NOTES

WHEN RELIGIOUS EXERCISE AND PRIVATE RIGHTS COLLIDE

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INTRODUCTION

Should parties be allowed to bring First Amendment free exercise claims and defenses in state statutory and common law disputes involving only private parties? For instance, what, if any, recourse do religious evangelists and proselytizers have when their efforts to share their views with others are prohibited or substantially burdened by other private citizens or nongovernmental entities because of the particular religious views being shared? Consider a common law trespass action, for example. The landowner or occupant, whether a private citizen, business, university, or other private entity, has the legally enforceable right to exclude others from the property as he or she wishes—and that includes the legally enforceable right to exclude any door-to-door solicitors regardless of whether they are religious proselytizers or not. But what if certain religious visitors are welcomed to the exclusion of others based on their particular beliefs? Or what if no particular religious views are favored by the occupant of the property, but certain religious visitors are categorically precluded from entering the property? This could be more than a hypothetical. Consider the following samples of signs posted by homeowners[1]:

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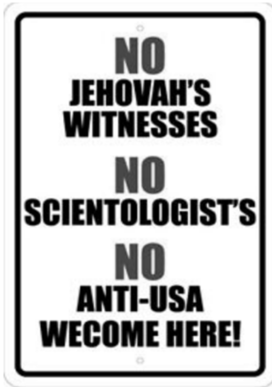
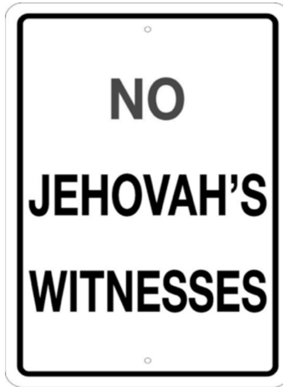
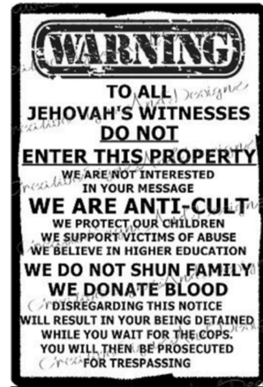
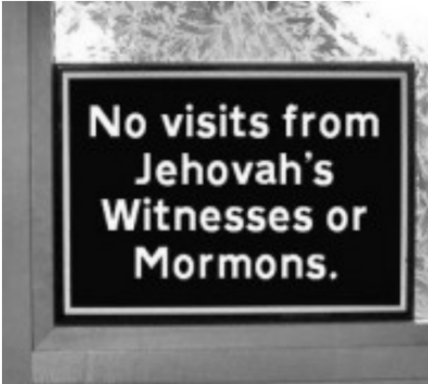
* J.D. Candidate, Notre Dame Law School, 2025; B.S. in Law and Policy: Pre-Law, Liberty University, 2020. Thank you to Professor Bruce Huber for his encouragement and advice on this project. His Property class will always be my favorite law school class and was where I was first introduced to the state action doctrine. Thank you as well to Professors Richard W. Garnett and Stephanie Barclay for helping me refine my topic and illuminating my understanding in this area of the law. Further thanks to my family, friends, and fellow editors of the *Notre Dame Law Review* for their unwavering support. All errors are my own. All glory belongs to the Lord Jesus Christ, my Savior.

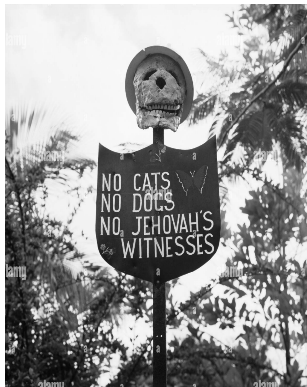
1 The author is not a member of any of the religious groups listed on these signs, but he has spent thousands of hours going door to door for (mostly) religious and (some) political causes over the years.

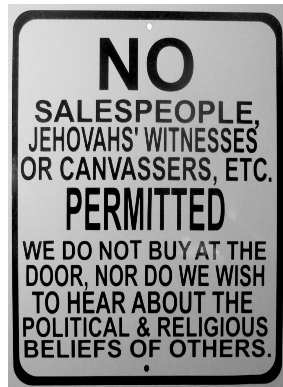












Then, of course, there could be situations where there is no posted sign, but the property owner threatens religious proselytizers because "this is a(n) [insert religious affiliation or lack thereof] household!" In other words, the private property owner or occupant expressly excludes the religious proselytizer on the basis of his or her religious views.

Another example could be the exclusion of certain religious proselytization from private businesses such as malls or from the campuses

of private universities. Especially in such contexts, exclusion could become more of a burden for the religious proselytizer than simply trying to defend oneself against an action for trespass. Religious proselytizers could be motivated by a strongly held religious conviction that they are personally responsible for warning all people of the need for salvation from the damnation of their souls and/or that they have a divine commandment to share their message with everyone.[2]

This Note proposes that the state action doctrine—where state statutory and common law, or the judicial finding of liability thereunder, is government burdening to the same extent that a criminal law or prosecution is government burdening—should extend to always allow religious exercise claims and defenses in disputes involving only private parties. Part I lays out the development of religious exercise jurisprudence under the federal and state systems and the current landscape of jurisdictions' treatment of religious exercise claims and defenses in private disputes.

Part II proceeds in two sections: Section A presents representative cases from criminal law and relevant areas of constitutional law (equal protection, free speech, and the free exercise doctrines of church autonomy and the ministerial exception) in which the Supreme Court has applied the state action doctrine. It then presents examples of state and lower federal court cases that applied the state action doctrine to private statutory and common law tort disputes under the former free exercise regime.

Section B argues that the state action doctrine should be applied in state courts to allow free exercise claims and defenses in private litigation and replies to objections. Predictability and consistency across all areas of the law compel the application of the state action doctrine to all private disputes, whether in federal or state court. Litigants are duly protected from frivolous and insincere free exercise claims under the current default free exercise regime, and, even in jurisdictions with higher protections for religious exercise, are protected by the state interest and substantial burden requirements. Accordingly, in litigation where a party's religious exercise is truly burdened by another party's

2 *See, e.g.*, *Mark* 16:15–16 (King James Version) ("Go ye into all the world, and preach the gospel to every creature. He that believeth and is baptized shall be saved; but he that believeth not shall be damned."); Thomas Farr, *Proselytism and Religious Identity Theft*, BERKLEY CTR. FOR RELIGION, PEACE & WORLD AFFS. (Mar. 1, 2010), https://berkleycenter.georgetown.edu/posts/proselytism-and-religious-identity-theft [https://perma.cc/8TVX-PWK5] ("Christianity and Islam, the two largest world religions, each have a theological imperative to convert others."); *Our Beliefs: Statement of Faith & Unalterable Convictions*, EVERY HOME, https://everyhome.org/who-we-are/our-beliefs/ [https://perma.cc/G5GU-EZ6T] ("The great commission must be taken literally.").

private right of action, religious exercise claims and defenses should at least be permitted to be raised and argued.

I. BACKGROUND

The United States has an extensive history of grappling with the delicate balance between religious freedom and the boundaries of permissible government interference therewith. The Free Exercise Clause of the First Amendment guarantees that Congress cannot prohibit the free exercise of religion.[3] In 1940, the Supreme Court incorporated the Free Exercise Clause against the states.[4] Thus, based on the plain language of the text of the First Amendment, it would seem reasonable to assume that United States citizens are categorically protected from government action, whether federal or state, against their religious beliefs and practices. But it is not that simple.[5]

"No one would contest the proposition that a State may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guarantee."[6] Accordingly, it would seem that any direct statutory burden on a religious exercise would be per se unconstitutional. But that is not the case—burdens on religious exercise that are not neutral and generally applicable are subject to strict scrutiny, a test that allows state action that substantially burdens religious exercise if the government can show that the action was the least restrictive means of furthering a compelling government interest.[7] As will be mentioned

3 U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

4 Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.").

