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Cohabitation, Fornication and the Free Exercise of Religion: Landlords Seeking Religious Exemption from Fair Housing Laws

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COHABITATION, FORNICATION AND THE FREE EXERCISE OF RELIGION: LANDLORDS SEEKING RELIGIOUS EXEMPTION FROM FAIR HOUSING LAWS

INTRODUCTION

Suppose that two individuals contact a landlord and tell her they are seeking rental housing. Upon learning that the couple is not married, the landlord refuses to rent an apartment to them, indicating that cohabitation is against her religion. The state fair housing law prohibits discrimination in housing on the basis of marital status, so the landlord is sanctioned for her illegal discrimination against the couple. As a defense, the landlord seeks a constitutionally compelled exemption from the fair housing statute, asserting that it violates her right to the free exercise of her religious beliefs. Does the Constitution, or a federal statute, require that she be exempted from the fair housing law?[1]

The Free Exercise Clause of the First Amendment requires that "Congress shall make no law . . . prohibiting the free exercise [of religion]."[2] When an individual makes a claim under the Free Exercise Clause, she is not claiming that a neutral, generally applicable law is unconstitutional, but that it is unconstitutional as applied to her because it unduly burdens her free exercise of reli-

1. Yes, according to some recent cases. *See* Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32, 33 (Cal. Ct. App. 1991), *review granted and opinion superseded*, 825 P.2d 766 (Cal. 1992); Attorney Gen. v. Desilets, 636 N.E.2d 233, 241 (Mass. 1994) (remanding case to allow state to show a compelling interest, but indicating that it would likely grant free exercise exemption); State by Cooper v. French, 460 N.W.2d 2, 10-11 (Minn. 1990) (holding that while state fair housing statute did not protect unmarried couples, it would grant religious exemption to a landlord if presented with the issue).

However, the Supreme courts of Alaska and California have both reached the opposite conclusion, holding that the landlord was not entitled to a religious exemption. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 276 (Alaska), *cert. denied*, 115 S. Ct. 460 (1994); Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 912 (Cal. 1996).

2. U.S. CONST. amend. I.

gion.[3] Thus, the claimant is asking for a constitutionally compelled exemption from the neutral, generally applicable statute.[4] In the case of a generally applicable fair housing statute, this would mean that the landlord would be exempt from the requirements of the law because it unconstitutionally burdens her free exercise of religion. Therefore, the result of granting a religious exemption would be to allow the landlord to discriminate against the tenants on the basis of their marital status, an otherwise illegal act. What makes

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3. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (compulsory school attendance law); Sherbert v. Verner, 374 U.S. 398 (1963) (unemployment compensation law). These challenged statutes were neutral and did not facially implicate religious exercise.

4. For a debate over whether the Framers of the Constitution intended to allow for religious exemptions to neutral, generally applicable laws, compare Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990), which asserts that a religious-based constitutional exemption was contemplated by the Framers, with Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 916-17 (1992), which asserts that the purpose of the Free Exercise Clause was merely to protect the exercise of religion, and not to provide a constitutional right of exemption from civil laws. Hamburger asserts that in the late eighteenth-century, Americans "increasingly said that they favored the free exercise of religion, and they clearly did not understand that right to include a right of exemption." *Id.* at 948. Moreover, even the politically active "expressly disavowed such a right [of exemption] and frequently agitated for equal civil rights and an absence of laws respecting religion." *Id.*

Some scholars have ardently defended the constitutionally compelled exemption, arguing that free exercise is not sufficiently protected under current standards. *See, e.g.*, James D. Gordon, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91 (1991); Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883 (1994); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990) [hereinafter, McConnell, *Free Exercise Revisionism*].

Others have questioned the doctrine of free exercise exemptions from neutral laws. *See, e.g.*, William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357 (1990) (arguing that constitutionally compelled exemptions prefer religion over secular interests). Criticisms of free exercise exemptions include concerns that exemptions may conflict with the Establishment Clause. *See* Ira C. Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739 (1986) (examining the tension between the Establishment Clause and the Free Exercise Clause); David A. Steinberg, *Religious Exemptions as Affirmative Action*, 40 EMORY L.J. 77, 83-87 (1991) (making a similar analysis of the two clauses). *But see* Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 33 (1989) (asserting that the two clauses are not in tension, but instead create "a free market in religion" if applied correctly). Criticisms also include concerns that exemptions create a preference for religion over non-religion, *see* William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 319-23 (1991) [hereinafter Marshall, *In Defense of* Smith], or for one religion over another. *See* Geoffrey R. Stone, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments; Constitutionally Compelled Exemptions and the Free Exercise Clause*, 27 WM. & MARY L. REV. 985, 987 (1986).

this issue so interesting is that it positions the state's interest in civil rights against a free exercise claim.[5]

Courts addressing free exercise claims apply the "compelling interest" test, which originated in *Sherbert v. Verner*[6] and *Wisconsin v. Yoder*.[7] In *Sherbert*, the Court held that in addressing a free exercise claim, it must first determine whether a secular law imposes an unconstitutional burden on the claimant's free exercise of religion.[8] Next, it must consider whether this burden is justified by a compelling state interest.[9] Finally, it must determine whether there is any less restrictive way to enforce the governmental interest without burdening the claimant's free exercise of religion.[10] This test was recently codified in the Religious Freedom Restoration Act of 1993 (RFRA).[11]

This Note will focus on the application of the RFRA to cases where a landlord seeks a religious exemption from housing statutes protecting unmarried couples. Part I will examine the compelling interest test codified by RFRA, and its likely application in free exercise cases. Next, Part II will examine the reasoning of the cases that address the issue of religious exemptions for landlords from fair housing statutes, focusing on *Donahue v. Fair Employment and Housing Commission*[12] and *Swanner v. Anchorage Equal Rights Commission*[13] as examples of recent cases that come to the opposite conclusion. Part III will analyze these decisions under the compelling interest test codified in RFRA, concluding in Part IV

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5. *See* Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 44 (D.C. 1987) (Pryor, J. concurring) ("By contrast, what is particularly compelling about the governmental interest asserted in this case is that it directly pits the civil rights of others against the claims of the religious objector."); *see also* Shelley K. Wessels, Note, *The Collision of Religious Exercise and Governmental Nondiscrimination Policies*, 41 STAN. L. REV. 1201, 1202-03 (1989) ("[P]recisely when the nondiscrimination principle should trump the principle of religious freedom is not always clear . . . .").

6. 374 U.S. 398, 410 (1963) (holding that a Seventh-Day Adventist should be exempt from a state unemployment compensation requirement that she accept work on Saturday, her sabbath, if available).

7. 406 U.S. 205, 234 (1972) (holding that the claimants were exempt from a compulsory school attendance law because attendance at high school would be contrary to their Amish religion).

8. *Sherbert*, 374 U.S. at 403.

9. *Id.*

10. United States v. Lee, 455 U.S. 252, 259 (1982).

11. 42 U.S.C. § 2000bb (1994).

12. 2 Cal. Rptr. 2d 32 (Cal. Ct. App. 1991), *review granted and opinion superseded*, 825 P.2d 766 (Cal. 1992).

13. 874 P.2d 274 (Alaska), *cert. denied*, 115 S. Ct. 460 (1994).

that landlords should not be granted religious exemptions from fair housing laws in order to discriminate against unmarried couples.

I. BACKGROUND

A. *The Religious Freedom Restoration Act of 1993*

In 1993, Congress codified the compelling interest test for free exercise challenges in the Religious Freedom Restoration Act (RFRA).[14] Specifically, the test in RFRA requires the government to demonstrate a compelling interest, applied with the least restrictive means, in order to justify a substantial burden on an individual's free exercise of religion. The statute states,

> (a) In general. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
> (b) Exception. Government may substantially burden a person's free exercise of religion only if it demonstrates that application of the burden to the person—
> (1) is in furtherance of a compelling governmental interest; and
> (2) is the least restrictive means of furthering that compelling governmental interest.[15]

The asserted purpose of RFRA is "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened."[16] The question remains, however, how courts will apply this compelling interest test.[17]

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14. 42 U.S.C. § 2000bb (1994).
15. 42 U.S.C. § 2000bb-1 (1994).
16. 42 U.S.C. § 2000bb(b)(1) (1994).
17. Additionally, the constitutionality of RFRA is questionable. *See, e.g.*, Canedy v. Boardman, 16 F.3d 183, 186 n.2 (7th Cir. 1994) ("The constitutionality of [RFRA]—surely not before us here—raises a number of questions involving the extent of Congress's powers under Section 5 of the Fourteenth Amendment."). *See generally* Scott C. Idelman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247 (1994). However, the Fifth Circuit Court of Appeals recently held that Congress did have the constitutional authority to enact RFRA. Flores v. City of Boerne, 73 F.3d 1352, 1354 (5th Cir. 1996).

Congress's asserted power for passage of RFRA is section 5 of the Fourteenth Amendment. *See generally* Katzenbach v. Morgan, 384 U.S. 641 (1966); Marbury v. Mad-

Just prior to the passage of RFRA, in 1990, the Supreme Court seriously altered the compelling interest test for free exercise claims in *Employment Division, Department of Human Resources v. Smith.*[18] In *Smith*, two members of the Native American Church were fired from a private drug rehabilitation organization for sacramental peyote use.[19] After being denied unemployment compensation due to their peyote use, the two claimed they were entitled to a religious exemption from the state law prohibiting drug use.[20] The Court denied their claim, holding that exemptions from neutral, generally applicable laws were only available when another constitutional right, such as free speech, was implicated in conjunction with religious exercise.[21] Thus, because no other constitutional right of the Native Americans was implicated by the state's criminal drug statute, they could not make out a free exercise claim.[22] As a result of this holding, *Smith* was highly criticized by commentators for misconstruing precedent and for essentially gutting the compelling interest test.[23]

The *Smith* decision was also highly criticized by Congress. In fact, there is significant evidence to suggest that RFRA was intended to overturn one Supreme Court decision, and to leave all other free exercise decisions untouched. According to the House Judicia-

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ison, 5 U.S. (1 Cranch) 137, 176 (1803); Laycock, *supra* note 4, at 896-97; James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1438 (1992). The *Flores* court reasoned that RFRA met the standards for a valid exercise of congressional power under Section 5, and that its enactment did not violate the constitutional separation of powers by restoring an old judicial test through legislation because the "judiciary's duty [] to say what the law is . . . is not exclusive." 73 F.3d at 1363.

18. 494 U.S. 872 (1990).

19. *Id.* at 874. Peyote is a hallucinogen, and its use without a doctor's prescription was illegal under state law. *Id.*

20. *Id.* at 876.

21. *Id.* at 882.

22. The Court stated that "[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech," and that "[t]he present case does not present such a hybrid situation." *Id.* at 881-82.

