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One Nation Under God(s)?: Post-Secular Governance in the United States and Republic of Ireland, A Comparison

Christopher M.W. Pioch*

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COMMENT

ONE NATION UNDER GOD(S)?: POST-SECULAR GOVERNANCE IN THE UNITED STATES AND REPUBLIC OF IRELAND, A COMPARISON

*By Christopher M.W. Pioch**

INTRODUCTION

The debate on the role of law, governance, and religion is not new; it has been a continuing conflict throughout history.[1] An exchange between James Madison and Bishop Thomas Bradbury Chandler, around the time of the United States' founding, clearly focuses secular versus sectarian poles that have developed this issue. Bishop Chandler wrote:

> An established religion, is a religion which the civil authority engages, not only to protect, but to support; and a religion that is not provided for by the civil authority, but which is left to provide for itself, or to subsist on the provision it has already made, can be no more than a tolerated religion.[2]

Bishop Chandler wanted to see an established, and therefore government-supported state religious practice.

In his reply, James Madison stated simply that:

> [T]he existing character, distinguished as it is by its religious features, and the lapse of time now more than 50 years since the legal support of Religion was withdrawn sufficiently prove that [religion] does not need the support of Government, and it will scarcely be contended that Government has suffered by the exemption of Religion from its cognizance, or its pecuniary aid.[3]

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1. *See, e.g.*, *The Enlightenment*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/event/Enlightenment-European-history (accessed Mar. 12, 2016) (discussing the changing nature of God and philosophy on the worldview of Europe and European Governance); Thomas Bradbury Chandler, *A Friendly Address to All Reasonable Americans on the Subject of Political Confusions in which the Necessary Consequences of Violently Opposing the King's Troops Are Fairly Stated* (1774) Evans TCP (arguing whether religion was still necessary in society to maintain order).

2. *See* Bill Fortenberry, *What Freedom of Religion?,* THE FEDERALIST PAPERS PROJECT (last accessed March 13, 2016), http://www.thefederalistpapers.org/current-events/what-freedom-of-religion (discussing the grounds for Free Expression); *see also* Bradbury Chandler, *supra* note 1 (maintaining the argument that the need from religion in society maintained the natural order).

3. *See* Fortenberry, *supra* note 2 (interpreting the original concept of the Freedom of Religion through the medium of the Federalist Papers); *see also* JAMES MADISON, THE

This exchange between Madison and Bishop Chandler begins the discussion of this Comment on the movements toward an emerging theory on post-secular governing.[4] The term "post-secular" describes a wide range of theories aiming to describe a phenomenon of increasing religious influence and awareness on society and its governing structures.[5] In the United States, post-secular governance began with the passage of the Religious Freedom Restoration Act ("RFRA") in 1993, which has spawned an increasing number of judicial opinions seeking to determine the interplay between religion and government.[6] Ireland, in contrast, began as a sectarian state by relying heavily on Catholic social programs, which has had the effect of also promoting Catholic prejudices on topics such as abortion and contraception; Ireland has faced the recurring issue of divorcing its government from much of the Catholic influences deeply ingrained in Irish society.[7]

Part I of this Comment examines recent historical developments on the shifting perspectives on free exercise of religion in both the United States and in Ireland.[8] Part II examines the social conflicts in

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WRITINGS OF JAMES MADISON (Gillard Hunt ed., 1910) (advocating that the government not take a position on established religion).

4. *See infra* Parts II and III (dissecting the intricacies of interpretations on religious freedom). Part II.A shows how the United States moves from secular thought to permitting religious arguments. Part II.B discusses the drift away from national, borderline established, religion.

5. *See, e.g.,* Jurgen Habermas, Tony Blair, & Regis Debray, *Secularism's Crisis of Faith*, http://www.staff.amu.edu.pl/~ewa/Habermas,%20Notes%20on%20Post-Secular%20Society.pdf (describing the influence of religion and how it has morphed into a largely personal experience, and describing how those experiences tend to affect or influence our society); *see also* Trevor Owens Jones, *What is Post-Secular?*, N.Y. PUB. LIBR. (Dec. 21, 2010) (accessed Oct. 2, 2015) (defining post-secularism as a drift from imperial secularism, and defining imperial secularism as viewing the world with religious neutrality).

6. *See, e.g.,* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2012); Burwell v. Hobby Lobby Stores, Inc., 575 U.S. ___ (2014); *compare* Obergefell v. Hodges, 576 U.S. ___ (2015) *with Same-Sex Marriage Referendum*, IRISH TIMES (May 22, 2015), http://www.irishtimes.com/news/politics/marriage-referendum (ensconcing marriage equality into Irish Law through popular referendum).

7. *See* Constitution of Ireland 1937 art. 44 (granting Free Exercise); *see also* Corway v. Ind. News Ltd. [1999] 4 IR 485 (Ir.) (identifying a shift away from a specific statute).

8. This Comment makes references throughout to free exercise. This specifically refers to the free exercise of religion in both the United States and Ireland. Both countries' constitutions contain provisions for the freedom of religion. The United States Constitution specifically calls this the "free exercise of religion," while the Irish Constitution refers to it as the "free profession and practice of religion." Throughout this Comment, I use the term "free

each country on issues such as business, education, the family, and personal objections to how others live their lives that have led to a common shift in ideology towards post-secular governance.[9] Part III then presents a conclusion on how the two governments are coming to similar post-secular conclusions despite their different constitutional language.

I. A HISTORICAL BACKGROUND ON RELIGIOUS EXERCISE

In the mid-1960s, the United States Supreme Court looked secularly upon the rights of citizens, finding that private rights of individuals were inherently found within Constitutional "penumbras."[10] Across the Atlantic, the Irish Supreme Court relied on the 1962 Encyclical of Pope John the XXIII to find that "many personal rights of each citizen follow from the Christian and democratic nature of the state." [11] Using conflicting methods of interpretation, both countries nonetheless came to similar conclusion that certain private rights of individuals were protected from state involvement. .[12]

Since the 1990s, differences between the Supreme Court and the legislature as to the extent and manner of the government's obligation

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exercise" interchangeably for both constitutions. *See* U.S. CONST. amend. I; *see also* Constitution of Ireland 1937 art. 44

9. *See, e.g., Hobby Lobby Stores, Inc.*, 575 U.S. (2014); *Obergefell*, 576 U.S.; Constitution of Ireland 1937 art. 44 (granting Free Exercise); Corway v. Ind News Ltd. [1999] 4 IR 485 (Ir.); *Same-Sex Marriage Referendum*, *supra* note 6 (ensconcing marriage equality into Irish Law through popular referendum).

10. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (noting that the First Amendment had penumbras geared towards privacy rights); *see also* Paul W. Butler & David L. Gregory, *A Not So Distant Mirror: Federalism and the Role of Natural Law in the United States, the Republic of Ireland, and the European Community*, 25 VAND. J. TRANSNAT'L L. 429, 454 (1992) (comparing the "natural law" as it is interpreted in the United States and in Ireland. While the United States found secular reasoning sufficient to discover the "natural law," Ireland relied upon religious dogma. The Article further examined the issues of Personal Autonomy, Abortion, Marriage Equality, and Divorce); Douglas Laycock, *Church and State in the United States: Competing Conceptions and Historic Changes*, 13 IND. J. GLOBAL LEGAL STUD. 501, 511 (2006) (laying out the religious-secular argument and the Left-Right conflict encountered in the Modern United States in easy to understand language).

11. Ryan v. Att'y Gen. [1965] IR 294 (Ir.) (creating two types of Constitutional rights in Ireland), *see also* JOHN PAUL XXIII, PACEM IN TERRIS (1962) (stating the governance of the State as being different from the laws of God).

12. *Compare Griswold,* 381 U.S. at 479 (granting private rights to citizens) *with* Ryan v. Att'y General [1965] IR 294 (Ir.) (granting private rights to citizens).

to honor and review religious free exercise claims have allowed conflicts, such as those surrounding women's healthcare, to develop in the United States.[13] Part I.A details the primary nexus for these changes. Conversely, in Ireland, religion has been described as being "inseparably bound up with the nation's traditions, history, and culture" and holds a special place in society.[14] This relationship has bred a different interpretation of free exercise.[15] Part I.B seeks to illustrate the Irish government's gradual march away from the Church influences in government while also moving towards a post-secular style of governance.[16]

A. Free Exercise and the United States' Religious Freedom Restoration Act

The 1993 Religious Freedom Restoration Act ("RFRA" or "the Act"), has had a tremendous impact on United States Free Exercise cases.[17] The Act is the culmination of three Supreme Court cases spanning nearly thirty years.[18] The first of these cases, *Sherbert v. Verner*, 374 U.S. 398, 406 (1963), involved a plaintiff (Ms. Sherbert)

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13. S*ee, e.g., Hobby Lobby Stores*, 575 U.S.; *Obergefell*, 576 U.S.; Eternal Word T.V. Network v. Sec'y of Health and Human Servs., 756 F.3d 1339 (11th Cir. 2014); Priests For Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229 (D.C. Cir. 2014) (*cert. granted sub nom.* Roman Catholic Archbishop of Washington v. Burwell, 136 S. Ct. 444, 193 (2015) and *cert. granted sub nom.* Priests for Life v. Dep't of Health & Human Servs., 136 S. Ct. 446, 193 (2015)).

14. *See* Siobhan Mullally & Darren O'Donovan, *Religion in Ireland's 'Public Squares': Education and the Family and Expanding Equality Claims*, PUB. L. 284, 284-86 (2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1649012 (citing the special place of the Catholic Church in Irish government)*; see also* Constitution of Ireland 1937 art. 44 (discussing the free exercise of religion).

15. *See* Mullally & O'Donovan*, supra* note 14*;* Constitution of Ireland 1937 art. 44. (commenting on the borderline establishment of Catholicism in government).

16. *See infra.* Part 1.B (discussing how the Irish government initially included the special place of the Catholic Church in their Constitution and in their social welfare programs has gradually divested itself of the need for Catholic sponsored assistance and has come to broadly separate the interests of Church and State.

17. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2012) (discussing requirements for the court in determining whether a practice has violated religious freedoms)

18. *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963) (stating strict scrutiny requirements); Wisconsin v. Yoder, 406 U.S. 205, 218 (1972) (discussing substantiality requirements); Emp't Div. v. Smith, 494 U.S. 872 (1990) (discussing the definition of "compelling").

who had become a member of the Seventh Day Adventist Church.[19] Two years after her conversion, the Plaintiff's employer implemented a six-day work week and tried to put her on a Saturday schedule. The Sabbath Ms. Sherbert celebrated, however, was on Saturdays, so she sought an exemption from working.[20] The employer fired Ms. Sherbert because she could not work on Saturdays, and she was subsequently denied unemployment benefits by the state for turning down a viable job opportunity.[21]

Justice Brennan's majority opinion states that the right of religious exercise is a fundamental constitutional right, and as such, it must be strictly scrutinized by the Court to see whether the government has any compelling interest that would justify an infringement of religious practice.[22] An alternative test Justice Brennan considered was whether any proposed legal bar to free exercise had a "rational relationship" to an existing state interest.[23] This test, useful in other situations of constitutional analysis, was immediately discarded by Justice Brennan because it did not adequately protect the notion of free exercise.[24] After these considerations, the Court established the three prongs of the *Sherbert* Test by asking whether the government placed a burden on the individual's free exercise of religion. If the answer is yes, then the government must apply a strict scrutiny analysis by asking the second prong of whether there is a compelling reason for this burden on free exercise. The government must then continue with the third prong of

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19. *See Sherbert*, 374 U.S. at 406 (creating the initial test); *see also* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2012) (utilizing the *Sherbert* test).

20. *Sherbert*, 374 U.S. at n.1.

21. *Id.*

22. *See Sherbert*, 374 U.S. at 406 (stating the need for a compelling interest and a narrowly tailored law in Free Exercise cases); *see also* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (stating that there needs to be a narrower scope when reviewing legislation appears to specifically violate the Constitution. This test is referred to as "strict scrutiny").

23. *See Sherbert*, 374 U.S. at 406 (requiring both a compelling state interest and a narrow interpretation on the law); *see also* Lochner v. New York, 198 U.S. 45, 75 (1905) (instituting a test of rational relationship).