5 *See id.* at 303–04 ("[T]he [First] Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.").

6 *Id.* at 304.

7 *Cf.* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542 (1993) (finding that ordinances that were "gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings" were not neutral, but "*had as their object the suppression of religion*," and thus needed to undergo strict scrutiny, *id.* at 546 (emphasis added)). But strict scrutiny has not always been the rule for laws that prejudicially and directly burden religious exercise. In the nineteenth century, the Court refused

in subsequent discussions of cases, statutes have also often been enacted by the federal Congress and the state legislatures that indirectly burden or restrict the freedom to practice a religion. Plus, many common law causes of action have been challenged by a religious exercise defense.[8] Thus, a colorful historical development of Supreme Court jurisprudence has unraveled in determining how to appropriately balance such claims to free exercise rights with government interests.

Prior to 1990, when the Supreme Court decided *Employment Division v. Smith*,[9] government burdens on religious exercise were analyzed by the Court under strict scrutiny.[10] In *Sherbert v. Verner*, the Supreme Court used strict scrutiny for a free exercise claim involving a request for an exemption from the unemployment eligibility provisions of a state statute.[11] In that case, a Seventh-Day Adventist was fired for refusing to work on Saturdays and was denied benefits under the eligibility

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to give religious exceptions to laws banning polygamy. In 1878, the Supreme Court held in *Reynolds v. United States* that while laws may not interfere with religious beliefs and opinions, religious conduct and practices may be regulated. 98 U.S. 145, 166 (1879). In that case, the Court refused to grant a religious exemption to a member of the Church of Jesus Christ of Latter-Day Saints from a law criminalizing bigamy. *Id.* at 161, 166–67. The Court reasoned that to allow an exception to such a generally applicable law would "make the professed doctrines of religious belief superior to the law of the land, and in effect . . . permit every citizen to become a law unto himself." *Id.* at 167. But religious exercise cases involving exemptions in that time period are sparse, perhaps because the Free Exercise Clause had not yet been incorporated against the states, and thus only federal laws could be challenged on the basis of the First Amendment.

8 *See, e.g.*, Alan Stephens, Annotation, *Free Exercise of Religion Clause of First Amendment as Defense to Tort Liability*, 93 A.L.R. Fed. 754 §§ 7–15 (1989).

9 Emp. Div. v. Smith, 494 U.S. 872 (1990).

10 However, during the 1980s, the Supreme Court deviated from applying the strict scrutiny standard in a number of religious exercise cases involving neutral, generally applicable laws. *See, e.g.*, United States v. Lee, 455 U.S. 252 (1982) (refusing a religious exemption from paying Social Security tax); Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (holding that the governmental interest in racial equality in education was sufficiently compelling to overcome university's free exercise claims); Goldman v. Weinberger, 475 U.S. 503 (1986) (rejecting Orthodox Jew's exemption request from the Air Force's prohibition of wearing hats indoors so as to allow him to wear a yarmulke) *superseded by statute*, Pub. L. No. 100-180 § 508, 101 Stat. 1019, 1086–87 (1987) (codified at 10 U.S.C. § 774 (2018)); O'Lone v. Est. of Shabazz, 482 U.S. 342 (1987) (refusing Muslim prisoners' requests for exemptions from regular prison work schedules in order to observe prayer services at specific times of the day). And in other cases in that decade, the Court never got to the strict scrutiny analysis because the inquiry ended at the determination that the government burden on the religious exercise at issue was too far removed because the government burden merely involved the government's internal procedures. *See* Bowen v. Roy, 476 U.S. 693 (1986) (refusing parents a religious exemption from the assignment of a social security number to their child); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (holding that building a road through federal land that would disturb a tribal worship site was merely an indirect burden and thus permissible).

11 Sherbert v. Verner, 374 U.S. 398, 403 (1963).

provisions of the South Carolina unemployment compensation statute because her religious belief did not constitute "good cause" to reject otherwise suitable and available employment.[12] The Supreme Court held the denial of unemployment benefits unconstitutional because there was no showing of a "compelling state interest," as opposed to the "showing merely of a rational relationship to some colorable state interest," that justified "the substantial infringement of [the Seventh-Day Adventist's] First Amendment right."[13] Similarly, in *Wisconsin v. Yoder*, the Supreme Court applied strict scrutiny to Wisconsin's denial of Amish parents' claims for religious exemptions for their children from Wisconsin's compulsory education law.[14] The Court held that the First and Fourteenth Amendments prevented the government from compelling Amish parents to cause their children, who had graduated from the eighth grade, to attend formal high school to age sixteen.[15] The court applied the compelling-interest balancing test to hold that the state failed to show that its strong interest in compulsory education was too adversely affected by allowing an exemption to the Amish.[16]

However, in the 1990 case of *Employment Division v. Smith*, the Supreme Court held that laws that are neutral and generally applicable do not violate the Free Exercise Clause, even if they incidentally prohibit or burden religious practices.[17] This decision marked a shift from the prior strict scrutiny jurisprudence that required the government to prove a compelling interest when burdening religious exercise. In *Smith*, the respondents' applications for unemployment compensation were denied by the State of Oregon under a state law disqualifying employees discharged for work-related "misconduct," because they had been fired by a private drug rehabilitation organization for ingesting peyote, a hallucinogenic drug, "for sacramental purposes at a ceremony of [their] Native American Church."[18] The Supreme Court held that the Free Exercise Clause does not relieve an individual of the

12 *Id.* at 401, 399–401.

13 *Id.* at 406, 406–09.

14 Wisconsin v. Yoder, 406 U.S. 205, 214 (1972).

15 *Id.* at 234.

16 *Id.* at 221–29, 236 ("[I]t was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish." (citing *Sherbert*, 374 U.S. 398)).

17 Emp. Div. v. Smith, 494 U.S. 872, 878 (1990). A law is not neutral if it targets religious conduct for unequal, discriminatory treatment; a law is not generally applicable if "a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542–43 (1993). In other words, the law restricts certain religious conduct, but it fails to restrict secular conduct that harms the governmental interest to at least the same extent as does the religious conduct.

18 *Smith*, 494 U.S. at 874.

obligation to comply with a law that incidentally forbids (or requires) the performance of an act that his religious belief requires (or forbids) if the law is not specifically directed to religious practice and is otherwise constitutional as applied to those who engage in the specified act for nonreligious reasons.[19] By contrast, the cases in which the Court had allowed a religious motivation to exempt a person from a neutral, generally applicable law involved the assertion of both the right of free exercise along with some other constitutional right.[20] The Court further held that the balancing test in *Sherbert* and its progeny, whereby governmental actions that substantially burden a religious practice must be justified by a "compelling governmental interest," is inapplicable to an "across-the-board criminal prohibition on a particular form of conduct."[21]

The Court's decision in *Smith* "produced widespread disbelief and outrage."[22] Thus, *Smith* was subsequently limited by Congress in its 1993 passage of the Religious Freedom Restoration Act (RFRA), which was enacted in direct response to the Court's decision in *Smith* in order to restore the compelling-interest test set forth in *Sherbert* and *Yoder* for all claims where there is substantial burden to religious exercise even if the burden results from a rule of general applicability.[23] RFRA provides that the government may not substantially burden a person's religious exercise unless it can demonstrate that the burden is necessary to further a compelling government interest and is the least restrictive means of achieving that interest.[24]

Later that decade, in *City of Boerne v. Flores*, the Supreme Court struck down RFRA as applied to state and local governments.[25] In that case, the Catholic Archbishop of San Antonio used RFRA to challenge local zoning authorities' denial of a building permit to expand a church.[26] The Supreme Court struck down RFRA's application to the

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19 *Id.* at 878.