23. *See, e.g.*, Gordon, *supra* note 4, at 114-16 (arguing that the Court manipulated precedent and logic); Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court Centrism*, 1993 B.Y.U. L. REV. 259, 260 (labeling *Smith* "substantively wrong and institutionally irresponsible"); McConnell, *Free Exercise Revisionism*, *supra* note 4, at 1111 (suggesting that *Smith* is contrary to the logic of the First Amendment); Ryan, *supra* note 17, at 1409 n.15 (citing numerous law review articles). *But see* Marshall, *In Defense of* Smith, *supra* note 4, at 308-09 (recognizing the inconsistencies of the *Smith* opinion but defending its central contention).

ry Committee report, RFRA "responds to the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith* by creating a statutory right requiring that the compelling governmental interest test be applied in cases in which the free exercise of religion has been burdened by a law of general applicability."[24] Additionally, the Senate was also primarily concerned with the effect of *Smith* on free exercise adjudication.[25] Furthermore, RFRA itself states that "Congress finds that . . . in *Employment Division v. Smith*, the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion."[26]

Additionally, it appears that courts are to apply the RFRA compelling interest standard by looking to all previous free exercise precedent (excluding *Smith*). Although RFRA specifically cites *Sherbert* and *Yoder*, the leading free exercise cases, the committee reports make it clear that courts are to look to all free exercise cases for guidance in applying the standard.[27] The House Committee Report states:

> It is the Committee's expectation that the courts will look to free exercise of religion cases decided prior to *Smith* for guidance in determining whether or not religious exercise has been burdened and the least restrictive means have been employed in furthering a compelling governmental interest. Furthermore . . . the Committee neither approves nor disapproves of the result in any particular court decision involving the free exercise of religion. . . . This bill is not a codification of any prior free exercise decision but rather the restoration of the legal standard that was applied in those decisions. . . . [T]he [compelling interest] test generally should not be construed more stringently or more leniently than it was prior to *Smith*.[28]

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24. H.R. REP. NO. 88, 103d Cong., 1st Sess. 1 (1993) (footnote omitted).

25. S. REP. NO. 111, 103d Cong., 1st Sess. 2, 7-8 (1993).

26. 42 U.S.C. § 2000bb(a)(5) (1994) (citation omitted).

27. *See* H.R. REP. NO. 88, *supra* note 24, at 7; S. REP. NO. 111, *supra* note 25, at 8-9. This may be difficult, given the variances in prior case law. *See* discussion *infra* part I.B.1.

28. H.R. REP. NO. 88, *supra* note 24, at 6-7 (1993); S. REP. NO. 111, *supra* note 25, at 9. Similarly, the Senate Report states, "The committee wishes to stress that the act does not express approval or disapproval of the result reached in any particular court decision . . . , including those cited in the act itself." *Id.*

Apart from the purported congressional intent, other factors indicate RFRA will be applied narrowly. Due to the increasing secularization of our society, religious free exercise claims are generally not looked upon with favor, and the mere presence of a statute will probably not change this trend.[29] Additionally, pre-*Smith* case law shows that *Smith* was not necessarily an aberration, but a culmination of a growing judicial hostility to free exercise claims.[30]

Therefore, based on a surface reading of RFRA, the legislative intent, and judicial and societal attitudes about free exercise claims, RFRA will probably be applied narrowly, not as a sweeping change in free exercise doctrine.[31] The result of RFRA will likely be to restore free exercise doctrine as it existed before *Smith*.

B. Free Exercise Doctrine Before Smith

If courts will be looking to pre-*Smith* case law in applying RFRA, it is important to see how courts have approached the key elements of the compelling interest test in the past. This section will discuss the primary Supreme Court cases addressing each element of the test and Part III will then apply these cases to the situation of a landlord seeking religious exemption from fair housing laws.

Under the compelling interest test, a free exercise claimant must initially establish that the government has substantially burdened her free exercise of religion.[32] An examination of the leading burden cases will show that the Supreme Court has gradually begun to impose more stringent standards for making out a legally cognizable burden. Once a Free Exercise claimant shows that her exercise of religion has been substantially burdened, the government may justify the burden by showing that it is "in furtherance of a compelling governmental interest."[33] The Court has defined a

29. Idelman, *supra* note 17, at 259-60.

30. See *infra* part I.B for a discussion of the pre-*Smith* case law. *See also* Idelman, *supra* note 17, at 265-84 (comparing existing case law to the text of RFRA); Ryan, *supra* note 17, at 1414-15 (reviewing the limited success of free exercise claimants prior to *Smith*).

31. *But see* Michael S. Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT L. REV. 249, 253 (1995) (arguing that RFRA should be applied as a "super-statute," implicitly modifying all federal law).

32. RFRA, 42 U.S.C. § 2000bb-1(a) (1994).

33. *Id.* § 2000bb-1(b)(1).

compelling state interest as "only those interests of the highest order and those not otherwise served."[34] A brief look at the leading cases addressing the compelling interest test will show that the determination of what qualifies as a compelling state interest depends largely on the facts of the case. Finally, the government must show that the burden to the free exercise claimant "is the least restrictive means of furthering that compelling governmental interest."[35]

1. The Burden Requirement

In *Wisconsin v. Yoder*, the Amish claimants alleged that the state compulsory school attendance laws burdened their religious exercise, because higher education "tends to develop values they reject as influences that alienate man from God."[36] Because the Amish religion is unique, dictating virtual isolation from society and focusing on self-sufficiency, compulsory education violates its religious principles.[37] Thus, the Court held that the state statute burdened the Amish by compelling them to violate the central tenets of their religion under threat of criminal sanction.[38]

In *Sherbert v. Verner*, the claimant, a Seventh-Day Adventist, was fired due to her refusal to work on Saturday, her Sabbath.[39] She was subsequently denied unemployment benefits by the state when she could not obtain work due to the exercise of her religion.[40] The Court held that the government's denial of unemployment benefits did constitute a substantial burden on her free exercise of religion because of the financial pressure placed on her to forego her religious practice.[41] In doing so, the Court established that the burden need not be a criminal sanction, but that it may be more "indirect."[42]

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34. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

35. RFRA, 42 U.S.C. § 2000bb-1(b)(2) (1994).

36. 406 U.S. 205, 212 (1972).

37. *Id.* at 217-18.

38. *Id.* at 219.

39. 374 U.S. 398, 399 (1963).

40. *Id.* at 401.

41. *Id.* at 406 ("[T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.").

42. *Id.* at 404. Thus, even though "the consequences of such a disqualification [from unemployment compensation] . . . may be only an indirect result of welfare legislation within the State's general competence to enact," it still constitutes a cognizable burden. *Id.* at 403.

More recently, however, the Court has applied a narrower burden standard.[43] In *Bowen v. Roy*, Native Americans refused to comply with a federal requirement that AFDC (Aid to Families with Dependent Children) applicants obtain social security numbers.[44] The claimants asserted that obtaining a social security number for their daughter would violate their Native American religious beliefs because it would "rob [her] spirit,"[45] as their beliefs dictated that a person's spirit be kept unique, free from any "identifier."[46] The Court held that this objection did not constitute a burden on the free exercise of the claimants' religion, because the regulation pertained to an internal governmental procedure.[47] Instead, the Court stated that the administrative requirement "may indeed confront some applicants for benefits with choices, but in no sense does it affirmatively compel [the claimants], by threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct that they find objectionable for religious reasons."[48] Thus, the Court effectively determined that there could be no "legally cognizable burden" because of internal government procedures, even though the claimants had to choose whether to violate their religious tenets.[49]

The Court developed the concept of burden as coercion[50] in *Lyng v. Northwest Indian Cemetery Protective Ass'n.*[51] In *Lyng*, Native American organizations challenged a United States Forest Service plan to build a road and harvest timber in government-owned land used by Native Americans for religious purposes.[52] The Court held that despite the fact that "the Government's proposed actions will have severe adverse effects on the practice of their religion," the Native Americans did not demonstrate a legally cognizable burden for free exercise purposes.[53] Relying on the

43. *See* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 944 (1989) (observing that the Court's 1986 and 1988 cases "suggest that the Court may be prepared to narrow the set of conflicts that will produce injury cognizable under the free exercise clause").

44. 476 U.S. 693, 695 (1986).

45. *Id.* at 696.

46. *Id.*

47. *Id.* at 699-700.

48. *Id.* at 703.

49. Lupu, *supra* note 43, at 944-45.

50. Professor Lupu calls this the "coercion test." *Id.* at 945.

51. 485 U.S. 439 (1988).

52. *Id.* at 443.

53. *Id.* at 447.

Bowen decision, the Court stated that "the affected individuals [would not] be coerced by the Government's action into violating their religious beliefs."[54] In other words, the government action did not affirmatively coerce the claimants into acting against their religious beliefs, so there was no legally cognizable burden, even though the government action made it more difficult to practice central ideas of their religion.[55] Thus, under *Lyng*, a Free Exercise claimant cannot pass the threshold test of a burden if the governmental action "[has] no tendency to coerce individuals into acting contrary to their religious beliefs."[56]

Another key case addressing the burden issue is *Mozert v. Hawkins County Board of Education*, where a group of Christian parents challenged the public school's reading program as being offensive to their religion.[57] The *Mozert* court held that mere exposure to offensive ideas was not a burden on the free exercise of religion, if the children were not required to affirmatively defy a religious belief or engage in a forbidden act.[58] Instead, the court asserted that "'distinctions must be drawn between those governmental actions that actually interfere with the exercise of religion, and those that merely require or result in exposure to attitudes and outlooks at odds with perspectives prompted by religion.'"[59]

Thus, although the Court initially recognized that indirect burdens may be sufficient for free exercise claims, it has more recently refused to recognize a burden when governmental action seriously interferes with central religious practices. Additionally, based on these holdings, the Court would probably not recognize a burden if it involves mere exposure to offensive material, as long as no affirmative coercion to violate a religious tenet is present.

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54. *Id.* at 449. Professor Lupu criticizes the implications of *Lyng* as "numerous and disturbing." Lupu, *supra* note 43, at 945.

55. *Lyng*, 485 U.S. at 450.

56. *Id.* at 450.

57. 827 F.2d 1058, 1060-61 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988). The parents, born-again Christians, objected to reading material about telepathy, supernaturalism, and evolution. *Id.* at 1061-62.

58. *Id.* at 1065. The court distinguished *Yoder* on the basis that it had a "singular set of facts." *Id.* at 1067. *But see* George W. Dent, Jr., *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 863, 886-88 (1988) (arguing that this characterization of *Mozert* is too broad).

59. 827 F.2d at 1068 (quoting Grove City v. Mead School Dist. No. 354, 753 F.2d 1528 (9th Cir. 1985), *cert. denied*, 474 U.S. 826 (1986)).

2. Sincerely Held Religious Belief

The burden on the free exercise claimant must be on that individual's religious practice or belief. In other words, burdens on the exercise of nonreligious moral beliefs do not suffice, as "[o]nly beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion."[60] Thus, while a free exercise claim based on an individual's religious objection to working in a military armaments factory may be recognized, a nonreligious, moral objection to the same work would not.[61]

Additionally, in order to make out a claim, the trial court must find that the claimant's religious beliefs are sincere, and not fraudulent. In general, courts (and opposing parties) tend to shy away from questioning a claimant's sincerity, because religious beliefs are very subjective, and a probing examination of sincerity may tend to discriminate against non-traditional religions.[62] Therefore, most free exercise cases are adjudicated on the burden and compelling interest requirements.

3. Compelling Interest

In *Sherbert v. Verner*, after determining that the state's unemployment compensation requirement substantially burdened a Seventh-Day Adventist, the Court held that the state could not demonstrate a compelling interest that justified the burden.[63] The state's asserted interest was that allowing a religious exemption would create the possibility of fraudulent claims, which in turn would cause scheduling problems for Saturday work and diffuse the unemployment compensation fund.[64] The Court held that this interest was not close to overriding the claimant's First Amendment

60. Thomas v. Review Bd., 450 U.S. 707, 713 (1981); *see also* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation . . . if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.").

61. *See Thomas*, 450 U.S. at 713-16.

62. Lupu, *supra* note 43, at 954; *see also Thomas*, 450 U.S. at 715 ("Courts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.").

