MISSING THE MARK: CHALLENGING THE COURT'S REFUSAL TO RECOGNIZE THE "MARK OF THE BEAST" AS A VALID RELIGIOUS-BASED EXEMPTION

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Numbers matter. Numbers, and more importantly their significance, play an integral role in virtually every area of everyday life, from serving as the driving force behind financial decision-making,[1] to groundbreaking scientific and mathematical calculations,[2] to predicting future outcomes in athletics;[3] the list goes on. Further, particular numbers have maintained a lasting place in history, from benchmarks to which all others are measured,[4] to particular numerical sequences impacting nature, science, and the arts.[5] Similarly, particular numbers have maintained a lasting controversy or negative connotation in history. Much like the ability of a piece of music to evoke a particular emotion,[6] so too can the sound and meaning of a particular number.[7] The sound of "9/11" triggers immediate visual and emotional

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1 Michelle Singletary, *The Most Important Financial Number*, WASH. POST (Mar. 17, 2005), http://www.washingtonpost.com/wp-dyn/articles/A42233-2005Mar16.html.

2 Ben Duronio & Walter Hickey, *The Ten Most Important Numbers in the World*, BUS. INSIDER (Jul. 8, 2012, 8:25 AM), http://www.businessinsider.com/most-important-numbers-2012-7?op=1.

3 Leigh Steinberg, *Changing the Game: The Rise of Sports Analytics*, FORBES (Aug. 8, 2015, 8:25 AM), http://www.forbes.com/sites/leighsteinberg/2015/08/18/changing-the-game-the-rise-of-sports-analytics/.

4 Doug Mead, *Cal Ripken's 2,632-Game Streak and MLB's 10 Most Unbreakable Records*, BLEACHER REP. (May 15, 2012), http://bleacherreport.com/articles/1183857-cal-ripkens-2632-game-streak-and-mlbs-10-most-unbreakable-records.

5 Gary Meisner, *Music and the Fibonacci Sequence and Phi*, PHI 1.618 (May 4, 2012), http://www.goldennumber.net/music/; Marcus du Sautoy, *How Composers from Mozart to Bach Made Their Music Add Up*, GUARDIAN (Apr. 5, 2013, 4:36 AM), http://www.theguardian.com/music/2013/apr/05/mozart-bach-music-numbers-codes.

6 Mark Changizi, *Why Does Music Make Us Feel?*, SCI. AM. (Sept. 15, 2009), http://www.scientificamerican.com/article/why-does-music-make-us-fe/.

7 Jaclyn Skurie, *Superstitious Numbers Around the World*, NAT'L GEOGRAPHIC (Sept. 14, 2013, 8:00 AM), http://news.nationalgeographic.com/news/2013/09/130913-friday-luck-lucky-superstition-13/.

memories,[8] while the number thirteen, for example, evokes varied and at times negative connotations from the superstitious to conspiracy theorists.[9] Although some of these numerical meanings may be rooted in mere superstition, within branches of certain religions, these meanings are not superstitions at all, but are instead deeply held religious beliefs.[10]

While numerical references and their symbolic value can be found across an array of many religions,[11] this note focuses on specific numeric references in the Bible that play a significant role in the observance and practice of fundamentalist Christianity.[12] One of the most recognized numbers in the Bible other than three, representing the trinity,[13] is the number 666, representing Satan,[14] as the "Mark of the Beast"[15]. While the mark referenced in the Bible

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8 Jeffrey Goldberg, *The Real Meaning of 9/11*, ATLANTIC (Aug. 29, 2011), http://www.theatlantic.com/national/archive/2011/08/the-real-meaning-of-9-11/244120/.

9 Robert Howard, *11, 13, and 33: The Illuminati/Freemason Signature*, FORBIDDEN KNOWLEDGE, http://www.bibliotecapleyades.net/sociopolitica/esp_sociopol_illuminati_14.htm (last updated Nov. 30, 2001); Barbara Marazani, *What's So Unlucky About the Number 13?*, HISTORY (Sept. 13, 2013), http://www.history.com/news/ask-history/whats-so-unlucky-about-the-number-13.

10 Anugrah Kumar, *Greg Laurie Explains Significance of the Mark of the Beast, 666*, CHRISTIAN POST (Jan. 23, 2013), http://www.christianpost.com/news/greg-laurie-explains-significance-of-the-mark-of-the-beast-666-88720/.

11 Varadaraja Raman, *Numbers in Religions*, ON BEING (Oct. 13, 2006), http://www.onbeing.org/program/heart039s-reason-hinduism-and-science/feature/numbers-religions/1265.

12 Michal Hunt, *The Significance of Numbers in Scripture*, AGAPE BIBLE STUDY, http://www.agapebiblestudy.com/documents/the%20significance%20of%20numbers%20in%20scripture.htm (last accessed Nov. 1, 2015).

13 Richard Patterson, *The Use of Three in the Bible*, BIBLE.ORG (Feb. 26, 2008), https://bible.org/seriespage/3-use-three-bible.

14 *See Revelation* 13:1 ("The dragon stood on the shore of the sea. And I saw a beast coming out of the sea. It had ten horns and seven heads, with ten crowns on its horns, and on each head a blasphemous name."); *see also Revelation* 20:2 ("He seized the dragon, that ancient serpent, who is the devil, or Satan, and bound him for a thousand years.").

15 *See Revelation* 13:16-18 (New American Standard) ("And he causes all, the small and the great, and the rich and the poor, and the free men and the slaves, to be given a mark on their right hand or on their forehead, and he provides that no one will be able to buy or to sell, except the one who has the mark, either the name of the beast or the number of his name. Here is wisdom. Let him who has understanding calculate the number of the beast, for the number is that of a man; and his number is six hundred and sixty-six."). Despite some versions and translations of the Bible equating the number corresponding to the mark of the beast to be 616, (*see* Gary DeMar, *The Mark of the Beast – 666 or 616?*, Am. Vision (May 10, 2005), http://americanvision.org/1746/mark-of-beast-or/) this note will ignore these distinctions and focus only on the mark as 666.

reflects a particular number, here 666, and the "beast," presumed to be the devil, Revelations 13:18 does not necessarily attribute a consequence to having the "mark of the beast" on one's person; however, in the subsequent chapter of the Book of Revelations, the consequences for the mark of the beast are clearly expressed, in dire fashion.[16]

For religious observers of the Bible, particularly those religious branches with strict adherence to the text, the Bible is not so much a guide to religious understanding as much as it is a moral compass for everyday life.[17] From this perspective, under these strictly held religious beliefs, the verses in Revelations instruct those who follow the text to disassociate themselves from *any* number that could be attached to them as a form of identification, for fear of the consequences outlined in scripture.[18] As a result, because federal regulations in certain instances require citizens to provide social security numbers,[19] (although other forms of identification, such as fingerprints,[20] have been attributed to the mark of the beast, this note will focus solely on social security numbers) a clear conflict arises between those federal regulations and those unwilling to attach an identification number to themselves.

Recognizing this conflict with federal law, a prospective

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16 *Compare Revelation* 13:18 (New King James) ("Here is wisdom. Let him who has understanding calculate the number of the beast, for it is the number of a man: His number *is* 666."), *with Revelation* 14:9-11 (New King James) ("Then a third angel followed them, saying with a loud voice, 'If anyone worships the beast and his image, and receives *his* mark on his forehead or on his hand, he himself shall also drink of the wine of the wrath of God, which is poured out full strength into the cup of His indignation. He shall be tormented with fire and brimstone in the presence of the holy angels and in the presence of the Lamb. And the smoke of their torment ascends forever and ever; and they have no rest day or night, who worship the beast and his image, and whoever receives the mark of his name.'").

17 *E.g.*, Ernest R. Sandeen & John G. Melton, *Christian Fundamentalism*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/topic/Christian-fundamen (last accessed Nov. 4, 2015); Traci Schumacher, *5 Beliefs that Set Evangelicals Apart from Other Christians*, NEWSMAX (Apr. 2, 2015, 12:16 PM), http://www.newsmax.com/FastFeatures/evangelical-christians-beliefs/2015/04/02/id/636050/.

18 *See Revelation* 16:2 (English Standard) ("So the first angel went and poured out his bowl on the earth, and *harmful and painful sores came upon the people who bore the mark of the beast and worshiped its image*." (emphasis added)).

19 *See* 26 U.S.C.A. §§ 6109(a)(3), 6109(d) (West 2015) (explaining how the IRS code requires employers to collect and provide social security numbers of their employees); 20 C.F.R. § 422.103 (2015). *See also* Carolyn Puckett, *The Story of the Social Security Number*, 69 SOC. SECURITY BULL., no. 2 (2009), https://www.ssa.gov/policy/docs/ssb/v69n2/v69n2p55.html.