20 *Id.* at 881 (first citing Cantwell v. Connecticut, 310 U.S. 296, 304–07 (1940); then citing Murdock v. Pennsylvania, 319 U.S. 105 (1943); then citing Follett v. Town of McCormick, 321 U.S. 573 (1944); then citing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); and then citing Wisconsin v. Yoder, 406 U.S. 205 (1972)).

21 *Id.* at 883–84.

22 Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 1 ("Anger at the result was compounded by anger at the procedure. The Court sharply changed existing law without an opportunity for briefing or argument, and it issued an opinion claiming that its new rules had been the law for a hundred years.").

23 Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb–2000bb-4 (2018)).

24 § 2000bb-1(a)–(b).

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

26 *Id.* at 512.

states as an unconstitutional use of Congress's enforcement powers.[27] It held that RFRA is a "considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."[28] Thus, although RFRA clearly applies to lawsuits in which federal officers and agencies are parties, it does not apply to state officers and agencies. A few years after *City of Boerne*, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA), which reinstated the application of the compelling-interest test to state and local governments only in the specific areas of land use regulations and penitentiary contexts.[29]

Hence, a private litigant who has a free exercise claim can bring such a claim under RFRA against federal officers or agencies and against state officers and agencies in the contexts of land use regulations and incarceration under RLUIPA. Of course, the First Amendment is incorporated against the state and local governments,[30] so the *Smith* framework applies to free exercise claims against state officers and agencies. Further, the states have their respective constitutions/bills of rights with varying levels of religious protections for state citizens against actions by state and local officers and agencies.[31] Twenty-eight state legislatures have enacted RFRAs, ten additional states "have RFRA-like protections in their state constitutions,"[32] and "[i]n 2016, twelve states had pending RFRAs, indicating the potential for similar legislation in the future."[33] Altogether, "the compelling-interest test discarded by *Smith* now again applies to the federal government and more than half the states."[34] But in federal jurisdictions

27 *See id.* at 520, 532–33, 536.

28 *Id.* at 534.

29 Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified as amended at 42 U.S.C. §§ 2000cc– 2000cc-5 (2018)).

30 *See supra* note 4 and accompanying text.

31 *See, e.g.*, Christopher C. Lund, *RFRA, State RFRAs, and Religious Minorities*, 53 SAN DIEGO L. REV. 163, 169 (2016) (noting that "in a number of states, [including Alaska, Kansas, and Mississippi,] the compelling-interest test for free exercise has come about through state courts interpreting the religious-freedom provisions of their state constitutions").

32 *Federal & State RFRA Map*, BECKET, https://www.becketlaw.org/research-central/rfra-info-central/map/ [https://perma.cc/73UE-WAHP] (select the "Strict Scrutiny" filter).

33 Jeff Nelson, Note, *Tipped Scales: A Look at the Ever-Growing Imbalance of Power Protecting Religiously Motivated Conduct, Why That's Bad, and How to Stop It*, 66 CLEV. ST. L. REV. 751, 760 (2018); *see also* Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 783–84 (1999) (arguing for enactment and sensible interpretation of state RFRAs that "will eliminate the need to prove discrimination, whether in terms of bad motive or unequal treatment or lack of general applicability," *id.* at 783).

34 Lund, *supra* note 31, at 164; *see also* Douglas Laycock, *The Supreme Court, 2003 Term — Comment: Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 212 (2004) ("In all, more than

under RFRA and in state jurisdictions with protections ranging from *Smith* alone to statutory or state constitutional provisions even more protective of religious exercise than the federal RFRA, do the various protections also apply in private litigation?

In the federal realm, "[t]here have already been numerous cases where individuals have either (1) brought a RFRA claim against a private party that acted in accordance with federal law, or (2) raised RFRA as a defense to a private cause of action created by federal statute."[35] "Although it is clear RFRA creates claims and defenses against the federal government itself and federal officials acting within the scope of their duties, the federal circuits cannot agree on when—if ever—RFRA applies in a suit involving only *private parties* who are not government officials."[36] This circuit split is "significant," with "[t]he Second, Eighth, and District of Columbia Circuits apply[ing] RFRA whenever federal law burdens religious exercise—regardless of the identity of the parties involved," and "the Sixth, Seventh, and Ninth Circuits read[ing] RFRA to apply only to claims or defenses against the federal government."[37]

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half the states appear to have adopted some version of the *Sherbert-Yoder* test."); Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466, 467 (2010) (noting that "about thirty states—well more than half—go[] beyond *Smith*"). Indeed, a number of state RFRAs include "key provisions that extend far beyond their federal parent." Terri R. Day & Danielle Weatherby, *LGBT Rights and the Mini RFRA: A Return to Separate but Equal*, 65 DEPAUL L. REV. 907, 919 (2016).

35 Martha Swartz, *Justice Scalia Was Right: We've Gone Too Far in Protecting the Exercise of Religious Beliefs*, 89 TEMP. L. REV. ONLINE 16, 27–28 (2017).

36 Sara Lunsford Kohen, *Religious Freedom in Private Lawsuits: Untangling When RFRA Applies to Suits Involving Only Private Parties*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 43, 45 (2011) (emphasis added) (footnote omitted); *see also* Thomas C. Berg, *Religious Freedom amid the Tumult*, 17 U. ST. THOMAS L.J. 735, 751 (2022) ("[T]here's debate whether the statute applies in suits brought by private parties, such as individuals claiming discrimination."). "A significant number of these cases occur when private citizens seek to enforce employment laws or antidiscrimination laws against private religious organizations and individuals." Shruti Chaganti, Note, *Why the Religious Freedom Restoration Act Provides a Defense in Suits by Private Plaintiffs*, 99 VA. L. REV. 343, 345 (2013).

37 Timothy J. Tracey, *Deal, No Deal:* Bostock*,* Our Lady of Guadalupe*, and the Fate of Religious Hiring Rights at the U.S. Supreme Court*, 19 AVE MARIA L. REV. 105, 127–28 (2021) ("Though the issue obviously seems ripe for review, the Supreme Court has not yet addressed the split." *Id.* at 128.).

For the circuit court cases holding that RFRA *can* apply to suits between only private parties, see *Hankins v. Lyght*, 441 F.3d 96, 104 (2d Cir. 2006) (stating that RFRA allows parties who "claim that a federal statute . . . substantially burdens the exercise of their religion to assert the RFRA as a defense to any action asserting a claim based on [that federal statute]"); *Christians v. Crystal Evangelical Free Church* (*In re Young*), 141 F.3d 854, 857 (8th Cir. 1998) (allowing a church to assert RFRA as a defense against a trustee going after previously paid tithes by debtors in a bankruptcy case); and *EEOC v. Catholic University of America*, 83 F.3d 455, 470 (D.C. Cir. 1996) (stating that Congress "create[d] a compelling interest

Some states have enacted mini-RFRAs that explicitly allow, or have been judicially construed to allow, their protections to be enforced in private litigation.[38] But other states have refused to, or do not explicitly, apply their free exercise protections to disputes between private parties.[39]

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defense for the benefit of those whose free exercise rights would be burdened by a neutral federal law of general application" (emphasis omitted)).

