strict scrutiny review in his seminal article, *Content-Neutral Restrictions*,[57]

> [T]he extension of strict scrutiny to all content-neutral restrictions would invalidate many laws that limit speech in a content-neutral manner. The consequential disruption, if individuals were free to speak or assemble at any time and place and in any manner they chose, would be intolerable. Many content-neutral laws that could not satisfy . . . strict scrutiny are essential to the general well-being of society. Laws, for example, prohibiting two groups from marching on Main Street at the same time, or forbidding the use of loudspeakers in residential neighborhoods at night, or prohibiting the scattering of leaflets over an entire city from helicopters, are perfectly sensible enactments despite the fact that they restrict free expression. It is simply not sensible to construe the first amendment in such a way as to turn people's homes and society's police stations, courthouses, and schools into completely open "forums in which anyone may freely engage in first amendment expression." As the Court observed almost fifty years ago, civil liberties "imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses." [quoting *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941)] The extension of strict scrutiny to all content-neutral restrictions would threaten society with chaos.[58]

State courts have also recognized that content-neutral laws are essential not only to social order, but to the protection of fundamental freedoms, such as freedom of speech, as well. As the California Supreme Court noted in *In re Kay*,[59] "the state retains a legitimate concern in ensuring that some individuals' unruly assertion of their rights of free expression does not imperil other citizens' rights of free association and discussion. . . . Freedom of eve-

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[57] Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987).

[58] *Id.* at 75-76.

[59] 1 Cal. 3d 930, 464 P.2d 142 (1970).

ryone to talk at once can destroy the right of anyone to effectively talk at all. Free expression can expire as tragically in the tumult of license as in the silence of censorship."[60]

4. Construing State RFRA Laws in State Court

Most state courts recognize that they have an obligation to construe statutes to be consistent with constitutional requirements when it is possible to do so. Courts must "presume that the Legislature intended to enact a valid statute; [they] must, in applying [a challenged] provision, adopt an interpretation that, consistent with the statutory language and purpose, eliminates doubts as to the provision's constitutionality."[61] Pursuant to this obligation, state courts should interpret state RFRA laws not to require exemptions for religious speech from content-neutral speech regulations if they can do so consistent with the language and purpose of the statute.

The intent and language of state RFRA laws do not preclude this result. If anything, they support such a construction of the law. State RFRA laws are intended to be understood in terms of a specific constitutional and statutory history. Indeed, some RFRA laws include in their findings and legislative history repeated references to the background events that necessitated their adoption.[62] It seems clear that state RFRA laws were intended to be interpreted with due regard to that history. In essence, state RFRA laws are an attempt to provide by state statute the kind of protection to religious liberty that had previously been enforced, initially under the authority of the Free Exercise Clause of the Federal Constitution, and later, after free exercise guarantees were undermined by the United States Supreme Court's decision in *Employment Division v.*

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[60] *Id.* at 941, 464 P.2d at 149; *see also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 387 (1969) (recognizing that free speech right of several speakers may have to be limited to some degree to allow each to be understood); Kovacs v. Cooper, 336 U.S. 77, 86 (1949) (noting that hecklers and those interrupting speech of others must be regulated if freedom of speech is to be more than "an empty privilege").

[61] *In re Kay*, 1 Cal. 3d at 942, 464 P.2d at 150; *see also* Blodgett v. Holden, 275 U.S. 142, 148 (1928); Lorie C. v. St. Lawrence County Dep't of Soc. Servs., 400 N.E.2d 336, 341 (N.Y. 1980); Chelsea Community Hosp., SNF v. Michigan Blue Cross Ass'n, 630 F.2d 1131, 1135 (6th Cir. 1980); ITT Community Dev. Corp. v. Seay, 347 So. 2d 1024, 1029 (Fla. 1977); 16 C.J.S. *Constitutional Law* § 96 (1984).

[62] *See* S. 604, 1998 Reg. Sess. § 2-3 (Ala. 1998); A.B. 1617, 1997-98 Reg. Sess. § 1 (Cal. 1997); H.R. 3201, 1998 Reg. Sess. (Fla. 1997); H.R. 2370, 90th Leg., 1997-98 Reg. Sess. § 10(b) (Ill. 1997); S. 1591, 90th Leg., 1997-98 Reg. Sess. § 10(b) (Ill. 1997).