20 David Kravets, *Teacher Claims Fingerprinting as Mark of the Beast*, WIRED (Nov. 5, 2009, 6:28 PM), http://www.wired.com/2009/11/mark-of-the-beast/.

employee in Ohio refused to supply a social security number to his prospective employer due his religious beliefs in *Yeager v. FirstEnergy Generation Corp.*[21] This note will examine the "mark of the beast" religious exemption argued for in *Yeager* to not provide a social security number to an employer due to the strictly held religious beliefs of the individual. Section I of this note will briefly examine the nature of the belief regarding the "mark of the beast," and how that belief impacts particular religions. Section II will then discuss the evolution of courts' rulings on religious-based exemptions, including which arguments are given more weight, while also highlighting areas of common ground amongst courts' varying (and continuously evolving) decisions.

With the backdrop of those contrasting views, Section III will then turn to the "mark of the beast" religious-based exemption. This section will also examine how this belief falls in conflict with federal regulatory provisions requiring the obtaining and subsequent release of one's social security number, and will further examine the courts' contrasting views and rulings when parties argue for a religious-based exemption from the federal requirement. Section IV will first turn directly to *Yeager,* the most recent case denied hearing by the Supreme Court of the United States and the subject of this note, and analyze the arguments raised, the reasoning behind the Court's decision, and the strengths of the arguments. This section will then shift to a discussion of possible alternative arguments for Plaintiff's counsel, as well as ways in which those alternative arguments could have reversed the decisions by the lower courts, either granting the religious exemption to the Plaintiff entirely, or at the very least, framing the issue in such a way to require the Court to grant certiorari on the issue. Section V will then advance the argument in light of the discussion of this note, that the Court's failure to accept the "mark of the beast" as a valid religious exemption runs contrary to the First Amendment's Free Exercise Clause and should therefore be reversed. Further, this section will offer a possible solution for the Court's inclusion of particular religious exemptions in the future, by identifying particular characteristics of certain religious beliefs that, when viewed in relation to the Free Exercise Clause, give the Court the only option to rule in favor of the particular exemptions, promoting religious clarity and eliminating the need for potential future litigation. Section VI will provide a brief conclusion and summary of the note.

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[21] 777 F.3d 362 (6th Cir. 2015).

I. THE SIGNIFICANCE OF THE "MARK OF THE BEAST" IN THE RELIGIOUS CONTEXT

The term "fundamentalism" is consistently characterized with a negative connotation,[22] with the reasoning behind this strong negativity stemming from the general confusion and misinterpretation between the terms fundamentalism and *extremism*.[23] Unlike the term extremism, defined as a "belief in and support of ideas that are *very far from what most people consider correct or reasonable*,"[24] fundamentalism is rather defined as "a movement in 20th century Protestantism, emphasizing the literally interpreted Bible as fundamental to Christian life and teaching . . . ."[25] A stark contrast is noticed between ideas "far from . . . correct or reasonable," and interpretations of the Bible "fundamental to Christian life." While there are distinct differences in both tone and substance to these definitions, some scholars have instead married the two terms entirely.[26] Particularly in recent years, the rise of terrorist organizations has played favorably to this skewed definition, as such organizations utilize the concept of promoting "strict adherence" to their religious teachings as an irrational excuse to carry out mass harm and destruction against innocent people.[27] In the Christian context, terrorist groups who shroud themselves as "Christian Fundamentalists" fuel the fire against the term fundamentalism, again to promote otherwise horrific and destructive actions.[28] Cloaking a terrorist organization under the

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22 Henry Munson, *Fundamentalism*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/topic/fundamentalism (last accessed Nov. 5, 2015).

23 Janet Parshall, *How Do You Define an 'Extremist'?*, CHRISTIAN POST (Apr. 15, 2013), http://www.christianpost.com/news/how-do-you-define-an-extremist-93956/.

24 *Extremism*, MERRIAM-WEBSTER.COM (emphasis added), http://www.merriam-webster.com/dictionary/extremism (last accessed Nov. 5, 2015).

25 *Fundamentalism*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/fundamentalism (last accessed Nov. 5, 2015).

26 Huma Baquai, *Extremism and Fundamentalism: Linkages to Terrorism Pakistan's Perspective*, 1 INT'L J. HUM. & SOC. SCI., no. 6 (2011), http://www.ijhssnet.com/journals/Vol._1_No._6;_June_2011/26.pdf.

27 *See* Graeme Wood, *What ISIS Really Wants*, ATLANTIC (Mar. 2015), http://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/; Tom Quiggin, *Understanding Al-Qaeda's Ideology for Counter-Narrative Work*, 3 PERSP. ON TERRORISM, no. 2 (2009), http://www.terrorismanalysts.com/pt/index.php/pot/article/view/67/html; Farouk Chothia, *Who are Nigeria's Boko Haram Islamists?*, BBC (May 4, 2015), http://www.bbc.com/news/world-africa-13809501.

28 Ledio Cakaj, *The Lord's Resistance Army of Today*, ENOUGH (Nov. 2010), http://www.enoughproject.org/files/lra_today.pdf; THE LORD'S RESISTANCE ARMY: MYTH AND REALITY (Tim Allen & Koen Vlassenroot eds., 2010). *See generally* Alex

guise of promoting religious values only furthers the divide between those whose beliefs are both spiritual and harmless in nature, and those whose intentions are solely to carry out destruction and generate fear against non-believers.[29] Therefore, in order to begin to accept and appreciate fundamentalist values, one must maintain the important distinctions between "fundamentalist" and "extremist."

While maintaining a positive understanding of fundamentalism is the first step in acknowledgement of the fundamentalist beliefs, the next equally if not more important step is the understanding of the fundamentalist view of the "mark of the beast."[30] Again, as previously mentioned, a fundamentalist takes a literal interpretation of the biblical text to serve as a how-to guide to following a proper Christian life.[31] With this literal interpretation, the language in chapters thirteen and fourteen of *Revelations* outlines both the extent of the mark, as well as the consequences associated with it.[32] In addition to the biblical references of the "mark of the beast," the mark itself has historical roots as well.

The "mark of the beast" has its historical roots in Roman imperialism, with the *charagma* ("stamp" in Greek) referring to the seal containing the name and date of the emperor, as it appeared on various commercial documents of the time.[33] Another meaning for *charagma*, however, is of a physical branding, generally associated with characterizations of ownership, punishment, and the organization of certain groupings.[34] While the "mark" in *Revelation* literally discusses a mark on the "right hand or forehead,"[35]

Henderson, *6 Modern-Day Christian Terrorist Groups Our Media Conveniently Ignores*, SALON (Apr. 7, 2015, 2:15 PM), http://www.salon.com/2015/04/07/6_modern_day_christian_terrorist_groups_our_media_conveniently_ignores_partner/.

29 *Id.* at 5.

30 *Revelation*, *supra* note 14.

31 Munson, *supra* note 22.

32 *Revelation*, *supra* note 14-15.

33 *See* Paul Kroll, *Revelation 13 and the "Mark of the Beast"*, GRACE COMMUNION INT'L, https://www.gci.org/bible/rev13/mark (last accessed Nov. 7, 2015); *Charagma*, BIBLE STUDY TOOLS, http://www.biblestudytools.com/lexicons/greek/nas/charagma.html (last accessed Nov. 7, 2015).

34 *See* Leonard J. Hoening, *The Branding of African American Slaves* 148 J. AM. MED. ASS'N DERM. No. 2 (Feb. 2012) http://archderm.jamanetwork.com/article.aspx?articleid=1105486; *Tattoos and Numbers: The System of Identifying Prisoners at Auschwitz*, U.S. HOLOCAUST MUSEUM, http://www.ushmm.org/wlc/en/article.php?ModuleId=10007056 (last accessed Nov. 7, 2015).

35 *Revelation*, *supra* note 14.

fundamentalists have not taken *such* a literal translation, but instead focus on the "mark" as a *general* symbol of identification.[36] It should also be noted that the biblical term "mark" is not always framed in a negative light, and in several instances the mark is instead a protective symbol.[37] For example, in *Exodus*, when the angel of death passed through Israel and killed the first-born child of each family, the doors of the Israelites that were "marked" with blood were passed over, symbolizing a mark of protection.[38] Another example can be found earlier in *Revelation*, where thousands of servants of God were marked with the "seal of the living God" on their foreheads, which would protect them from plagues of the Earth, whereas those without the seal would be afforded no such protection.[39] The counter to this mark of protection is the "mark of the beast," in which those who instead serve the beast will be marked as stated in *Revelation*, and the associating consequences will follow.[40] While certain fundamentalist offshoots may express their "mark of the beast" beliefs to the extent of a borderline conspiracy-theorist fervor,[41] there are those who simply and sincerely, which is a term carrying much legal weight, as will be discussed later in great detail, follow the literal biblical text, who wish not to attribute a numerical mark or symbol to themselves, all while doing so without creating an us-against-them narrative.[42]

With the mark *itself* being generally viewed as symbolic, those who follow fundamentalist beliefs will attribute many different forms of identification to the mark. In addition to the aforementioned radio frequency identification chip ("RFID") implant discussion,[43] other forms of identification have been

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36 Kroll, *supra* note 33.

37 *Id.*

38 *Id.* (citing *Exodus* 12:21-23).

39 *Id.* (citing *Revelation* 7:2-3, 9:4).