For the circuit court cases holding that RFRA *does not* apply to suits between only private parties, see *Listecki v. Official Committee of Unsecured Creditors*, 780 F.3d 731, 737 (7th Cir. 2015) ("The plain language [of the statute] is clear that RFRA only applies when the government is a party."); *General Conference Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 411 (6th Cir. 2010) ("Congress did not intend [RFRA] to apply against private parties."); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006) ("RFRA is applicable only to suits to which the government is a party."), *abrogated on other grounds by Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012); and *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826, 843 (9th Cir. 1999) ("[T]he plaintiff must establish some other nexus sufficient to make it fair to attribute liability to the private entity as a governmental actor. Typically, the nexus consists of some willful participation in a joint activity by the private entity and the government."); *see also* Bogan v. Miss. Conf. of the United Methodist Church, 433 F. Supp. 2d 762, 766 (S.D. Miss. 2006) ("RFRA does not apply to suits between private parties but rather only applies to governmental action."), *aff'd sub nom.* Boggan v. Miss. Conf. of the United Methodist Church, 222 F. App'x 352, 353 (5th Cir. 2007) (per curiam).

38 *See* Day & Weatherby, *supra* note 34, at 935 (noting that "many of the state RFRAs allow private individuals and companies to assert a RFRA defense against private parties who bring discrimination charges against them"); Michael C. Dorf, *Religious Freedom Claims in Private Litigation*, VERDICT (Apr. 8, 2015), https://verdict.justia.com/2015/04/08/religious-freedom-claims-in-private-litigation [https://perma.cc/M6JM-YPSU] (observing that "some state courts interpret their generally worded RFRAs to apply in private litigation"); Vikram David Amar & Alan E. Brownstein, *How Best to Understand State Religious Freedom Restoration Acts (RFRAs): Part One in a Two-Part Series of Columns*, VERDICT (Apr. 24, 2015), https://verdict.justia.com/2015/04/24/how-best-to-understand-state-religious-freedom-restoration-acts-rfras [https://perma.cc/D8B2-FSK2] ("[A] state can (and often does) elect to have a lot of different kinds of laws enforced through private causes of action—and when it chooses to do so we often find there to be 'state action' in the enforcement.").

39 Some states, in fact, have explicitly refused to extend application of their free exercise protections to disputes between private parties. *See, e.g.*, Elane Photography, LLC v. Willock, 284 P.3d 428, 444–45 (N.M. Ct. App. 2012) ("The text of the NMRFRA is clear in limiting its scope to cases in which a 'government agency' has restricted a person's free exercise of religion. . . . [The NMRFRA] was not meant to apply in suits between private litigants. . . . [We] conclude that the NMRFRA is applicable *only* in cases that involve a government agency as an adverse party in the litigation." (emphasis added)), *aff'd*, 309 P.3d 53 (N.M. 2013) ("[T]he statute is violated only if a 'government agency' restricts a person's free exercise of religion. . . . The list of government agencies does *not* include the Legislature or the courts. It could be expected that the Legislature would have included itself and the courts in [the NMRFRA] if it meant the NMRFRA to apply in common-law disputes or private enforcement actions. Instead, the examples of government agencies are exclusively administrative or executive entities." *Id.* at 76.); *In re* Episcopal Church Prop., 76 Va. Cir. 873, 878–79 (Va. Cir. Ct. 2008) ("[I]t is clear from the face of [the VARFRA] that the statute

One theory that has been proposed to apply the federal RFRA to suits involving only private parties is that "RFRA should create a defense whenever *enforcing* a federal law would substantially burden the defendant's free exercise of religion, regardless of the plaintiff's identity. This conclusion . . . prevents the government from doing *indirectly*—through creating and adjudicating private causes of action—what it may not do directly."[40] The federal government burdens religious exercise *directly* when it, or one of its officers or agencies, is a party to a religious liberty lawsuit. It burdens religious exercise *indirectly* "by creating and adjudicating private causes of action. The second type of burden restricts religious liberty at least as much as the first: the fear of damage awards can chill an individual's willingness to engage in an activity as much as a criminal penalty would."[41]

Thus, the legislative *creation* and the judicial *enforcement* of a federal right of action that burdens religious exercise in a dispute involving *only private parties* could be grounds for a defendant—whose religious exercise would be burdened by such legislative creation and judicial enforcement—to raise a RFRA defense.

This *indirect* burden (also known as the state action doctrine[42]) does not identify as a government actor the private party seeking enforcement of a right of action that burdens the other party's religious exercise. Rather, it is the involvement of a branch of the government that is the state action. A landmark case for this doctrine is *Shelley v. Kraemer*,[43] which will be discussed further below. In that case involving state common law, "the Supreme Court held that a *court* is a state actor when *enforcing* a racially discriminatory restrictive covenant in a suit with only private parties."[44]

Interestingly, Sara Lunsford Kohen argues that "a court is even more of a state actor when it enforces a federal law that burdens an

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does not apply to litigation between private parties, but only to litigation in which a governmental entity is a party. The statute clearly states that 'No *government entity* shall substantially burden a person's free exercise of religion,' . . . and '[a] person who prevails in any proceeding to enforce this section against *a government entity*[,] may recover his reasonable costs and attorney fees.'" (third and fourth alterations in original) (quoting VA. CODE ANN. § 57-2.02(D) (2007) (emphasis added))); *cf.* State v. Horn, 377 N.W.2d 176, 179 (Wis. Ct. App. 1985) (declining to extend First Amendment free speech protection from state action to religious expression on private property), *aff'd*, 407 N.W.2d 854 (Wis. 1987).

40 Kohen, *supra* note 36, at 46 (emphases added).

41 *Id.* at 75; *see also* Chaganti, *supra* note 36, at 356 (noting that there is "a large body of law holding that government can burden constitutional rights when it creates legal rules, even if a burdensome legal rule is enforced by a private plaintiff").

42 State action, in the sense used in this Note, does not refer only to action by the individual states, but to government action generally, whether federal, state, or local.

43 Shelley v. Kraemer, 334 U.S. 1 (1948).

44 Kohen, *supra* note 36, at 57 (emphases added).

individual's religious exercise than when it enforces a discriminatory covenant, as was the case in *Shelley*."[45] When a court enforces a federal law that burdens a party's free exercise, "all three branches of government must act to impose the burden: a court burdens religious freedom by enforcing a law passed by Congress and signed by the President."[46] In *Shelley*, "the judiciary was the only branch of government involved" because that case involved an action under common law.[47]

This argument could also be applied to state statutory and common law rights of action for those states that apply the compelling-interest test under RFRA, RLUIPA, their state constitutions, and/or mini-RFRAs. In other words, the state legislature's *creation* and/or the judicial *enforcement* of a statutory or common law right of action that burdens a party's religious exercise in a dispute involving *only private parties* could be grounds for a defendant to raise a defense that the compelling-interest test should be applied to the indirect burdening of their religious exercise. The compelling-interest test, of course, would apply only when a dispute is subject to RFRA or RLUIPA, is in a state that has enacted a mini-RFRA, or is in a state that has judicially construed its state constitution to require strict scrutiny review of free exercise claims. Otherwise, *Smith* governs. But even then, a private litigant could still raise a free exercise claim or defense to challenge state statutory or common law as not neutral or generally applicable.

