ALL CITIZENS OF KENTUCKY ARE EQUAL, EXCEPT SOME ARE MORE EQUAL THAN OTHERS: THE CONSTITUTIONAL DEFICIENCIES OF THE KENTUCKY RFRA

Daniel Reed*

I. INTRODUCTION

In 2013, the Kentucky General Assembly, over the veto of Governor Beshear, passed House Bill 279, legislation requiring the Commonwealth and local governments to demonstrate a “compelling [state] interest” before enforcing any law impacting upon a person’s “sincerely held religious belief[s].” In passing the bill, the Kentucky legislature created a state analog to the federal Religious Freedom Restoration Act (“RFRA”). The intended effect of the statute was to impose a strict scrutiny standard of review upon statutes even of general application when those statutes substantially burden what are asserted to be sincerely held religious beliefs; previously, the standard of review was the relaxed rational basis scrutiny. Functionally, however, the effect of this statute is to divide the citizenship into a multitude of classes, including those with sincerely held religious beliefs that are not infringed by state law, those with sincerely held religious beliefs that are infringed by state law, and those without sincerely held religious beliefs.

This note will address the conflict between House Bill 279, now codified at KRS § 446.350 (“Kentucky RFRA”) and various provisions of the Kentucky Constitution. Under section 3 of the Kentucky Constitution, all citizens are equal before the law, and no special privileges are to be afforded any groups. The Kentucky RFRA undoubtedly violates this dictate. Rather, some citizens are more equal than others in that, consequent to their sincerely held religious beliefs, they are afforded the license to avoid the application of laws of otherwise general applicability.

* J.D. Candidate, May 2016, Brandeis School of Law, University of Louisville.
1 KY. REV. STAT. ANN. § 446.350 (West 2015).
2 Id. (“The right to act or refuse to act in a manner motivated by a sincerely held religious belief may not be substantially burdened unless the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest.”).
3 See Gingerich v. Commonwealth, 382 S.W.3d 635 (Ky. 2012).
4 KY. CONST. § 3.
Section 5 of the Kentucky Constitution provides that the civil rights, privileges, or capacities of no person shall be in any way enlarged on account of any religious belief or disbelief. Similar to its Federal counterpart, the Establishment Clause of the First Amendment, Section 5 of the Kentucky Constitution is aimed at preventing government from endorsing or advancing religion. On its face, the Kentucky RFRA’s principal purpose is to advance religion or at the very least, the free exercise thereof. Accordingly, the Kentucky RFRA is in direct conflict with both the federal Establishment Clause and Section 5 of the Kentucky Constitution.

Finally, where the State Legislature has proscribed a standard of review for the judiciary, in this case, strict scrutiny, the Kentucky RFRA threatens to run afoul of separation of powers as promulgated in Section 28 of the Kentucky Constitution.

Part II of this note will provide a legislative history of H.B. 279, including an overview of the proposed amendments to the bill, as well as Governor Beshear’s Veto message and the legislature’s subsequent override. Additionally, a central causal factor to passage of the Kentucky RFRA is Gingerich v. Commonwealth, a Kentucky Supreme Court decision applying the rational basis standard of review to a free exercise challenge. This section will closely analyze the rationale of Gingerich, which the Kentucky legislature asserts as the impetus for the Kentucky RFRA.

Part III will provide a broad overview of free exercise cases and statutes of general applicability. States did not begin to pass State RFRAs until 1993, following the passage of the federal RFRA. The Federal RFRA was passed as a direct response to the United States Supreme Court decision in