40 *Id.*

41 *See, e.g.*, Timothy Campbell, *Murray's Mark of the Beast Leads His Followers to Hell*, SHEPHERD'S CHAPEL & ARNOLD MURRAY EXPOSED! (Oct. 25, 2015), https://shepherdschapel.wordpress.com/2015/10/25/murrays-mark-of-the-beast-leads-his-followers-to-hell/; Geoffrey Grider, *Over 10,000 People Have Now Received a Permanent Human RFID Microchip Implant*, NOW THE END BEGINS (Sept. 4, 2015), http://www.nowtheendbegins.com/over-10000-people-have-now-received-a-permanent-human-rfid-microchip-implant/; Walid Shoebat, *What Every Christian Needs to Know About the Mark of the Beast and the Mark of God*, SHOEBAT.COM (Sept. 9, 2014), http://shoebat.com/2014/09/09/every-christian-needs-know-mark-beast-mark-god/.

42 Rick Shabi, *Will You Be Ready to Reject the Mark of the Beast?*, BEYOND TODAY (May 3, 2009), http://www.ucg.org/world-news-and-prophecy/will-you-be-ready-to-reject-the-mark-of-the-beast.

43 Grider, *supra* note 41. *See also* David Kravets, *Farmers See 'Mark of the Beast' in RFID Livestock Tags*, WIRED (Sept. 9, 2008), http://www.wired.com/2008/09/farmers-decryin/.

associated with the "mark," such as fingerprinting,[44] biometric hand scanners,[45] and the particular numbers appearing on a W-2 tax forms.[46] However, a main source of contention in the courts regarding the "mark of the beast" is whether an employee has the responsibility of obtaining a social security number or providing it to their employer for federal purposes, and whether a religious exemption exists under the Free Exercise Clause against that requirement.[47] While the following discussion will be based around a recent case, *Yeager v. FirstEnergy Generation Corp.*,[48] this note will additionally look at several other cases that have considered this issue.

II. THE CONFLICT: WHEN RELIGIOUS BELIEFS RUN COUNTER TO THE REQUIREMENTS OF FEDERAL LAW

The First Amendment's Free Exercise Clause prohibits the ability of Congress to create a law that would inhibit the *free exercise* of religion.[49] The Free Exercise Clause stems historically from what was first a concept of religious tolerance, as outlined by George Mason in the Virginia Declaration of Rights of 1776,[50] with an eventual substitution of the "toleration" language to "the full and free exercise of religion,"[51] following James Madison's successful objection the toleration terminology "implie[d] an act of legislative grace."[52] While the acceptance of religious freedom has separated

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44 Kravets, *supra* note 20.

45 Leonardo Blair, *Jury Awards $150K to Evangelical Christian Fired for Refusing 'Mark of the Beast'*, CHRISTIAN POST (Jan. 23, 2015), http://www.christianpost.com/news/jury-awards-150k-to-evangelical-christian-fired-for-refusing-mark-of-the-beast-133038/.

46 Kelly Phillips Erb, *Man Quits Job over "Mark of the Beast" on His Tax Form*, FORBES (Feb. 15, 2013, 2:23 PM), http://www.forbes.com/sites/kellyphillipserb/2013/02/15/man-quits-job-over-mark-of-the-beast-on-his-tax-form/#f5070713bf6c.

47 Peter J. Reilly, *Social Security Number May Be Mark of the Beast but That Will Not Save Your Job*, FORBES (Jul. 16, 2014, 10:00 AM), http://www.forbes.com/sites/peterjreilly/2014/07/16/social-security-number-may-be-mark-of-the-beast-but-that-will-not-save-your-job/#13d574d23e1a.

48 777 F. 3d at 362, *cert. denied*, 136 S. Ct. 40 (2015).

49 U.S. CONST. amend. I.

50 *See* Michael W. McConnell, *Why Protect Religious Freedom?*, 123 YALE L.J. 770, 777 (2013) (citing Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1443, 1462-63 (1990)).

51 *Id.* at 778.

52 *Id.*

the United States[53] from other parts of the world in which such freedoms are not provided,[54] this acceptance has come with both controversy and legislative tension.[55]

As the country has evolved, so too has the interpretation of the Free Exercise Clause, with interpretations falling in a general sense into one of two categories, either viewing the clause with a broad scope,[56] or with a narrow scope.[57] Within these general views of the Establishment Clause exist several differing means of interpretation, only adding to the confusion of the Court.[58] While it is accepted that the Free Exercise Clause protects belief *as well as* conduct that is considered to be religiously motivated,[59] the question of whether an exemption to a generally applicable law is justified based on those beliefs and conduct must be addressed.[60] In answering this question, one must decide which interpretation of the Free Exercise Clause to follow. Under a narrow reading, the Free Exercise Clause does not allow for exemptions to applicable law,[61] as "disturbing-the-peace" caveats in which the state governments could therefore deny the rights to religious liberty,[62] illuminating a general distaste for exemptions that would run counter to generally followed laws.[63] As an opposing view, taking a

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53 Thomas C. Berg, *Free Exercise of Religion*, HERITAGE GUIDE TO THE CONST., http://www.heritage.org/constitution#!/amendments/1/essays/139/free-exercise-of-religion (last accessed Nov. 8, 2012).

54 BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, INTERNATIONAL RELIGIOUS FREEDOM REPORT FOR 2015: EXECUTIVE SUMMARY, http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm#wrapper (last accessed Nov. 8, 2015) (exampling countries without religious freedoms); *see also* Brian Pellot, *The Worst Countries for Religious Freedom*, INDEX (Jan. 3, 2014), https://www.indexoncensorship.org/2014/01/worst-countries-religious-freedom/.

55 Berg, *supra* note 53.

56 Everson v. Bd. of Educ., 330 U.S. 1 (1947).

57 Berg, *supra* note 53.

58 Varied approaches to varied interpretations of the Establishment Clause have resulted in confusion and a lack of direction. *See, e.g.*, Michele Hyndman, *Tradition is Not Law: Advocating a Single Determinative Test for Establishment Clause Cases*, 31 T. MARSHALL L. REV. 101, 114-15 (2005); Christopher Pierre, Note, *"With God All Things Are Possible," Including Finding Ohio's State Motto Constitutional Under the Establishment Clause of the First Amendment*, 49 CLEV. ST. L. REV. 749, 752-54 (2001). *See also* Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) ("[E]ven the most conscientious governmental officials can only guess what motives will be held unconstitutional.").

59 Hyndman, *supra* note 58, at 114-15.

60 *Id.*

61 Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 948 (1992); Vincent Muñoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 HARV. J.L. PUB. POL'Y 1083, 1086 (2009).

62 *Id.* at 948.

63 *Id.*

broader reading of the Free Exercise Clause would permit a pro-exemption conception of free exercise,[64] and therefore open the door for the acceptance of more religious exemptions.[65] To be noted, even within these two conflicting viewpoints exists an even wider range of constitutional interpretations, which only furthers the notion of how unsettled the discussion has become.[66]

To better understand this continuing tension, and more importantly, Congress's difficulties in interpreting the Free Exercise Clause, it is important to briefly discuss the Court's various attempts to adequately define the interpretation of "free exercise." A literal reading of the Free Exercise Clause indicates just that a United States citizen has a right to freely exercise one's own religion,[67] and with this right comes the afforded rights to one's actions as a result of those beliefs.[68] Further, the language that precedes the term "free exercise," in particular, "Congress shall make no law . . . prohibiting,"[69] are as definitive as they are directive. This "original meaning" reading suggests that the government should not "intermeddle with religion."[70] This concept of suggested free exercise has not come without its limits however, and controversies.[71]

*A. Religious-Based, Pre-*Smith *Exemptions.*

While state constitutions historically carved out barriers to religious exemptions,[72] two Supreme Court decisions initially indicated a reversal on that interpretation. First, in *Sherbert v. Verner*, the Court's decision to strike down a state law denying unemployment benefits to an employee whose beliefs as a Seventh Day Adventist precluded her from either working or being available

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64 Berg, *supra* note 53.

65 City of Boerne v. Flores, 521 U.S. 507, 544-65 (1997) (O'Connor, J. dissenting); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion,* 103 HARV. L. REV. 1409, 1443, 1462-63 (1990).

66 Rupal Doshi, Note, *Nonincorporation of the Establishment Clause: Satisfying the Demands of Equality, Pluralism, and Originalism*, 98 GEO L.J. 459, 460 (2010).

67 U.S. CONST. amend. I; Claire Mullally, *Free Exercise-Clause Overview*, FIRST AMEND. CTR. (Sept. 16, 2011), http://www.firstamendmentcenter.org/free-exercise-clause.

68 MICHAEL MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 105 (1st ed. 2002).

69 U.S. CONST. amend. I

70 William F. Cox, *The Original Meaning of the Establishment Clause and its Application to Education*, 13 REGENT U. L. REV. 111, 142 (2000) (citing ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND FICTION 8 (1988)).