24. *See Sherbert*, 374 U.S. at 406 (requiring both a compelling state interest and a narrow interpretation on the law). *Compare Lochner*, 198 U.S. 45, 75 (1905) *with Carolene Products Co.*, 304 U.S. at 152 n.4 (outlining two of the bases for the Supreme Court's analysis for Constitutional rights questions: rational relationship to a state interest (*Lochner*) and strictly scrutinizing something that infringes on a fundamental right (*Caroline Products*)).

determining whether the imposition is narrowly tailored so as to limit the burden.[25]

In *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972), the Court addressed a proposed statute that would require all children to receive secondary school education.[26] The Amish traditionally removed their children from school after eighth grade due to both practical and religious reasons.[27] This clash resulted in a challenge to the new statute.[28]

The Court was ultimately forced to distinguish the difference between a religious practice — which would enjoy constitutional protection — from what is simply considered to be a way of life.[29] The Court acknowledged that while both are important to citizens, the United States Constitution only protects Free Exercise of religion.[30] The facts of *Yoder* were exceptionally important because the Amish lifestyle is directly tied to their religion, making it nearly impossible to separate the two.[31] By analyzing what would specifically constitute a religious practice the court was able to determine the elements necessary to show how religious practice mandates a moral or lifestyle disposition as opposed to a moral or lifestyle disposition unsupported by religious practice.[32]

For just under twenty years, the Court decided Free Exercise claims using the *Sherbert* and *Yoder* tests, implementing strict scrutiny and looking for demonstrable evidence as to the substantial

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25. *Compare Sherbert*, 374 U.S. at 398, 406 (1963) (creating the initial test) *with* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2012) (utilizing the *Sherbert* test).

26. Wisconsin v. Yoder, 406 U.S. 205, 218 (1972) (detailing substantiality requirements for religious practice).

27. *See generally id.*

28. *See generally id.*

29. *See id.* at 216 (stating that "if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority . . . their claims would not rest on a religious basis").

30. *See* U.S. CONST amend. I (granting a Constitutional protection to the exercise of religion); *see also Yoder*, 406 U.S. at 215-16 (noting that Religious Exercise is protected, and that sometimes a way of life is extracted from religion, but also noting religious practice and lifestyle are decidedly different things).

31. *See* U.S. CONST. amend. I; *see also Yoder*, 406 U.S. at 215-16.

32. *See generally Yoder*, 406 U.S. at 217-19 (noting that a substantial religious belief that influences the community's lifestyle or moral practice can be demonstrated through empirical evidence); *see, e.g.,* Brandt v. Burwell, 43 F.Supp.3d 462 (2014) (detailing the use of an Encyclical to prove religious belief).

belief of the affected religious practice.[33] *Employment Division v. Smith* altered the governmental requirement of justifying burdens on religious exercise and was the primary reason for the creation of RFRA.[34] In *Smith*, the Court attempted to define what constitutes a compelling interest in Free Exercise claims, and asked whether there should be any limitations to determining a compelling interest.[35]

Smith involved a Native American plaintiff using peyote in religious practice, which resulted in the denial of unemployment benefits.[36] The Court held that a religiously neutral law may burden religious practice without violating the spirit of the Free Exercise Clause of the First Amendment.[37] The Court justified the limitation on free exercise by noting that any true compelling interest analysis would only become muddled in inter-religious conflicts and therefore serve only to cause anarchy in society.[38]

As a direct response to EEOC v. Smith, the United States Congress passed RFRA in 1993.[39] RFRA provided that laws designed to be "neutral" towards religion may nonetheless risk burdening religious exercise.[40] RFRA was Congress' means of overturning the Supreme Court through the legislative process by declaring that the "compelling interest test" previously set forth by the Court in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), would be strictly adhered to and applied in all cases

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33. *See* Sherbert v. Verner, 374 U.S. 398, 406-09 (1963) (using strict scrutiny); *see also Yoder*, 406 U.S. at 228-29 (defining substantial belief).

34. *See* Employment Div. Dep't of Hum. Res. of Or v. Smith, 494 U.S. 872, 881-85 (1990) (ruling that religiously neutral laws, as in laws that do not otherwise mention religious practice, don't necessarily violate the Free Exercise Clause.); *see also* U.S. CONST. amend. I.

35. *Smith*, 494 U.S. at 881-85.

36. *Id.* at 874.

37. *Id.* at 881-85.

38. *See id.* (placing much added emphasis on the anarchical nature of examining all religious differences under a blanket compelling interest requirement).

39. *See* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2012); *see also 42 U.S. Code Chapter 21B Religious Freedom Restoration*, LEGAL INFO. INST. https://www.law.cornell.edu/uscode/text/42/chapter-21B (stating that Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except where a burdening religious exercise is (1) in furtherance of a compelling governmental interest and (2) is the least restrictive means of furthering that compelling governmental interest. This has given rise to a three-prong test: (1) whether religious exercise is substantially burdened, (2) there is a compelling state interest being furthered, and (3) that the least restrictive means is being used to further the compelling interest).

40. *See* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2012)

where the free exercise of religion is substantially burdened, without exception.[41]

Congress defined what constitutes a "religious belief" by specifically referring back to both *Yoder* and *Sherbert*.[42] The first challenge to RFRA came in 1997 when the Supreme Court held that the Act exceeded Congress' power under the Fourteenth Amendment.[43] The Court reasoned that RFRA was too broad of an intrusion into the traditional realm of the states to govern and regulate for the health and welfare of their residents in certain situations.[44] Three years later, however, Congress passed the Religious Land Use and Institutionalized Persons Act ("RLUIPA").[45] RLUIPA provides:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden . . . is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest.[46]

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41. *Compare* Sherbert v. Verner, 374 U.S. 398, 406 (1963) (requiring demonstration of such a compelling interest and narrow tailoring in all Free Exercise cases where a religious person was substantially burdened by a law) *with Smith*, 494 U.S. at 888 (stating that the adoption of a true compelling interest test would lead to anarchy).

42. *See* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2012) (stating that a government shall not "*substantially burden"* the exercise of religion); *see, e.g.,* Wisconsin v. Yoder, 406 U.S. 205 (1972) (examining how to consider a proposed substantial belief).

43. *See* City of Boerne v. Flores, 521 U.S. 507, 508-09 (1997) (stating that the RFRA alters the meaning of the Free Exercise Clause in a way that the Fourteenth Amendment does not permit).

44. *See id.* (relaying that the Bishop in the region sought to expand his Church grounds. Local zoning laws prohibited this, and thus the Bishop filed suit stating that this law substantially burdened the free exercise of Religion. The holding in this case meant there were limitations on the RFRA but only with regard to zoning); *see also* Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (examining the notion that there should be a dialogue between people in the United States created by the Free Exercise Clause, but that the State has a duty to remain outside of this dialogue).

45. *See* The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (2014) (stating that Churches and other Religious institutions could avoid otherwise burdensome zoning laws. RLUIPA is hereinafter included in all references to the RFRA because it took the one aspect of the RFRA deemed unconstitutional and found a Constitutional basis to enforce it); *see also* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2012) (stating the original language of the RFRA).

46. *See* The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (2012) (reiterating the language of the RFRA); *see also* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2012) (for the RFRA's original language).

According to RLUIPA, even where the land use is one of general acceptance, such as a zoning law, a religious burden can still be placed upon the individual.[47] The passage of RLUIPA once again overturned the Supreme Court on the issue of religious freedom by having the effect of restoring RFRA to full potency.[48]

The attention and care that must be taken regarding matters of religion, along with the clear disagreement on the interpretation of free exercise between the Legislative and Judicial branches, continues to keep the United States from being able to consistently and completely separate a person's religious views from laws meant to benefit society as a whole.[49] Justices must now be more open to religious discussion, which also explains why disputes grounded in religious reasoning are attracting much more attention in the courts.[50] The attention given to these claims by courts and the media indicates a sensitivity towards the religious argument, and the judiciary's need to analyze the substantiality of religion-based arguments in order to determine if they fall in the purview of protected acts.[51]

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47. *See* The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (2012) (finding an alternative basis, the Commerce Clause, to permit the exact same protections of the RFRA); *see also City of Boerne*, 521 U.S. at 512-14 (discussing the basis of the authority for the original RFRA as too broad).

48. *See* The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (2012); *see also City of Boerne*, 521 U.S. at 512-14.

49. *See* The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (2012); *see also City of Boerne*, 521 U.S. at 512-14.

50. *See* Robert Barnes, *The Justices Beliefs Affect How Others Approach Them,* MOMENT (Jan. 2015), http://www.momentmag.com/symposium-religion-supreme-court/ (examining the notion that people tailor arguments with a Justice's beliefs in mind); *see also* Lyle Deniston, *The Justices' Values are Influenced by Religion,* MOMENT (Jan. 2015), http://www.momentmag.com/symposium-religion-supreme-court/ (examining the notion that religious influence is not so separable from a Justice's decision making).

51. *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (supporting the notion that there should be a dialogue between people in the United States by the Free Exercise Clause, but that the State has a duty to remain outside of this dialogue); *see also* Steve Bennen, *Kim Davis Finds a New Home in the GOP*, THEMADDOWBLOG (Sept. 28, 2015, 10:40 AM), http://www.msnbc.com/rachel-maddow-show/kim-davis-finds-new-home-the-gop (noting the idea that that religion and religious morality help shape the political beliefs of certain people in the United States).

B. Historical Background of Religious Freedom in Ireland

In Ireland, religion has always been important to the identity of the people.[52] Bunreacht na hEireann, the Constitution of Ireland, initially recognized certain enumerated religious practices, specifically:

> The State recognize[d] the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens. The State also recognize[d] the Church of Ireland, the Presbyterian Church in Ireland, the Methodist Church in Ireland, the Religious Society of Friends in Ireland, as well as the Jewish Congregations and the other religious denominations existing in Ireland at the date of the coming into operation of this Constitution.[53]

The Catholic Church enjoyed great deference by the government given its "special place" for nearly forty years before the Fifth Amendment to the Constitution Act removed the above clause from the Irish Constitution in 1972.[54] This may have been due, in part, to Ireland's preparation to sign the Treaty of Accession in 1973, which allowed Ireland to join the European Union.[55] Around this same time,

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52. *See generally Religion and Society*, ASK ABOUT IR., http://www.askaboutireland.ie/reading-room/history-heritage/pages-in-history/Ireland%20in%201904/religion-and-society/ (describing the heavy role religion and subsequent religious social services played in the development of the Irish nation); *see also* J.R. Walsh, *Religion: The Irish Experience* (Nov. 30, 1999) http://www.catholicireland.net/religion-the-irish-experience/ (describing a surveying method by which modern Irish people experience or do not experience faith, in contrast to the traditional notion of the role of the Church in the nation).

53. *See* Fifth Amendment to the Constitution Act 1972 (SI 5/1972) (Ir.) http://www.irishstatutebook.ie/1972/en/act/cam/0005/sec0001.html#sec1; *see also Constitution of Ireland - Bunreacht na hÉireann*, ROINN AN TAOISIGH, DEP'T OF THE TAOISEACH, http://www.taoiseach.gov.ie/eng/Historical_Information/The_Constitution/ (outlining the particulars of the Amendment). Ireland has two official languages, English and Irish. The Irish Constitution is written in both languages. For a distinction between the Irish Constitution and the United States Constitution, I use the Irish name for the Irish Constitution throughout the body of the Comment, however I cite to the Constitution using the English citation for ease of understanding.

54. *See* Fifth Amendment to the Constitution Act 1972 (SI 5/1972) (Ir.) http://www.irishstatutebook.ie/1972/en/act/cam/0005/sec0001.html#sec1.

55. *See Ireland in the EU*, EUR. COMM'N (Mar. 22, 2016) http://ec.europa.eu/ireland/ireland_in_the_eu/index1_en.htm (looking at Ireland's attempts to enter the Union.); *see also* Treaty Concerning the Accession of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community, Mar. 27,

the Irish courts' reasoning was also influenced by increasing social pressures to change laws and policies regarding the State's conservative religious values.[56]

The first challenge to Bunreacht na hEireann came in the 1964 matter of *Ryan v. Attorney General*.[57] While not a religious issue, *Ryan* established a rights-based analysis that has become pertinent in examining religious exercise claims.[58] At the time, the complainant sued the government for adding fluoride to the water supply, stating it should be her right to decide whether she wants to drink water with fluoride in it or not.[59] The Supreme Court held that Bunreacht na hEireann grants two types of rights: the private rights given to the individual, and the public rights of the State to care for its people.[60] The decision by the state to add fluoride to the water supply did not affect the private right of the family to be reared according to how Ms. Ryan saw fit, but it also did not impose an affirmative duty for the Irish Government to remove fluoride from water sources.[61]

It is with this idea of the distinction between private and public rights in mind that the Court of *McGee v. Attorney General* discussed the limitations of a criminal law barring access to contraceptives in 1974.[62] The Court examined whether Mrs. McGee, a married woman with four children, should have the ability to access contraceptives solely on the basis of an asserted need to preserve her health.[63] The

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1972 O.J. L 73/15, at 5 (outlining the provisions the countries would adopt in entering the European Union).