Of course, when claims or defenses assert that state action directly or indirectly burdens religious exercise, it does not automatically mean that an exemption is to be granted, even in jurisdictions with strict scrutiny regimes for free exercise claims. Under such regimes, the free exercise claim or defense "simply shifts the burden to the government: The government may still justify the burden by showing that applying the law to the objectors is the least restrictive means of serving a compelling government interest."[48]

Thus, litigants with free exercise claims or defenses can automatically get strict scrutiny review, pursuant to the Federal RFRA, in disputes against the federal government, its officers, and its agencies, as well as against private litigants with federal law claims or defenses in some federal circuits. They also are entitled to strict scrutiny review under RLUIPA when they have free exercise claims or defenses against federal, state, and local governments in disputes involving land use or institutionalized persons. On the state level, litigants with free exercise

45 *Id.*

46 *Id.* at 57–58.

47 *Id.* at 58.

48 Eugene Volokh, *1A. What Is the Religious Freedom Restoration Act?*, VOLOKH CONSPIRACY (Dec. 2, 2013, 7:43 AM), http://volokh.com/2013/12/o2/1a-religious-freedom-restoration-act [https://perma.cc/BH6R-YN79].

defenses or claims against state or local laws can get strict scrutiny review in disputes against the state and local governments in the many states that have enacted RFRAs or have judicially construed their state constitutions to provide such protection. And some of those states have explicitly extended that protection to private disputes. In states without such protections, litigants whose religious exercise is burdened by state or local laws still can get strict scrutiny review in disputes with the state and local governments when such laws are not neutral or generally applicable.

This Note is mainly concerned with two remaining scenarios: when a party's religious exercise is burdened by state or local laws in private litigation (1) in a state that affords strict scrutiny review to such burdens via a RFRA or judicial construction of its constitution, but refuses to, or does not explicitly, extend that protection to private disputes and (2) in a state that does not have a RFRA or a judicial construction of its constitution extending strict scrutiny review to actions involving law that burdens religious exercise.

II. DISCUSSION

This Part explores whether the state action doctrine should allow litigants to assert religious-exercise burdens in private litigation concerning state statutory and common law. It examines the Supreme Court's application of the state action doctrine in several different areas of the law, most notably equal protection, free speech, and church autonomy, as well as state and lower federal courts' pre-*Smith* application of the doctrine to free exercise burdens, and argues that those precedents should inform how the state action doctrine should apply to free exercise under state and local laws in private litigation.

A. *Caselaw Application of the State Action Doctrine*

We begin with a case more famous for its selective incorporation of the Free Exercise Clause of the First Amendment than for its purported application of the state action doctrine.[49] *Cantwell v. Connecticut*, decided in 1940, was not a dispute between private parties. It involved the prosecution and conviction by the state of Connecticut of three Jehovah's Witnesses for solicitation without a license, a statutory violation, and for inciting a breach of the peace, a common law offense.[50] While the Court opined that a general regulation of solicitation, including soliciting for religious purposes, would not be unconstitutional as long as it did not involve any religious test, the licensing

49 *See supra* note 4 and accompanying text.
50 Cantwell v. Connecticut, 310 U.S. 296, 301–03 (1940).

requirement for solicitation was an unconstitutional denial of religious liberty because the issuance of a license depended on a discretionary "exercise of judgment" by a public official.[51] The Court applied a compelling-interest balancing test to the common law breach of peace count: "whether the alleged protection of the State's interest, means to which end would, in the absence of limitation by the Federal Constitution, lie wholly within the State's discretion, has been pressed . . . to a point where it has come into fatal collision with the overriding interest protected by the [Constitution]."[52]

The state action doctrine does not seem to be explicitly applied in *Cantwell*—although the Court did hold that "the statute, as construed and applied," violated the defendants' free exercise rights and noted that the state court determined that one of the defendant's actions violated a common law offense which the state court construed as part of the state's law.[53] Notwithstanding, *Shelley v. Kraemer* later cited *Cantwell* as an example of state action, specifically the *judicial enforcement* of a common law cause of action that unduly burdened the defendant's religious exercise.[54] This is interesting given that *Cantwell* was a criminal case in which the state was clearly a party. The obvious state action would appear to be the prosecution, not the judicial conviction or the legislative enactment of the state law under which the defendants were charged. Yet, the Supreme Court in *Shelley* still extrapolated the judicial enforcement/conviction form of state action from *Cantwell*.

1. State Action and Fourteenth Amendment Equal Protection Cases Between Private Parties

The Supreme Court's most notable application of the state action doctrine was in an equal protection case decided in 1948. In *Shelley v. Kraemer*, a case involving only private parties, homeowners sued to enforce privately created restrictive covenants against occupancy or ownership of neighborhood houses based on race.[55] The state courts enforced the racially restrictive covenants by means of the common law of covenants.[56] The Supreme Court noted that while the Equal Protection Clause of the Fourteenth Amendment precluded the imposition of such racial restrictions on the right of occupancy by state statute or local ordinance, the Fourteenth Amendment "erects no shield against

51 *Id.* at 305.

52 *Id.* at 307.

53 *Id.* at 303, 308.

54 Shelley v. Kraemer, 334 U.S. 1, 17–18, 21 n.27 (1948) (citing *Cantwell*, 310 U.S. at 307–08).

55 *Id.* at 4–5.

56 *Id.* at 19.

merely private conduct, however discriminatory or wrongful."[57] Thus, the Supreme Court stated that "the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed . . . by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence . . . there has been no [state] action and the provisions of the Amendment have not been violated."[58]

However, the Supreme Court found that state action actually did effectuate the terms of the racially restrictive covenants because "the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements."[59] The Supreme Court held that it had been long established that "the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment," but that state judicial action was not restricted to situations of procedural unfairness.[60] Rather, the Court pointed out that state courts' actions, "in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process."[61]

Curiously, the Supreme Court in *Shelley* cited *Cantwell v. Connecticut* as an example of this doctrine in the religious exercise context: "[A] conviction in a state court of the common-law crime of breach of the peace was, under the circumstances of the case, found to be a violation of the Amendment's commands relating to freedom of religion."[62]

Later on in the *Shelley* opinion, the Supreme Court wrote that "previous decisions of this Court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy."[63] The Supreme Court thus held that a court is an actor under the state action doctrine when it enforces a common law right, and that such state action cannot stand "when the effect of that action is to deny rights subject to the protection of the Fourteenth

57 *Id.* at 13, 11–13.

58 *Id.* at 13.

59 *Id.* at 13–14.

60 *Id.* at 14, 14–17.

61 *Id.* at 17.

62 *Id.* at 18, 17–18 (citing Cantwell v. Connecticut, 310 U.S. 296 (1940)).

63 *Id.* at 20 (first citing Bridges v. California, 314 U.S. 252 (1941); and then citing Am. Fed'n of Lab. v. Swing, 312 U.S. 321 (1941)).

Amendment."[64] Commentators have also characterized the state action in *Shelley* as both the states' adoption of the common law at issue itself, since it imposed an impermissible burden on the constitutional rights of the defendants, and the common law action brought by the plaintiffs.[65]

Another equal protection case in which the Supreme Court applied the state action doctrine was a 1979 family law case. In *Orr v. Orr*, although only private parties were involved in the case (an ex-wife sued her ex-husband for failure to make alimony payments), it was undisputed that an equal protection violation argument under the Fourteenth Amendment was available to the ex-husband because the state's statutory scheme for alimony provided for differential treatment on the basis of sex.[66] The Supreme Court held that the state statutes that allowed ex-wives, but did not allow ex-husbands, to receive alimony payments violated the Equal Protection Clause of the Fourteenth Amendment.[67] Thus, the state action that allowed the equal-protection defense to be raised in that particular private litigation was the state legislature's enactment of the statutes that impermissibly burdened the ex-husband.