71 Muñoz, *supra* note 61, at 1083.

72 Berg, *supra* note 53.

to work on Saturday,[73] articulated not only an updated understanding of the scope of the Free Exercise Clause, but also highlighted and stressed the importance of respect for one's individual beliefs, fundamental to the Framer's original intent of free exercise.[74] Specifically, the Court explained, "Government may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities."[75] Reaffirming the importance of the separation between church and state, the Court further explained, "[I]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."[76]

To reach such a determination, the Court in *Sherbert* adopted a test known today as the "*Sherbert* test," where a plaintiff must demonstrate a (1) sincerely held religious belief, and (2) that the challenged law in question prohibits the plaintiff from exercising that belief.[77] If the plaintiff succeeds in demonstrating both prongs, the burden then shifts to the government to prove the challenged law (1) acts in furthering a "compelling state interest," (2) is narrowly tailored to achieve the state interest, and (3) is the least restrictive means of achieving that state interest.[78] The Court followed this test with strict adherence in religious exemption challenges for years to come, until the expansion of the test in *Yoder*.[79]

Second, in *Wisconsin v. Yoder*, a Wisconsin compulsory school attendance law was challenged by an Amish group, which sought to keep its children out of school following the eighth grade.[80] The Court concluded that although the state's intentions of maintaining schooling for children until at least the age of sixteen were well intended,[81] the fact that the state's intentions ran counter to the religious beliefs and desired actions of the Amish families ended in a result favoring the group, as the religious beliefs of the

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73 374 U.S. 398, 409 (1963).
74 *Id.* at 402.
75 *Id.*
76 *Id.* at 404 (citing Braunfield v. Brown, 366 U.S. 599, 607 (1961)).
77 *Id.* at 402–03.
78 McConnell, *supra* note 65, at 1416.
79 Michael D. Currie, Note, *Scrutiny Mutiny: Why the Iowa Supreme Court Should Reject Employment Division v. Smith and Adopt a Strict Scrutiny Standard for Free Exercise Claims Arising Under the Iowa Constitution*, 99 IOWA L. REV. 1363, 1370 (2014).
80 406 U.S. 205, 210-11 (1972).
81 *Id.* at 213

Amish community's members outweighed the state's intentions.[82] As in *Sherbert*, the Court in *Yoder* produced a test to determine the outcome, however, the test in *Yoder* was an extension of the *Sherbert* test with three parts.[83] The balancing-of-interests prong in the *Yoder* test, while perhaps intending to provide an expansion of the acceptance of religious-based exemptions, incorporated the rights of parents in their child's education[84] in conjunction with one's religious values. The decision only narrowed religious-based exemptions, due in part to the specificity of the case's facts regarding the Amish culture, the Court's applied definition of the kind of religion applicable to such a ruling,[85] as well as the likely unintended consequence of the creation of religious parenting issues between parents, along with the child's individual rights.[86] This perhaps unintended narrowing of religious-based exemptions ultimately led to the Court's reversal on the decision in *Employment Division v. Smith*.[87]

Prior to a discussion on *Smith,* however, one must not forget throughout the discussion that the pervasive notion of the importance of religion to the country as well as its citizens does not waiver, despite the Court's struggles with the various machinations

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82 *Id.*

83 In its application of the *Yoder* test, the Court first looked to sincerity of the religiously held beliefs, as the Court did in *Sherbert. Id.*at 216. The Court then, also as in *Sherbert*, asked whether the sincerely held religious beliefs were seriously burdened by the state law. *Id.* at 218. Finally, if the Court found the first two prongs of the test were satisfied, a balancing-of-interests prong was implemented, in which the interests of the state were weighed against the free exercise interests of the Amish families. *Id.*,at 221.

84 *See* Meyer v. Nebraska, 262 U.S. 390 (1923) (holding a 1919 Nebraska law restricting foreign-language education was in violation of the due process clause of the Fourteenth Amendment); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (holding state enactment conflicted with the parent's right to choose their child's education).

85 *Yoder*, 406 U.S. at 236 ("Nothing we hold is intended to undermine the general applicability of the State's compulsory school-attendance statutes or to limit the power of the State to promulgate reasonable standards that, while not impairing the free exercise of religion, provide for continuing agricultural vocational education under parental and church guidance by the Old Order Amish or others similarly situated.").

86 Ryan S. Rummage, *In Combination: Using Hybrid Rights to Expand Religious Liberty*, 64 Emory L.J. 1175 (2015) (arguing for a hybrid-rights approach to circumvent the limiting aspects of decisions in *Sherbert* and *Yoder*); Jeffrey Shulman, *What Yoder Wrought: Religious Disparagement, Parental Alienation and the Best Interests of the Child*, 53 VILL. L. REV. 173, 178 (2008) (arguing in addition to *Yoder*'s narrowing of the scope of religious-based exemptions, the *Yoder* decision presents an additional problem of parental alienation in regards to religious parenting); Jeffrey Shulman, *The Supreme Court's Religious Parenting Precedent*, NAT'L CONST. CTR. (July 14, 2014), http://blog.constitutioncenter.org/2014/07/the-supreme-courts-religious-parenting-precedent/.

87 Emp't Div. v. Smith*,* 494 U.S. 872 (1990).

in which it attempts to make sense of the arising conflicts between church and state. Even more so, throughout these evolving interpretations, the Court's deference to the religious rights of the citizens still carries great weight, and indicates that even in spite of evolving interpretations, the Court's respect for maintaining religious freedom may ultimately prevail.[88]

B. The Impact of Smith on Religious-Based Exemptions

As suggested above, the *Sherbert-Yoder* interpretations reversed with the Court's ruling in *Smith*, and the once-permitted exemptions to governmental laws as a result of the Court's interpretation of the Free Exercise clause were once again curtailed. Under *Smith*, a 1990 case in which the plaintiffs, as a result of ingesting peyote for sacramental purposes as a part of a Native American Church ceremony, were fired from their jobs due to "misconduct" at the workplace, and were subsequently denied unemployment compensation.[89] By ingesting peyote, a banned substance under Oregon criminal law, the Court reasoned that while banning the plaintiffs' actions "only when they are engaged in for religious reasons, or only because of the religious beliefs they display" would likely be in violation of the Free Exercise Clause,[90] the plaintiffs in this case were attempting to "carry the meaning of 'prohibiting the free exercise [of religion]' one large step further" by asserting "that 'prohibiting the free exercise [of religion]' includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires).'"[91] To this assertion, the Court held that, with Justice Scalia writing for the majority of the Court, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[92] Scalia could not agree that the function of government should be outweighed by religious-based objections to valid and neutral laws,[93] commenting, "To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' . . . contradicts both constitutional tradition

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88 Cox, *supra* note 70, at 143.
89 *Smith*, 494 U.S. at 874.
90 *Id.* at 877.
91 *Id.* at 878.
92 *Id.* at 879 (Stevens, J., concurring) (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982).
93 Rummage, *supra* note 86, at 1184.

and common sense."[94] This point served as a nullification of the *Sherbert* compelling-interest test,[95] and a return to a pre-*Sherbert*, rational-basis test in reviewing the relationship between government law and religious exercise, in which the government was almost always successful.[96] Scalia's concluding point is perhaps the most telling, in which he acknowledges the likely disadvantage to those religious practices not generally observed, stating:

> It may fairly be said that leaving accommodation to the political process *will place at a relative disadvantage* those *religious practices that are not widely engaged in*; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[97]

While the tone of Scalia's points come with a sense of finality, this nullification would be short-lived and, as will be discussed, only further demonstrated that the battle between the interests of the state and the religious interests of the citizens was far from over. The changes that were about to come truly demonstrated the conflict between church and state.

C. The Post-Smith Court

Following the Court's dramatic shift away from *Sherbert* in *Smith*, an equally dramatic response from Congress only three years later would again revitalize the importance the nation places on religious freedom by reestablishing the balancing test employed by *Sherbert* for religious-based exemptions to general laws, by way of the enactment of the Religious Freedom Restoration Act of 1993 ("RFRA").[98] The purpose of RFRA, as in *Sherbert-Yoder*, was to restore the compelling interest tests as outlined in those cases and, as a further renouncement of the *Smith* decision, to *guarantee* the application of that test in *all* cases where the free exercise of religion was substantially burdened.[99]

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94 *Smith*, 494 U.S. at 885.

95 *Id.* ("We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [*Sherbert*] test inapplicable to such challenges.").

96 Rummage, *supra* note 86, at 1182.

97 *Smith*, 494 U.S. at 890 (emphasis added).

98 42 U.S.C. §§ 2000bb-2000bb-4 (1993).

99 42 U.S.C. § 2000bb.

However, RFRA was also short-lived, and despite the support of religious liberty advocates, within the four years following its passage, RFRA was overturned in *City of Boerne v. Flores*.[100] In *Flores*, while the issue regarded a decision by a local zoning authority to deny a church a building permit, which was then subsequently challenged under RFRA,[101] the much larger issue that then had a profound impact was the Court outlining the scope of congressional power, as it relates to the Constitution.[102] The Court explained:

> Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the states. Legislation which alters the meaning
> of the Free Exercise Clause cannot be said to be enforcing the Clause.
> Congress does not enforce a constitutional right by changing what the right is.
> It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation."[103]

Here, the Court reestablished its own authority in constitutional interpretation, while at the same time limiting the power of Congress under Section 5 of the Fourteenth Amendment as being only able to pass remedial, and not substantive, measures,[104] and again also limiting religious-exemption challenges to government laws. However, while RFRA no longer was applicable to the states, it was and is still applicable to the federal government.[105]

It must be noted however, as outlined in Justice O'Connor's dissent joined in large part by Justice Breyer, members of the Court acknowledge the importance of religious freedom, and more specifically, the freedom to exercise that freedom without the fear

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100 521 U.S. 507 (1997).