56. *See infra* Part II.B (discussing specifics on methods employed by the Irish government when religious freedom is at issue); *see also* Timothy J. White*, Catholicism and Nationalism in Ireland: From Fusion in the 19th Century to Separation in the 21st Century*, 4(1) WESTMINSTER PAPERS IN COMMC'N & CULTURE 47, 47-64 (2007) https://www.researchgate.net/publication/273381464_Catholicism_and_Nationalism_in_Ireland_From_Fusion_in_the_19th_Century_to_Separation_in_the_21st_Century (discussing the history of secularization in Ireland).

57. Ryan v. Att'y Gen. [1965] IR 294 (Ir.) (creating two types of Constitutional rights inherent in the Bunreacht).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. McGee v. Att'y Gen. [1974] IR 284 (Ir.).

63. *See id.* (Mrs. McGee had four children already with her husband and was advised by a doctor that becoming pregnant again would severely jeopardize her life. Her doctor prescribed a spermicidal lubricant and use of a diaphragm. The right to access these was subsequently barred by the state for its Catholic influenced ban of contraceptives).

Irish Supreme Court ruled that, under Bunreacht na hEireann, marital privacy is considered to be one of the private rights granted protection and therefore the nature of permitting a married couple to use contraceptives was an issue of private morality to be determined between the husband and wife.[64] The Court reasoned that while God was the source of all authority, humans have different religious denominations that help to formulate different beliefs and views on morality; this consequently has an effect on areas such as procreation.[65]

Even after these events, religious influence on the State still remains an important part of Irish identity.[66] Bunreacht na hEireann continues to provide that "[t]he State acknowledge that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion . . . [but shall be] subject to public order and morality."[67] Religion has been, and in some regards continues to be intrinsic to the identity of the Republic of Ireland.[68]

For example, it was not until 1996 that the Irish Government amended Bunreacht na hEireann to permit married couples to divorce.[69] The ban on divorce had been a "direct product of the Catholic Church's strong political influence in Ireland, [and demonstrated] the role of the Catholic Church in the cultural identity of the Irish State."[70] In 2009, the Irish government became a party to

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64. *Id.*

65. *See* Paul W. Butler & David L. Gregory, *supra* note *10; see also* McGee v. Att'y Gen. [1974] IR 284 (Ir.) (recognizing that the personal right to marital privacy in the home superseded the public religious right).

66. See Constitution of Ireland 1937 art. 44, https://www.constitution.ie/Documents/Bhunreacht_na_hEireann_web.pdf.

67. *See id.*

68. *See* TIM P. COOGAN, IRELAND IN THE TWENTIETH CENTURY 709 (2003) (discussing the development of the Irish Nation); *see generally* Butler and Gregory, *supra* note 65 (discussing Ireland's religious background).

69. *See* Jackson N. Maogoto & Helena A. Anolak, *Legalising Divorce in the Republic of Ireland: A Canonical Harness to the Legal Liberation of the Right to Marriage Among the Disenfranchised,* L. & RELIGION EJOURNAL *(*2009*)*, http://ssrn.com/abstract=1465343 (arguing that the disenfranchisement of religion has effected the identity on the Irish People); s*ee also* Ronan Keane, *Reflections on the Irish Constitution*, 5-7 RADHARC 147 (2004-2006) (discussing the evolution of Bunreacht na hEireann).

70. *See* Maogoto & Anolak, *supra* note 70 (discussing the influence of Catholicism); *see generally* Maurice Curtis, *The Splendid Cause: The Catholic Action Movement in Ireland*. (2008) (discussing the Catholic actions in politics in Ireland).

the European Union's Treaty of Lisbon, subject to the condition that "nothing in that treaty would affect the protections afforded to the rights to life, family, and education in the Irish Constitution."[71] This vehemence for religious protections inherent in those rights shape the religious discourse in Ireland.[72]

II. PRESENT STATUS OF RELIGIOUS FREEDOM IN GOVERNMENT

Both the United States and Ireland have constitutional provisions granting religious protection.[73] Each country developed differing understandings as to the extent of this protection.[74] Part II.A discusses the extent of free exercise afforded to corporations and other large organizations in the United States. Part II.B discusses arguments against the idea of extending free exercise to these United States corporations, paying attention to the area of employment and civil rights law. Part II.C analyzes the popular discussion on religious free exercise claims by individuals in the United States.[75] This is contrasted by the Irish understanding on religious free exercise discussed in Part II.D. Part II.E discusses the involvement of the European Community in evoking change on conservative religious-based policies in Ireland. Part II.F describes how Ireland is able to avoid many of the problems the United States faces through its constitutional language and an understanding that religious ideologies are inherently private and should be given voice only where there is an overwhelming opinion on the morality of the issue.[76]

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71. *See* Mullally & O'Donovan, *supra* note *14,* at 284-86 (discussing the importance of these Catholic values); *see also* TREATY OF LISBON AMENDING THE TREATY ON EUROPEAN UNION AND THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY (2007/C 306/01) (discussing Ireland's agreement to subject itself to the Human Rights standards of the European Union with reservations on certain areas).

72. *See* Mullally & O'Donovan, *supra* note 14, at 284-86 (discussing the evolution of the Catholic State); *see also* Constitution of Ireland 1937 art. 44 (granting the Free Exercise to worship as one sees fit subject to the conditions of public order and morality).

73. *Compare* U.S. CONST. amend. I *with* Constitution of Ireland 1937 art. 44 (noting the free exercise of religion clauses in each).

74. *See supra* note 73 and accompanying text (emphasizing the difference between US absolute Freedom versus Ireland's Freedom subject to Public Order and Morality).

75. *See* U.S. CONST. amend. I (granting free exercise); *see also* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (extending free exercise to corporations).

76. *See* Constitution of Ireland 1937 art. 44; *see also Same-Sex Marriage Referendum*, *supra* note 6 (ensconcing marriage equality into Irish Law through popular referendum).

A. Religious Freedom in the United States

The United States broadly guarantees the free exercise of religion.[77] *Burwell v. Hobby Lobby Stores*, *Inc*., 134 S. Ct. 2751 (2014), extended the protection of religious expression to include closely held corporations.[78] As a result, corporations use this religious freedom to object to supplying certain benefits to its employees due to a deeply-held religious belief.[79] The Court stated that while the Affordable Care Act mandates preventive care and screening for women, a religious exemption can exist.[80] The Court then determined that the Dictionary Act treats corporations as people under RFRA, which ultimately creates a conflict between the corporation's religious interests and the employees' health, religious, and employment interests.[81]

The Court uses the standards set forth in RFRA to assess the validity of a corporation's assertion of a religious belief.[82] The Court must first determine if the religious belief being infringed upon is a substantial one; second, determine whether the state's interest in restricting the exercise is compelling; and third, ensure that the government's actions are the least restrictive means to accomplishing

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77. *See* U.S. CONST. amend. I; *see also* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2012) (protecting rights of religious expression and exercise).

78. *See generally Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2751 (stating that a closely held corporation is a person under the Dictionary Act, which permits these corporations to not be burdened for their substantially held beliefs); *see also infra* Part II (examining decisions in the Circuit Courts that expand this notion on Free Exercise under the RFRA).

79. *See generally Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2759 (stating that the opinion looked only at where the exercise of religion should be burdened under the RFRA, not whether corporations, specifically, should be burdened); *see also Hobby Lobby Case: Court Curbs Contraception Mandate*, BBC NEWS (June 30, 2014), http://www.bbc.com/news/28093756 (stating the rule from *Hobby Lobby* and potential future issues).

80. *See Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2762 (describing the fact that unless an entity fits into an exemption, the Affordable Care Act mandates the entity supply contraceptive coverage for women); *see also Hobby Lobby Case: Court Curbs Contraception Mandate*, BBC NEWS (June 30, 2014), http://www.bbc.com/news/28093756 (stating mandate for contraceptive coverage and describing the views of conservative religious leaders as one of the most significant victories for religious freedom in America).

81. The Court stated that there is a very difficult question regarding an act that "has the effect of enabling or facilitating the commission of an immoral act by another." *See Hobby Lobby*, 134 S. Ct. at 2778; *see also* Words Denoting Number, Gender, and So Forth, 1 U.S.C. § 1 (2012) (stating that corporations are considered people for purposes of the laws of the United States).

82. *See* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2012) (discussing the three prongs); *see also* Wisconsin v. Yoder, 406 U.S. 205 (1972) (defining substantial belief).

that state interest.[83] This test applies traditional strict scrutiny to determine the strength of the governmental interest with one notable exception: while the test contains both a requirement of substantiality as to the proffered belief and a requirement that any subsequent infringement on that belief places the least restrictive means on the religious practice, the courts cannot first frame the issue by asking whether or not the law has been narrowly tailored to that issue.[84]

The government must give quantifiable cost-based estimates of the particular measure, then compare those costs with the level of restriction to religious liberty.[85] Because neither Congress nor the Supreme Court has yet to define its parameters,[86] this has had far-reaching implications on the United States Circuit Courts as they are left to interpret when the government violates the least restrictive means test.[87]

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83. *See* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2012) (stating that the RFRA ensures that any intrusion into Religious Liberty is the least restrictive means afforded by government); *see also Hobby Lobby Stores, Inc.*, 134 S. Ct. (stating that filing for an exemption may in fact be the least restrictive means in this case, thereby exempting the corporation from having to provide care and allowing employees to receive the same care from the government).

84. *See* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2012) (stating that the RFRA ensures that any intrusion into Religious Liberty is the least restrictive means afforded by government); *see also Hobby Lobby Stores, Inc.*, 134 S. Ct. (showing that the government is not using the least restrictive means, and that the belief being restricted is substantial to the faith through empirical data, and that proof of that substantiality would constitute an absolute defense to the State action).

85. *See Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2780 (stating that, first, there must be a compelling state interest and, second, the government must show that it is furthering that interest through the least restrictive means, even where the costs of accomplishing those means are not necessarily the least expensive for the government); *see also* David Post, *What's Wrong With the Hobby Lobby Decision*, WASH. POST, (July 9, 2014) (posing the essential question of how a corporation can express any means of religious belief when it does not express the qualities of people who practice that religious belief).

86. *See Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2782 (stating that "[The Department of Health and Human Services] itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs."). *But see* Tom Howell Jr., *Obama Admin's attempt to follow Supreme Court's Birth Control Ruling Pleases Few*, WASH. TIMES (July 15, 2015), http://www.washingtontimes.com/news/2015/jul/10/obama-skirts-supreme-court-birth-control-ruling/?page=all (stating that, subsequent to some of the proceeding cases, President Obama issued an Executive Order changing the requirement for organizations with religious objections to healthcare to afford them the opportunity to voice their conscientious objection, which serves to give the government the notice that Form 700 previously did).

87. The eleven Circuit Courts of Appeals hear cases from the United States Federal District Court(s) of each state. Each Circuit Court is in charge of a different geographic area of

In *Eternal Word T.V. Network v. Secretary of Health and Human Services* ("*EWTN*"), 756 F.3d 1339 (11th Cir. Ala. 2014) the concurring judges stated that even minimal participation in an act that substantially violates a firmly-held religious belief was not allowed under RFRA's least restrictive means test.[88] In *EWTN*, the minimal participation involved was filing a form (Form 700) notifying the government that the organization would not cover contraceptives for its employees.[89] Upon receipt of the form, the government would then have a third party appointed to administer those same health benefits contested by the company.[90] This was contrary to dicta in the *Hobby Lobby* opinion, which noted that the notice requirement of Form 700 did not necessarily violate the least restrictive means of governmental intrusion.[91]

Judge Pryor's concurrence in *EWTN* stressed that the government already exempted eligible organizations, who themselves may not have filed Form 700, from the healthcare law.[92] The government's definition of an eligible organization is "a non-profit organization that holds itself out as religious and opposes some or all

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the country. *See Geographic Boundaries of the United States Courts of Appeals and United States District Courts*, U.S. COURTS, http://www.uscourts.gov/uscourts/images/CircuitMap.pdf.