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5 Id. § 5.
6 Id. ("No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity").
7 KY. REV. STAT. ANN. § 446.350 (West 2015).
8 "First, the statute must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’" Triplett v. Livingston Cty. Bd. of Educ., 967 S.W.2d 25, 31 (Ky. Ct. App. 1997) (quoting Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971)).
9 KY. CONST. § 28 ("[N]o person or collection of persons belonging to one of the three branches of government, shall exercise any power properly belonging to either of the others.").
10 Gingerich v. Commonwealth, 382 S.W.3d 835 (Ky. 2010).
Employment Division v. Smith. 13 The Court’s decision in Smith set off a domino effect, leading to the passage of the federal RFRA, the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), and in turn the passage of state RFRA.14 Thus, implicit in the analysis of the Kentucky RFRA is the historical backdrop of pre-Smith and post-Smith free exercise jurisprudence. Next, this section will provide a discussion of laws of general applicability. After the decision in Smith, the focus in free exercise litigation became defining the boundaries of neutrality and general applicability.15 At bottom, the equal protection fault in the Kentucky RFRA stems directly from the ability of those with asserted sincerely held religious beliefs to avoid the application of laws of otherwise general applicability. The privilege to avoid laws of general applicability where those similarly situated cannot is precisely what section 3 of the Kentucky Constitution was meant to preempt. Accordingly, an understanding of rules of general applicability is necessary to arrive at the note’s conclusion.

Part III will then analyze the constitutionality of the Kentucky RFRA under the Kentucky Constitution. This section will propose that the Kentucky RFRA is inapposite to the Kentucky Constitution’s equal protection guarantees. In addition to equal protection concerns, this section will address the inordinate deference provided to free exercise by the Kentucky RFRA and the resulting potential to run afoul of the establishment clause. Inherent in affording special privileges to those with sincerely held religious beliefs under Kentucky RFRA is the risk of creating a law that respects the establishment of religion. Finally, this section will explore whether the Kentucky RFRA is a violation of separation of powers in that the legislature cannot define a constitutional standard of review.

Part IV will discuss the difficulties in resolving the constitutional deficiencies of the Kentucky RFRA through the legislative and judicial process and provide solutions to the problems inherent in the legislation.

Finally, section V will provide a conclusion summarizing the Constitutional concerns of enforcing the Kentucky RFRA and reiterating the ultimate disposition that the law violates Kentucky constitutional guarantees.

13 Id.
14 Id.
II. HISTORY

A. Gingerich v. Commonwealth

In September 2011, eight male Amish members of a sect known as the Old Order Swartzentruber were arrested and briefly jailed by police for failure to pay court-imposed fines that were incurred when the men refused to affix orange reflective safety triangles to their buggies.\(^{16}\) The Circuit Court of Graves County had found the men guilty of violating KRS § 189.820, a statute requiring slow moving vehicles to display a standardized emblem on the rear of their vehicles so as to warn fellow motorists.\(^{17}\) Members of the Amish sect objected to the bright, orange color of the triangles as a violation of their strict modesty code banning vivid colors.\(^{18}\) The Kentucky Court of Appeals affirmed the lower court’s decision and the defendants’ subsequent petition for discretionary review was granted by the Kentucky Supreme Court.\(^{19}\) The members of the sect argued to the Kentucky Supreme Court that KRS § 189.820 unconstitutionally interfered with their freedom to practice their religion in accordance with their beliefs.\(^{20}\) Specifically, the use of the emblem interfered with their requirement to be plain.\(^{21}\) The emblem also brightly displays the trinity, a symbol not adopted by the Amish.\(^{22}\) The Commonwealth, in turn, argued that the statute is one of general applicability, with the primary purpose of regulating safety on public highways by requiring slow moving vehicles to display the emblem to warn other travelers of the slow speed.\(^{23}\)

Writing for the majority in a 5-4 decision, Justice Noble began the analysis by recognizing the opportunity before the Court to delineate the requirements of the Kentucky Constitution when a claim is made that a statute interferes with the practice of religion.\(^{24}\) The Court first noted that the free-exercise-of-religion protections in Section 1 and Section 5 of the Kentucky constitution provide no more protection than the First