101 *Id.* at 512.

102 *Id.* at 518 ("[A]s broad as the congressional enforcement power is, it is not unlimited." (quoting Oregon v. Mitchell, 400 U.S. 112, 128 (1970)).

103 *Id.* at 519.

104 *Id.* at 530 ("While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented.").

105 *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006); *see also* Howard M. Friedman, *10 Things You Need to Know to Really Understand RFRA in Indiana and Arkansas*, WASH. POST (Apr. 1, 2015), https://www.washingtonpost.com/news/acts-of-faith/wp/2015/04/01/10-things-you-need-to-know-to-really-understand-rfra-in-indiana-and-arkansas/.

of government interference.[106] As mentioned earlier, the importance of religious freedom for the citizens continues to be addressed, regardless of what arguments may be occurring in the Court. In response, Congress passed the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), in order to address free exercise claims challenging religious land use, as well as religious practices in prisons.[107] RLUIPA, applicable to state and local laws as mentioned, was subsequently upheld in *Cutter v. Wilkinson*,[108] and again, mandates the compelling-interest and least-restrictive means standards for free exercise claims.[109] While applicable only to land use and institutionalized persons in prisons, hospitals, and nursing homes, the shift back, along with the Court's acceptance, to a *Sherbert-Yoder* analysis, suggests the Court has not abandoned this analysis for future claims, and further, leaves the door open for further shifts by the Court in the future.[110] Even those who promote a non-exemption interpretation of the free exercise clause still recognize the Court's division on the matter, and further, suggest that a pro-exemption interpretation is more than likely.[111] In addition to the back and forth legislation, the Court has several tests at its disposal, which can be applied to Establishment Clause challenges on the basis of religious claims. The numerous tests available to the Court indicate that, due to the various methods the Court takes to answer Establishment Clause challenges, an apparent lack of clarity is present in determining an outcome to such challenges. This lack of clarity serves as the basis for the following discussion.

D. Tests the Court Can Apply to Determine Whether a Religious-Based Exemption Should Be Validated

The Court has several tests available to determine whether or not a religious-based exemption should be validated. An understanding of each test, as well as how the tests relate to each other, highlights the Court's approaches to religious-based claims.

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106 *Flores*, 521 U.S. at 546 ("[T]he Clause is best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible governmental interference, even when such conduct conflicts with a neutral, generally applicable law." (O'Connor, J., dissenting)).

107 42 U.S.C. §§ 2000cc-2000cc-5 (2000).

108 *See* 544 U.S. 709, 720 (2005) ("RLUIPA's institutionalized-persons provision [is] compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise.").

109 42 U.S.C. §§ 2000cc-2000cc-5.

110 *See* 544 U.S. 709, 719 (2005) ("Our decisions recognize that 'there is room for play in the joints' between the clauses.").

111 Muñoz, *supra* note 61, at 1119.

A brief review of each test, and a comparison of them, can aid in streamlining the Court's approach, and also hope to provide guidance to those with religious-based claims.

1. The *Lemon* Test

In the Court's 1971 decision in *Lemon v. Kurtzman*,[112] the aptly named "*Lemon* test" applies a three-pronged assessment in determining whether government action violates the Establishment Clause. The three prongs are as follows: (1) the statute must have a secular legislative purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) the statute must not foster an excessive government entanglement with religion.[113] Using this test, the Court in *Lemon* struck down a Rhode Island state program providing aid to religious elementary and secondary schools.[114] The Court acknowledged that while no complete separation between church and state is possible,[115] the test aimed to ensure the two are not so excessively entwined as to result in a difficulty differentiating between each of them.[116] A modified version of the test combined the last two prongs in *Agostini v. Fenton*, creating a "purpose prong" as well as a modified "effects prong."[117] While the test has received criticism from justices of the Court over time,[118] the test is still utilized in most Establishment Clause cases.

2. The Endorsement Test

The endorsement test, advanced by Justice Sandra Day O'Connor in the 1984 Supreme Court case of *Lynch v. Donnelly*,[119] asks whether the government action amounts to an endorsement of

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112 403 U.S. 602 (1971).

113 *Id.* at 612-13.

114 *Id.* at 606.

115 *See id*. at 614 ("Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable." (citing Zorach v. Clauson, 343 U.S. 306, 312 (1952))).

116 *See generally id.* at 614-15.

117 521 U.S. 203, 222-23, 232-33 (1997).

118 *See*, *e.g.*, Wallace v. Jaffree, 472 U.S. 38, 112 (1985) (Rehnquist J., dissenting) (stating that, if the *Lemon* test is "a constitutional theory [that] has no basis in the history of the amendment it seeks to interpret, [it] is difficult to apply, and yields unprincipled results"); Aguilar v. Felton, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting) (voicing "doubts about the entanglement test").

119 465 U.S. 668 (1984).

religion, and if so, that action should be struck down.[120] O'Connor explained, "The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community."[121] While the language of the endorsement test is somewhat different than the test in *Lemon*, it has at times been incorporated into the *Lemon* test, particularly in terms of the second prong.[122] While applicable primarily to expressive activities (graduation prayers, religion in the curriculum),[123] the endorsement test is also utilized in a similar fashion to the test in *Lemon.*

3. The Coercion Test

The coercion test, as outlined by Justice Kennedy in his dissent in *County of Allegheny v. American Civil Liberties Union*,[124] and in determining whether the Establishment Clause has been violated, has two prongs, and due to the acknowledgement of "diligent observance on the border between accommodation and establishment,"[125] the coercion test allows for greater government support of religion than that of the *Lemon* test.[126] The first prong of the coercion test states that the government has not violated the Establishment Clause unless (1) it coerces people to support or participate in religious exercise, and (2) it establishes or attempts to establish a state church. This less stringent expectation on part of the government in regards to religion suggests again, an appreciation and inherent support for the country's religious observances of its citizens.[127]

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120 *See id.* at 688 (O'Connor, J., concurring) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.").

121 *Id.* at 687.

122 *See* Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 849-50 (7th Cir. 2012) ("[U]nder *Lemon's* "primary effect" prong, '[w]hat is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. . . . [T]he endorsement test [is] a legitimate part of *Lemon's* second prong . . . .").

123 *See* Mark Strasser, *The Endorsement Test is Alive and Well: A Cause for Celebration and Sorrow*, 39 PEPP. L. REV. 1273 (2013) (providing a supplemental discussion of the endorsement test).

124 492 U.S. 573 (1989).

125 *Id.* at 659, (Kennedy, J., dissenting).

126 *See id.* ("[G]overnment may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'").

127 *Id.*

4. The Neutrality Test

The neutrality test is generally reserved for issues regarding the use of government funds, and therefore provides for neutrality in the disbursement of government funds in such areas as school voucher programs (providing equally for religious schools and public schools),[128] and teaching services to low-performing students, regardless of whether they attend a public school or a religious school.[129]

5. Hybrid-Rights Exception

As articulated by Justice Scalia in *Employment Division v. Smith*, in order for the hybrid-rights exception[130] to apply in evaluating Establishment Clause challenges, free exercise challenges to a neutral, generally applicable law's application to a religiously motivated action cannot succeed on a free exercise challenge alone, but instead require an *additional* assertion of protection from the Constitution along with the free exercise challenge, "such as freedom of speech and of the press, or the rights of parents . . . to direct the education of their children."[131] If such a combination were presented, the Court would then likely apply a heightened level of scrutiny rather than rational basis review.[132] This combination cannot be asserted frivolously however,[133] as the combination of constitutional claims would, as Justice Souter

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128 *See* Bd. of Educ. v. Allen, 392 U.S. 236 (1968) (holding that the lending of textbooks to all students, including religious schools, did not violate the Establishment Clause because (1) it required school boards to lend books to all students, not just those at religious schools, (2) the program was advancing the promotion of education, and (3) school boards were entitled to turn down requests (such as religious texts) that they may deemed inappropriate for their schools).

129 *See* Zelman v. Simmons-Harris, 536 U.S. 639, 662 (2002) (holding "neutral educational assistance programs that, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion" are constitutional).

130 494 U.S. at 881-82. Justice Scalia reasoned that, in all previous free exercise cases decided by the Court, "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* . . . ." *Id.* at 881 (emphasis added).

131 *Id.* at 881 (internal citations omitted).