88. *See* Eternal Word TV Network, Inc. v. Sec'y, U.S. HHS, 756 F.3d 1339 (11th Cir. 2014) (Pryor, J., concurring); *cf.* Howell, *supra* note 87 (stating that, as of July 2015, President Obama required organizations declaring a religious exemption to write a letter to the Department of Health and Human Services stating what their beliefs were and why they will not cover contraception. This places the government on notice in a way that prevents corporations from filing an objectionable form).

89. *See Eternal Word TV Network, Inc*, 756 F.3d at 1339 (stating that filing Form 700 required the corporation to turn a blind eye to the violation of their religious beliefs). *Cf.* Howell, *supra* note 87 (filing conscientious objector letter would seemingly serve to fulfill Judge Pryor's fears)..

90. *See Eternal Word TV Network, Inc*, 756 F.3d at 1339; *see also* Thomas Reese, *Supreme Court: Accommodation, Yes*; *Form 700, No*, NAT'L CATHOLIC REP. (July 7, 2014) (describing the refusal of religiously affiliated organizations to participate in the government mandated healthcare program by not filing Form 700); *see also* Howell., *supra* note 87.

91. *Compare Eternal Word TV Network, Inc.*, 756 F.3d at 1339 (stating any method of allowing the government to supply the healthcare violates this belief and therefore the least restrictive means is to not supply it) *with Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2779-80 (stating that filing the Form would not necessarily violate the least restrictive means analysis).

92. *See Eternal Word TV Network, Inc.*, 756 F.3d at 1342. *But see* Howell, *supra* note 87 (looking at the fact that President Obama changed the Form 700 requirement to that of a conscientious objector letter).

of the coverage based on religious exemptions."[93] Judge Pryor failed to adhere to the plain meaning of the exception, which grants a religious exemption only to non-profit religious organizations and does not mention any exemption for for-profit corporations.[94]

Judge Pryor's interpretation of the *Hobby Lobby* analysis can easily be contrasted with the Fifth Circuit ruling in *McAllen Grace Brethren Church v. Salazar*, 756 F.3d 1339 (5th Cir. 2014).[95] In *McAllen*, plaintiffs sued the government for the right to possess eagle feathers for use during religious ceremonies.[96] The existing law stated that the government may issue permits to members of recognized Native American tribes who are believers in the tribal religious practices.[97] The Court then examined two of the three RFRA prongs by requiring that the government action "(1) advance a compelling government interest and (2) is the least restrictive means of furthering that interest."[98] The Court first held that there is a compelling interest in protecting the bald and golden eagle as United States national symbols; second, it held that despite this interest, there is no reason to

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93. *See Eternal Word TV Network, Inc.*, 756 F.3d at 1342. *But see* Howell, *supra* note 87.

94. *Id.*

95. *Compare Eternal Word TV Network, Inc.*, 756 F.3d at 1342 (finding a least restrictive means has been violated by filing Form 700) *with* McAllen Grace Brethren Church v. Salazar, 764 F.3d 465 (5th Cir. 2014) [hereinafter McAllen] (declining to examine whether a substantial wait time of six months to three and one half years to acquire ceremonial objects was the least restrictive means).

96. *See McAllen*, 764 F.3d at 469 (stating plaintiffs were practitioners of a Native American religion that used eagle feathers in its services); *see also* Bald and Golden Eagles, 16 U.S.C. § 668 (2012) (stating that Bald and Golden Eagles are protected creatures, and the only people permitted to possess Eagle feathers were members of Native American tribes, for use in their ritual practices).

97. *See McAllen*, 764 F.3d at 469; *see also* Bald and Golden Eagles, 16 U.S.C. 668-668c (2012) (stating that Bald and Golden Eagles are protected creatures, and the only people permitted to possess Eagle feathers were members of Native American tribes, for use in their ritual practices).

98. *See McAllen*, 764 F.3d at 469 (relying on the RFRA test); *see also* Definitions, 42 U.S.C. § 2000e (2012) (giving the three prongs of the test used in McAllen. The first prong is that there is a substantially held religious belief, the second prong is that there is a compelling government interest, and the third prong is that the least restrictive means affecting religion to further that state interest has been employed. Only then will the action be legal under the RFRA).

keep people in non-federally recognized Native American tribes from possessing bird feathers for use in religious ceremonies.[99]

In *McAllen*, the Court made the distinction that while not being allowed to file the proper forms constitutes a substantial bar to the free exercise of religion, an extended waiting period to obtain these parts for religious use might not constitute a substantial impediment to religion.[100] This illustrates that while a compelling interest was demonstrated, the most the court was willing to do was allow non-recognized Native tribes access to the waitlist rather than attempt to impose a lesser restrictive measure allowing for the timely distribution of ceremonial feathers.[101] This interpretation of Free Exercise was more narrowly tailored, and the court avoided the issue as to whether the way in which the religious items were supplied was the least restrictive means to facilitate the religious practice.[102]

The idea of what may constitute a burden on the free exercise of religion was complicated in *Brandt v. Burwell*, 43 F.Supp.3d 462 (2014), which dealt with several religious corporations similar to those in *EWTN*.[103] The difference is that *Brandt* involved organizations falling under the umbrella of Church governance. The court made its decision, in part, by permitting Ecumenical papers and a Papal decree to be admitted as evidence of the hundreds of years of Catholic teaching.[104] The Church argued that this historical practice permits it to infringe upon the liberty of individuals that were

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99. *See McAllen*, 764 F.3d at 473 (citing to the principle of religious freedom); *see also* Definitions, 42 U.S.C. § 2000e (2012) (stating that the government shall not infringe upon a substantially held religious belief).

100. *See McAllen*, 764 F.3d at 470 (stating that there is a six month waiting list for a practitioner to receive feathers for their ceremonies and a waiting period of three and one half years for an entire bird); *see also National Eagle Repository*, U.S. FISH & WILDLIFE SERV.. http://www.fws.gov/mountain-prairie/law/eagle/ (discussing an amendment to the Act allowing bird parts to be imported) (Mar. 13, 2016).

101. *See McAllen*, 764 F.3d at 470e (adding these non-recognized tribes to the waiting list for bird parts); *see also National Eagle Repository*, *supra* note 100 (discussing an amendment to the Act allowing bird parts to be imported).

102. *See supra* note 101 and accompanying text.

103. *Compare* Brandt v. Burwell, 43 F.Supp.3d 462 (2014) (examining organizations run by an Archdiocese who pay into a community trust for health coverage, which is also run by the archdiocese) *with* Eternal Word TV Network, Inc. v. Sec'y, U.S. HHS, 756 F.3d 1339, 1342 (11th Cir. 2014) (involving a private for-profit corporation not affiliated with a diocese).

104. The Plaintiffs' Exhibit 4 consisted of an "Apostolic Letter Issued 'Motu Proprio' on the Supreme Pontiff Benedict XVI on the Service of Charity." *See Brandt,* 43 F.Supp.3d at 469.

employees of the Church's charitable organizations.[105] In this case, the archdiocese directly managed and paid health benefits through a private trust, and did not utilize a third party insurance company.[106] This turned the archdiocese into a healthcare provider for its own employees, which potentially created a separate issue under the United States' Constitution's Establishment Clause.[107] In this context, it is plausible that filing for a religious healthcare exemption could not only violate a substantially held religious belief, but also may not be the least restrictive means for furthering the government interest.[108] This is distinguishable from *EWTN* because *Brandt* involved a concrete affiliation between the corporations, non-profit organizations, and the Catholic Church's diocese – which directly governed these organizations – whereas in *EWTN*, the corporation holding itself out to be religious and Catholic was a standalone organization not governed by a diocese.[109]

The trend of merely allowing any organization to be granted the same protections as a church was interrupted in November 2014, when a limitation was placed on the ability for an unaffiliated religious organization to object to filing the healthcare forms.[110] In

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105. *Id.* (utilizing the Encyclical to show a history of long-standing belief for all practitioners of Catholicism, and an expectation that people follow the teaching).

106. *Compare id.* (noting the idea of paying into a private, Church-run trust) *with Eternal Word TV Network, Inc.*, 756 F.3d at 1342 (utilizing a third party insurance carrier).

107. U.S. CONST. amend. I (stating that the United States will not support an established religion. The fact that the Church has handled all of their healthcare needs internally by having its employees pay into and out of a trust fund specifically for Catholic-based healthcare may violate the idea of a separation of Church and State); *see also Brandt*, 43 F.Supp.3d at 466-67(privately sourcing its coverage).

108. *Compare Brandt*, 43 F.Supp.3d at 469 (stating that after hearing testimony, including Catholic doctrine, a substantial belief was met and the form was not the least restrictive means of engaging in the government interest) *with* McAllen Grace Brethren Church v. Salazar, 764 F.3d 465, 469 (5th Cir. 2014) (in which the government declared that after filing the paperwork, the court need not rule on whether the government was in fact engaging in the least restrictive means); *see also* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2012) (requiring the government to have a compelling reason to infringe on Free Exercise and to use the least restrictive means to meet that goal).

109. *Compare Brandt*, 43 F.Supp.3d at 466-67 (involving organizations that were governed directly by the Archdiocese) *with* Eternal Word TV Network, Inc. v. Sec'y, U.S. HHS, 756 F.3d 1339, 1342 (11th Cir. 2014) (granting exemptions normally permitted to an archdiocese to a non-affiliated for-profit corporation).

110. *See* Priests For Life v. U.S. Dep't of Health & Hum. Servs. 772 F.3d 229 (D.C. Cir. 2014) (*cert. granted sub nom.*); Roman Catholic Archbishop of Washington v. Burwell, 136 S. Ct. 444, 193 (2015) (*cert. granted sub nom*.); Priests for Life v. Dep't of Health & Hum. Servs., 136 S. Ct. 446, 193 (2015) (noting that the filing of conscientious objection

Priests For Life v. U.S. Dep't of Health & Human Services, 772 F.3d 229 (D.C. Cir. 2014) the court found that non-profit organizations affiliated with a religious group are nonetheless required to follow the regulations for opting out of the Health Care provisions.[111] This was a drastically different ruling from those in other circuits and gives a minor indication of the government's ability to estop certain assertions that the least restrictive means to accomplish the compelling interest of placing a restriction on a certain religious practice or group, the final element of the RFRA test, has not been met.[112]

B. Arguments Against Corporate Inclusion in United States' Religious Rights

Hobby Lobby granted closely held corporations the ability to exercise the religious rights of their owners as though the corporation itself was a practitioner of the faith.[113] Justice Ginsburg's dissent in *Hobby Lobby* cites to cases in which the court held that "accommodations to religious observances . . . must not significantly impinge on the interests of third parties."[114] This understanding of the freedom of religion in the United States comports with the traditional understanding of the Free Exercise Clause of the Constitution.[115] The dissent argues that the section of RFRA regarding government actions that "substantially burden a

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forms was a de minimus inconvenience for the groups); *see also* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2012) (requiring the government use the least restrictive means to accomplish its interests).

111. *See supra* note 110 and accompanying text.

112. *See id.*

113. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751,2759 (2014) (granting corporations the power to exercise religious beliefs); *see also supra* Part II.B (detailing the instances of corporate exercise of religious belief in various situations across the circuits).

114. *See Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2790 n.8 (Ginsburg, J., dissenting) (understanding Free Exercise in a manner consistent with the Irish understanding of Free Exercise); *see also* Constitution of Ireland 1937 art. 44 (subjecting free exercise to public order and morality requirements).

115. *See Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2791 (citing Zechariah Chafee, *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 957 (1919)) (stating that a person's "right to swing [his] arms ends just where the other man's nose begins"); see also U.S. CONST. amend I. (stating that Congress shall not pass any law establishing or restricting the Free Exercise of Religion).

person's exercise of religion" should not apply to corporations.[116] The Dictionary Act contains a provision that refers to corporations as people; however, it controls "only where context does not indicate otherwise."[117] This case is contextualized in the traditional role of religion in a for-profit corporate setting.[118]

This corporate right to Free Exercise contributes to the friction between employers—who may be entitled to institute policies based on their religious beliefs—and Title VII of the American Civil Rights Act—which protects certain enumerated classes including religious affiliation—from discrimination in the workplace.[119] The Supreme Court held that Title VII protections extend to include employment discrimination as occurring where there has been a reasonable suspicion of religious intolerance when determining a candidate's eligibility to be hired for a job.[120] Future conflict is likely to arise where a corporate entity exerts a religious belief contrary to the belief of an employee,[121] or where a person's lifestyle is contrary to an

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116. *See* Words Denoting Number, Gender, and So Forth, 1 U.S.C. § 1 (2012) (including corporations in the definition of persons); *see also Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2793 (stating that a corporation does not exercise a religion the way a person does).