Smith,[63] by the Federal Religious Freedom Restoration Act.[64]

As this Article has demonstrated already at some length, the protection of religious liberty provided by the Free Exercise Clause prior to *Employment Division v. Smith* was never understood to require exemptions for religious speech from content-neutral speech regulations.[65] It is also clear that the Federal Religious Freedom Restoration Act was intended to be similarly limited in its scope. The Senate Judiciary Committee's report on the Federal Religious Freedom Restoration Act in the section titled, "Other Areas of Law Are Unaffected," makes this point explicitly. The report states, "Furthermore, where religious exercise involves speech, as in the case of distributing religious literature, reasonable time, place, and manner restrictions are permissible consistent with First Amendment jurisprudence."[66]

Accordingly, state courts should interpret a state RFRA statute in a way that eliminates doubts as to its constitutionality that is consistent with the statute's language and purpose. Such an interpretation would preclude the granting of exemptions from content-neutral regulations for religious speech and would uphold the application of reasonable time, place, and manner restrictions to religious expression.

II. FEDERAL CONSTITUTIONAL CONSTRAINTS ON INTERPRETING STATE RFRA LEGISLATION TO REQUIRE EXEMPTIONS FOR RELIGIOUSLY MOTIVATED SPEECH

The foregoing analysis presupposes that religiously motivated expression communicates a religious message. Thus, an exemption for religiously motivated speech would involve preferential treatment for speech that explicitly discusses a religious subject or expresses a religious viewpoint. An exemption for religious proselytizing is an obvious example. As I noted previously, however, an exemption for religiously motivated expression might also apply to a religious individual who expresses the exact same message as a nonreligious speaker, such as the message that "Abortion is murder." Where an exemption is provided for religiously motivated expression that does not involve explicitly religious content, the

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[63] 494 U.S. 872 (1990).

[64] 42 U.S.C. §§ 2000bb-1 to -4 (1994).

[65] *See supra* notes 12-46 and accompanying text.

[66] S. REP. NO. 103-111, at 13 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1903.

religious abortion protestor would be exempt from restrictions on the time, place, and manner of his expressive activity while a secular abortion protestor engaged in exactly similar expressive behavior would have to obey whatever content-neutral regulations the state imposed on his actions. While this disparity in treatment obviously constitutes a preference for the religious speaker, it is more difficult to contend that the exemption constitutes content or viewpoint discrimination in favor of the message that the speaker is communicating.

A. Evaluating Discrimination on the Basis of Motivational Beliefs that Are Reflected in the Favored Speaker's Message

As a technical matter, it is possible to argue that the state is not engaged in content or viewpoint discrimination even in the religious proselytizing example above where an exemption is granted for speech that is explicitly religious in its message. In theory, a law directed at the motive of the speaker is distinct from a law directed at the content of the message a speaker is expressing. Thus, it may be argued that while the message being expressed by the person proselytizing his faith is overtly religious in its content, that fact is entirely incidental to the preference that the speaker receives. As a matter of definition, not all religiously motivated speech is religious in its content and not all speech that discusses a religious subject or expresses a religious viewpoint is necessarily motivated by religious beliefs. Daniel Farber raises this general argument in his recent book, *The First Amendment*, in the context of a discussion of hate speech regulations, although he concedes that the argument might not receive judicial approval.[67]

There is little specific law on this issue and only limited relevant commentary in law reviews. Notwithstanding these limited resources, I believe it may be argued persuasively that a law discriminating in favor of or against expression motivated by specific beliefs should be evaluated under the same rigorous standard of review applied to laws that discriminate in favor of or against the subject or viewpoint of particular messages. For First Amendment purposes, the formal distinction between speech and the belief system that motivates a speaker should be of little importance.

Certainly, the language the Court employs in describing content

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[67] *See* DANIEL FARBER, THE FIRST AMENDMENT 115-17 (1998).

and viewpoint discriminatory regulations of speech reflects an equivalence between laws directed at the message of speech and laws directed at the speaker's perspective or purpose in expressing his message. Thus, in *Rosenberger v. Rector and Visitors of the University of Virginia*,[68] the Court justifies its decision to strike down a subsidy scheme alleged to discriminate against religious viewpoints by explaining that "[t]he Government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[69] Similarly, in *R.A.V. v. City of St. Paul*, the Court seemed to accept the substantive identity of motivating beliefs and the content of speech in explaining its decision to strike down a hate speech ordinance on First Amendment grounds.