63. 374 U.S. 398, 408-10 (1963).

64. *Id.* at 407.

rights.[65] Instead, it held that barring extraordinary evidence, preventing potentially fraudulent claims was not sufficient.[66]

Wisconsin v. Yoder presented a more difficult search into the state's compelling interest. In *Yoder*, the state argued that it had an interest in compulsory education of all its citizens to a certain minimum age.[67] The Court, however, held that this interest was not compelling enough to justify burdening the Amish religion.[68] Instead, while acknowledging that the state generally may have a compelling interest in requiring school attendance for children, it noted that "[the state's] interest in compelling the school attendance of Amish children to age 16 emerges as somewhat less substantial."[69] In doing so, the Court strongly emphasized the unique Amish way of life and reliance on community self-sufficiency.[70]

In *United States v. Lee*, the Court found a compelling interest that did override an Amish farmer's claim for a religious exemption from the social security tax system.[71] The Court held that the public interest in maintaining a tax system outweighed the farmer's religious objections to complying with such laws.[72] Additionally, it proposed that when religious groups enter into secular commercial activities, the state's interest in regulation will be greater, stating that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."[73]

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65. *Id.* at 407-08.

66. *Id.*

67. 406 U.S. 205, 221 (1972).

68. *Id.* at 228-29.

69. *Id.* at 228.

70. *See id.* at 222-28.

71. 455 U.S. 252, 258-59 (1982). The farmer asserted that payment of social security taxes on his Amish employees was improper because "both payment and receipt of social security benefits is forbidden by the Amish faith." *Id.* at 257.

72. *Id.* at 260. It may seem inconsistent that the Court would allow the Amish an exemption from school due to their separate, religious way of life, but not from the social security system. There seemed to be a real fear in *Lee* that allowing a religious exemption for the Amish would lead to other religious challenges to the tax system: "The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." *Id.*

73. *Id.* at 261. The Court has also held that the governmental interest in regulation is much greater in cases involving the military and prisons. *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503, 504 (1986) (holding that the Air Force's desire for uniformity of appearance was not outweighed by Orthodox Jew's First Amendment freedom to exer-

The Supreme Court addressed the issue of free exercise exemptions from governmental antidiscrimination regulations in *Bob Jones University v. United States*.[74] In *Bob Jones University*, two private religious schools sought exemption from an IRS requirement that schools operate on a racially nondiscriminatory admission basis in order to obtain tax exempt status.[75] Both schools operated racially discriminatory admission policies based on their religious belief that the mixing of the races is contrary to the teachings of the Bible.[76]

There was no dispute about the burden placed on the religious schools, as they were denied tax benefits because of their exercise of religious beliefs.[77] The Court denied the claims for free exercise exemptions, holding that "the Government has a fundamental, overriding interest in eradicating racial discrimination in education,"[78] which outweighs the burden on the schools' religious exercise. The reasons for finding a compelling interest included eradication of the long history of discrimination in education and a broad national policy barring such action.[79]

Thus, the Court's treatment of the compelling interest prong mirrors its treatment of the "burden" requirement: while early cases did grant some religious exemptions, most recent cases have favored state interests over religious claimants' objections.

4. Least Restrictive Means

In *United States v. Lee*, the Court determined that there was no less restrictive way of administering the social security tax system, as it would be too difficult to operate the system while accounting for religious exceptions.[80] Instead, it held that the interest in maintaining the tax system was so compelling that no religious exemp-

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cise his religious beliefs by wearing a yarmulke); O'Lone v. Estate of Shabazz, 482 U.S. 342, 345 (1987) (holding that prison's policy requiring inmates to work during the time of their religious services served legitimate penological interests and, therefore, did not offend the inmates' First Amendment right to practice their religion).

74. 461 U.S. 574 (1983).

75. *Id.* at 579, 583.

76. *Id.*

77. *Id.* at 604. This situation is similar to the "financial pressure" in the unemployment compensation cases, where claimants were forced to choose between benefits generally available to all citizens and violating their religious beliefs. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 404 (1963).

78. *Bob Jones Univ.*, 461 U.S. at 604.

79. *Id.* at 594-95; *see infra* notes 136-38 and accompanying text.

80. *Lee*, 455 U.S. at 260-61.

tions could be granted.[81] Thus, the holding that no accommodation could be made rested on two grounds: administrative difficulty and the magnitude of the compelling interest. Similarly, in *Bob Jones University*, the Court determined that there was no other less restrictive way to accommodate the schools' racially discriminatory religious beliefs that would still implement the compelling purposes of the antidiscrimination statute.[82] Thus, the least restrictive means prong of the compelling interest test has generally not been the sole determinative factor in a free exercise case, but instead is often used to support the Court's resolution of the other issues.

This summary of the major free exercise cases shows that while the Court has recently become less receptive towards free exercise claims, the cases are not consistent, and a claimant can probably find federal precedent to support many arguments for religious exemption. The next section will show how the federal free exercise cases have been used in recent state cases addressing landlords' claims for exemption from fair housing statutes with different results.

II. FREE EXERCISE EXEMPTIONS FROM FAIR HOUSING STATUTES PROTECTING UNMARRIED COUPLES: RECENT CASES

Several recent state cases have addressed the issue of whether a landlord may obtain a religious exemption from a fair housing statute because of a belief that cohabitation or fornication is sinful.[83] This section will focus on *Donahue* and *Swanner* because they reach contradictory conclusions, and because the courts' analyses provide good examples of the reasoning in all the decisions.[84]

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81. *Id.* at 260 ("Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.").

82. *Bob Jones Univ.*, 461 U.S. at 603.

83. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska), *cert. denied*, 115 S. Ct. 460 (1994); Smith v. Fair Employment & Hous. Comm'n, 30 Cal. Rptr. 2d 395 (Cal. Ct. App. 1994), *aff'd in part and rev'd in part*, 913 P.2d 909 (Cal. 1996); Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32 (Cal. Ct. App. 1991), *review granted and opinion superseded*, 825 P.2d 766 (Cal. 1992); Attorney Gen. v. Desilets, 636 N.E.2d 233 (Mass. 1994); State by Cooper v. French, 460 N.W.2d 2 (Minn. 1990).

84. In Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909 (Cal. 1996), the California Supreme Court essentially overruled the *Donahue* case, holding that the landlord's religious belief was not "substantially burdened" under RFRA, and that the landlord therefore could not obtain a religious exemption from the California fair housing statute. *Id.* at 929. However, the reasoning of the *Donahue* court still serves as a repre-

In *Donahue v. Fair Employment and Housing Commission*, Agnes and John Donahue refused to rent to an unmarried cohabiting couple. The Fair Employment and Housing Commission (FEHC) found that they illegally discriminated in violation of California's housing statute.[85] The Donahues were "devout Roman Catholics" who believed "that sexual intercourse outside of marriage [wa]s a mortal sin" and that to assist or facilitate such behavior also constituted a sin.[86] The California court of appeals held that the landlords were entitled to a constitutionally compelled exemption from compliance with the housing law.[87]

In evaluating the Donahues' claim of a free exercise defense, the court analyzed the facts under the compelling interest test.[88]

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sentative example of the reasoning used by several courts holding that such landlords are entitled to religious exemptions.

85. *Donahue*, 2 Cal. Rptr. 2d at 33-35. Unless unmarried couples are protected by statute from discrimination in housing, a free exercise defense will not even apply. In other words, barring "marital status protection," landlords are free to discriminate against unmarried couples.

Until recently, legislatures and courts generally did not protect marital status. John C. Beattie, Note, *Prohibiting Marital Status Discrimination: A Proposal for the Protection of Unmarried Couples*, 42 HASTINGS L.J. 1415, 1417 (1991). The Federal Fair Housing Act does not list marital status as a protected classification. *See* 42 U.S.C. § 3604 (1995). Federal housing law does, however, protect marital status in two small categories: credit and public housing. *See* Equal Credit Opportunity Act, 15 U.S.C. § 1691(a)(1) (1995); Matthew J. Smith, Comment, *The Wages of Living in Sin: Discrimination in Housing Against Unmarried Couples*, 25 U.C. DAVIS L. REV. 1055, 1068-71 (1992) (discussing cases that held discrimination in public housing against unmarried couples to be illegal). Twenty-one states and the District of Columbia list marital status as a protected class in their housing antidiscrimination statutes. *Id.* at 1074 & n.80.

Courts have differed over the definition of the term marital status. Some have interpreted it to protect only individuals, not couples. *Id.* at 1076-91 (examining case law on both sides). For example, in *State by Cooper v. French*, the court held that Minnesota's housing discrimination statute, which protected marital status, did not protect unmarried couples from discrimination. 460 N.W.2d 2, 6-7 (Minn. 1990). However, others have interpreted the term marital status to protect unmarried couples. *See, e.g., Donahue*, 2 Cal. Rptr. 2d at 38; Worcester Hous. Auth. v. Massachusetts Comm'n Against Discrimination, 547 N.E.2d 43, 45 (Mass. 1989).

Still, only a handful of states have definitively interpreted marital status to include unmarried couples. Smith, *supra*, at 1078. These states include Alaska, California, Massachusetts, and New Jersey. *Id.* at 1076-77.

Many times, municipal ordinances also protect unmarried couples from discrimination in housing. *See, e.g., Swanner*, 874 P.2d at 278. Adding more protected classes appears to be the recent trend in fair housing statutes. Beattie, *supra*, at 1417.

86. *Donahue*, 2 Cal. Rptr. 2d at 33 n.1.

87. *Id.* at 33.

88. *Id.* at 39. At the time of this decision, *Employment Division, Department of Human Resources v. Smith* was the current Supreme Court precedent for the Federal constitutional analysis. *Id.* The *Donahue* court addressed *Employment Division v. Smith*, noting

The court determined that the Donahues' religious exercise was burdened, defining this burden as "the choice [the Donahues] were required to make between adhering to their religious beliefs by refusing to rent to an unmarried cohabiting couple or modifying their behavior to comply with [California's housing statute] and the FEHC's order."[89] The court also determined that the fact that this discrimination occurred in the commercial context did not affect the outcome of the case, stating that a person does not lose the "constitutional right to the free exercise of religion just because the clash between religious duty and governmental regulation occurs in a commercial context."[90] The court addressed *Lee*, but determined that the burden on the landlords' religious exercise in this case was more fundamental than in *Lee*.[91]

Finally, the court concluded that the government did not have a compelling interest that could override the burden on the Donahues' religious exercise. Although the state contended it had a compelling interest in the eradication of invidious discrimination, the court found this interest too general.[92] The court described a

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that this case may potentially present a "hybrid state constitutional claim . . . implicating the Donahues' 'inalienable rights . . . [of] . . . enjoying . . . liberty, acquiring, possessing, and protecting property, and pursuing and obtaining . . . happiness'." *Id.* at 40 n.10 (citing CAL. CONST., art. I, § 1). However, the court determined that the state constitutional free exercise doctrine, which applied the pre-*Smith* "compelling state interest analysis," governed their decision. *Id.* at 39. This is the same analysis now required under RFRA. *See* 42 U.S.C. § 2000bb (1994).

89. *Donahue*, 2 Cal. Rptr. 2d at 42. In *Attorney Gen. v. Desilets*, the court held that the burden was established because

> [t]he [fair housing] statute affirmatively obliges the defendants to enter into a contract contrary to their religious beliefs and provides significant sanctions for its violation. Moreover, both their nonconformity to the law and any related publicity may stigmatize the defendants in the eyes of many and thus burden the exercise of the defendants' religion.