2. State Action and First Amendment Free Speech Cases Between Private Parties

The Supreme Court has also found state action in disputes between exclusively private parties in free speech cases dealing with defamation and intentional infliction of emotional distress. In the 1964 case of *New York Times Co. v. Sullivan*, a private libel action was brought against the New York Times by a public official suing in his private capacity.[68] Although the state supreme court rejected all constitutional defenses because the action involved only parties in their private capacities, the Supreme Court disagreed.[69] It held that notwithstanding an action between private parties, application by the state courts of a state rule of law that "impose[s] invalid restrictions on . . . constitutional freedoms of speech and press" counts as state action.[70] "It matters not that th[e] law has been applied in a civil action and that it is common law only . . . . The test is not the form in which state power

64 *Id.* at 20, 19–20.

65 *See* Nathan B. Oman & Jason M. Solomon, *The Supreme Court's Theory of Private Law*, 62 DUKE L.J. 1109, 1145 (2013) ("Since *Shelley v. Kraemer*, common-law actions brought by private parties can be deemed state action.").

66 Orr v. Orr, 440 U.S. 268, 270–71, 278–79 (1979).

67 *Id.* at 283.

68 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 256 (1964).

69 *Id.* at 264.

70 *Id.* at 265.

has been applied but, whatever the form, whether such power has in fact been exercised."[71] Thus, enforcement of the common law of defamation by the state courts was "state action, subject to the First and Fourteenth Amendments even when enforced in a private lawsuit."[72]

In 1988, the Supreme Court decided *Hustler Magazine, Inc. v. Falwell*, finding that "a State's authority to protect its citizens from the intentional infliction of emotional distress" tort was limited by the First Amendment's free speech doctrine.[73] "Even though no governmental entity was a party to the case"—a well-known pastor sued a private magazine over a lewd parody depicting him—the defendant magazine company was entitled under the state action doctrine to "invoke the First Amendment because the government was present in the case" in its "common-law tort of intentional infliction of emotional distress" that imposed damages liability for protected speech under the First Amendment.[74] The Supreme Court characterized the damages as "governmentally imposed sanctions."[75] It stated that

> "[t]he freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions.[76]

Fast-forward to 2011, when the Supreme Court decided *Snyder v. Phelps*, a case in which several members of the infamous Westboro Baptist Church in Topeka, Kansas, picketed the funeral of a marine "killed in Iraq in the line of duty."[77] The picketers legally stood on public property holding posters displaying hateful messages toward homosexuals, the U.S. military, and the Roman Catholic church, among others.[78] The deceased's father, Snyder, sued the church, its pastor, and some of its members on state tort claims, including intentional infliction of emotional distress, and a jury awarded Snyder millions of dollars in damages.[79] The Supreme Court held that the First Amendment shielded the defendants from tort liability, despite the fact that all the

71 *Id.* (citation omitted) (first citing *Ex parte* Virginia, 100 U.S. 339, 346–47 (1880); and then citing Am. Fed'n of Lab. v. Swing, 312 U.S. 321 (1941)).

72 Chaganti, *supra* note 36, at 356.

73 Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 50 (1988).

74 Dorf, *supra* note 38.

75 *Falwell*, 485 U.S. at 51.

76 *Id.* at 50–51 (quoting Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 503–04 (1984)).

77 Snyder v. Phelps, 562 U.S. 443, 448 (2011).

78 *Id.*

79 *Id.* at 449–50.

parties to the lawsuit were private.[80] Some commentators have argued that since the tort claim here at issue

> rested on a state created privately enforced tort, the First Amendment claim was justiciable despite the fact that the government was not the alleged speech violator. The state action doctrine was satisfied by the state created private cause of action, subjecting a purely private dispute to constitutional limitations.[81]

In another form of the state action doctrine, one could argue that the judicial enforcement of the jury award for the tort of intentional infliction of emotional distress against the defendants would have been punishing the exercise of free speech under the appropriate tests, and thus could also be characterized as state action against them.[82] Additionally, it could be argued that the jury award itself was state action on account of an agency relationship between the government and the jury, by which the government burdens speech through the imposition of damages by the jury, the government's agent.[83]

3. State Action and First Amendment Free Exercise Cases Between Private Parties

As mentioned above, *Shelley v. Kraemer* cited *Cantwell v. Connecticut* as an example of state action specifically in the judicial conviction pursuant to a common law cause of action that unduly burdened the defendant's free exercise of religion.[84] But the State of Connecticut was a party in *Cantwell*; that case was not a dispute exclusively between private parties.

However, prior to *Employment Division v. Smith*, "the Free Exercise Clause often provided a defense against private claims."[85] Of course, many of these cases were based on the church autonomy and

80 *Id.* at 458–59.

81 Day & Weatherby, *supra* note 34, at 936.

82 The state action doctrine "does not take into account the differences between the type and extent of state involvement. . . . The state-action doctrine is unitary: either something is state action, or it is not. If it is, then full-blown constitutional scrutiny applies; if it is not, then no constitutional scrutiny applies." Oman & Solomon, *supra* note 65, at 1145.

83 *See id.* at 1140; *cf. id.* at 1141 ("In a case like *Snyder*, involving a common-law action, 'the state' is at once everywhere and nowhere. It empowers plaintiffs to bring lawsuits. It provides its authority to juries to decide what is acceptable and what is outrageous. And it, of course, provides a forum for the highly staged dance of demands for accountability and explanations of conduct to take place. At the same time, the state has no control over the litigation. Rather, the decision to bring an action and the subsequent course of the litigation is left entirely in the hands of the victim." (footnotes omitted)).

84 Shelley v. Kraemer, 334 U.S. 1, 17–18, 21 n.27 (1948) (citing Cantwell v. Connecticut, 310 U.S. 296, 307–08 (1940)).

85 Kohen, *supra* note 36, at 71.

ministerial exception doctrines, in which church property, employment, and internal affairs disputes between private parties were based on doctrinal and religious authority disagreements, so the courts recognized both the Establishment Clause and the Free Exercise Clause as simultaneous defenses to such private claims (and thus either completely deferred to the church tribunals or used neutral principles of law to decide the issues); otherwise, the courts themselves would be the state actors impermissibly determining which religious views were correct and incorrect and what religious actions could or could not be taken.[86] In fact, in one of these church autonomy cases between private parties, the Supreme Court relied specifically upon *Shelley v. Kraemer* to strike down as unconstitutional *state action in the form of a state court common law ruling* on whether the Archbishop appointed by the Patriarch of Moscow could use and occupy New York City's Saint Nicholas Cathedral.[87]

But in addition to free exercise defenses to private claims in matters covered by the church autonomy and ministerial exception doctrines, "the Free Exercise Clause provided at least some protection against tort liability for religiously-motivated conduct before *Smith*" in various state supreme court, federal district court, and federal circuit court decisions.[88] For instance, in *Bear v. Reformed Mennonite Church*, the Pennsylvania Supreme Court applied *Sherbert v. Verner*'s compelling-interest test to various tort claims premised on religiously motivated shunning that an excommunicated member of a church alleged against the other members of the church.[89] Although the court below had sustained the defendant church's preliminary objection to the plaintiff's tort claims because it viewed the Free Exercise Clause as a "complete defense" to the claims, the supreme court reversed but allowed that—although the tort claims raised issues of state concern and regulation that could possibly survive *Sherbert*'s balancing test—"the First Amendment may present a complete and valid defense to the allegations" upon further inspection later on in the litigation process,

86 *See, e.g.*, Jones v. Wolf, 443 U.S. 595 (1979); Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich, 426 U.S. 696 (1976); Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969); Kreshik v. Saint Nicholas Cathedral, 363 U.S. 190 (1960); Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94 (1952); United States v. Ballard, 322 U.S. 78 (1944); Gonzalez v. Roman Cath. Archbishop of Manila, 280 U.S. 1 (1929); Watson v. Jones, 80 U.S. 679 (1872).