> What we have here, it must be emphasized, is not a prohibition of fighting words that are directed at certain persons or groups (which would be *facially* valid if it met the requirements of the Equal Protection Clause); but rather, a prohibition of fighting words that contain (as the Minnesota Supreme Court repeatedly emphasized) messages of "bias-motivated" hatred and in particular, as applied to this case, messages "based on virulent notions of racial supremacy."[70]

The Court's statement in *R.A.V.* is of particular importance to understanding the role of motivating beliefs in free speech doctrine because of the juxtaposition of this hate speech case and *Wisconsin v. Mitchell*,[71] a case in which the Court upheld the constitutionality of a hate crimes statute against a First Amendment challenge only one year later. In *Mitchell*, the Court concluded that a law enhancing the sentence of the perpetrator of an aggravated battery that selected his victim on the basis of the victim's race did not raise the same constitutional concerns as the hate speech ordinance struck down the previous year.[72] Significantly, the Court did not distinguish *R.A.V.* on the grounds that the ordinance in the earlier case was directed at the content of speech as opposed to the

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[68] 515 U.S. 819 (1995).

[69] *Id.* at 829 (1995).

[70] R.A.V. v. City of St. Paul, 505 U.S. 377, 392 (1992) (quoting *In re* Welfare of R.A.V., 464 N.W.2d 507, 508, 511 (Minn. 1991)).

[71] 508 U.S. 476 (1993).

[72] *See id.* at 487.

motives of the speaker or actor. Instead, it emphasized the difference in First Amendment scrutiny applied to a law directed at "'bias-motivated'" speech and a law directed at "bias-inspired" conduct.[73]

As the Court explained in *Mitchell*,

> Nothing in our decision last Term in *R.A.V.* compels a different result here. That case involved a First Amendment challenge to a municipal ordinance prohibiting the use of "'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.'" Because the ordinance only proscribed a class of "fighting words" deemed particularly offensive by the city — i.e., those "that contain . . . messages of 'bias-motivated' hatred," we held that it violated the rule against content-based discrimination. But whereas the ordinance struck down in *R.A.V.* was explicitly directed at expression (i.e., "speech" or "messages"), the statute in this case is aimed at conduct unprotected by the First Amendment.[74]

The Court's decision to distinguish *R.A.V.* from *Mitchell* on the basis of the difference between a law directed at speech and a law directed at conduct rather than on any perceived difference between a law directed at the content of a message and a law directed at the speaker's motivational beliefs is important and justified. The constitutional legitimacy of laws directed at belief-motivated conduct may not be entirely free from debate,[75] but the impact of such

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[73] *See id.*

[74] *Id.* (citations omitted).

[75] While approving of the Court's decision in *Mitchell*, Professor Tribe, for example, draws a distinction

> between motive in the more-or-less superficial, external sense corresponding to the classic criminal law notion of intent or of *mens rea*, and motive in a deeper, more attitudinal or expressive sense — a sense that evokes the First Amendment norm that people shouldn't be penalized for the views, ideas or opinions they hold or choose to express, however wrong-headed or hateful those views may be to the majority — even when those views accompany, or help to explain, actions that could be independently prohibited without violating the First Amendment.

Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 SUP. CT. REV. 1, 11.

Pursuant to this analysis, a hate crimes statute, such as the one upheld in *Mitchell*, is constitutional when it enhances the sentence of an individual because he acted purposefully or knowingly with regard to a particular fact, the race of his victim. On the other hand, a law enhancing the sentence of an individual because his proscribed conduct developed out

laws on public discourse is muted by their explicit focus on conduct that is not conventionally understood to serve expressive purposes. Critical First Amendment concerns about the deliberate distortion of the marketplace of ideas simply can not be avoided, however, when the state discriminates for or against belief-motivated speech.

> A law regulating conduct that may or may not be expressive in nature can be limited in its application to persons who act with particular motives while remaining content-neutral. The state may have a legitimate reason, unrelated to the suppression of ideas, for prohibiting the non-expressive exercise of the conduct when the actor is motivated by a specific intent. In this circumstance, if the state also punishes the same belief-motivated conduct on those occasions when it does express a message, the Court will accept the state's explanation that the prohibition of the conduct, when it is engaged in for an expressive purpose, is incidental to the furtherance of the state's initially legitimate objective. It is for this reason that the court upheld the hate crimes statute at issue in *Mitchell* as a content-neutral regulation of conduct. It is for this same reason that the statute would be upheld as a content-neutral regulation of conduct even if it was applied to a bias-motivated assault that was intended to communicate a message.
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> The same argument is unavailable, however, if the state is regulating speech that communicates a message itself. Here, for both conceptual and practical reasons, a law directed at belief-motivated expression will be reviewed as a content-discriminatory law. As a conceptual matter, a law directed at belief-motivated speech cannot target anything other than the message the speech communicates. Whatever the speaker is intending to accomplish with her speech, it is her speech and nothing else that is being used to implement her goal. There is no non-speech activity, no

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of a particular belief system, a racist ideology or a system of religious beliefs, would violate the First Amendment. For First Amendment purposes, the government can no more punish an individual because his conduct is grounded on a specific belief system than it can punish an individual because his conduct communicates a particular message. Either attempt at punishment would have to be justified under strict scrutiny review. *See id.* at 7-8.