Desilets, 636 N.E.2d at 237-38.

90. *Donahue*, 2 Cal. Rptr. 2d at 43; *see also Desilets*, 636 N.E.2d at 238 ("The fact that the defendants' free exercise of religion claim arises in a commercial context, although relevant when engaging in a balancing of interests, does not mean that their constitutional rights are not substantially burdened.").

91. *Donahue*, 2 Cal. Rptr. 2d at 43 ("Here, the burden was personal and spiritual . . ., as well as financial, as indicated by the substantial monetary sanctions and other penalties imposed by the FEHC.").

92. *Donahue*, 2 Cal. Rptr. 2d at 44. In fact, the court implicitly questioned whether there was any governmental interest in prohibiting discrimination in housing against unmarried couples, stating that "[t]he FEHC has not only failed to establish a compelling governmental interest, but has also failed to explain what exactly is so invidious or unfairly offensive in not treating unmarried cohabiting couples as if they were married." *Id.* at 46. This statement seems to imply that the court perceived some sort of requirement

"hierarchy" of state interests beginning with the prohibition of racial discrimination in education, noting that prohibiting marital status discrimination in housing is not highly ranked because "California has, in effect, sanctioned and judicially enforced discrimination against cohabiting couples in contexts other than housing."[93]

Addressing the FEHC's argument that the state has another compelling interest in providing housing, the court concluded that its ruling would only limit the housing options available to unmarried couples, not make housing unavailable to them.[94] Thus, the *Donahue* court held that the state's asserted interests were not sufficiently compelling to overcome the substantial burden on the claimants' religious exercise.

The Alaska Supreme Court came to the opposite conclusion in *Swanner v. Anchorage Equal Rights Commission*.[95] There, three prospective tenants were rejected by a landlord, Tom Swanner, because they each intended to cohabit with a member of the opposite sex.[96] Under Swanner's Christian religious beliefs, unmarried couples may not cohabitate, so that in his view "even a nonsexual living arrangement by roommates of the opposite sex is immoral and sinful because such an arrangement suggests the appearance of immorality."[97]

In evaluating Swanner's claim for a constitutionally compelled exemption, the court applied the federal compelling interest test.[98]

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that a couple be married in order to live together.

93. *Donahue*, 2 Cal. Rptr. 2d at 44. These other contexts include the right to sue for loss of consortium, unemployment compensation, standing to sue for wrongful death, and the marital communication privilege. *Id.* The court noted that while the law has recognized unmarried cohabitation as a "modern reality," it has "not affirmatively promoted it as a matter of government policy." *Id.* at 45; *cf. Smith*, 30 Cal. Rptr. 2d at 405 (noting the state's strong interest in promoting marriage); *Desilets*, 636 N.E.2d at 245 (citing the state's criminal fornication law); *French*, 460 N.W.2d at 10 (observing that marriage is a "'preferred status'").

94. *Donahue*, 2 Cal. Rptr. 2d at 45 (stating that the "Donahues' discrimination does not compel the unavailability of all suitable housing"); *see also Smith*, 30 Cal. Rptr. 2d at 407-08 (stating that "in light of dominant community mores, it is entirely likely complainants could live together for the rest of their lives and never again confront discrimination because of their unmarried status").

95. 874 P.2d 274 (Alaska) (holding that the landlord discriminated against potential tenants based on their marital status and that he was not deprived of his free exercise rights by the statute), *cert. denied*, 115 S. Ct. 460 (1994).

96. *Id.* at 276.

97. *Id.* at 277.

98. *Id.* at 281. As in the *Donahue* case, free exercise adjudication was operating under the *Smith* decision at the time of this controversy, so the court based its decision on the state constitutional free exercise protections. *Id.* at 280. Alaska courts had also adopted

While the court held that Swanner met the preliminary requirements under a state case allowing broad interpretation of the burden requirement necessary to invoke a free exercise defense,[99] it concluded that the government had a compelling interest that outweighed the landlord's free exercise interest.[100]

The court identified two governmental interests: an interest in "providing access to housing for all," and a separate interest in "preventing acts of discrimination based on irrelevant characteristics."[101] The court determined that the more general interest was compelling enough to override Swanner's exemption claim, stating, "[t]he government views acts of discrimination as independent social evils even if the prospective tenants ultimately find housing."[102]

Additionally, the court was not persuaded that the fact that the state discriminates against unmarried couples in other areas showed that it had a lesser interest.[103] Moreover, as Swanner's free exercise claim arose in the context of voluntary commercial activity, the court analogized Swanner's claim to *Lee*, concluding that "[voluntary] commercial activity does not receive the same status accorded to directly religious activity."[104]

Thus, each court, in applying the same compelling interest test, came to quite different conclusions. Part III will analyze the decisions of these courts under RFRA's requirements, examine other alternative arguments not raised in these decisions, and conclude that landlords should not be given religious exemption from fair housing laws in order to discriminate against unmarried couples.

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the *Sherbert* compelling interest test, the test codified in RFRA. *Id.* at 281.

99. *Id.* at 281.

100. In Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 912 (Cal. 1996), the California Supreme Court ultimately reached the same conclusion, but with different reasoning. There, the court held that the landlord seeking religious exemption from California's fair housing law did not meet RFRA's "burden" requirement. *Id.* at 929. Thus, the court did not reach the issue of whether the state had a compelling interest in applying the fair housing statute over a religious objection. *Id.*

101. *Id.* at 282.

102. *Id.* at 283; *see also French*, 460 N.W.2d at 19 (Popovich, J., dissenting) ("We should reaffirm that the prevention of invidious discrimination in Minnesota, including on the basis of marital status, is a compelling state interest.").

103. Instead, the court limited the issue to the eradication of discrimination in housing, noting that other policies discriminating against unmarried couples are "irrelevant." *Swanner*, 874 P.2d at 283; *see also infra* part III.B.1.b (discussing treatment of unmarried couples in other areas of the law).

104. *Swanner*, 874 P.2d at 283.

III. ANALYSIS

A. *Burden*

Under RFRA, there must be a "substantial burden" on a landlord's religious exercise in order to make out a prima facie case for a free exercise defense.[105] There is a serious question about whether the housing laws in these cases constitute a substantial burden on a landlord's exercise of religion.

Both the *Swanner* and *Donahue* courts accepted the premise that the landlord's free exercise of religion was burdened by the state's fair housing statute.[106] A careful analysis shows that the courts' examinations of this requirement were not sufficient and that in each case, the initial burden aspect of the free exercise test was not necessarily met.

1. "Appearance" of Immoral Conduct

In *Swanner*, the landlord believed that nonsexual cohabitation by members of the opposite sex was "sinful" because it "suggest[ed] the appearance of immorality."[107] If this statement accurately reflected the landlord's belief, then he was, in effect, claiming that the housing discrimination statute was burdening him because it forced him to rent to individuals who, under his religious beliefs, appeared to be committing a sin.

Recognizing a burden in this case is very problematic. The government was not coercing the landlord himself into committing this "immoral" behavior.[108] In effect, the housing statute was merely requiring the landlord to be exposed to another's conduct (or appearance of conduct) that offends his religious beliefs.[109]

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105. RFRA, 42 U.S.C. § 2000bb-1(a) (1994).

106. *Swanner*, 874 P.2d at 281; *Donahue*, 2 Cal. Rptr. 2d at 42. Neither of the courts challenged the parties' sincerity of belief, or contended that the beliefs were not based in religion.

107. *Swanner*, 874 P.2d at 277; *see also French*, 460 N.W.2d at 4 ("[The landlord] believes that living together constitutes the 'appearance of evil' and would not have rented to them on that basis.").

108. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 449 (1988) (holding that the governmental action must coerce the claimant into violating a religious tenet); *see also supra* notes 50-56 and accompanying text. This is different from facilitation, *infra* part III.A.2 (differentiating facilitation, which concerns the role of the religious individual, from coercion, which concerns the role of the state).

109. This exposure would probably only take place in the rental relationship between the landlord and tenants, not in the actual living facility. If the landlord lived in the same dwelling, he would probably be exempted from compliance with antidiscrimination laws,

There is some question as to whether mere exposure to ideas offensive to one's religion is sufficiently burdensome.[110] In *Mozert v. Hawkins County Board of Education*, the court held that mere exposure to reading material that offends a student's religious beliefs did not constitute a sufficient burden for a violation of the Free Exercise Clause.[111] Therefore, under the *Lyng* coercion test, and the *Mozert* exposure rule, the landlord who refuses to rent to cohabitants because she objects to their behavior would not pass the burden requirement.

2. "Facilitation" of Another's "Sin"

In *Donahue*, the landlords believed that nonmarital sexual intercourse is a "mortal sin," and that "assisting or facilitating such behavior also constitutes a sin."[112] Similarly, in *Attorney General v. Desilets*, the landlords "believe[d] that they should not facilitate sinful conduct, including fornication."[113] Under this belief, the connection is less of a problem. The landlord is actually facilitating the cohabitation (or fornication) by renting them an apartment. Thus, the fair housing statute does directly burden the free exercise of religion of a landlord who believes that facilitating the cohabitation of others is a sin.

The idea of facilitation avoids the *Mozert* holding because it raises the issue beyond mere exposure to offensive conduct or beliefs.[114] Additionally, the landlord is being coerced into violating his tenets and facilitating another's sin.[115]

A religious tenet that prohibits facilitation of another's sins raises problems. Arguably, many activities can be causally related,

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because most fair housing laws exempt small, owner-occupied dwellings. *See, e.g.*, Fair Housing Act, 42 U.S.C. § 3603(b) (1995) (exempting owner-occupied dwellings if intended for residence by less than four families).

110. This case is distinguishable from the free exercise cases addressing governmental requirements of affirmation of a belief offensive to one's religion. *See, e.g.*, West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding a requirement that school children pledge and salute the flag unconstitutional as applied to Jehovah's Witnesses). Here, on the other hand, a fair housing act does not require the landlord to affirm or accept the tenants' belief in cohabitation.

111. 827 F.2d 1058, 1068-69 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988); *see also supra* notes 57-59 and accompanying text.

112. 2 Cal. Rptr. 2d at 42.

113. 636 N.E.2d 233, 235 (Mass. 1994).

114. *See supra* notes 57-59 and accompanying text (discussing the *Mozert* holding).

115. *See supra* notes 50-56 and accompanying text (discussing the *Lyng* coercion requirement).

albeit indirectly.[116] However, even though the landlord-tenant relationship is closely related, any burden on the landlord's religious beliefs is still marginal. Therefore, in those cases where a landlord sincerely believes, based upon her religion,[117] that it is a sin to facilitate the cohabitation of an unmarried couple, the landlord should pass the burden requirement.[118] However, any legally recognized burden should be relatively weak, because the landlord is essentially objecting to someone else's behavior.

Thus, the exact clarity of the landlord's religious belief has a major effect on the finding of a burden in these cases.[119] It is likely that each landlord's religious beliefs were slightly different.[120] In fact, this is exactly what the Free Exercise Clause is supposed to protect: diverse religious beliefs. As a result, a landlord who objects to the facilitation of cohabitation will be able to demonstrate a tenuous burden, while a landlord who only objects to cohabitation will not.

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116. For example, a person with a sincere religious objection to war might assert that payment of taxes burdened his religious exercise if his taxes were used to facilitate a war. *See* United States v. Lee, 455 U.S. 252, 260 (1982) (recognizing, hypothetically, that a taxpayer might, based on his religious beliefs, be able to object to specific tax dollars being spent to finance a war, but further recognizing that it is impossible to differentiate tax dollars and therefore impossible to allow such an objection to prevail).