117. *See* Words Denoting Number, Gender, and So Forth, 1 U.S.C. § 1 (2012) (declaring corporations be interpreted as people); *see also Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2793 (noting that, in this instance, context should indicate otherwise).

118. *See Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2795 (citing 42 U.S.C. §§2000e(b), 2000e-1(a), 2000e-2(a) (2012)) (stating that "Workers who sustain operations of [for-profit] corporations are commonly not drawn from one religious community. Indeed, by law, no religion based criterion can restrict the work force of for-profit corporations.").

119. *See* Definitions, 42 U.S.C. 2000e (2012) (noting that Title VII protects individuals from discrimination based on their status as a member of a protected class. Protected classes include: age, sex, race, gender, and religious affiliation); *see also* Jess Bravin, *Supreme Court Sides With Muslim Abercrombie Job Applicant over Head Scarf*, WALL ST. J. 1 (June 1, 2015), http://www.wsj.com/articles/supreme-court-sides-with-muslim-abercrombie-job-applicant-over-head-scarf-1433170999.

120. A headscarf "controversy" has erupted throughout Europe with the influx of many Muslim individuals into countries like Spain, France, and even Ireland. The controversy surrounds permitting Muslim women and girls to wear a veil for school and work. Many jurisdictions have found the hijab acceptable, while more extreme forms of veiling, such as the *niqab or* burka, are not permitted. This could be considered the United States' version of such a controversy. *See* Jess Bravin,*„supra* note 119. *See generally* ,Hilal Elver*, The Headscarf Controversy: Secularism and Freedom of Religion*, FOREIGN AFF. (2012) (advocating for Muslim women who choose to dress in the "symbols of their faith").

121. *See supra* note 120.

employer's religious belief.[122] This effectually incentivizes people to follow a religious way of life—which seems contrary to the idea of the Free Exercise Clause of the First Amendment and to RFRA.[123]

Title VII may be considered a valid exception to the RFRA but it only protects the religious rights of employees who can prove substantial belief contradictory to that of the employer, not those of employees with a moral disposition unrelated to religion.[124] In *EEOC v. Abercrombie and Fitch*, 135 S. Ct. 2028 (2015), the Court held that even a suspicion as to the religion of a person, where a religious accommodation may be requested, violates Title VII.[125] This would have the effect of forcing the court to evaluate, and in some cases to rule upon, the substantiality of the parties' beliefs.[126]

C. Religious Rights of the Individuals Leading to Discussion and Litigation in the United States

Courts have generally recognized certain limitations to the RFRA where there are other, more prevalent, interests involved.[127] *In*

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122. *See id.*; *see also* Wisconsin v. Yoder*,* 406 U.S. 205, 216-18(1972) (discussing the differences between a lifestyle based upon a substantial religious belief from a non-religiously based lifestyle choice).

123. *Compare* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2012) (stating that government may not intrude on a substantially held religious belief) *with* Definitions, 42 U.S.C. § 2000e (2012) (protecting religious beliefs of individuals from employment discrimination); *see also* U.S. CONST. amend. I.

124. Title VII protects against various forms of employment discrimination, including discrimination based on religious practice. *Compare* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2012) (permitting that government may not intrude on a substantially held religious belief) *with* Definitions, 42 U.S.C. § 2000e (2012) (protecting the religious beliefs of individuals from employment discrimination); *see also Yoder,* 406 U.S. at 216-18 (distinguishing between a substantial belief and a lifestyle choice).

125. *See* E.E.O.C. v. Abercrombie & Fitch Stores, Inc*.,* 135 S. Ct. 2028 (2015) (ruling that Abercrombie violated Title VII in anticipating that a hiring candidate would seek an exception to the neutral "looks" policy to wear a headscarf); *see also* Definitions, 42 U.S.C. § 2000e (2012) (stating employers shall not discriminate against employees based on religious grounds).

126. *See, e.g.,* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2797 (2014) (Ginsburg, J., dissenting) (noting that a closely held corporation can have a substantial belief); *see also* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2012) (stating that government will not substantially infringe on the exercise of religion.); *see also* Definitions, 42 U.S.C. § 2000e (2012) (stating employers shall not discriminate against employees based on religious grounds).

127. *See* People v. Jackie H. (In the Interest of L.H.), 2014 IL App (1st) 133252-U, 2014 Ill. App. Unpub. LEXIS 1602 (Ill. App. Ct. 1st Dist. 2014) (discussing the interests of

re L.H., 2014 IL App (1st) 133252-U (2014), describes a substantial public interest in protecting children from dangerous situations even where the dangerous situation is created by the practice of religion.[128] Here, the defendant participated in a religious experience called "light therapy;" this involved a minister praying over the recipient while laying his hands on the recipient. Eventually, this touching progressed to the minister removing the recipient's clothing and ultimately ended with his hands on the recipient's genitals.[129] The evidence in this case supported the conclusion that too much involvement in the church may be harmful to children's development, and therefore, the court's order did not impermissibly infringe on the parental freedom of religion.[130]

The more recent cases on Free Exercise involve disputes on marriage equality.[131] In June 2015, the Supreme Court decided *Obergefell v. Hodges* declaring marriage equality in the United States a fundamental right under the Equal Protection Clause of the Fourteenth Amendment.[132] The majority opinion of *Obergefell* addressed the religious argument against same-sex marriage on two points: first, that people have a valid ground from which to voice a religious objection, and second, that the state should remain outside of such philosophical debates.[133] The Court concluded the legitimacy of the marriage equality argument by referencing the oft-cited religious

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protecting children); *see also* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2012) (setting forth the requirements to be overcome).

128. *See In re L.H.*, 2014 IL App (1st) 133252-U (2014) (holding that the danger to the child outweighed the religious practice).

129. *See id.*

130. *See id.*; *see also* 42 U.S.C. § 2000bb (2012) (stating that the government shall use the least restrictive means to accomplish a compelling interest).

131. *Compare* Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (stating that Free Exercise permits an appropriate discourse) *with* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (permitting businesses to decline benefits based on their religious beliefs). These two cases run the risk of clashing should closely held corporations raise conscientious objections to extending spousal benefits to married homosexual couples.

132. *See Obergefell*, 135 S. Ct. at 2597-99 (stating that marriage equality is a right under our federal government without examining the moral merits); *see also* U.S. CONST. art. XIV (requiring the States to comply with these Equal Protection rulings). *Compare Obergefell*, 135 S. Ct. at 2611-13 (Roberts, C.J., dissenting) (stating that this decision should have been left to be decided by the people) *with Same-Sex Marriage Referendum*, *supra* note 6 (ensconcing marriage equality into Irish Law through popular referendum).

133. *Compare Obergefell*, 135 S. Ct. at 2607 (stating that the State has a duty to protect its citizens) *with* John Paul, XXIII, *supra* note 11 (stating the governance of the State as being different from the laws of God).

debates and asserting that the protections of the First Amendment apply to all people in the United States.[134] The role of the state is to simply grant groups of people the benefit of the rights afforded under the Equal Protection Clauses.[135]

The dissenting Justices in *Obergefell* reasoned that the Court lacked the proper authority to make a decision of this magnitude and that the decision should therefore be left to the people through popular debate, referendum, or through the legislative process.[136] Justice Roberts quoted historical ideas surrounding the development of marriage, and alluded to the changing public opinion in defining marriage as reasoning to allow the process to continue without judicial interference.[137] Justice Scalia added that the Court exhibited great hubris for finding within the Constitution a fundamental right to same-sex marriage, interfering in the democratic process, and taking away the debate on marriage from the people of the United States.[138] Meanwhile, Justice Thomas' dissent discussed the notions of liberty and Due Process as they were historically recognized and how this decision failed to conform to them.[139]

After *Obergefell*, many religiously-affiliated organizations asked the courts to clarify the extent of rights to be afforded to homosexuals regardless of religious objections; this ultimately forces the courts to continue to weigh in on religious matters.[140] The climate surrounding Free Exercise claims post-*Hobby Lobby* and post-*Obergefell,* has led

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134. *See supra* note 133 and accompanying text.

135. *See Obergefell*, 135 S. Ct. at 2607 (stating that marriage equality is a right under our federal government without examining the moral merits); *see also* U.S. CONST. art. XIV (giving all people across all states Equal Protection under the law).

136. *Compare Obergefell*, 135 S. Ct. at 2611 (Roberts, C.J., dissenting) (stating that this decision should be left to the People) *with Same-Sex Marriage Referendum*, *supra* note 6 (stating that Ireland passed same-sex marriage through referendum).

137. *See supra* note 136 and accompanying text.

138. *See Obergefell*, 135 S. Ct. at 2626 (Scalia, J., dissenting) (stating that the Court overextends the meaning of Equal Protection for claims that the Court "really likes").

139. *Id.* at 2631-32 (Thomas, J., dissenting) (arguing against the type of substantive due process rights the Majority employed).

140. *See, e.g.*, Cole v. North Carolina, 2015 U.S. Dist. LEXIS 112478 (Aug. 3, 2015); G.M.M. v. Kimpson, 2015 U.S. Dist. LEXIS 99715 (July 29, 2015); Robert v. UPS Inc., 2015 U.S. Dist. LEXIS 97989 (July 27, 2015); Haas v. S.C. D.M.V., 2015 U.S. Dist. LEXIS 106415 (Aug. 13, 2015); De Leon v. Abbot, 791 F.3d 619 (2015) (involving the subsequent discourse on this issue).

to the current post-secular path in interpreting the understandings of Free Exercise.[141]

D. Religious Freedom in Ireland

Bunreacht na hEireann provides a guarantee for a "person's free profession and the practice of religion of one's choice, subject to the requirements of public order and morality."[142] At first glance, this would appear to limit a person in Ireland from fully expressing their religious beliefs in public.[143] Rather than hinder Free Exercise, these requirements of order and morality are strictly interpreted in order to actively facilitate religious practices and religious ways of life among private persons by limiting the ability of one group of individuals to quash the public practices of another group unless a real harm could result from the practice.[144]

In 1999, the Irish Supreme Court decided in *Murphy v. Independent Radio and Television Commission* that a prohibition on religious advertisement was necessary to prevent the potential for unrest and divisiveness between people, specifically by limiting the potential for inter-religious strife.[145] The Court applied a proportionality test to determine the appropriateness of the action and concluded that the best way to avoid involving the government in

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141. *See supra* notes 131-40 (discussing the litigious environment in which the United States has found itself).

142. *See* Mullally & O'Donovan, *supra* note 14, at 287 (discussing the manner in which people are free to exercise); *see also* Constitution of Ireland 1937 art. 44 (stating the provisions of the Free Exercise Clause).

143. *See supra* note 142 (indicating that free exercise is not an absolute right and recognizing the inherent need to have limitations in place).

144. *See* Mullally & O'Donovan, *supra* note 14, at 287-88 (stating a general preference to have a religious presence). *Compare* Constitution of Ireland 1937 art. 44 (granting Free Exercise of Religion) *with* People v. Jackie H. (In the Interest of L.H.), 2014 IL App (1st) 133252-U, 2014 Ill. App. Unpub. LEXIS 1602 (Ill. App. Ct. 1st Dist. 2014) (acknowledging the idea that limitations on proselytizing displays of religious practice may be necessary to prevent harm to others).

145. *See* Murphy v. Ind. Radio and Television Commission [1999] 1 IR 12 (Ir.) (discussing the importance of public order and morality in a nation heavily influenced by religious practice); *see also* Mullally & O'Donovan, *supra* note 14, at 287-89 (discussing the evolving role of religion in the Irish Nation); Heaney v. Ireland [1994] 3 IR 531 (Ir.) (instituting the proportionality test).

active evaluation of the merits of differing religious beliefs was to impose a blanket ban on all religious advertisement.[146]

That same year, *Corway v. Independent News* narrowed a person's ability to sue another based on religious principles.[147] In *Corway*, applicant John Corway sued defendants Independent Newspapers (Ireland) and Aengus Fanning over a cartoon published in the Irish Independent News after the passage of Ireland's divorce referendum.[148] The cartoon, depicting a caricature of a plump priest offering communion in one hand and a chalice in the other while three politicians turn away and wave, read, "Hello progress - bye bye Father?"[149] Mr. Corway stated he suffered extreme emotional distress as a result of the disrespect shown to the Church.[150]

Mr. Corway sought to have defendants convicted under the Defamation Act of 1961.[151] Bunreacht na hEireann protects Free Speech, provided that the "publication or utterance is not blasphemous, [wherein the] matter of the offence shall be punishable in accordance with [the] law."[152] The Court, however, came to the

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146. *See* Murphy v. Ind. Radio and Television Commission [1999] 1 IR 12 (Ir.) (discussing the importance of maintaining the public order and morality); *see also* Mullally & O'Donovan, *supra* note 14, at 287-89 (discussing the evolving role of religion in the Irish Nation); Heaney v. Ireland [1994] 3 IR 531 (instituting the proportionality test).