Under Professor Tribe's analysis, the government's exemption of religiously motivated conduct from content-neutral speech regulations would involve treating one individual more favorably than another because his conduct developed out of a particular belief system. *Mitchell* provides no constitutional support for such a distinction. *R.A.V.*, on the other hand, strongly suggests that such preferences are unconstitutional. *See id.* at 4-11.

> non-expressive conduct, that can be distinguished as the legitimate focus of the law. As a practical matter, if a law directed at a speaker's motive was permitted to circumvent First Amendment doctrine prohibiting content-discriminatory regulations of speech, freedom of speech would be fundamentally undermined. Speech would receive no more protection than it did in 1919 when laws prohibiting "any language intended to incite resistance to the United States or promote the cause of its enemies" were regularly upheld.[76] By directing its regulation at the speaker's purpose or intent instead of her message, the state could effectively silence the expression of "dangerous ideas" under deferential review.[77]

This last point is critical, and although this lengthy quote is directed at government suppression of speech, it applies with equal force to government discrimination in favor of belief-motivated expression.[78] First Amendment doctrine is not an abstract intellectual exercise in which real world consequences can be freely sacrificed to achieve some standard of formal symmetry. It is a legal framework developed to protect fundamental rights and must be interpreted in light of that purpose. The practical effect of a constitutional rule that allows government to discriminate on the basis of the motivational beliefs of speakers in providing access to public property for expressive activity is easy to predict and directly in conflict with the goal of public discourse that is free from government manipulation.

> [R]educing the level of scrutiny applied to laws directed at the intent of a speaker in communicating a message would significantly undermine the protection provided expression and facilitate the suppression of ideas. In the great majority of instances, we will determine the intent of a speaker in communicating a message by looking at the content of what he or she says. If the state can escape rigorous review by directing its laws at the speaker's intent, while it enforces its laws by using the speaker's words as control-

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[76] Abrams v. United States, 250 U.S. 616, 618-19 (1919) (upholding application of Espionage Act of 1918 to defendants convicted of distributing circulars criticizing American military intervention in Russia).

[77] Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-abortion Protests*, 29 U.C. DAVIS L. REV. 553, 562-63 (1996).

[78] *See supra* notes 45-46 and accompanying text.

> ling evidence of the speaker's motives, many content and viewpoint discriminatory laws could be rewritten to accomplish most of their speech suppressive objective in this way without fear of judicial intervention. The new intent based laws might not capture every message the state would hope to suppress [or favor], but their net will stretch sufficiently wide to reach almost as many statements as a more precise content-discriminatory regulation. And the chilling effect of such laws will far outdistance their actual scope. If the state's goal is to suppress unpopular speech, an intent based law is more than good enough for government work.[79]

Even if, by some extraordinary redirection of First Amendment doctrine, courts determined that a law discriminating in favor of religiously motivated speakers did not constitute content or viewpoint discrimination and, therefore, should not receive strict scrutiny review under the Free Speech Clause of the First Amendment, such a law would certainly violate the Establishment Clause. The argument that a law directed at the motivational beliefs of the speaker does not violate the constitutional prohibition against content or viewpoint discrimination is grounded on a technical claim of formal neutrality. The law is arguably neutral for free speech purposes because it does not discriminate on its face with regard to the subject or viewpoint of any message. But formal neutrality and lack of overt discrimination does not have the same mitigating force under Establishment Clause doctrine that it has in free speech cases.