117. Presumably, if the landlord's objection was based on a nonreligious, moral opposition to nonmarital cohabitation, her claim would fail because it is not based upon exercise of a *religious* belief. *See supra* notes 60-62 and accompanying text.

118. *But see* Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 912, 929 (Cal. 1996) (holding that a landlord's religious belief that "it is a sin . . . to rent . . . to people who engage in nonmarital sex on her property" was not substantially burdened under RFRA). The court reasoned that the landlord's religious belief was not substantially burdened because (1) her religion did not require her to rent apartments, so she could avoid violating this belief by making other investments; (2) while compliance with the fair housing statute might make the landlord's religious practice more expensive, it was still an incidental burden; and (3) granting the exemption would detrimentally affect the tenants' rights. *Id.* at 928-29. While these are legitimate reasons for refusing to grant an exemption, they do not necessarily implicate the "burden" requirement. Instead, these reasons tend to indicate that the government has a more compelling interest in enforcing the fair housing statute.

119. This assertion implicates the judicial concern about questioning the sincerity and exactitude of the religious belief. *See supra* note 62 and accompanying text. However, this inquiry is necessary because of the narrow burden standard outlined by the Court.

120. In his dissent to the denial of certiorari in *Swanner*, Justice Thomas characterized the landlord's religious belief differently, stating that the landlord had a sincere belief that "cohabitation is a sin and that he would be facilitating the sin by renting to cohabitants." 115 S. Ct. 460, 460 (1994). If this was in fact Swanner's belief, then he might meet the burden requirement; however, Justice Thomas's description of the landlord's belief is significantly different than the Alaska Supreme Court's. *See supra* note 107 and accompanying text.

B. Compelling Interest

It is generally accepted that the government has an interest in eradicating invidious discrimination in access to housing.[121] Additionally, the states that outlaw discrimination in housing against unmarried couples have shown that they have some interest in protecting against discrimination on the basis of marital status. However, the mere presence of a statute does not by itself indicate a compelling governmental interest; if it did, the entire compelling interest test would be swallowed up, because any statute would automatically pass the compelling interest standard.[122] There must be other evidence to justify the government's intrusion on religious exercise.[123] Thus, any compelling interest critique must look beyond the mere existence of the statute, to the reasons and interests behind enforcement of the statute. Some governmental interests that potentially justify burdening a landlord's free exercise of religion include (1) an interest in eradicating discrimination on the basis of marital status, in general or specifically in housing, (2) an interest in protecting the tenants' privacy interests, (3) an interest in providing individual tenants with housing, and (4) an interest in regulating commercial activity.

1. Compelling Interest in Eradicating Discrimination on the Basis of Marital Status

The Supreme Court has found a "fundamental, overriding interest in eradicating racial discrimination in education[,]"[124] and in eradicating gender discrimination in public accommodations.[125] However, it is not clear whether this reasoning can be extended to unmarried couples in the context of housing. Some courts have argued that the classification of marital status is much different

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121. Even the courts that allowed free exercise exemptions for landlords objecting to cohabitation acknowledge this. *See, e.g.*, Smith v. Fair Employment & Hous. Comm'n, 30 Cal. Rptr. 2d 395, 404 (Cal. Ct. App.) ("California has a significant interest in eradicating discrimination in employment and housing."), *aff'd in part and rev'd in part*, 913 P.2d 909 (Cal. 1996); Donahue v. Fair Employment & Hous. Comm'n, 13 Cal. App. 4th 350, 373 (1991), *review granted and opinion superseded*, 825 P.2d 766 (Cal. 1992).

122. Paulsen, *supra* note 31, at 256 ("The mere fact that Congress has passed a law on the subject or struck a balance in a particular way . . . does not qualify as a compelling interest . . . .").

123. *See* Ryan, *supra* note 17, at 1416 (observing that free exercise claimants face a "catch-22" because courts usually find that a government intrusion substantial enough to be called a burden is compelling enough to override the free exercise claim).

124. Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983).

125. Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984).

from race or gender, so that any state interest in preventing discrimination is significantly lessened.[126] However, examination of case law will show that the compelling interests behind eradication of race and gender discrimination should be extended to marital status discrimination.

a. All Protected Classes Are Not Alike

Antidiscrimination statutes generally list a number of classes of people without distinguishing between the interests in protecting each.[127] However, as demonstrated by constitutional equal protection doctrines, there is a convincing argument that protected classes are not equal in terms of governmental interests.[128] Under equal protection doctrine, classifications based on marital status receive only rational basis scrutiny.[129]

However, the fact that a group or class is not a suspect class under equal protection doctrine does not end the analysis for the purposes of the compelling interest test. In an equal protection challenge, a claimant alleges that the state treats her differently from similarly situated individuals, and that this unequal treatment in the law violates her Fourteenth Amendment right to equal protection.[130] Here, the state has already chosen to protect the class of unmarried couples; therefore, the question is whether the state

126. *See, e.g., Swanner*, 115 S. Ct. at 461 (Thomas, J., dissenting from a denial of certiorari) (distinguishing *Bob Jones University* because of the difference between racial discrimination and marital status discrimination); Smith v. Fair Employment & Hous. Comm'n, 30 Cal. Rptr. 2d 395, 404 (Cal. Ct. App. 1994) ("[I]t cannot be said [that] the goal of eliminating discrimination on the basis of unmarried status enjoys equal priority with the state public policy of eliminating racial discrimination."), *aff'd in part and rev'd in part*, 913 P.2d 909 (Cal. 1996); Attorney Gen. v. Desilets, 636 N.E.2d 233, 239 (Mass. 1994) (noting that the Massachusetts state constitution prohibits discrimination on the basis of race, but not marital status).

127. *See, e.g.*, 42 U.S.C.A. § 2000a(a) (West 1996) (prohibiting discrimination in public accommodations on the basis of "race, color, religion or national origin"); 42 U.S.C. § 2000e-2(a) (1995) (prohibiting discrimination in employment on the basis of "race, color, religion, sex, or national origin"); 42 U.S.C.A. § 3604(a) (West 1996) (prohibiting discrimination in housing on the basis of "race, color, religion, sex, familial status, or national origin").

128. *See, e.g.*, Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-42 (1985) (observing that in equal protection analysis, classifications based on race, alienage, or national origin receive strict scrutiny, classifications based on gender receive heightened scrutiny, and classifications based on other categories receive rational basis scrutiny).

129. Smith v. Shalala, 5 F.3d 235, 239 (7th Cir. 1993) (holding that a distinction based on marital status receives only rational basis scrutiny in an equal protection challenge), *cert. denied*, 114 S. Ct. 1309 (1994).

130. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 601 (12th ed. 1991).

has a compelling interest in protecting this class, not whether the class itself is suspect or constitutionally protected.[131] The state may have many different reasons for protecting a certain group through antidiscrimination laws; some of these may be compelling, while others may not. Therefore, for purposes of the compelling interest test, the presence of a suspect class is not dispositive, although it may be highly relevant. Thus, the government's compelling interest does not have to be the protection of a fundamental constitutional right.[132]

It is important to examine cases that find compelling state interests in protecting certain groups from discrimination, so that one may determine what makes an antidiscrimination interest compelling enough to outweigh infringement of a constitutional right. An analysis of these cases will show that there are four major reasons that courts find protection of certain groups compelling: (1) there is a clear, national policy of protecting the group from discrimination; (2) the particular group has suffered from a history of discrimination or stereotyping that must be remedied; (3) the act of discrimination against an individual in the protected class creates a stigma, stereotype, or loss of equal opportunity; and (4) acts of discrimination in general are evils, so the government has a more general compelling interest in eradicating invidious discrimination and promoting civil rights.

The only Supreme Court case addressing the issue of a free exercise exemption from an antidiscrimination statute is *Bob Jones University v. United States*,[133] a case involving two private religious schools that maintained racially discriminatory admissions policies.[134] While the schools asserted that their religion dictated separation of the races, so that an IRS antidiscrimination requirement interfered with their religious exercise, the Court held that the compelling interest in eradicating racial discrimination in education outweighed the schools' First Amendment free exercise rights.[135]

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131. *See* RFRA, 42 U.S.C. § 2000bb (1994).

132. For example, the Court has determined that education may be a compelling governmental interest, even though there is no constitutional right to education. *Compare* Wisconsin v. Yoder, 406 U.S. 205, 228-29 (1972) (observing that a state may generally have a compelling interest in educating children), *with* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (holding that there is no fundamental constitutional right to education).

133. 461 U.S. 574 (1983).

134. *Id.* at 580-81, 583.

135. *Id.* at 604.

One reason the Court gave for finding a compelling interest in eradicating discrimination was the long history of racial discrimination in education, which "prevailed, with official approval, for the first 165 years of this Nation's constitutional history."[136] Additionally, the Court emphasized the "fundamental policy of eliminating racial discrimination,"[137] citing the line of cases beginning with *Brown v. Board of Education* as well as numerous efforts by the executive and legislative branches to stop racial discrimination in education.[138] Thus, the Court's compelling interest analysis rested on rationales of the history of racial discrimination and the broad national policy promoting racial equality.

In *Roberts v. United States Jaycees*,[139] the Court found a compelling interest in eradicating gender discrimination in places of public accommodation that overrode the Jaycees' First Amendment right of association.[140] In *Roberts*, the United States Jaycees, a civic organization, had refused to grant full membership rights to women.[141] This action violated a Minnesota statute that makes it illegal to discriminate on the basis of sex in places of public accommodation.[142] As a defense, the Jaycees asserted that the statute infringed their First Amendment rights of free speech and association.[143]

Noting that "[i]nfringements on [the right of association] may be justified by regulations adopted to serve compelling state interests," the Court held that Minnesota's compelling interest in eradicating gender discrimination justified any infringement.[144] The Court advanced three basic arguments in its compelling interest analysis. The Court recognized the history of gender discrimination, stating that the state has a compelling interest in "removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups,

136. *Id.*
137. *Id.* at 595.
138. *Id.* at 593-96.
139. 468 U.S. 609 (1984).
140. *Id.* at 623.
141. *Id.* at 613.
142. At the time of this case, Minnesota's Human Rights Act provided that "'[i]t is an unfair discriminatory practice[t]o deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of . . . sex.'" *Id.* at 614-15 (quoting MINN. STAT. § 363.03, subd. 3 (1982)).
143. *Id.* at 615.
144. *Roberts*, 468 U.S. at 623 (1984).

including women."[145]

A second reason the Court gave for this holding was the assertion that the state has a compelling interest in preventing the stigma of discrimination and denials of equal opportunity: "discrimination based on archaic and overbroad assumptions" about the sexes deprives individuals of their "dignity."[146] Finally, the Court concluded that the state has a compelling interest in generally preventing acts of invidious discrimination, maintaining, "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent."[147] Thus, while the government's compelling interest in *Bob Jones University* centered on remedying historical barriers as well as a broad national policy, the *Roberts* Court found compelling interests not only in eradicating historical barriers, but also in preventing individuals from acquiring the stigma of discrimination and in generally deterring invidious discrimination in public accommodations.