147. *See* Corway v. Ind. News Ltd. [1999] 4 IR 485 (Ir.) (stating that the plaintiff felt deeply offended by the newspaper's publication and blasphemous nature against the Church); *see also* Defamation Act 2009 (Act No. 31/2009) (Ir.) (instituting revisions to the statutory crime of Blasphemy post-*Corway*), http://www.irishstatutebook.ie/pdf/2009/en.act.2009.0031.pdf..

148. *See* Corway v. Ind. News Ltd. [1999] 4 IR 485 (Ir.) (stating that the Defendant had blasphemed against all of Catholicism in its cartoon); *see also* Defamation Act 2009 (Act No. 31/2009) (Ir.) (instituting revisions to the statutory crime of Blasphemy post-*Corway*), http://www.irishstatutebook.ie/pdf/2009/en.act.2009.0031.pdf.

149. *See* Corway v. Ind. News Ltd. [1999] 4 IR 485 (Ir.) (proposing that caricatures of this nature are clearly an offense against God); *see also* Defamation Act 2009 (Act No. 31/2009) (Ir.), http://www.irishstatutebook.ie/pdf/2009/en.act.2009.0031.pdf (instituting revisions to the statutory crime of Blasphemy post-*Corway*).

150. *See* Corway v. Ind News Ltd. [1999] 4 IR 485, 3/10 (Ir.) (stating that the private offense and ridicule the Plaintiff felt is not in doubt); *see also* Defamation Act 2009 (Act No. 31/2009) (Ir.), http://www.irishstatutebook.ie/pdf/2009/en.act.2009.0031.pdf.

151. The Defamation Act of 1961 provides, in relevant part, that people who engage in blasphemy and libel against a religious institution are to be fined and imprisoned.

152. *See* Corway v. Ind. News Ltd. [1999] 4 IR 485, 4/10 (Ir.) (declaring the only definition for blasphemy as of the time of this case came from Murdoch's Dictionary on Irish Law (Topaz Publications 1988) which defined blasphemy as the "crime which consists of indecent and offensive attacks on Christianity, or the Scriptures, or sacred persons or objects calculated to outrage the feelings of the community. However, the definition does go on to say

conclusion that while the applicant did communicate his outrage at what he "perceived to be an insult to the Sacrament of the Eucharist," the blasphemy charge was not met.[153]

Ten years later, the Oireachtas (Ireland's legislative branch) clarified the government's position on blasphemy in the 2009 Defamation Act.[154] This version of the Act created an intentional *mens rea* requirement for blasphemy.[155] As a historically religious people, the change in this blasphemy provision exemplifies how the recognition of religious claims is important to Ireland's heritage, but also how restrictions on religious claims are necessary to "safeguard the impartiality of the state."[156]

In 1999, the Irish demonstrated their ability to consider and apply Catholic canonical law in the court system rather than utilize the Irish government's divorce code during the proceedings of *O.B. v. R*.[157] The parties, seeking a divorce, requested that the High Court apply the Catholic Church's sacramental definition of marriage rather

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that the mere denial of Christian teaching is not sufficient to constitute an offense); *see also* Defamation Act 2009 (Act No. 31/2009) (Ir.) (instituting limitations to the Blasphemy Statutes), http://www.irishstatutebook.ie/pdf/2009/en.act.2009.0031.pdf.

153. *See* Corway v. Ind. News Ltd. [1999] 4 I.R. 485 (Ir.) (stating that the man's personal convictions were not in doubt); *see also* Defamation Act of 2009 (Act No. 31/2009) (Ir.), http://www.irishstatutebook.ie/pdf/2009/en.act.2009.0031.pdf (limiting blasphemy based on Corway).

154. *See* Defamation Act 2009 (Act No. 31/2009) (Ir.), http://www.irishstatutebook.ie/pdf/2009/en.act.2009.0031.pdf. The Act provides in relevant part that a person who is convicted of blasphemy shall be fined up to EU€25,000 for a person who "publishes or utters matter that is grossly abusive or insulting in relation to matters held sacred by any religion, thereby causing outrage among a substantial number of the adherents of that religion, and (b) [the person] intends, by the publication or utterance of the matter concerned, to cause such outrage."

155. *See* Corway v. Ind. News Ltd. [1999] 4 IR 485 10/10 (Ir.) (declaring a mens rea requirement existed); *see also* Defamation Act 2009 (Act No. 31/2009) (Ir.) (instituting the mens rea requirement discussed in *Corway*), http://www.irishstatutebook.ie/pdf/2009/en.act.2009.0031.pdf.

156. *See* Corway v. Ind. News Ltd. [1999] 4 IR 485 10/10 (Ir.) (stating that the jury must find an intent on the part of the alleged blasphemer); *see also* Defamation Act 2009 (Act No.31/2009) (Ir.) (changing the requirements for Blasphemy), http://www.irishstatutebook.ie/pdf/2009/en.act.2009.0031.pdf; s*ee* Mullally & O'Donovan, *supra* note 14, at 291 (describing the reasoning of the State).

157. *See* O.B. v. R. [1999] 62M IR 168 (Ir..) (describing a divorce in which the parties requested the application of Canon Law). *See generally* Royal Commission on University Education in Ireland, 32 Sessional Papers 19 January 1902 through 18 December 1902 (1902) (indicating the religious bias even in the Royal Academies, which taught the generation of Judges up to this point).

than use the civil contractual approach defined in Irish Law.[158] The High Court did not address why the parties did not apply the civil law when seeking a divorce; it simply opted to apply the Catholic Canon Law.[159]

Aside from these instances, the extent of free exercise is generally resolved on a local level, and occasionally in alternative dispute tribunals.[160] In 2004, the general position of the Irish was exemplified in the tribunal case of *Sheeran v. Office of Public Works*.[161] In *Sheeran*, an Equality Tribunal expressed that the state was not obliged to adopt a secular approach but was required to respect and honor religion.[162] The complainant, an atheist who objected to the Chapel Royal ringing the Angelus Bells on public property, argued that the religious use of public property was

158. *See* Maogoto & Anolak, *supra* note 70 (detailing the deference to religion); *see also* O.B. v. R. [1999] 62M IR 168 (Ir.) (divorcing parties opted to utilize Canon Law when presenting their cases for divorce. Specifically, they had obtained an annulment and considered themselves divorced).

159. *See* Maogoto & Anolak, *supra* note 70 (describing how the petitioner obtained a Papal Annulment and subsequently remarried. Nearly twenty years later after realizing that the annulment did not change her status under Irish Law, the Court declared her second marriage bigamous, and the petitioner and her ex-husband sought a decree of nullity as opposed to filing for a divorce); *see also* O.B. v. R. [1999] 62M IR 168 (Ir.) (utilizing annulment papers to evidence their divorce).

160. *See generally* Mullally & O'Donovan, s*upra* note 14 (describing the general reliance on religion); *see, e.g., infra* xx (discussing the typical way in which the Irish have dealt with the public and private spheres).

161. *See* Sheeran v. Office of Public Works dealing with mediation tribunal and as such has no case reporter; *see also* Patsy McGarry, *Tribunal Rejects Angelus Complaint*, IRISH TIMES (Feb. 19, 2004) (describing why the Angelus Complaint was rejected); *see generally* Paul Hopkins, *RTE and the Angelus: Daily Bells Still Chime with Me*, BELFAST TELEGRAPH (Jan. 17, 2015) (describing the Angelus Bells and asking why they should be discontinued even if one doesn't believe in them), http://www.belfasttelegraph.co.uk/opinion/debateni/rte-and-the-angelus-daily-bells-still-chime-with-me-31342332.html.

162. *See* Mullally & O'Donovan, *supra* note 14, at 289. Mullally and O'Donovan acknowledge that while this may be the general mindset of the nation, there are other local decisions that may conflict with this viewpoint. The authors compare the decision in *Sheeran* to that of *Garda Siochána*, a case in which the Irish Garda refused to allow a Sikh member of the Garda to wear his turban while on duty. The reasoning was that the prohibition was necessary to safeguard the impartiality of the police force as an arm of the state. This decision faces some criticism, however, since the Police Service of Northern Ireland allows its Sikh members to wear the turban along with their uniform. Pursuant to the 1998 Belfast Agreement, also known as the Easter Agreement, there must be an "equivalence of rights" between Northern Ireland and the Republic. Equivalence of rights is particularly applicable in the religious context given the tensions that occurred between the Catholics and Protestants in Ireland.

inappropriate.[163] Because this was an issue that did not affect public morality, the tribunal granted the exercise of religious expression in the public sphere.[164]

A brief debate involving the rights of Muslim women to wear the *hijab* in certain places was also decided without traditional litigation.[165] The Irish headscarf controversy occurred in 2008 when a request by a town Board of Education asked for departmental guidance as to whether a Muslim pupil should be allowed to wear her *hijab* as a part of her school uniform.[166] Ultimately, the Department of Education left the decision to the discretion of the local school board and the student was permitted to wear the *hijab*.[167]

Subsequent criticism of the Department of Education's lackluster response spurred the Department to issue an official statement describing how uniform policies were to be determined on a local level, noting that the policy should not operate as to exclude pupils of different religious backgrounds from seeking or continuing their enrollment.[168] As with the constitutional provision for freedom of expression, the statement issued by the Department of Education suggests that there may be limits on the forms of clothing that may be acceptable in school, specifically clothing that "obscures facial views and creates an artificial barrier between pupil and teacher."[169] The

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163. *See* Mullally & O'Donovan, *supra* note 14, at 289 (examining the complaint Mr. Sheeran put before the tribunal); *see also* McGarry, *supra* note 162. *See generally* Hopkins, note 162 (stating the Angelus Bells will continue to ring).

164. *See* Constitution of Ireland 1937,art. 44 (describing the requirements that religious expression fits into the public order and morality); *see also* Mullally & O'Donovan, *supra* note 14, at 296; *McGarry*, *supra* note 162. *See generally Hopkins*, *supra* note 162.

165. *See* Mullally & O'Donovan, *supra* note 14, at 296; *see also* Jonathan Spollen, *Hijab Sparks Controversy in Ireland*, NAT'L (Sept. 20, 2008) (reporting specifics on the unlikely controversy that has been one of several such issues cropping up in Europe), http://www.thenational.ae/news/world/europe/hijab-sparks-controversy-in-ireland.

166. *See* Mullally & O'Donovan, *supra* note 14, at 296 (discussing the headscarf controversy); *see also* Spollen, *supra* note 166 (reporting specifics on the unlikely controversy).

167. *See* Mullally & O'Donovan, *supra* note 14, at 297-98 (detailing the "headscarf controversy," if it can be called that); *see also* Spollen, *supra* note 166 (reporting specifics on the unlikely controversy); *see also* E.E.O.C. v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (2015) (detailing the US "headscarf controversy").

168. *See* Mullally & O'Donovan, *supra* note 14, at 297-98 (describing the public response after the controversy); *see also* Spollen, *supra* note 166, (reporting specifics on the unlikely controversy).

169. *See* Constitution of Ireland 1937 art. 44 (granting religious freedom subject to public order and morality); Mullally & O'Donovan, *supra* note 14, *at* 297-98 (noting a

statement elaborates on how local schools should "consult the communities on the scope of religious freedom, the duty to ensure effective access to education, and the effectiveness of local consultation mechanisms."[170] This effectively gives regulatory voice to article 44 of Bunreacht na hEireann's public order and morality clause.[171]

The Irish government's active policy of "facilitating religious ways of life" is reinforced in its requirement that education is to be given state aid, even where the schools are under the management of different religious institutions.[172] As of the 2006 census, a staggering ninety-eight percent of children attending primary school in Ireland attend Catholic or Protestant Schools.[173] This reflects the Irish people's historical reliance on religious institutions for the provision of social services.[174] Even in the two percent of schools that are not expressly affiliated with a religious order, a religious education based on Christianity is incorporated into the school system, embracing the belief that "a religious spirit should inform and vivify the whole work of the school."[175]

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somewhat similar case in the United Kingdom in which a Muslim teacher was suspended for wearing a full *niqab* because it did not allow for optimum communication between teacher and student). Thus, a distinction is drawn between wearing the *hijab* and that of wearing the *niqab* or *burka*.