87 *Kreshik*, 363 U.S. at 191 ("[I]t is established doctrine that '[i]t is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize.'" (second alteration in original) (first quoting NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 463 (1958); and then citing Shelley v. Kraemer, 334 U.S. 1, 14–16 (1948))).

88 Kohen, *supra* note 36, at 72.

89 Bear v. Reformed Mennonite Church, 341 A.2d 105, 106–08 (Pa. 1975).

thus implying that it was permissible to raise the First Amendment as a defense to state common law tort liability in private litigation.[90]

Similarly, in *Alberts v. Devine*, the Supreme Judicial Court of Massachusetts recognized that a judicially created law, such as that in tort covering the duty of confidentiality in physician-patient relationships, was state action in a dispute between private parties, but that such state action was only impermissible if the law's burden on religious exercise outweighed the state's interest under the *Sherbert* and *Yoder* compelling-interest test.[91] And in *Molko v. Holy Spirit Ass'n for the Unification of World Christianity*, the Supreme Court of California stated that "[w]hile judicial sanctioning of tort recovery constitutes state action sufficient to invoke the same constitutional protections applicable to statutes and other legislative actions . . . , religious groups are not immune from all tort liability" when the government has a compelling enough interest and uses the least restrictive means of advancing that interest.[92]

In *Van Schaick v. Church of Scientology*, a dispute between private parties, the United States District Court for the District of Massachusetts stated that "even if we were to find that the [church at issue] is a religious institution, the free exercise clause of the First Amendment would not immunize it from all common law causes of action alleging tortious activity."[93] And in the Ninth Circuit case of *Paul v. Watchtower Bible & Tract Society of New York, Inc.*, where an excommunicated member of the Jehovah's Witnesses sued her former church in tort for the effects of the church's religious practice of shunning, the court cited *New York Times Co. v. Sullivan* for the rule that "[s]tate laws whether statutory or common law, including tort rules, constitute state action."[94] The court continued:

> Clearly, the application of tort law to activities of a church or its adherents in their furtherance of their religious belief is an exercise of state power.
>
> . . . .

90 *See id.* at 107–08.

91 Alberts v. Devine, 479 N.E.2d 113, 123 (Mass. 1985).

92 Molko v. Holy Spirit Ass'n for the Unification of World Christianity, 762 P.2d 46, 57 (Cal. 1988) (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964)); *see also* Carrieri v. Bush, 419 P.2d 132, 137 (Wash. 1966) (recognizing religious exercise claims in a suit between private parties for alienation of affection tort claims).

93 Van Schaick v. Church of Scientology of Cal., Inc., 535 F. Supp. 1125, 1134 (D. Mass. 1982) (citing Turner v. Unification Church, 473 F. Supp. 367, 311 (D.R.I. 1978)).

94 Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc., 819 F.2d 875, 880 (9th Cir. 1987).

> We agree that the imposition of tort damages on the Jehovah's Witnesses for engaging in the religious practice of shunning would constitute a direct burden on religion.[95]

In applying the *Sherbert* test, the court found that the direct burden of tort liability under the circumstances was impermissible given the state's lack of a compelling interest under the circumstances.[96]

The upshot of these pre-*Smith* cases across state and federal jurisdictions is that each recognized, either explicitly or implicitly, that the judicially imposed liability under tort law and the legislatively enacted tort law itself was state action, and that it was either permissible or impermissible state action based on the circumstances of the case at issue under the *Sherbert-Yoder* compelling-interest test.

B. *Application to Post-*Smith *Landscape*

The state action doctrine has a well-established function in the equal protection and free speech cases discussed above. The Supreme Court has even used the doctrine in the church autonomy and ministerial exception areas of free exercise. Indeed, state and lower federal courts applied the doctrine to common law burdens on free exercise pre-*Smith*. Thus, it would seem that the state action doctrine should be recognized to allow parties in private litigation to raise religious exercise burdens in jurisdictions that refuse to, or do not explicitly, extend free exercise protection to state and local laws enforced by private parties.

One objection to extending the state action doctrine's application in the equal protection and free speech contexts to state statutory and common law burdens on religious exercise could be the apparent difference in tests applied under each scheme. What if the contexts are simply "just different," where judicial, statutory, or common law state action is not really "direct enough" state action under circumstances such as those governed by a strict scrutiny regime? The *Shelley v. Kraemer* opinion did not seem to subject the state action at issue to a strict scrutiny regime, but seemed to indicate that state action denying equal protection on the basis of race is impermissible no matter what because the state can have no interest compelling enough to warrant violating its citizens' equal protection rights. However, racial classifications imposed by state action are now subject to strict scrutiny.[97] And the state

95 *Id.*

96 *Id.* at 881–83 ("We find the practice of shunning not to constitute a sufficient threat to the peace, safety, or morality of the community as to warrant state intervention." *Id.* at 883.).

97 *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

action in *Orr v. Orr* violating equal protection on the basis of sex was subjected to strict scrutiny as well.

On the other hand, in the free speech context, two schemes under which the state action has been found to violate free speech rights are defamation and intentional infliction of emotional distress. These categories are not subject to strict scrutiny, but have their own more or less complicated inquiries that seem much more protective of speech than even strict scrutiny.

Notwithstanding, the Supreme Court in *Cantwell v. Connecticut* purportedly applied the state action doctrine in the form of a judicial application of common law that burdened religious exercise, and that burden was subjected to, and failed to meet the demands of, strict scrutiny review.[98]

Ultimately, the form of review should be irrelevant to a determination of whether judicial enforcement of state statutory and common law, or any other form of state action, for that matter, should count as state action for the purpose of subjecting a private lawsuit to a free exercise inquiry. The context should not matter. Objectively, any burden, no matter the degree, that a state's statutory law, or regulation, or common law, or application of such by its executive or judicial branches, places on its citizens is state action.

And the Supreme Court has even expressly subjected the judicial branch to the same limits the Free Exercise Clause imposes on the legislative branch.[99] Neither may burden religious exercise.

Accordingly, the issue really should not be the applicability of the state action doctrine to the free exercise context, or any other situation, for that matter, but rather why this doctrine is not recognized consistently by courts across all jurisdictions and all relevant areas of the law.[100] Under our federal system, states do, of course, have the prerogative to choose not to recognize judicial and legislative burdening as state action. But states that have so chosen should reconsider based on the arguments set forth below.

Maybe there is a fear that applying the doctrine in a context like free exercise will allow parties to unduly trammel other parties' private rights. In other words, while application of this doctrine was necessary to address overt race discrimination, sex discrimination, and millions of dollars of liability for simply expressing oneself, religious-exercise burdening by private parties under state statutory and common law is not so big of a deal (under the view that the courts are more worried that government will have bad motives toward minority categories

98 *See* Cantwell v. Connecticut, 310 U.S. 296, 307 (1940).