132 *See generally id.*

133 *See* Harline v. Drug Enf't Admin., 148 F.3d 1199, 1203 (10th Cir. 1998) ("A constitutional claim . . . is not colorable if it is 'immaterial and made solely for the purpose of obtaining jurisdiction or . . . is wholly insubstantial or frivolous.'" (citing Koerpel v. Heckler, 797 F.2d 858, 863 (10th Cir. 1986)).

discussed in his concurrence of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[134] "be so vast as to swallow the *Smith* rule . . . ."[135] Further, multiple constitutional claims, regardless of their strength, cannot be asserted in an effort to "*bootstrap*" claims to satisfy a hybrid-rights analysis.[136] Additionally, this hybrid-rights analysis has taken different approaches amongst the circuit courts,[137] only further emphasizing just how unclear free exercise claims are to be decided.

While the hybrid-rights approach has been applied in decisions by the courts,[138] the varied interpretations of this analysis, much like the tests discussed above, in no way solidifies an analytical framework in deciding free exercise claims. Put another way, "'There is no underlying theory of religious freedom that has captured a majority of the Court,' and every new case 'presents the very real possibility that the Court might totally abandon its previous efforts and start over.'"[139] Since starting over would invariably create more problems than solutions, identifying the evolving approaches to free exercise claims opens the door to varied interpretations, and therefore greater success for those who raise such challenges when faced with a potential forced acceptance of the

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134 508 U.S. 520 (1993).

135 *Id*. at 567 (Souter, J., concurring).

136 *See* Jacobs v. Clark Cty. Sch. Dist., 526 F.3d 419, 440 n.45 (9th Cir. 2008) ("[N]o court has ever allowed a plaintiff to bootstrap a free exercise claim in this manner. We decline to be the first." (internal citation omitted)).

137 *See generally* Hope Lu, Comment, *Addressing the Hybrid-Rights Exception: How the Colorable-Plus Approach Can Revive the Free Exercise Clause*, 63 CASE WESTERN RES. L. REV. 257, 259, 267, 269 (2012) (overviewing various approaches the courts have taken in applying the exception including: "The Refusal-to-Recognize Approach," "The Independently-Viable-Claim Theory," "The Colorable-Claim Standard," as well as "'Open-Recognition' Approaches"). *See also* Timothy J. Santoli, *A Decade after* Employment Division v. Smith*: Examining How Courts are Still Grappling with the Hybrid-Rights Exception to the Free Exercise Clause of the First Amendment*, 34 SUFFOLK U. L. REV. 649, 668-70 (2001) (adding discussion on the free exercise uncertainty in the post-*Smith* circuit courts).

138 *See* Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston, 250 F. Supp. 2d 961, 989 (N.D. Ill. 2003) (showing how a church demonstrating a free exercise claim coupled with a "colorable infringement of one of the other constitutional rights" brought a successful hybrid-rights claim, thereby resulting in the court applying strict scrutiny); *see also* Soc'y of Separationists, Inc. v. Herman, 939 F.2d 1207 (5th Cir. 1991) (applying a per se approach to the hybrid-rights claim, only allowing a constitutional claim expressly recognized by the Court to be coupled with a free exercise claim in order to qualify for exemption from the Court's holding in *Smith*).

139 Patrick M. Garry, *Religious Freedom Deserves More than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, 57 FLA. L.REV. 1, 4 (2005) (citing William P. Marshall, *What is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193, 194 (2000)).

"mark of the beast" as a part of their identification to the federal government, despite their sincerely held beliefs against such an identifier.[140]

E. Advocating a Colorable Claims Approach to Allow the "Mark of the Beast" Free Exercise Exemption

The tests available to the Court are as muddled as they are varied. Fortunately, a variant of the hybrid-rights test, the "colorable claims" approach adopted by the Ninth and Tenth Circuits,[141] is a test that focuses primarily on balancing governmental and judicial concerns with the constitutional rights of the individual.[142] While the *Thomas* decision was ultimately overturned for lack of "ripeness,"[143] the same reasoning was reaffirmed in the Ninth Circuit in *Miller v. Reed*.[144] In *Miller*, the Ninth Circuit upheld the denial of a driver's license to the plaintiff who objected to provide a social security number for religious reasons.[145] The court determined that the plaintiff, in failing to provide a "colorable" claim of an infringement of his right to interstate travel or a "non-existent claim of a 'right to drive,'"[146] these failing claims could therefore not be used in conjunction with his free exercise claim.[147] For purposes of the "mark of the beast" exemption particular to this note, the matter of failing to provide a social security number due to religious reasons as discussed in *Miller* provides guidance in how plaintiffs asserting such a claim should approach litigation in hopes of success. In that regard,

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140 *See*, for example, Bernadette Meyler, *The Equal Protection of Free Exercise: Two Approaches and their History*, 47 B.C. L. Rev. 275, 310-11 (2006).

141 *See* Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 699-700 (10th Cir. 1998) ("Whatever the *Smith* hybrid-rights theory may ultimately mean, . . . it *at least requires a colorable showing of infringement* of recognized and specific constitutional rights . . . . [S]imply raising such a claim is not a talisman that *automatically* leads to the application of the compelling-interest test." (emphasis added); *see also* Thomas v. Anchorage Equal Rights Comm'n, 102 P.3d 937, 940 (Alaska 2004) ("*Smith* creates an exception that would require proof of a compelling state interest in 'a hybrid situation' where the facts indicated a possible violation of the Free Exercise Clause and some other constitutionally protected right . . . .").

142 Lu, *supra* note 137, at 273.

143 Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1137 (9th Cir. 2000).

144 176 F.3d 1202, 1207 (9th Cir. 1999) ("[A] free exercise plaintiff must make out a 'colorable claim' that a companion right has been violated-that is, a 'fair probability' or a 'likelihood,' but not a certitude, of success on the merits." (citing *Thomas*, 165 F.3d at 703, 707)).

145 *Id.* at 1204.

146 *Id.* at 1208.

147 *Id.*

"colorable claims" also allow for a more individualized approach to free exercise claims, with courts having the flexibility to review the claims on a case-by-case basis and to determine the weight of the companion claims asserted along side the free exercise claim.[148] This flexible approach has received several endorsements from scholars and commentators over time.[149] Again, a combination of similar facts and flexibility in the courts can only aid in achieving a successful claim of the "mark of the beast" exception, to which this note now turns its focus.

III. CONFLICT OF THE "MARK OF THE BEAST" EXEMPTION WITH FEDERAL REGULATORY PROVISIONS

As discussed earlier, the government's requirement for American citizens to provide social security numbers as a means of identification runs in direct conflict with persons who, because of their sincerely held religious beliefs, refuse to attach such a number to themselves.[150] Generally, this religious-based exemption has failed to gain acceptance among the courts for reasons that will be now discussed. In the discussion of these cases however, one must be mindful of the ever-evolving and balancing interpretations of free exercise claims, articulating that while challenges to the "mark of the beast" have generally proven unsuccessful, this should not be construed as an indication that future challenges under the same claim will have the same result.

A. Prior Unsuccessful Challenges to the "Mark of the Beast" Free Exercise Claim

An example of an unsuccessful challenge to the "mark of the beast" occurred in *McDonald v. Alabama Department of Public Safety*.[151] In *McDonald*, the plaintiff refused to execute a *de facto* form, which recognized an exception to the social-security-number requirement for those averring the number for religious reasons.[152]

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148 Santoli, *supra* note 137, at 666.

149 *See, e.g.*, John L. Tuttle, Note, *Adding Color: An Argument for the Colorable Showing Approach to Hybrid Rights Claims Under* Employment Division v. Smith, 3 AVE MARIA L. REV. 741, 756-57 (2005) ("The Ninth and Tenth Circuits have adopted the best approach to hybrid rights claim. They require that the companion claim present a colorable showing of infringement of an additional constitutional right."); *see also* Santoli, *supra* note 137, at 670 ("Thus, the 'colorable claim' theory to the hybrid-rights exception is best suited to weigh the companion claim.")

150 *See supra* Section I.

151 756 So. 2d 880 (Ala. Civ. App. 1999).

152 *Id.* at 882.

The court held that, while the plaintiff's seventeen-page affidavit offered ideas that could "convince a legislative body . . . to decline to adopt a Social-Security-number requirement for driver licensing, . . . it is not the role of this court to conduct such a searching inquiry into the *wisdom*" of the challenged regulation.[153] More importantly, however, the court's reasoning was premised on an understanding of the *Smith* decision, and accordingly *Smith*'s heavy reliance on the decision in *Bowen v. Roy*.[154] As explained in the decision, whether or not the plaintiffs in *McDonald* would succeed relied on the determination of the whether the regulation challenged by the plaintiffs was "a reasonable means of promoting a legitimate public interest."[155] The court also relied on the premise that "practically every American citizen has obtained, or will at some time obtain, a unique Social Security number pursuant to federal law,"[156] justifying the ubiquity of the number as a partial reason for its inherent acceptance.

In relying heavily on *Bowen*'s relationship to the *Smith* decision however, a decision that predates the evolution of the analyses available under *Smith*, the court in *McDonald* neglected the other approaches stemming from *Smith*, in particular, the hybrid-rights analysis.[157] The court does note, however, that a violation of a constitutional claim was not raised by the plaintiffs at the trial level, but was eventually raised on appeal.[158] Due to the plaintiff's failure to raise such a claim at the trial level, "[t]his court will not consider a theory or issue where it was not pleaded or raised in the trial court."[159] This *at least* raises the question on how the court would have ruled had the issue been raised at the trial level, but fortunately for the court, they did not need to address the issue.