170. *See* Mullally & O'Donovan, *supra* note 14, at 298-99 (describing the scope of the controversy); *see also* Nathalie Rougier & Iseult Honohan, *Religion and Education in Ireland: Growing Diversity, or Losing Faith in the System*, 51 COMPARATIVE EDUC. 71, 71-86 (2015) (describing the extent of religious exercise in school systems).

171. *See* Constitution of Ireland 1937 art. 44 (granting free exercise of religion subject to the public order and morality); *see also* Rougier & Honohan, *supra* note 171.

172. *See* Mullally & O'Donovan, *supra* note 14, at 291-92 (describing the spirituality still contained in the Irish system); *see also* Rougier & Honohan, *supra* note 171 (describing religion in the Irish curriculum); Niall Murray, *Religion In Schools Opt Out Demand is 'Very Low'*, IRISH EXAMINER (Mar. 13, 2015) (describing how, despite a drift away from the Catholic faith, children still learn the Catholic doctrine), http://www.irishexaminer.com /ireland/religion-in-schools-opt-out-demand-is-very-low-318153.html.

173. *See* Mullally & O'Donovan, *supra* note 14, at 291-92; *see also* Rougier & Honohan, *supra* note 171; *Murray*, *supra* note 173.

174. *See* Mullally & O'Donovan, *supra* note 14 (detailing current trends); *see also* TIM P. COOGAN, IRELAND IN THE TWENTIETH CENTURY (2003) (describing the evolution of the Irish State and its reliance on the social services that the Church provided).

175. *See* Mullally & O'Donovan, *supra* note 14, at 291-92 (citing to Department of Education Curriculum Teacher's Handbook) (detailing the mandates for teachers to facilitate spirituality).

In 2002, the Irish National Teachers Union sought to modify and update the teaching of religion in schools by officially adopting the Intercultural Guidelines, which defines intercultural education as "respecting, celebrating, and recognizing the normality of diversity in all areas of human life."[176] The government finally recognized that there must be a "dynamic and two way process of mutual accommodation by all migrants and residents here in Ireland" regarding religious practice in schools in 2007, but so far it has only granted members of minority religions the constitutional right to opt out of religious instruction.[177] Ultimately, this indicates that while the notion of incorporating the various religious practices of the non-Christian minority into the school system has been received positively, Christianity remains the religion of the majority and subsequently the religion in which pupils are educated.[178]

E. Influences of the European Community

The European Commission on Human Rights ("ECHR") has continued to criticize Ireland in other areas for its adherence to certain religious practices promoting discrimination.[179] Employment discrimination, for example, is permitted where it will preserve "the religious ethos" or otherwise "avoid offending religious sensitivities."[180] As a result, the government uses a test of reasonable

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176. *See* Mullally & O'Donovan, *supra* note 14, at 294 (explaining the Intercultural guidelines for school systems); *see also* The National Center for Curriculum and Assessment, *Intercultural Integration in the Primary School* (2005) *http://www.ncca.ie/uploadedfiles/Publications/Intercultural.pdf* (teaching young people to respect diversity).

177. *See* Mullally & O'Donovan, *supra* note 14, at 295 (noting the importance of religion in Irish education); *see also* Murray, *supra* note 173 (stating that, despite having the option to, most families do not opt out of this education).

178. *See* Mullally & O'Donovan, *supra* note 14, at 295 (noting the majority of family continue the religious formational education offered in schools). *But see* Douglas Dalby, *Catholic Church's Hold on Schools at Issue is Changing*, N.Y. TIMES (Jan. 21, 2016) http://www.nytimes.com/2016/01/22/world/europe/ireland-catholic-baptism-school.html?_r=0.

179. *See* Mullally & O'Donovan, *supra* note 14, at 295 (noting the majority of family continue the religious formational education offered in schools). *But see* Douglas Dalby, *Catholic Church's Hold on Schools at Issue is Changing*, N.Y. TIMES (Jan. 21, 2016) http://www.nytimes.com/2016/01/22/world/europe/ireland-catholic-baptism-school.html?_r=0.

180. Mullally & O'Donovan, *supra* note 14. at 292 (describing how Ireland has refused to remove religion entirely from its governing system); *see also* Rougier & Honohan, *supra* note 171 (respecting religion in the Irish system); Murray, *supra* note 173 (stating that it was the choice of the people to continue a religious path in the education system by not opting out of the religion's education instruction).

necessity on a case-by-case basis to determine whether a discriminatory practice is justified.[181]

Abortion rights in Ireland are highly charged by religious advocates as an immoral practice; Irish laws, influenced by the majority religious opinion, continue to be an area of criticism.[182] *A, B, and C v. Ireland* was a landmark decision judged by the European Court which involved three women who traveled to England for abortions and sued the Irish Republic for failing to assist them in a manner consistent with their asserted human rights.[183] The Court found that while Ireland does allow women to travel outside of the country to receive an abortion, the process of traveling was psychologically and physically harmful for the women who did so.[184] The ECHR previously found an obligation on the part of States to provide for the physical and psychological integrity of people living within their borders, something that the Commission determined Ireland had failed to do.[185] As a result of pressures from the ECHR, Ireland was forced to examine the religiously conservative contexts of its abortion policy.[186]

A, B, and C v. Ireland did not, however, eradicate the Catholic majority influence on Ireland's abortion practices; this was evidenced by a 2013 inquest into the death of a woman who was refused a

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181. *See* Mullally & O'Donovan, *supra* note 14, at 293 (describing the propensity test). *Compare* Heaney v. Ireland [1994] 3 IR 531 (Ir.) (describing the Irish Proportionality Test) *with* Lochner v. New York, 198 U.S. 45, 75 (1905) (instituting a rational relationship to a state interest). Note how the test established in *Heaney* mirrors the rational relationship test expressed in *Lochner*, not the strict scrutiny of *Carolene Products*.

182. *See* A, B, and C. v. Ireland, 25579/05 Eur. Ct. H.R (2010) (the three petitioners had difficulty obtaining abortions and ultimately came before the European Court of Human Rights alleging that Ireland's anti-abortion laws violated their human rights); *see also A, B, and C v. Ireland*, IRISH FAMILY PLANNING ASS'N, https://www.ifpa.ie/Hot-Topics/Abortion/ABC-v-Ireland (accessed Oct. 1, 2015) (describing the ruling and subsequent measures the EU took against Ireland).

183. *See supra* note 182.

184. *See* A, B, and C. v. Ireland, 25579/05 Eur. Ct. H.R. 67 (2010) (describing the difficulties of the applicants in getting the abortion); *see also* ABC v. Ireland in Sexuality, Information Reproductive Health and Rights, IRISH FAMILY PLANNING ASS'N, https://www.ifpa.ie/Hot-Topics/Abortion/ABC-v-Ireland (last visited Oct. 1, 2015) (describing the ruling and subsequent measures the EU took against Ireland).

185. *See* A, B, and C. v. Ireland, 25579/05 Eur. Ct. H.R. 69 (2010) (stating the importance of protecting the rights of a state's citizens); *see also ABC v. Ireland*, *supra* note 182 (describing the ruling and subsequent measures the EU took against Ireland).

186. *Id.*

potentially life-saving abortion.[187] Savita Halappanavar, a practitioner of the Hindu religion, was told that though the fetus' prognosis was poor Irish laws prevented abortion.[188] Pursuant to a 1992 Supreme Court ruling, abortion in Ireland is permitted where the fetal heartbeat ceases, or when there is a "substantial risk" to the life of the mother.[189] During the inquest, the state coroner testified that public hospitals, while not bound by religious dogma, may continue to adhere to a policy stemming from a Catholic pro-life perspective.[190] The public order and morality clause of Bunreacht na hEireann protects this majority opinion because there remains a religious influence in the population; while Ireland has been criticized for these practices, the idea of requiring a strong majority to overhaul Catholic abortion policies maintains a measure of stability and predictability in the government which permits future legislative changes to be conducted with the support of the Irish people.[191]

F. Changing Public Order and Morality Perceptions

In 2010, the Oireachtas encountered an issue similar to the recent United States holding in *Obergefell* just prior to passage of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act of 2010.[192] This Act gave same-sex couples greater legal rights,

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187. *See* A, B, and C. v. Ireland, 25579/05 Eur. Ct. H.R. (2010) (stating Ireland was guilty of not providing for the human rights of the Plaintiffs); *see also* Douglas Dalby, *Religious Remark Confirmed in Irish Abortion Case*, N.Y. TIMES, (Apr. 11, 2013) http://www.nytimes.com/2013/04/11/world/europe/religious-remark-confirmed-in-irish-abortion-case.html?_r=0 (stating the results of the inquest found that part of the reasoning for this denial was that "Ireland was a Catholic country").

188. *See* Dalby, *supra* note 178 (confirming the abortion practice despite the law); *see also Failure in Basic Care of Salita Halappanavar*, BBC NEWS (Oct. 9, 2013) http://www.bbc.com/news/world-europe-24463106 (declaring the failings of Ms. Halappanavar's care).

189. *Supra* note 188.

190. *See* Dalby, *supra* note 178 (describing why Ms. Halappanavar died); *see also* Mullally & O'Donovan, s*upra* note 14 (describing the strength of Catholic Influence in Ireland).

191. Mullally & O'Donovan, s*upra* note 14. (noting how the prevalence of Catholicism weighs on the people of Ireland); *see also* Constitution of Ireland 1937 art. 44 (subjecting religious freedom to public order and morality).

192. Civil Partnership and Certain Rights and Obligations of Cohabitants Act of 2010 (Ir.) (granting homosexuals more rights than they had enjoyed before) http://www.irishstatutebook.ie/pdf/2010/en.act.2010.0024.pdf. *Cf. Same-Sex Marriage Referendum, supra* note 6.

but still did not grant to them all of the benefits of marriage.[193] The justification for this was the need to safeguard the privileged status given to marriage in the Irish Constitution.[194] The dialogue of the debate process is interesting specifically because it demonstrates the overwhelming shifting ideas of public opinion on this issue.[195]

During the Oireachtas debate process the Minister for Justice noted that "it was now time to add to the legal protections in place against discrimination and exclusion, and to officially recognize and affirm same-sex relationships so as to bring to an end the legacy of prejudice and inequality."[196] The Catholic Bishop's Conference called for a "free vote" on the proposed bill and prepared a statement arguing that the bill failed to "ensure special care for the institution of marriage on which . . . the family is founded."[197] This involvement by the Catholic Bishops Conferences was actually criticized by the Minister for the Environment for attempting to influence the legislative process, and was even described as "reminiscent of earlier eras of 'church interference.'"[198] The Attorney General of Ireland commented that future litigation on this Act would hinge upon the public order and morality clause of Article 44 of the Bunreacht.[199]

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193. *See* Civil Partnership and Certain Rights and Obligations of Cohabitants Act of 2010 (Ir.) http://www.irishstatutebook.ie/pdf/2010/en.act.2010.0024.pdf. *Cf. Same-Sex Marriage Referendum, supra* note 6 (making this act obsolete by completely legalizing same-sex marriage).

194. *See* Civil Partnership and Certain Rights and Obligations of Cohabitants Act of 2010 (Ir.) http://www.irishstatutebook.ie/pdf/2010/en.act.2010.0024.pdf. *Cf. Same-Sex Marriage Referendum, supra* note 6.

195. *See* Mullally & O'Donovan, *supra* note 14, at 301 (describing the process in the Oireachtas to get this passed and the special interest groups involved); *see also* Civil Partnership and Certain Rights and Obligations of Cohabitants Act of 2010 (Ir.) http://www.irishstatutebook.ie/pdf/2010/en.act.2010.0024.pdf.

196. *See supra* note 195.

197. *See, e.g.,* Mullally & O'Donovan, *supra* note 14 (describing the Bishop's call for a free vote); *see also* Debate on the 2010 Cohabitants Act (2010) http://www.oireachtas.ie/parliament/about/libraryresearchservice/onlinecataloguecollections/documentslaidthroughthedecades/2010s-debateonmarriageequality/ (detailing the debate).