The reasoning given by the Court in *Bob Jones University* has some application to the issue of marital status discrimination in housing. Unmarried couples can point to a history of discrimination, even if it is not as prevalent or severe as the history of race or gender discrimination. Historically, most states had statutes making cohabitation a crime.[148] Most of these have been repealed, but several states still have these laws.[149] Additionally, unmarried couples have historically been discriminated against in enforcement of property agreements.[150] Despite this history, however, there is no fundamental national policy of protecting unmarried couples.[151]

The additional rationales given in *Roberts* regarding the stigma of discrimination, and the general evils of allowing discrimination have more application to unmarried couples. Persons discriminated

145. *Id.* at 626.

146. *Id.* at 625. Equating the injuries of gender discrimination to race, the Court stated that the "stigmatizing injury [of discrimination], and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race." *Id.*

147. *Id.* at 628.

148. Smith, *supra* note 85, at 1059 & nn.28-29.

149. *Id.* at 1059 n.29. The continuing existence of statutes making cohabitation a crime is very interesting, given the fact that in 1989, 2,764,000 unmarried couples were cohabiting. *Id.* at 1058.

150. *Id.* at 1060-61.

151. *See supra* note 85 (discussing the few state and federal statutes that do prohibit discrimination on the basis of marital status).

against on the basis of marital status also suffer from a stigma based on their nonadherance to others' religious convictions or moral beliefs.[152] They also suffer the "denial of equal opportunities that accompanies" the stigma of discrimination.[153] Finally, the government's general interest in eradicating discrimination implicates marital status discrimination as well as gender discrimination.

There are, however, fundamental differences that separate the fair housing/marital status cases from *Bob Jones University* and *Roberts*. First, race and gender are distinguishable from marital status. Generally, race and gender are immutable characteristics, while an individual's marital status may change.[154] Thus, it is arguable that discrimination on the basis of marital status is less invidious because it is often based on a mutable, moral choice, not an immutable physical characteristic.[155] Additionally, there are times when the state does have an interest in promoting marriage, or a certain marital status,[156] whereas it is unlikely that the state ever has an interest in promoting one race over another, or one gender over the other. Finally, it may be argued that *Bob Jones University* and *Roberts* can be distinguished based on the type of discrimination prohibited (education and public accommodations antidiscrimination statutes, as opposed to fair housing laws). However, it would be difficult to support an assertion that access to housing is any less important or fundamental than access to education or public accommodations.

Decisions by other courts support the argument that the state may have a compelling interest in eradicating discrimination against groups traditionally less protected than race and gender. In *Gay Rights Coalition of Georgetown University Law Center v.*

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152. Beattie, *supra* note 85, at 1435-36, 1445 ("Such [discriminatory] policies lend credence to the stereotype that nonmarital relationships are transitory, frivolous, morally reprehensible, or simply unimportant."); Robert C. Mueller, Comment, Donahue v. Fair Employment and Housing Commission: *A Free Exercise Defense to Marital Status Discrimination?*, 74 B.U. L. REV. 145, 157, 170 (1994); Smith, *supra* note 85, at 1092.

153. Roberts v. United States Jaycees, 468 U.S. 609, 625 (1984).

154. Beattie, *supra* note 85, at 1428 ("Unlike sex, race, or disability, for instance, a person can change her marital status with relative ease.").

155. *Id.*; *see also* Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 401-04 (1994) (arguing that while race is a "morally neutral characteristic[,] . . . [s]exual conduct and preferences are fraught with moral and religious significance").

156. *Cf. infra* notes 185-87 and accompanying text (reviewing areas of the law that treat married couples more beneficially than unmarried couples).

Georgetown University,[157] the District of Columbia Court of Appeals held that the compelling interest in eradicating discrimination on the basis of sexual orientation outweighed a university's First Amendment free exercise rights.[158] In *Georgetown University*, two student groups charged that Georgetown University violated the District of Columbia's Human Rights Act by refusing to grant them university recognition and access on the basis of their sexual orientation.[159] As a defense, Georgetown University asserted that compliance with the statute would violate its right to free exercise of religion, as its Roman Catholic teachings forbid giving university benefits to homosexual student groups.[160]

The court gave several reasons for determining that a compelling governmental interest in eradication of sexual orientation discrimination overrode the burden on the university's free exercise rights. The court rested its decision on the rationale that eradicating discrimination based on historical moral attitudes that are unrelated to individual merit is a compelling governmental interest.[161] In support of this, the court cited studies showing a history of discrimination against homosexuals as well as studies showing that homosexuality is an ingrained part of society, and has no relation to an individual's merit as a person.[162] Finally, the court concluded that since discrimination in general harms society, the state has a compelling interest in eradicating all forms of invidious discrimination.[163] These arguments should also be applicable to the issue of marital status discrimination in housing, as marital status has nothing to do with one's merit as a tenant.[164] The court's holding also shows that invidious discrimination can occur even if the pro-

157. 536 A.2d 1 (D.C. 1987).

158. *Id.* at 5, 38.

159. *Id.* at 4, 5. The Human Rights Act prohibits an educational institution from denying "access to [] any of its *facilities and services* to any person *otherwise qualified*, . . . *based upon* the . . . *sexual orientation* . . . of any individual . . . ." *Id.* at 5 n.1 (emphasis in original) (citing D.C. CODE § 1-2520 (1987)).

160. *Id.* at 31. While acknowledging that the issue of the burden on Georgetown University's religious exercise was questionable, the court declined to thoroughly examine it because the parties had not "fully developed" the issue. *Id.* Instead, the court accepted the assertion that the antidiscrimination statute burdened the university and addressed the compelling governmental interest issue. *Id.*

161. *Id.* at 33.

162. *Id.* at 33-38.

163. *Id.* at 37-38.

164. Smith, *supra* note 85, at 1092 ("A couple's marital status alone does not indicate whether the couple will make good tenants or neighbors.").

tected group is not a constitutionally suspect class.

Addressing the lack of a broad national policy of protecting homosexuals from discrimination, the *Georgetown University* court concluded that a compelling interest need not be national.[165] Instead, the court found a broad District of Columbia policy in support of eradication of sexual orientation discrimination.[166] Similarly, a state that prohibits marital status discrimination in many areas, such as employment, public accommodations, and housing, may demonstrate such a broad state policy.

In *State by McClure v. Sports & Health Club*,[167] the Supreme Court of Minnesota held that the state does have a compelling interest in eradicating marital status discrimination in employment.[168] In *McClure*, three fundamentalist Christians who owned a health club conducted a practice of questioning applicants for employment about their marital status, refusing to hire homosexuals or individuals who cohabited with a member of the opposite sex.[169] These employment practices violated the Minnesota Human Rights Act, which prohibits discrimination in employment on the basis of marital status.[170]

As a defense, the club owners asserted that enforcement of the Act violated their First Amendment rights to free speech, exercise of religion, and association.[171] The court held that the government's compelling interest in "prohibiting discrimination in employment and public accommodation" overrode the owners' religious objections.[172] The court cited several cases in support,

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165. *Georgetown Univ.*, 536 A.2d at 38 n.25.

166. *Id.* at 32-33.

167. 370 N.W.2d 844 (Minn. 1985), *appeal dismissed*, 478 U.S. 1015 (1986).

168. *Id.* at 853.

169. *Id.* at 846-47.

170. *Id.* at 850. The court stated the following:

> Sports and Health, in some instances, went far beyond legally permissible bounds in questioning applicants and employees. The evidence clearly substantiates the findings of the hearing examiner that questioning concerning religious beliefs, practices and concerning marital status permeated the employment process and were the true reasons for the actions taken by Sports and Health.

Id.

171. *Id.* The court treated the three claims essentially as a free exercise claim, because the assertions were all based in the religious beliefs of the club owners. *Id.* at 850 n.11.

172. *Id.* at 853. The court did not examine the burden requirement because the state did not challenge the club owners' assertion that the statute burdened their religious exercise. *Id.* at 852. Apparently, the objection was that the club owners did not want to "subsidize" an "immoral relationship" through employment. *Id.* at 858 (Peterson, J., dissenting). However, given the discussion *supra*, part III.A, dealing with the "immoral" actions of

including *Bob Jones University* and *Roberts*, where the government's interest in supporting individual civil rights outweighed constitutional rights.[173] It did not, however, examine the differences accorded to the various protected classes, or address any type of historical or stigma arguments. Instead, it determined that the enhancement of civil rights, and the prohibition against discrimination in employment for all citizens was a compelling interest in itself.[174]

Thus, *McClure* stands for the proposition that the state's interest in promoting civil rights and eradicating discrimination for all protected groups is sufficiently compelling to outweigh a religious objection.[175] This reasoning, along with the other rationales of *Georgetown University*, *Roberts*, and *Bob Jones University* should be applied and extended to the fair housing/marital status cases to establish a compelling state interest in eradicating marital status discrimination in housing.

One theme running through all the cases is the idea that invidious discrimination, in any form, harms society in general, so that the government has a compelling interest in eradicating arbitrary discrimination against all groups, and enhancing civil rights for all citizens. However, some courts have argued that unmarried couples are disfavored in other areas of the law, and so discrimination against this group is not invidious, and the interest in promoting civil rights of this group, therefore, is not compelling.[176]

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employees may not have legally burdened the employer in this situation.

173. *Id.* at 852.

174. *Id.* at 853. The court stated,

> In a pluralistic and democratic society, government has a responsibility to insure that all its citizens have equal opportunity for employment, promotion, and job retention without having to overcome the artificial and largely irrelevant barriers occurring from gender, status, or beliefs to the main decision of competence to perform the work. Likewise, the government has a responsibility to afford its citizens equal access to all accommodations open to the general public.

Id.

175. *Cf.* Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987) ("[P]ublic accommodations laws 'plainly serv[e] compelling state interests of the highest order.'" (quoting Roberts v. United States Jaycees, 468 U.S. 609, 624 (1984))).

176. *See, e.g.*, Attorney Gen. v. Desilets, 636 N.E.2d 233, 239-40 & n.10 (Mass. 1994) (holding that marital status discrimination is not a strong state concern because Massachusetts has no constitutional prohibition against discriminating on the basis of marital status).

b. Treatment of Unmarried Couples in Other Areas of the Law

One reason cited for the argument that the government has no compelling interest in protecting marital status from discrimination is that unmarried couples are not favored in other areas of the law.[177] This argument has two different aspects: first, some states have fornication laws making sexual intercourse between unmarried couples a crime; second, several other areas of the law frequently distinguish between married and unmarried couples.

i. Fornication Laws

In *Attorney General v. Desilets*, the court noted that Massachusetts still has a statute on the books making fornication a crime.[178] Although observing that the statute was of doubtful constitutionality under the Massachusetts Constitution, the court concluded that because fornication remains a crime on the books, the state's interest in protecting unmarried couples from discrimination was diminished.[179] Although this assertion is accurate, based on a facial reading of the criminal statue, it is difficult to support in light of the treatment of fornication laws.

Thirteen states still make fornication a crime.[180] However, these laws are not enforced,[181] and are of questionable constitutionality, at least as applied to consenting heterosexual adults.[182] Additionally, many states have either repealed these types of laws,

177. *See* State by Cooper v. French, 460 N.W.2d 2, 10 (Minn. 1990).

178. 636 N.E.2d at 240; *see also French*, 460 N.W.2d at 10 (citing MINN. STAT. § 609.34 (1988)).

179. The court cited a Massachusetts state case for the proposition that the state fornication statute may be unconstitutional as applied to consensual, private conduct between adults. *Desilets*, 636 N.E.2d at 240; *see also* Commonwealth v. Balthazar, 318 N.E.2d 478, 481 (Mass. 1974) (holding that the Massachusetts law "must be construed to be inapplicable to private consensual conduct of adults").