Justice O'Connor's concurring opinion in *Pinette* makes this point emphatically clear. While the four Justice plurality opinion suggested that neutral speech regulations would not violate the Establishment Clause even if they would be perceived by a reasonable observer as endorsing religion, Justice O'Connor explicitly rejected this contention. For O'Connor, the important question for constitutional purposes was whether state action endorsed religion. And the resolution of that issue depended not only on the state's purpose but also on the effect of the state's decision. The facial neutrality of the state's policies could not control the Court's

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[79] Alan E. Brownstein, *Alternative Maps for Navigating the First Amendment Maze*, 16 CONST. COMMENTARY 101, 141-42 (1999) (reviewing DANIEL FARBER, THE FIRST AMENDMENT (1998)).

determination of whether government endorsed religion because "the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions. Governmental intent cannot control, and not all state policies are permissible under the Religion Clauses simply because they are neutral in form."[80]

To be sure, applying the endorsement test to government action relating to religion is not always an easy undertaking. O'Connor understands fully that the Establishment Clause should not be interpreted to reject all government acknowledgment or accommodation of religion in public life. What the Establishment Clause does require courts to do is to "seek to identify the point at which the government becomes responsible, whether due to favoritism toward or disregard for the evident effect of religious speech, for the injection of religion into the political life of the citizenry."[81] Exempting religiously motivated expression from content-neutral time, place, and manner regulations governing public discourse on public property involves both favoritism for religion and almost complete disregard for the distorting effect of such preferential treatment on the marketplace of ideas. Indeed, it is difficult to imagine an endorsement of religion short of blatant sectarian favoritism that would have a more obvious political effect.

B. Evaluating Discrimination on the Basis of Motivational Beliefs that Are Not Reflected in the Favored Speaker's Message

The problem is more ambiguous if the religiously motivated expression receiving an exemption from content-neutral speech regulations does not express a religious message. Here there is no direct state discrimination for or against the religious content of a message. In practical terms, however, discriminating in favor of religiously motivated expression might skew debate on a controversial issue if religious people as a group were more likely to support one position over another. An exemption for religiously motivated speech might benefit opponents of abortion, for example, more than those who support a woman's right to have an abortion if many more religious people oppose abortion rights than support

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[80] Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring).

[81] *Id.* at 779.

them. In theory, at least, one might argue that the instrumental effect of such an exemption would be entirely incidental to the focus of the discrimination. Just as the fact that certain content-neutral speech regulations may have more of an impact on one side or the other of a particular debate does not undermine the Court's conclusion that the law is content-neutral,[82] the fact that people with particular motivational beliefs are more likely to support one side or the other of a public debate does not directly implicate the state in content or viewpoint discrimination.

This argument must be rejected. Its premise suggests that motivational beliefs have the same neutral relationship with the subject or viewpoint of speech as the time, place, and manner of expression. But this is clearly not the case. Motivational beliefs reflect specific viewpoints especially when, as is the case with regard to religion, the direct expression of those beliefs would be held to constitute a viewpoint for First Amendment purposes.[83] Surely a law that discriminates in favor of speech that is motivated by left wing beliefs constitutes viewpoint discrimination. It is difficult to understand why a law that discriminates in favor of speech motivated by religious beliefs should not also be characterized as viewpoint discriminatory.

The distorting effect on public discourse of a contrary rule should be obvious. As noted, by granting these exemptions, the state would be privileging the side of any debate generally favored by religious individuals. Even when both religious and nonreligious individuals would espouse essentially the same general position on an issue, discussion would be substantially skewed. Both religious and nonreligious people might agree in principle that "censorship is wrong," for example, but they would disagree to a considerable extent on the question of what instances of censorship are important enough to generate public protests. If a state grants exemptions for religiously motivated speech, protests

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[82] *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (noting that "[t]he government's purpose is the controlling consideration" in determining whether law is content-neutral or not and that "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others").

[83] *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 831 (1995) (explaining that denial of subsidy to religious periodical constituted viewpoint discrimination because "[r]eligion may be vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered").

against acts of censorship that offend religious sensibilities will be subject to far fewer regulatory constraints than protests against censorship that offends nonreligious sensibilities.

Finally, even if we put instrumental concerns about the manipulation of the marketplace of ideas aside, exemptions for religiously motivated speech violate the Establishment Clause as well as the Free Speech Clause of the First Amendment. All of the reasons described above that suggest that religious individuals would receive a privileged position in the marketplace of ideas if they received exemptions for religiously motivated speech also demonstrate that exemptions would have an impermissible, primary effect of advancing religion. Those who hold religious beliefs would be provided a special benefit — the ability to engage in public expression free from content-neutral regulations — that is unavailable to secular individuals.