99 *See* Kreshik v. Saint Nicholas Cathedral, 363 U.S. 190, 191 (1960).

100 *See supra* note 39 and accompanying text.

because the government is made up of those elected by the majority, or toward speech critical of its policies, but will not have such bad motives toward religion). And there is a legitimate danger of parties abusing a right to assert religious exercise claims and defenses in private litigation given the amorphous nature of religious exercise definitionally. It could be fair to argue that people will be emboldened to bring a fabricated religious-burden defense whenever they are sued by other private parties upon their recognition that a privately enforced law in and of itself, and/or the judicial enforcement of that law, would violate their purported free exercise rights.

While "[t]he Court has always insisted that to warrant accommodation, the claimant's underlying religious belief must be sincere . . . judicial enquiries into sincerity have long been feared by courts."[101] "Courts can (and often do) evaluate religious sincerity . . . . But at the same time, . . . courts are hesitant to deem religious claims insincere."[102]

Indeed, the resolution of what constitutes a religious belief "is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[103] And a person need not be a member of an organized religious denomination or even believe the same as all the other members of their religious sect in order to merit free exercise protection.[104]

It is true that religious exercise is distinct from areas like free speech and equal protection in that it is much harder to determine exactly what is "religious" than it is to determine what is "speech" or what falls in the protected categories of race and sex. For instance, "[e]ven taking into account the doctrine of expressive conduct, the right to freedom of speech is limited to those behaviors that our law

101 MICHAEL W. MCCONNELL, THOMAS C. BERG & CHRISTOPHER C. LUND, RELIGION AND THE CONSTITUTION 123 (5th ed. 2022); *see also* JOHN WITTE, JR., JOEL A. NICHOLS & RICHARD W. GARNETT, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 135–36 (5th ed. 2022).

102 MCCONNELL ET AL., *supra* note 101, at 129; *see, e.g.*, Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 714 (1981); Wisconsin v. Yoder, 406 U.S. 205, 235 (1972) ("[T]he Amish in this case have convincingly demonstrated the sincerity of their religious beliefs . . . ."); United States v. Seeger, 380 U.S. 163, 165–66 (1965); Witmer v. United States, 348 U.S. 375, 383 (1955); United States v. Ballard, 322 U.S. 78 (1944). *See generally* Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185 (2017); John T. Noonan, Jr., *How Sincere Do You Have to Be to Be Religious?*, 1988 U. ILL. L. REV. 713.

103 *Thomas*, 450 U.S. at 714.

104 *See* Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829, 834 (1989); *Thomas*, 450 U.S. at 715–16.

and society conventionally understand to be forms of expression."[105] Based on that conventional societal understanding, burning a draft card was found not to be expressive in one context, but burning a flag was found to be expressive in another context.[106] Accordingly, an action such as sleeping in a park may or may not be found to be expressive, but the inquiry is guided by conventional, ascertainable standards.[107]

In contrast, there is no operative definition of religion in United States constitutional law. Framing-era attempts to define "religion," such as the 1776 Virginia Declaration of Rights, although inconsistent, included elements such as "belief in a transcendent reality of some sort, . . . a moral code connected to that transcendent reality, and . . . religious practices."[108] Thomas Jefferson thought that "the rights of conscience extended to those who say 'there are twenty gods, or no god.'"[109] And James Madison, in his 1785 *Memorial and Remonstrance Against Religious Assessments*, wrote that to claim that "the Civil Magistrate is a competent Judge of Religious truth . . . is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world."[110] More recent judicial attempts to define "religion" and what constitutes "religious" beliefs have been nebulous as well. One Supreme Court decision listed "Buddhism, Taoism, Ethical Culture, Secular Humanism and others" as "religions."[111] Another held that a statute's reference to "religious training and belief" required a "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God."[112] And one lower court judge found that useful indicators to guide a determination of whether something is a religion include whether it addresses fundamental and ultimate questions having to do with deep and imponderable matters, is comprehensive in nature (a belief system as

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105 Perry Dane, *Thoughts on the Architecture of Freedom of Religion and Freedom of Speech*, 99 NOTRE DAME L. REV. REFLECTION 247, 260 (2024).

106 *See id. Compare* United States v. O'Brien, 391 U.S. 367 (1968), *with* Texas v. Johnson, 491 U.S. 397 (1989), *and* United States v. Eichman, 496 U.S. 310 (1990).

107 *See* Dane, *supra* note 105, at 260; Uptown Tent City Organizers v. City of Chi. Dep't of Admin. Hearings, No. 17-C-4518, 2018 WL 2709431, at *10 (N.D. Ill. June 5, 2018).

108 MCCONNELL ET AL., *supra* note 101, at 671, 670–71.

109 *Id.* at 670 (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 235 (3d Am. ed., Newark, 1801)).

110 JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* MCCONNELL ET AL., *supra* note 101, at 43.

111 Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961).

112 United States v. Seeger, 380 U.S. 163, 176 (1965).

opposed to isolated teaching), and has certain formal and external signs.[113]

Despite the amorphous nature of religious claims and defenses, the *Smith* framework and even strict scrutiny review give assurance that we need not fear abuse of a system that predictably and consistently recognizes state action in private litigation involving religious exercise disputes. Private litigants in states extending no more protection to religious exercise burdens than that required under *Smith* will likely not succeed in bringing religious exercise claims and defenses in private litigation because the laws and the laws' liability enforcement at issue, even though constituting state action, will often be found neutral and generally applicable, and thus the state action will be only an incidental burden on the religious exercise, and thus permissible. Under such a regime, private litigants will be unlikely to even bring such claims, even countenancing the state action doctrine, due to the unlikelihood of their success under *Smith*.

And such claims will likely not fare much better in states with RFRA-like protections. Litigants will need to show that the state statutory or common law or the enforcement of liability thereunder constitutes a substantial burden, perhaps akin to the high damages award in a case like *Snyder v. Phelps* (thus evincing a chilling effect by the state on their religious exercise). And the state's interest in such cases is likely to be sufficiently compelling, as evinced in the majority of the previously discussed pre-*Smith* state and lower-court opinions applying the state action doctrine in private-tort–religious-exercise disputes. So while such private litigants will have a bit more protection in a state with RFRA-like protections, application of the state action doctrine will likely not open the floodgates to liability for asserting one's private law rights against another's religious exercise.

CONCLUSION

To return to the trespass example raised in the Introduction, a state's interest in protecting its citizens' private property and their privacy is likely to be a compelling interest that outweighs someone's religious exercise on another's private property. And the burden of liability on a religious observer in such a case is likely small.[114] Thus, it may seem completely useless for all state courts (and federal courts in every circuit for that matter) to allow something like a religious-

113 *See* Malnak v. Yogi, 592 F.2d 197, 208–09 (3d Cir. 1979) (Adams, J., concurring in the result).

114 *But cf.* Wisconsin v. Yoder, 406 U.S. 205, 235–36 (1972) (finding a substantial burden despite only a five-dollar fine, as the burden was on the free exercise of the Amish way of life, which was intrinsically religious).

solicitation defense to a private trespass action pursuant to the state action doctrine. But religious exercise claims and defenses should be allowed in private litigation, nonetheless. Consistency and predictability in the law and the possibility of chilling liability for religious exercise compel this result. The possibility of unscrupulous claims taking advantage of the system is unlikely, given the protection of *Smith* and the substantial-burden–compelling-interest balancing test in RFRA-like jurisdictions. In these situations, ultimately, "[i]t is not of moment that the State has . . . acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power."[115]

115 NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 463 (1958).