198. *See supra* note 197

199. *See* Mullally & O'Donovan, *supra* note 14, at 303 (detailing the statements made by the Attorney General); *see also*. Constitution of Ireland 1937 art. 44 (declaring religious rights are subject to public order and morality). In fact, the issue of marriage equality was ultimately left to the Public Order and Morality clause when the public voted by referendum, thereby declaring what public order and morality actually was. *See Same-Sex Marriage Referendum*, *supra* note 6.

The Attorney General's comment that the Act would hinge on the public order and morality clause would prove oddly clairvoyant as, on May 23, 2015, Ireland became the first country in the world to recognize marriage equality by referendum; the act of such a referendum had the direct effect of announcing where the public stood on the issue, laying to rest any notion that marriage equality went against notions of public order and morality.[200] The act of using a referendum was the most tactically advantageous as it was the only means by which "the public order and morality" could definitively be surveyed on this issue.[201] This act most clearly illustrates the ideological differences of the United States and Ireland vis-á-vis the expression of religion, namely that the United States relied upon the power and authority of the judiciary to permit the extension of marital rights whereas the Irish allowed public moral opinion to dictate such an extension.[202]

III. GOVERNMENTAL MOVEMENT TOWARDS POST-SECULAR SOCIETIES

Current movements in the United States and Ireland are bringing these countries—which were previously on opposing sides of the spectrum—on convergent paths where religious free exercise meets government.[203] The Irish trend of deferring to religion and allowing opposing parties to bring Church dogma into the court is beginning to occur in the United States.[204] The act of following a religion is, however, by its nature a personal right, and the Irish demonstrate a

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200. *See* Lisa McNally, *Ireland Votes to Legalize Gay Marriage in a Historic Referendum*, NBC NEWS (May 23, 2015), http://www.nbcnews.com/news/world/ireland-gay-marriage-referendum-count-begins-after-high-turnout-n363666 (reporting the results of the marriage referendum); *see also Same-Sex Marriage Referendum Results*, IRISH TIMES (May 22, 2015), http://www.irishtimes.com/news/politics/marriage-referendum (giving the results of the marriage referendum).

201. *See Same-Sex Marriage Referendum*, *supra* note 6 (noting that Ireland utilized the methods discussed in the dissenting opinions); *see also* Constitution of Ireland, 1937 art. 44 (subjecting Free Exercise to the requirements of public order and morality).

202. *Compare* Obergefell v. Hodges, 135 S. Ct. 2584 (2015) *with Same-Sex Marriage Referendum*, *supra* note 6 (affording the Irish people to do precisely what both Justices Scalia and Roberts advocated for in their dissents).

203. *See supra* Part II (paying particular attention to comparisons that can be drawn between US and Irish law).

204. *See supra* Part II.A (describing the substantiality requirement and the least restrictive means test).

better balance of religion with public opinion than the United States.[205] Irish policy generally favors free exercise, but only insofar as it maintains public order and morality.[206] This necessarily leads to a certain amount of discrimination on the part of certain parties, but the goal of maintaining public order is accomplished.[207] Without the government prioritizing the overall society, individuals in the United States could begin to equate the personal liberty to practice religion with the personal right to proselytize.[208] This encourages more instances of discrimination and more disputes entering into the judiciary.[209]

The United States' concern over the individual practice of religion and the ability to hold sincere religious beliefs is complicated by the inclusion of closely held corporations as members of a community of believers, which are granted all the rights and protections of the individual in asserting one belief over that of another.[210] *Hobby Lobby* allowed the religious morals and beliefs of a single family to dictate policy for employees, irrespective of the fact that the employees may not be part of the same community of believers.[211] The power this grants owners of closely-held corporations violates the premise that "by incorporating a business, an individual separates herself from the entity and escapes personal responsibility for the entity's obligations."[212]

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205. *See supra* Part I.B (describing the history of Ireland); *see also* Constitution of Ireland 1937 art. 44 (noting public order and morality provisions).

206. *Compare* Corway v. Ind. News Ltd. [1999] 4 IR 485 (Ir.) (noting that, despite a shift in religious ideology, there was generally not a negative effect upon the public) *with Same-Sex Marriage Referendum*, *supra* note 6 (showing a change in policy brought about by an overwhelming declaration on the public perceptions of same-sex marriage).

207. *See id.*

208. *See supra* Part II.A (describing the idea that people want to impose their own morality on other's actions).

209. *See supra* Part II.A.

210. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2796 (2014) (Ginsburg, J., dissenting) (noting the difference between a homogenous community celebrating the same beliefs and a non-homogenous community whose only common connection may be their place of employment); *see also supra* Part II.B (describing how the government can potentially regulate conflicts between religious corporations and religious employees).

211. *See supra* note 210.

212. *Id.*

The United States' perceptions of religious expression have overextended the idea of personal rights, discussed in *Griswold*.[213] Personal rights should be granted to protect citizens from a higher establishment's ability to dictate how a person lives.[214] Currently, most governmental protections are given to religious people, which can have the unwanted side effect of facilitating religious practices in people who do not believe.[215] Presently, the religious beliefs of subsets of people can dictate how the government, a corporation, or a colleague will treat others. The protections of Title VII of the Civil Rights Act of 1964 only protect citizens who are experiencing religious discrimination by employers or potential employers.[216] Corporations are permitted to hold religious beliefs, which allows them to object to the government or to implement policy decisions based on that belief.[217] The judiciary's ability to deal with religious questions is constrained by the legislature's passage of RFRA and RLUIPA.[218]

The simple solution is for Congress to actively exclude for-profit corporations from constituting persons for purposes of religious exercise.[219] This rids owners of corporations of the ability to preach their positions to employees with the economic weight of their business behind them.[220] This also has the effect of eliminating inter-religious conflicts between the corporation and the employee.[221] In the United States, there is still no clear consensus as to how to treat a large organization's religious beliefs.[222] Denying corporations the benefit of asserting a free exercise claim would ensure they are not unduly advantaged by basing decisions on corporate religious

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213. *Compare* Griswold v. Connecticut, 381 U.S. 479 (1965) *with* Ryan v. Att'y Gen. [1965] IR 294 (Ir.) (discovering private rights of privacy within both the US and Irish Constitutions).

214. *Id.*

215. *See supra* Part II.B (discussing the circumstance in which employees receive the benefit of Title VII protections).

216. *See supra* Part II.B

217. *Id.*

218. *See* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2012) (describing limitations by which the government can infringe on the free practice of religion); *see also* The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (2012) (reinforcing the same limitations).

219. *See supra* Part II (comparing the United States with the Irish approach).

220. *Id.*

221. *Id.*

222. *Id.*

declarations.[223] In Ireland, shifting notions on religion lead to an indication that discriminatory practices grounded in a religious majority are coming to an end.[224] Both countries must realize that organizations unaffiliated with a recognized religion cannot assert religious claims to the detriment of others.[225] The only means of effectively leveling the playing field is to exclude religiously-based regulatory practices.[226]

Prior to the passage of RFRA, the *Sherbert* test had been successfully used to determine free exercise claims for roughly thirty years.[227] This is because the *Sherbert* test allowed greater discretion in determining if a law was sufficiently narrowly tailored so as to limit a burden on religious practice before determining if that particular limitation was the least restrictive measure the government could use.[228] Incorporating the "narrowly tailored" language into RFRA would help to limit the scope of determining the point at which the government is violating the right of free exercise.[229] The current trend of permitting a broad mandate that anything the government does must be constructed in the least restrictive manner to any religious practice is both an insurmountable burden and tends to encourage the adoption of a religious practice in order to seek an exemption from an unpopular law.[230] Doing this would allow the courts to revisit the ideology of those judicial opinions, including *Smith*, to determine a more workable standard for analyzing claims involving the Free Exercise Clause of the First Amendment.[231] The United States can establish the use of an approach similar to that of Ireland in which claims brought before the judiciary can be analyzed on a case-by-case basis.[232] The District Courts can further this by instituting policies and

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223. *Id.*

224. *Id.*

225. *Id.*

226. *Compare* Part II.A (discussing the issue of extending religious exemptions to large organizations) *with* Part II.E (noting that the death of Savita Halapannavar was due to Catholic influence on hospital policy).

227. *See id.*

228. *See* Sherbert v. Verner, 374 U.S. 398 (1963) (applying a strict scrutiny analysis to Free Exercise Claims); *see also supra* Part I.A.

229. *See supra* note 228.

230. *Id.*

231. *See supra* Part I.A (describing the *Sherbert* test and giving the historical background of the RFRA).

232. *See supra* Part I.B (analyzing the historic approach to claims in Ireland).

procedures calling for alternative dispute resolution methods to be used in these cases in much the same way that the Irish make use of methods such as alternative dispute tribunals.[233]

The third option is for the legislative branches of the United States and Ireland to begin changing policies regarding the nature of how religion is interpreted in the Constitution and in government as a whole.[234] Both countries can learn about the advantages and disadvantages of the other systems.[235] The United States has worked on acknowledging the religious ideology of individuals and the role that government can play on restricting this expression.[236] However, the current methods place too much emphasis on the individual, rather than on what works best to maintain society.[237] Conversely, Ireland pays too much attention to allowing the majority opinion to dictate the direction of policy.[238] The Irish should continue working towards eliminating discrimination resulting from religious observance , as the current system is unjustly weighted against members of minority religions and citizens who seek to be unaffiliated with religion.[239] Ultimately, the United States Constitution's Free Exercise Clause of the First Amendment can be examined alongside Bunreacht na hEireann's Article 44. While both documents contain different language, there exists enough parallels in the history, case law, and legislation to see that the Irish and United States perspectives have been on a convergent path towards similar post-secular understandings of governance.[240] This would entrench religious observance as a private right of the individual, free from governmental interference.[241] This freedom would extend to public displays of religious practice but only where such displays won't be construed to incite hatred, violence, or discrimination in others.[242]

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233. *See, e.g., supra* Part II.F (discussing the tribunal of *Sheeran v. Department of Public Works*).

234. *See supra* Part II (contrasting the US and Irish styles of governance).

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *See supra* Parts I and II (discussing the similarities of the history of the United States and Ireland).

241. *See supra* Parts I and II.

242. *Id.*

Post-secular governance seeks to respect the religious practices of the different parties involved in disputes.[243] It emphasizes governance that allows individuals to express a religious belief only insofar as it would not negatively impact the physical or mental health of a significant portion of other people.[244] Both the United States and Ireland moving toward this common goal, and are approaching it from opposite starting points. On the one hand, Ireland began as a sectarian State that increasingly moves towards post-secular governance**.** On the other hand, the Establishment Clause in the First Amendment to the United States Constitution has always been interpreted so as to limit the role of religion in government.[245] Despite this, the judiciary of the United States is increasingly called upon to evaluate claims involving substantial religious beliefs, to weigh those beliefs in the context of how they are affected by governmental policy and procedure, and to make a determination as to whether there is a religious exemption to a law, or if the law itself is averse to religion. Regardless of where on the spectrum of sectarian-secular the United States and Ireland fall, the idea that both countries are now considering the multicultural as well as inter- and intrareligious effects of law and policy is an indication that these issues will continue to remain prevalent in the near future.[246]

CONCLUSION

What happens to citizens when the religious free exercise rights of one subset of the population are protected to the point where they infringe upon another portion of the population?[247] The Free Exercise Clause of the First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[248] This term of "free exercise" should be equated to the freedom to pursue religion,

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243. *See supra* note 4 and accompanying text (defining post-secular governance).

244. *Id.*

245. *See* U.S. CONST. amend. I (protecting the free exercise of religion).

246. *See supra* Part II (examining the increase in religious claims since the passage of the RFRA in 1993).

247. *See supra* Part II

248. *See* U.S. CONST. amend I (upholding the free exercise of religion).

the freedom to pursue different religions, and the freedom to not pursue religion.[249]

Conversely, Bunreacht na hEireann grants religious freedom subject to the public order and morality.[250] Through the legislative process, alternative dispute resolution methods, and case law, the Irish understanding on religious rights indicates that there must be an overwhelming societal support on an issue in order to have religious ideologies endorsed by the state.[251] Religion is a personal matter, however, and Ireland acknowledges its influence on personal decision-making. The public order and morality requirements help to ensure that no policy is adopted that is disagreed upon by the vast majority of the population.[252]

This Comment addresses a convergence of two different governing bodies towards a similar concept of post-secularism. Post-secularism is a way to both respect and honor a religious belief, while also maintaining governmental separation from such beliefs.[253] By doing so, governments can see to the needs of all people residing in their countries rather than give preference to certain religious organizations and belief systems.[254]

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249. *See supra* Part II (comparing the United States with the Irish Approach).
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.*