Another example of an unsuccessful challenge to avoiding the "mark of the beast" identifier occurred in *United States v. Bales*.[160] Unlike the plaintiffs in *McDonald*, who asserted denial of social security numbers due to a seemingly sincere belief of a renouncement of the "mark of the beast," the defendant in *Bales* attempted to circumvent the charges of fraudulent documentation under the auspices of religious convictions.[161] This attempt at exploiting the nature and premise of the beliefs runs in direct

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153 *Id.* at 885.

154 *See generally id.* at 884-86 (explaining the *Smith* Court's reliance on *Bowen v. Roy*, 476 U.S. 693 (1986)).

155 *Id.* at 885 (citing *Bowen*, 476 U.S. at 707-08).

156 *Id.*

157 *Id.* at 884.

158 *McDonald*, 756 So. 2d at 886.

159 *Id.* (quoting Garrison v. Int'l Enters., Inc., 585 So. 2d 84, 86 (Ala. Civ. App. 1991)).

160 813 F.2d 1289 (4th Cir. 1987).

161 *Id.* at 1297.

contrast to both the purpose of preserving such convictions as well as the point of this note; the court, in agreement, reasoned two salient points:

> First, as the government points out in its brief, *Bales was not prosecuted for failing to use an assigned number*, but for knowingly and intentionally using false numbers for fraudulent purposes. He should not be allowed to avoid a fraud conviction by arguing that the social security numbering system should not have been imposed on him. Additionally, *Bales has not demonstrated the existence of a religious belief that will sustain a free exercise claim*.[162]

While this case predates *Smith*, and therefore could be considered too far removed, the important contrast highlighted in this decision between sincerely held beliefs and an attempt at criminal avoidance cannot be overlooked. The court in *Bales*, though reaching a likely conclusion based on the facts presented, does acknowledge the importance of religiously held convictions as outlined in *Yoder*,[163] and that notion of sincerely held beliefs carries the discussion to the next section: a discussion of successful challenges in terms of the "mark of the beast."

B. Prior Successful Challenges to the "Mark of the Beast" Free Exercise Claim

While the two examples above demonstrate a general lack of success, cases where the challenge was successful have indeed occurred. In *Stevens v. Berger*,[164] the court found that requiring the plaintiffs, as a condition of receiving welfare benefits, to obtain social security numbers for their children was a violation of the plaintiffs' free exercise of religion under the First Amendment.[165] In *Stevens*, the plaintiffs asserted the requirements of social services ran counter to their sincerely held religious beliefs, and despite offering an alternative to requiring their four children to be given a social security number, social services refused, prompting the litigation.[166] While this case neglected to perform an analysis on the privacy claim,[167] the court did recognize the strength of joining the

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162 *Id.* (emphasis added).
163 *Id.*
164 428 F. Supp. 896 (E.D.N.Y. 1977).
165 *Id.* at 897.
166 *Id.* at 897-98.
167 *Id.* at 899.

interests of the parent along with a First Amendment challenge as significant.[168] Perhaps the most cogent point raised in the opinion occurred in the form of a question, and serves as a maxim permeating the hybrid-rights analysis: "the 'significant question' is whether a belief is 'truly held'. 'This is the threshold question of sincerity which must be resolved in every case.'"[169] This case-by-case analysis, similarly articulated in a "colorable claims" approach of the hybrid-rights analysis,[170] adheres to the principle that an individual's rights (particularly religious rights) must be analyzed prior to instituting a blanket policy, which could ultimately adversely impact sincerely held beliefs.[171]

Similarly, in *Callahan v. Woods*,[172] the question of sincerity played a pivotal role in the ultimate decision by the Ninth Circuit. In *Woods*, the plaintiff at the trial court level had requested his daughter receive public benefits from the public officers, despite his refusal to obtain a social security number for her due to his observance of the "mark of the beast," and his fears of putting her life in peril.[173] While the lower court had thought the plaintiff's beliefs were sincere, due to his beliefs stemming from experiences while being incarcerated, the trial court had determined the beliefs were "not religious in nature."[174] On appeal, the Ninth Circuit articulated the importance of religious convictions on a variety of fronts. In terms of religious coincidence, the court said, "[A] coincidence of religious and secular claims in no way extinguishes the weight appropriately accorded the religious one."[175] In terms of religious duties, the court explained, "Religious duties need not contradict personal values or preferences in order to be protected."[176] Most telling, however, was the Ninth Circuit's assertion that, "[i]n applying the free exercise clause of the First Amendment, courts may not inquire into the truth, validity, or reasonableness of a claimant's religious beliefs."[177] This strong

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168 *See id.* at 907 ("Once a bona fide First Amendment issue is joined, *the burden* that must be shouldered by the government to defend a regulation with impact on religious actions *is a heavy one*." (emphasis added)).

169 *Id.* at 901 (quoting United States v. Seeger, 380 U.S. 163, 185 (1965)).

170 Santoli, *supra* note 137, at 666-67, 669-70.

171 Berger, 428 F. Supp. 896 at 907.

172 Callahan v. Woods, 658 F.2d 679 (9th Cir. 1981).

173 *Id.* at 682.

174 *Id.*

175 *Id.* at 684.

176 *Id.*

177 *Id.* at 685. "The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect." *Callahan*, 658 F.2d at 685 (quoting United States v. Ballard, 322 U.S. 78, 87 (1944)).

statement reasserts the deeply rooted convictions of religious freedom as well as the notion that such freedom should not be questioned. Although the case was decided almost a decade prior to *Smith*, which as discussed continues to be the subject of scrutiny, the possible difference in plaintiff's convictions from the meanings of his particular church could not "itself invalidate his free exercise right."[178] These deeply rooted values cannot be overlooked in suggesting a proper analysis of the case below, and will in part shape the focus of the discussion.

IV. VALIDATING THE "MARK OF THE BEAST" EXCEPTION IN *YEAGER V. FIRSTENERGY GENERATION CORP.*

In the most recent decision regarding the "mark on the beast" on which this note is based, *Yeager v. FirstEnergy Generation Corp.*,[179] the combination of procedural and substantive factors which ultimately dictated the outcome of the case will be first discussed, and then called into question. Having disclaimed and disavowed his social security number, the plaintiff, Donald Yeager, filed an initial claim of religious discrimination under Title VII of the Civil Rights Act of 1964, asserting FirstEnergy neglected to hire him as a direct result of his refusal to provide a social security number for purposes of the IRS, with FirstEnergy failing to respect his fundamentalist Christian belief of renouncing anything associated with the "mark of the beast."[180] The District Court of Ohio dismissed the complaint for failing to state a claim under which relief could be granted.[181] On appeal, by way of a Title VII employment discrimination analysis,[182] the Sixth Circuit concluded that the employer was not required to accommodate Yeager's beliefs if "such accommodation would violate a federal statute."[183] Because the IRS code requires employers like FirstEnergy to collect and provide employees' social security numbers,[184] Yeager's refusal

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178 Callahan, 658 F.2d 679 at 685.

179 777 F.3d 362 (6th Cir. 2015)..

180 Yeager v. FirstEnergy Generation Corp, No. 5:14-CV-567, 2014 WL 2919288, at *1 (N.D. Ohio June 27, 2014).

181 *Id.* at *2.

182 *See generally Yeager*, 777 F.3d at 363 (determining whether the employee establishes a "prima facie case of religious discrimination," and if so, the burden shifts to the employer to show "it could not 'reasonably accommodate' [the] religious beliefs without 'undue hardship.'" (quoting Tepper v. Potter, 505 F.3d 508, 514 (6th Cir. 1987)).

183 *Id.*

184 *Id.* at 363; *see* 26 U.S.C. § 6109(d) (2011) (defining the social security account number as the proper identifying number for such purposes).

violated that requirement, and his argument thus failed.[185] This case was subsequently denied for rehearing,[186] as well as upon request for certiorari.[187]

While Yeager's lack of success could more easily have been attributed to the court's refusal to either acknowledge or accept those rejecting the "mark of the beast," the lack of success was instead due to an improper framing of the nature of the complaint. While the initial complaints were structured under the employment discrimination umbrella, in Yeager's petition for writ of certiorari, Yeager's counsel focused on the lower court's "underappreciation of the constitutional efficacy of the 'free exercise' interest."[188] While prior decisions have established that employers are not responsible for providing an accommodation that violates a federal statute,[189] the issue here is not with the employer, but with the statute itself. Unlike prior decisions in the employment discrimination context, an accommodation from the employer would likely be granted if the *federal statute* afforded such an accommodation. However, attacking the employer in this case is not attacking the issue. While there is an example of a plaintiff who has had recent successful claims brought against their employers for religious accommodation practices linked to the mark of the beast,[190] the ultimate success of the employee was due to the employer's failure to provide an alternative means of identification so as not to violate his religious beliefs, not because the belief was considered too harmful to override the federal statute.[191] While the case highlighted how employers should take requests for religious accommodations quite seriously in the workplace, the case failed to achieve an exemption to the federal statute.[192] Here, though framed in a Title VII claim,

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185 *Yeager*, 777 F.3d at 364.