180. Note, *Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex*, 104 HARV. L. REV. 1660, 1661 n.9 (1991). These states include Georgia, Idaho, Illinois, Massachusetts, Minnesota, Mississippi, New Mexico, North Carolina, North Dakota, South Carolina, Utah, Virginia, and West Virginia. *Id.*

181. *Id.* at 1661 & n.11. Generally, the few arrests made are discriminatory, used to apprehend "suspected prostitutes, rapists and other criminals." *Id.* at 1662 (citations omitted).

182. *Id.* at 1665-68 (arguing that such laws may be unconstitutional, as applied to consenting heterosexual adults, under *Griswold* and its progeny).

or overturned them in the judicial system.[183]

Therefore, it is difficult to support the argument that fornication statutes show that a state cannot have a compelling interest in protecting unmarried couples from discrimination in housing.[184] They are outdated, unenforced (and possibly unenforceable) criminal statutes that may be unconstitutional. Therefore, they are not persuasive enough to show that the state does not have a compelling interest in providing housing for unmarried couples.

ii. Other Areas of the Law with Differential Treatment for Unmarried Couples

All of the courts that addressed the issue of a compelling interest in the eradication of marital status discrimination in housing recognized that unmarried couples are not treated the same as spouses in other areas of the law.[185] For example, unmarried couples are often treated differently from married couples in the areas of torts, property law, and employee benefits.[186] Additionally, they generally cannot bring an action for wrongful death or loss of consortium, are generally not entitled to employee benefits normally available to spouses and other family members, and are not allowed to assert the marital communication privilege.[187]

These differences show that the state does not have a compelling interest in treating unmarried couples the same as married couples at all times. However, it does not mean that there is not a compelling interest in the area of eradicating discrimination in housing. Although there are specific reasons why the state distinguishes between individuals based on their marital status in certain areas of the law, the reasoning does not apply to the aims of fair housing laws.

The reasons for differentiating between married and unmarried couples in such non-housing areas are to protect against fraud in dispensing benefits and to avoid the difficulties of determining

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183. Smith, *supra* note 85, at 1059 & n.30.

184. In *Georgetown University*, the court accepted the government's compelling interest in protecting sexual orientation discrimination despite the existence of a District of Columbia law making sodomy a crime. Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ, 536 A.2d 1, 75 (D.C. App. 1987) (Nebeker, J., dissenting).

185. *See Swanner*, 874 P.2d at 283; *French*, 460 N.W.2d at 10; *Desilets*, 636 N.E.2d at 239-40; *Smith*, 30 Cal. Rptr. 2d at 404-05; *Donahue*, 2 Cal. Rptr. 2d at 44-45.

186. *See* Beattie, *supra* note 85, at 1444 (discussing differential treatment in torts and property law); Smith, *supra* note 85, at 1063-64 (concerning employee benefits).

187. *See* Beattie, *supra* note 85, at 1444; Smith, *supra* note 85, at 1063-64.

whether a relationship is truly intimate and genuine.[188] A marriage certificate makes it much easier to determine who is eligible for benefits, for example, even if it does not accurately measure intangible feelings or genuineness.[189] Furthermore, it creates a barrier for preventing fraudulent claims for benefits. However, this reasoning does not translate into housing discrimination cases. There is no concern about fraud in obtaining housing; instead, the concern is over basic access and invidious discrimination.[190]

Additionally, the government may sometimes differentiate between married and unmarried couples because it has an interest in promoting marriage.[191] However, this does not mean that the state does not also have an interest in prohibiting discrimination against unmarried couples in housing.[192] Some courts that addressed this issue missed this important distinction. In *French*, the court observed, "[w]e are not told what is so pernicious about refusing to treat unmarried, cohabiting couples as if they were legally married."[193] Similarly, the *Smith* court stated, "[w]e simply hold the extension to unmarried couples of rights which inhere in the marriage relationship is not a state interest of the highest order."[194] Neither court noted what "rights" allow only married couples to live together, failing to recognize the distinction between civil rights statutes and other areas of the law.

This misstatement of the central issue is precisely what makes antidiscrimination statutes in public accommodations, education, housing, and employment so important. While classifications such as marital status may have some relevance in these other areas of the law (so that the government may prevent fraud or support marriage relationships), marital status has no bearing on a person's

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188. One can imagine how difficult it would be to inquire into the length, sincerity, and intimacy of a relationship. *See Swanner*, 874 P.2d at 283 ("The difficulty of discerning whose bonds are genuine and whose are not may justify requiring official certification of the bonds via a marriage document.").

189. *Id.*

190. *Id.* ("That problem is not present in housing cases; as this case demonstrates, if anything, an unmarried couple who wish to live together are at a disadvantage if they claim to be romantically involved.").

191. Beattie, *supra* note 85, at 1429.

192. *Id.* at 1444; *see also* Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 918 (Cal. 1996) ("One can recognize marriage as laudable, or even as favored, while still extending protection against housing discrimination to persons who do not enjoy that status.").

193. 460 N.W.2d at 10.

194. Smith v. Fair Employment & Hous. Comm'n, 30 Cal. Rptr. 2d 395, 396 n.10 (Cal. Ct. App. 1994), *aff'd in part and rev'd in part*, 913 P.2d 909 (Cal. 1996).

civil rights of access to public accommodations, housing, and employment. That is precisely what is so invidious about discrimination in housing. These areas are distinctly different, and the failure of courts to recognize this, results in the continuation of stereotypes and moral judgments.[195] Additionally, by protecting unmarried couples from discrimination, the state is not promoting or discouraging either type of marital status; it is treating the two equally.

It may be correct that the government does not have a compelling interest in eradicating discrimination against unmarried couples in all areas of the law; however, it does have a compelling interest in eradicating discrimination against unmarried couples in housing, employment, and other areas where distinctions based on marital status would be invidious and stigmatizing.

2. Compelling Interest in Protecting Tenants' Privacy and Intimate Association Interests

Although the issue was not raised in any of the housing cases, the government may have a compelling interest in protecting the privacy interests of the tenants. While the relationship between two unmarried individuals has not been recognized as a constitutionally protected privacy interest,[196] it does share many of the same qualities as those intimate relationships that are so protected. Consequently, the cohabitating unmarried individuals' relationship, at least for heterosexuals, could rise to the level of a compelling governmental interest based on existing case law.

The Supreme Court has recognized that certain intimate relationships and interests are so personal that they are protected by a constitutional right of privacy or intimate association.[197] Generally, however, these cases have been limited to family,[198] mar-

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195. *See supra* notes 152-53 and accompanying text (discussing the stigma of discrimination suffered by unmarried couples); *see also* Beattie, *supra* note 85, at 1445 ("State legislatures enacted human rights laws to prevent [employers, landlords, and owners of public accommodations] from imposing arbitrary and sometimes moralistic policies on individuals and to require those entities to base their decisions on merit and legitimate business concerns.").

196. *See infra* note 205 and accompanying text.

197. These are based in the First Amendment right of association and other "penumbras." *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (observing that "specific guarantees in the Bill of Rights have penumbras").

198. *See* Moore v. City of East Cleveland, 431 U.S. 494, 503-04 (1977) (recognizing the right to cohabit with one's relatives); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (recognizing the privacy of the parent-child relationship); Pierce v. Society of Sis-

riage,[199] procreation,[200] contraception,[201] and choices about whether to beget a child or terminate a pregnancy.[202]

In *Bowers v. Hardwick*,[203] the Court held that this right would not extend to a homosexual couple engaging in sodomy.[204] However, the Court has not yet addressed the issue of whether this right would apply to unmarried heterosexual couples.[205] Although some have argued that *Bowers* stands for the proposition that there is no constitutional right to privacy in any consensual sexual relations between unmarried adults—heterosexual or homosexual[206]—there is significant evidence to suggest that the holding in *Bowers* is limited to sexual relations between homosexuals.[207]

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ters, 268 U.S. 510, 534-35 (1925) (recognizing parents' right to control education and rearing of their children).

199. *See* Zablocki v. Redhail, 434 U.S. 374, 383-86 (1978) (recognizing the right to privacy with respect to marriage); Loving v. Virginia, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

200. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (regarding forced sterilization).

201. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); *Griswold*, 381 U.S. at 485-86.

202. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 684-86 (1977); Roe v. Wade, 410 U.S. 113, 153 (1973).

203. 478 U.S. 186 (1986).

204. *Id.* at 190-91.

205. *See Carey*, 431 U.S. at 694 n.17 ("We observe that the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults."); *Bowers*, 478 U.S. at 191 (observing that *Carey* did not extend the right to privacy to all sexual conduct between adults); Note, *supra* note 180, at 1663 ("[T]he Court has never addressed this issue directly." (footnote omitted)).

In *Village of Belle Terre v. Boraas*, the Court refused to overturn a zoning law prohibiting a group of students from living together. 416 U.S. 1, 7-9 (1974). However, the *Belle Terre* Court did not reach the issue of unmarried couples, as the zoning ordinance allowed an unmarried couple to live together. *Id.* at 8.

206. *See* Michael H. v. Gerald D., 491 U.S. 110, 131-32 (1989) (upholding state law presumption that a child born to a woman living with her husband is the husband's child over the constitutional challenge of the natural father). The *Michael H.* Court, like the *Bowers* Court, relied heavily on historic practices and the presumption of legitimacy. *Id.* at 123-27. There is an argument that by reading *Bowers* broadly along with *Michael H.*, the Court will only protect "historically-based" relationships. *But see* Note, *supra* note 180, at 1666-67 & nn.49-53 (refuting that approach by observing that historical-based arguments have only been used in due process cases, and noting that neither *Bowers* nor *Michael H.* overruled *Griswold* and its progeny).

207. First, the Court's reasoning focuses solely on homosexuals. *See Bowers*, 478 U.S. at 192-94 (discussing the historical treatment of homosexuals in the law); Note, *supra* note 180, at 1666 n.48 ("*Bowers*' focus on . . . homosexual conduct limits its impact on settled privacy jurisprudence."). Additionally, the Court specifically distinguishes homosexual sodomy because it is not procreative. 478 U.S. at 191 ("No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated.").

Moreover, the Court has recognized a constitutional right to privacy regarding choices about contraception for unmarried individuals, which was not overruled by *Bowers*.[208]

Even though the relationship between heterosexual cohabitants has not been explicitly protected on constitutional grounds, it exhibits the same qualities as those relationships that are constitutionally protected. In *Roberts v. United States Jaycees*,[209] the Court defined the limits of the right to intimate association:

> Between [the] poles [of selection of spouse and selection of employees], of course, lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State. Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments. . . . We note only that factors that may be relevant include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent.[210]

The relationship between a cohabiting unmarried couple clearly shares many of the characteristics that would place it on the spectrum as one of the most intimate. The relationship is small and highly selective. As cohabitation is often a precursor for or an alternative to marriage, its purpose may be very similar to the purposes of the marriage relationship.[211] Thus, although the Court has not expressly recognized this relationship as constitutionally protected, it should have a claim to protection.

Moreover, courts have held that the state may have a compelling interest in protecting the privacy interests of individuals.[212]

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208. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (emphasis in original)); *see also* Note, *supra* note 180, at 1665-68 (arguing that this, along with the cases recognizing the right to bear children, logically leads to the conclusion that sexual relations between two unmarried heterosexual partners must be constitutionally protected).

209. 468 U.S. 609 (1984).

210. *Id.* at 620.

211. *Contra* Note, *supra* note 180, at 1666 n.45 (focusing on fornication).