Providing benefits of this nature and value to religious individuals can not be justified on the grounds that they are simply another accommodation of religion. Free speech rights are recognized to be interests of unique worth. Like the right to vote, they are considered to be one of the most cherished privileges of citizenship.[84] Religious exemptions become constitutionally problematic under the Establishment Clause when they result in religious individuals receiving benefits that have substantial intrinsic value that is entirely divorced from their religious nature.[85] The right to engage in

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[84] In Thomas Emerson's words:

> The right to freedom of expression is justified first of all as the right of an individual purely in his capacity as an individual. It derives from the widely accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being. . . .
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> . . . .
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> From this it follows that every man — in the development of his own personality — has the right to form his own beliefs and opinions. And, it also follows, that he has the right to express these beliefs and opinions. Otherwise they are of little account. For expression is an integral part of the development of ideas, of mental exploration and of the affirmation of self. The power to realize his potentiality as a human being begins at this point and must extend at least this far if the whole nature of man is not to be thwarted.
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> Hence suppression of belief, opinion and expression is an affront to the dignity of man, a negation of man's essential nature.

Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963); *see also* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (explaining that "[t]hose who won our independence . . . valued liberty both as an end and as a means . . . [and] believed liberty to be the secret of happiness").

[85] *See* Estate of Thornton v. Caldor, 472 U.S. 703, 710 n.9 (1985). In striking down a law

public discourse on public property would certainly seem to be such a benefit.

CONCLUSION

Granting an exemption from content-neutral speech regulations for religiously motivated expression would violate both the Free Speech Clause and the Establishment Clause of the Constitution. Providing regulatory preferences to religious speakers or religious speech would constitute content and viewpoint discrimination prohibited by the Free Speech Clause and an endorsement of religion prohibited by the Establishment Clause. Accordingly, neither the state nor any of its agencies or political subdivisions can provide religiously motivated speech immunity from regulatory requirements that are applied to secular speakers and speech. Any attempt to grant such religious exemptions would subject the state's action to constitutional challenge.[86]

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providing Sabbath observers an absolute legal preference for having that day of the week off from work, the Supreme Court noted that the explicit favoring of religion in the allocation of valuable benefits implicated Establishment Clause concerns. The Court explained that the challenged law

> gives Sabbath observers the valuable right to designate a particular weekly day off — typically a weekend day, widely prized as a day off. Other employees who have strong and legitimate, but non-religious, reasons for wanting a weekend day off have no rights under the statute. For example, those employees who have earned the privilege through seniority to have weekends days off may be forced to surrender this privilege to the Sabbath observer; years of service and payment of "dues" at the workplace simply cannot compete with the Sabbath observer's absolute right under the statute. Similarly, those employees who would like a weekend day off, because that is the only day their spouses are also not working, must take a back seat to the Sabbath observer.

Id.; *see also* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1016-18 (1990) (discussing the problems associated with granting exemptions in such circumstances).

[86] The free speech challenges to religious exemptions discussed in this Article refer exclusively to statutory attempts to exempt religiously motivated expression from the application of conventional, content neutral, time, place, and manner regulations of speech. It should be clear, however, that the exemption of religious practices from a variety of other kinds of neutral laws of general applicability may implicate expression and free speech concerns. It may be argued, for example, that an exemption for a house of worship from certain land use regulations provides preferential treatment, albeit indirectly, to the religious expression that occurs in a church, synagogue, or mosque.

While I do not believe that exemptions of this kind violate free speech prohibitions against content and viewpoint discrimination, these arguments deserve scholarly attention. Unfortunately, the problem of drawing effective demarcation lines that determine the proper scope of free speech doctrine, and an analysis of why the Free Speech Clause of the First Amendment should not control religious exemptions from laws that do not directly

Because of these constitutional constraints, the refusal by a state agency or official to grant an exemption for religiously motivated speech furthers the compelling state interest of complying with constitutional guarantees. Therefore, the state may reject a religious speaker's claim for an exemption under the authority of state RFRA laws that permit the state to substantially burden religiously motivated conduct when it is necessary to do so to further a compelling state interest.

This conclusion can not be avoided by arguing that the state has a less restrictive alternative available to it than denying exemptions for religiously motivated speech. The only regulatory alternative available would require the state to repeal any content-neutral regulation found to be substantially burdensome to a religious speaker. The state has a compelling state interest, however, in enforcing a range of content-neutral speech regulations to promote order and facilitate expression. An interpretation of state RFRA laws that upholds challenges by religious speakers to content-neutral speech regulations would fundamentally undermine the ability of states to adopt content-neutral speech regulations of any kind. Avoiding this result is itself a compelling state interest.

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regulate speech, are both far beyond the scope of this Article. *See generally* Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89 (1990).