186 Yeager v. FirstEnergy Generation Corp., No. 14-3693, 2015 U.S. App. LEXIS 2257 (6th Cir. Feb. 11, 2015).

187 Yeager v. FirstEnergy Generation Corp., 136 S. Ct. 40 (2015).

188 Petition for Writ of Ceritorari, Yeager v. FirstEnergy Generation Corp., 136 S. Ct. 40 (2015) (No. 14-1302), 2015 U.S. S. Ct. Briefs LEXIS 1668, at *9.

189 *See* Weber v. Leaseway Dedicated Logistics, Inc., No. 98-3172, 1999 WL 5111, at *2 (10th Cir. Jan. 7, 1999) ("To require an employer to subject itself to potential fines [] results in undue hardship.").

190 *See, e.g.*, EEOC v. Consol Energy, Inc., 151 F. Supp. 3d 699 (Mem.) (N.D. W. Va. 2015) Civil Action No. 1:13-cv-00215-FPS (N.D.W. Va. Aug. 21, 2015) (awarding employee compensatory damages and lost wages from former employer who failed to provide an alternative means of tracking his time and attendance other than by means of a biometric scanner, which the employee repeatedly notified was against his beliefs as an evangelical Christian).

191 *Id.* at 699.

192 Judy Greenwald, *'Mark of the Beast' Case Puts Spotlight on Religious Accommodation*, BUS. INS. (Sept. 1, 2015 10:50 AM), http://www.businessinsurance.com/article/20150901/NEWS06/150909981.

the issue in *Yeager* ultimately rests with the federal government failing to carve out a religious exemption for those disavowing the mark of the beast due to their sincerely held religious beliefs.[193] Though Title VII prohibits religious discrimination in the workplace, so broadly defining religion as to include "all aspects of religious observance and practice, as well as belief,"[194] even when Yeager's sincerely held religious beliefs are viewed under a more critical lens, those beliefs should still carry the day.

In earlier American jurisprudence, the state would have been "constitutionally compelled to carve out an exception—and to provide benefits—for those whose unavailability is due to their religious convictions."[195] As the approach to free exercise challenges has evolved as discussed earlier however, from a less forgiving analysis in *Smith*,[196] to a more recently individualized colorable claims approach,[197] framing an argument under the latter analysis would have likely resulted in a different outcome for Yeager. While no alternate means of identification were discussed in the case, and cases have arisen in which alternate means of identification were offered as an option,[198] even without such an alternative, requesting an exemption under a colorable-claims analysis, combining a free exercise claim with an equal protection claim,[199] could have had a much better chance of success. This alternative claim and analysis, discussed below, will highlight those chances.

V. "MARK OF THE BEAST" AS A VALID RELIGIOUS EXEMPTION UNDER A COLORABLE-CLAIMS ANALYSIS

As mentioned earlier in this note, the analysis of religious-based exemptions has evolved,[200] resulting in a viable option promoting a greater chance of heightened scrutiny when raising a free exercise claim, the colorable-claims approach.[201] To review, the test focuses on finding a balance between governmental and judicial

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193 777 F.3d 362, 363. Had such an exemption existed under federal law, the employer could have made such an accoomodation.

194 42 U.S.C. § 2000e(j) (1991).

195 Sherbert v. Verner, 374 U.S. 398, 420 (1963) (Harlan, J., dissenting).

196 *See supra* Section II B.

197 *See supra* Section II E.

198 *See* Steckler v. United States, No. Civ. A. 96-1054, 1998 WL 28235 (E.D. La. 1998) (recognizing the "mark of the beast" as a sincere religious belief, although alternative exemptions otherwise available to a tax payer refusing to provide his social security number due to his religious beliefs were refused by the taxpayer, resulting in a finding for the government).

199 U.S. CONST. amend. XIV.

200 *See supra* Section II D.

201 *See supra* Section II E.

concerns with constitutional rights of the individual.[202] Further, the claims cannot be made frivolously, which would result in anyone attempting to "bootstrap" claims to force a hybrid-rights analysis.[203] In the case of *Yeager*, however, which in turn could have long-term effects on further free exercise claims regarding the "mark of the beast," a colorable-claims approach combining a free exercise right along with an equal protection right as afforded in the Fourteenth Amendment,[204] would neither be frivolous nor feeble in application.

While the interpretation of the Free Exercise clause as articulated throughout this note has been anything but clear in the eyes of the Court, the Court would not argue that *both* the rights of free exercise as well as the right of equal protection of its citizens are fundamentally *guaranteed*.[205] Further, even accepting varied interpretations of free exercise, the Court *unanimously* held the Equal Protection Clause of the Fourteenth Amendment *required* strict scrutiny,[206] and that holding so evolved from the racial context to other contexts of equality.[207] With this backdrop, the colorable-claims approach as adopted by the Ninth and Tenth Circuits highlights this evolution, and serves as a viable possibility in the "mark of the beast" context.

In the equal protection context, the Court has suggested the Equal Protection Clause as it applies to religion ensures the respect of one's religious beliefs.[208] Further, in the free exercise context as discussed throughout this note as well as on its face,[209] the right of a citizen to freely exercise his religion is protected by the Constitution. Regardless of whether either claim is considered *less strong* in the eyes of the Court, the combination of these constitutional claims is such that when applied in tandem, provide

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202 Lu, *supra* note 140, at 273.

203 Rummage, *supra* note 86.

204 *See generally* U.S. Const. amend. XIV ("No state shall . . . deny within its jurisdiction the equal protection of the laws."). While the equal protection clause applies only to state and local governments, as articulated in *Bolling v. Sharpe*, 347 U.S. 497 (1954) (and applicable for purposes of this note), through incorporation of the due process clause of the Fifth Amendment, equal protection also applies to the federal government. U.S. Const. Amend. V.

205 *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954); City of Boerne v. Flores, 521 U.S. 507, 544-65 (1997) (O'Connor, J., dissenting).

206 *See* Loving v. Virginia, 388 U.S. 1, 11 (1967) ("At the very least, the Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny . . . .'" (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)).

207 *See generally* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

208 *See* Bd. of Educ. v. Grumet, 512 U.S. 687, 715 (1994) ("Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." (O'Connor, J., concurring)).

209 U.S. CONST. amend. I; Sherbert v. Verner, 374 U.S. 398 (1963); McConnell, *supra* note 68.

a strong basis for argument of heightened scrutiny. Neither argument is frivolous by themselves, and despite the perceived notion that strict adherence to renouncing the "mark of the beast" falls short of overriding a compelling government interest supporting a federal statute, such a claim falls short of acknowledging the sincerity of the belief, the fundamental rights afforded in the Constitution, and the seemingly *evolving-towards-acceptance* nature of the rights and beliefs of *every individual* in the country.[210] Further, clarity on validating the "mark of the beast" exemption will ultimately validate a sincere religious belief often stigmatized as too "extreme,"[211] and in turn, reduce the need for future litigation on the subject. These fundamental rights are what set the United States from other parts of the world, and those rights should be celebrated rather than limited, particularly when supported by two tenets of the Constitution, the Free Exercise Clause and the Equal Protection Clause.

VI. CONCLUSION

During the writing of this note, the horrific tragedy in Paris, France occurred, in which ISIS terrorists murdered 130 people in the furtherance of their cause, however abhorrent their cause may have been.[212] The victims lost in the senseless violence[213] were a product of this skewed version of extremism,[214] and this definition should in no way be considered synonymous with strict-adherence fundamentalism, as "the perception may be wrong but it continues to exist and thrive."[215] While the perceptions of those equating those refusing the "mark of the beast" as people with "extreme" views, unfairly characterized as such due in part to the muddled distinction between fundamentalism and extremism,[216] along with the notion that those sincerely held beliefs are generally dismissed as trivial as they relate to federal numerical identification requirements, both of those conclusions fail to give those following such beliefs adequate consideration, and therefore should be reexamined under the more accurate definition and religious

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210 *Brown*, 347 U.S. at 493; *Loving*, 388 U.S. at 12; *Obergefell,* 135 S. Ct. at 2602-03.

211 Parshall, *supra* note 23.

212 Adam Chandler, Krishnadev Calamur, & Matt Ford, *The Paris Attacks: The Latest*, ATLANTIC (Nov. 22, 2015) http://www.theatlantic.com/international/archive/2015/11/paris-attacks/415953/.

213 *Paris Attacks: Who Were the Victims?*, BBC NEWS (Nov. 27, 2015) http://www.bbc.com/news/world-europe-34821813.

214 Baqai, *supra* note 27, at 242.

215 *Id.* at 243; Munson, *supra* note 22.

216 Munson, *supra* note 22.

understanding.

As a country born out of a desire for religious freedom, limiting that freedom limits its people, while also limiting the potential for growth in religious understanding and acceptance. Accommodating those individual beliefs, no matter how "incredible, if not preposterous,"[217] must be preserved.

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217 United States v. Ballard, 322 U.S. 78, 87 (1944).