212. *See* Evans v. Romer, 882 P.2d 1335, 1344 (Colo. 1994) (observing that "preserving

Additionally, for an interest to be compelling, there is no requirement that it reach the level of a constitutional right.[213] In *Evans v. Romer*, the Colorado Supreme Court held that the government may have a compelling interest in protecting the right of associational privacy, if the relationship resembled those defined by *Roberts*.[214] The relationship between an unmarried heterosexual couple does meet the *Roberts* definition.[215] Therefore, even though the relationship between heterosexual cohabitants is not constitutionally protected, the state does have a compelling interest in protecting it.

3. Compelling Interest in Providing the Individual Tenants with Housing

There is vast agreement that providing access to housing to individuals is a compelling governmental interest.[216] Housing is a basic, fundamental need, and there is a clear national interest in providing housing for all.

However, while many exemptions from the housing statute may frustrate this interest, a few exemptions probably will not result in much harm to the individual tenants. It may slightly inconvenience them, but if they find alternative housing, the governmental interest is still served.[217] Moreover, for economic reasons, it is unlikely that droves of landlords will seek religious exemption from antidiscrimination laws.[218] The only danger would be if scores of landlords began seeking religious exemption from fair housing laws, or if there is a shortage of rental housing or of rental housing in a certain price range.

Providing housing for all citizens is a compelling interest; however, this interest will likely fail the least restrictive means

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associational privacy may rise to the level of a compelling state interest"), *cert. granted*, 115 S. Ct. 1092 (1995); *see also* Schultz v. Frisby, 807 F.2d 1339, 1350 (7th Cir. 1986) (stating that state protection of privacy interests may be a justification for a statute restricting free speech rights).

213. *See supra* note 132 and accompanying text.

214. *Evans*, 882 P.2d at 1344-45.

215. *See supra* notes 210-11 and accompanying text.

216. *See, e.g.*, Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 282 (Alaska 1994), *cert. denied*, 115 S. Ct. 460 (1994); Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32, 45 (1991), *review granted and opinion superseded*, 825 P.2d 766 (Cal. 1992).

217. *Swanner*, 874 P.2d at 282.

218. *See* Smith, *supra* note 85, at 1058 (noting that over 2,764,000 unmarried couples live together).

aspect.[219] Although an unmarried couple may be able to show that they cannot find housing, this will require unusual circumstances in housing markets, and is unlikely to succeed.

4. Compelling State Interest in Regulating Secular Commercial Activities

The government may have a more compelling interest in regulating an individual's activities when they occur in the context of commercial activities.[220] This factor is very important in the case of a landlord seeking a religious exemption from a fair housing law. In *United States v. Lee*, the Court held that "every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs,"[221] especially when that burden occurs in voluntary commercial activity.[222] Similarly, the Court has refused to grant religious exemptions in other cases where religious organizations have been involved in commercial activities.[223]

Essentially, this argument relates not only to the heightened governmental interest in regulating commercial activities, but also to the decrease in burden on a free exercise claimant who enters into secular commercial activities. In other words, First Amendment rights are not absolute, and a person may waive them, to some extent, by entering the marketplace.[224] For example, the court in *State by McClure v. Sports and Health Club* noted that "Sports and

219. *See infra* part III.C.

220. United States v. Lee, 455 U.S. 252, 261 (1982).

221. *Id.*

222. *Id.* Specifically, the court stated, "[w]hen followers of a particular sect enter into commercial activity *as a matter of choice*, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Id.* (emphasis added).

223. *E.g.*, Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 303-05 (1985) (holding that the application of the Fair Labor Standards Act to the employees of commercial businesses run by a religious organization is constitutional); Bob Jones Univ. v. United States, 461 U.S. 574, 585 (1983) (upholding application of antidiscrimination laws to a church-run private school); *see also* Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 384 (1990) (holding that a generally applicable sales tax does not constitutionally burden an organization's sale of religious materials).

224. *Tony & Susan Alamo Found.*, 471 U.S. at 294 ("'By entering the economic arena and trafficking in the marketplace, the foundation has subjected itself to the standards Congress has prescribed for the benefit of employees.'" (quoting Tony & Susan Alamo Found. v. Secretary of Labor, 722 F.2d 397, 400 (1984)); *cf.* Roberts v. United States Jaycees, 468 U.S. 609, 622-29 (1984) (O'Connor, J., concurring) (arguing that First Amendment protections are waived in commercial transactions).

Health, however, is not a religious corporation—it is a Minnesota business corporation engaged in business for profit. By engaging in this secular endeavor, appellants have passed over the line that affords them absolute freedom to exercise religious beliefs."[225] Conversely, in *Wisconsin v. Yoder*, the Court focused on how the Amish religion dictated separation from society.[226] In the cases involving landlords seeking religious exemption from fair housing statutes, the landlords did not enter the commercial real estate market for religious purposes.[227] This is not to suggest that their free exercise rights are waived completely, just that governmental regulations are less burdensome, or more compelling, when they occur in the commercial context.

This argument may sound completely contrary to everything the Free Exercise Clause and RFRA stand for: making allowances for religious liberty and diverse religious practices in a secular society. The Court has granted religious exemptions in cases involving commercial activities. For example, the Court's leading free exercise case, *Sherbert v. Verner*, granted an exemption from an unemployment compensation requirement for a worker who had a religious objection to Saturday work.[228] However, the housing cases are distinguishable. In *Sherbert*, the claimant was asking for government unemployment benefits; she was not asking her former employer to rehire her and accommodate her religious beliefs. In the housing arena, the landlords are essentially expecting the tenants, and society's general antidiscrimination ideal, to accommodate their religious beliefs. In *United States v. Lee*, the Court stated, "[g]ranting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees."[229] Similarly, granting an exemption from a fair housing law

225. *Sports and Health Club*, 370 N.W.2d 844, 853 (Minn. 1985).

> [W]hen appellants entered into the economic arena and began trafficking in the market place, they have subjected themselves to the standards the legislature has prescribed not only for the benefit of prospective and existing employees, but *also* for the benefit of the citizens of the state as a whole in an effort to eliminate pernicious discrimination.

Id. (emphasis added).

226. Wisconsin v. Yoder, 406 U.S. 205, 222-28 (1972).

227. If they were, they could potentially fall under the religious organization exemptions to fair housing laws. *See* 42 U.S.C. § 3607 (1994) (allowing religious organizations to discriminate by renting only to members of the same religion).

228. 374 U.S. 398, 399 (1963).

229. 455 U.S. 252, 261 (1982).

imposes the landlord's religious faith on the tenants.

Therefore, the government's interest in regulating secular commercial activities adds to the magnitude of its compelling interests in eradicating marital status discrimination in housing, protecting privacy interests, and providing housing. Moreover, the fact that this religious objection takes place in commercial activity for profit makes any burden on the landlord less onerous.[230]

C. *Least Restrictive Means*

Even if the government does have a compelling interest that justifies burdening a landlord's exercise of religion, it must still show that "application of the burden to the person . . . is the least restrictive means of furthering that compelling governmental interest."[231] In the case of discrimination statutes, however, there is no less restrictive means of preventing arbitrary discrimination other than applying the statutes equally to all persons.

If the only compelling governmental interest is in providing housing for all individuals, married or unmarried, refusing to allow one religious exemption from a fair housing act is probably not the least restrictive means of accomplishing that goal. If the tenants find housing from a landlord who cannot claim a religious exemption, the governmental interest is served.[232] However, when one considers the compelling interest of eradicating discrimination against unmarried couples in housing, the answer is different. Case law supports the argument that there is no least restrictive means of accomplishing the goal of eliminating discrimination in public accommodations, employment, education and housing.[233] The

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230. As most fair housing acts exempt small, owner-occupied dwellings, a landlord who lived in the same dwelling with the tenants (and is therefore arguably more burdened) would be allowed to discriminate. *See, e.g.*, Fair Housing Act, 42 U.S.C. § 3603(b) (1994) (exempting sale or rental of a single-family home, if the owner does not own more than three single-family homes, and owner-occupied dwellings, if intended for no more than four families).

231. RFRA, 42 U.S.C. § 2000bb-1(b)(2) (1994).

232. *See supra* part III.B.3. This is supported by Thomas v. Review Bd., 450 U.S. 707 (1981), which allowed a free exercise exemption from the requirements of an unemployment compensation statute. *Id.* at 719 ("There is no evidence in the record to indicate that the number of people who find themselves in the predicament of choosing between benefits and religious beliefs is large enough to create 'widespread unemployment.'").

233. *See* Roberts v. United States Jaycees, 468 U.S. 609, 626-29 (1984); Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983); State by McClure v. Sports and Health Club, 370 N.W.2d 844, 853 (Minn. 1985), *appeal dismissed*, 478 U.S. 1015 (1986); *see also* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 283 (Alaska 1994), *cert. denied*, 115 S. Ct. 460 (1994); State by Cooper v. French, 460 N.W.2d 2, 20

McClure court observed that the state's interest in eradicating discrimination would be frustrated by allowing an exemption.[234] Even more emphatic, the *Roberts* Court held that

> acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent. . . . [L]ike violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection.[235]

All these courts indicate that even allowing limited discrimination is wrong. Similarly, in the marital status/fair housing cases, there is no less restrictive means of the state's goal of eradicating marital status discrimination in housing and promoting and protecting civil rights. Once arbitrary discrimination is allowed, no matter how few or how many times, the state's interest is being undermined.

IV. CONCLUSION

The claim of the landlord seeking a religious exemption from state fair housing acts protecting unmarried cohabitants should not be granted. Although Congress manifested its desire to protect religious liberty and free exercise by passing RFRA, evidence shows that RFRA will probably not alter free exercise doctrine other than overruling *Employment Division, Department of Human Resources v. Smith*. Additionally, as Supreme Court standards for granting religious exemptions were narrowing before *Smith*, the requirements for obtaining an exemption under RFRA will likely be the same.

Thus, landlords seeking exemption from a state fair housing act may have difficulty meeting even the initial burden requirement under RFRA. Whether a landlord can make out a legally cognizable burden will depend on whether she objects to just unmarried cohabitation, or to the facilitation of that behavior. In any event, any legal burden on the landlord who objects to the facilitation of cohabitation is legally minimal, because the landlord herself is not

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(Minn. 1990) ("Federal courts have also consistently refused to allow religious exemptions from anti-discrimination statutes.").

234. *McClure*, 370 N.W.2d at 853.

235. *Roberts*, 468 U.S. at 628.

coerced into cohabiting; instead, she is merely objecting to another's sin.

The state has several compelling interests that could override this burden on the landlord's exercise of religion. First, it has a compelling interest in eradicating marital status discrimination in housing. Although marital status is not one of the more traditionally protected groups, the compelling reasons for protecting groups such as race and gender can be extended and applied to marital status. Moreover, the fact that unmarried couples are treated differently in other areas of the law does not mean that the state's interest in promoting their civil rights should be decreased. The state may also have a compelling interest in protecting the privacy rights of unmarried tenants, at least for heterosexuals. However, the compelling governmental interest of providing housing is probably too broad to apply to one landlord.

Finally, the fact that this issue arises in a commercial context tilts the balance away from the landlord's free exercise interests, toward governmental interests in regulation. Thus, even if religious liberty is "emphatically mandated in RFRA,"[236] landlords discriminating against unmarried couples have crossed the line of constitutionally protected conduct. They should be required to adhere to fair housing statutes that govern the limits of discriminatory conduct.

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236. *Swanner*, 115 S. Ct. at 462 (Thomas, J., dissenting from a denial of certiorari).