\(^{16}\) Anna Bick, American Safety Laws Test Amish Tradition, PBS (Feb. 24, 2012), http://www.pbs.org/wgbh/americanexperience/blog/2012/02/24/amish/.
\(^{17}\) Id.
\(^{18}\) Id.
\(^{19}\) Gingerich v. Commonwealth, 382 S.W.3d 835, 835 (Ky. 2012).
\(^{20}\) Id. at 837.
\(^{21}\) Id.
\(^{22}\) Id.
\(^{23}\) Id.
\(^{24}\) Id. at 839.
Amendment of the federal constitution. 25 Moreover, the Court recognized that section 5 of the Kentucky constitution lists several governmental requirements that may conflict with religious practice. 26 Among the provisions in Section 5 include requirements that the state government may not give preference to any religious sect; the state cannot compel religious attendance nor the participation in building or maintaining churches or paying ministers; parents may not be compelled to send their children to schools they conscientiously oppose; and most pertinent, no one can have his or her civil rights, privileges, or capacities taken away or enlarged because of religious belief. 27

But often, the religious rights of individuals come into conflict with the government’s burden of acting for the common good. As stated by a predecessor to the Gingerich Court:

Laws enacted for the purpose of restraining and punishing acts which have a tendency to disturb the public peace or to corrupt the public morals are not repugnant to the constitutional guaranties of religious liberty and freedom of conscience, although such acts may have been done pursuant to, and in conformity with, what was believed at the time to be religious duty. 28

Indeed, under the police power, the state may enact laws in order to promote the general welfare, public health, safety, order, and morals without violating constitutional guarantees. 29 The Gingerich court was tasked with resolving this delicate issue of conflicting constitutional mandates. 30

The court notes that religious freedom consists of two components, the freedom to believe and freedom to act; 31 the former being an absolute right, while the latter is subject to regulation for the protection of society. 32 First, the “freedom to act cannot be absolute in human society where beliefs and practices vary, and where a given practice, absolutely freely enacted, can

25 Id. at 839–40 (“[I]t is linguistically impossible for language to be more inclusive than that in the First Amendment: ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .’”).
26 Id. at 840.
27 KY. CONST. § 5 (emphasis added).
28 Lawson v. Commonwealth, 164 S.W.2d 972, 976 (Ky. 1942) (citation omitted).
29 Id. at 840.
30 Gingerich, 382 S.W.3d at 840.
32 Gingerich, 382 S.W.3d at 841.
inflict harm on others.”\(^{33}\) It follows that religious conduct must remain subject to regulation for the protection of society.\(^{34}\) In other words, “the constitutional guarantee of religious freedom does not permit the practice of religious rites dangerous or detrimental to the lives, safety or health of the participants or to the public.”\(^{35}\)

Having established the right of the government to restrict, through regulation, the exercise of religion that is detrimental to the common good, the court answered the central question that would lead to the eventual passage of the Kentucky RFRA: “Whether the governmental regulation is subject to a heightened level of review or whether it must merely meet a rational governmental purpose.”\(^{36}\)

The court noted that “[e]nactments that directly prohibit or restrain a religious practice are subject to a strict scrutiny standard of review.”\(^{37}\) However, relying heavily on Employment Division, Department of Human Resources of Oregon v. Smith and supporting post-Smith decisions, the Kentucky Supreme Court held that “statutes, regulations, or other governmental enactments which provide for the public health, safety and welfare, and which are statutes of general applicability that only incidentally affect the practice of religion, are properly reviewed for a rational basis under the Kentucky Constitution, as they are under the federal constitution.”\(^{38}\) Applying the rational basis standard, the court ultimately found KRS 189.820 to be a constitutional law of general applicability.\(^{39}\) The statute was “aimed at protecting public safety on the highways by requiring a brightly colored, reflective, universally shaped warning emblem.”\(^{40}\) The statute in no way directly prohibits specific religious practice, but instead applies to all slow-moving vehicles on public highways.\(^{41}\) Indeed, the statute is not aimed at slow-moving vehicles because they have some innate religious character, but because they present dangers to other drivers on public highways.\(^{42}\) Needing only to find a rational basis in order to find the statute constitutional, the court found a clear rational basis in promoting general public safety and concluded that the statute works towards that goal by using a universal symbol, which

\(^{33}\) Id.

\(^{34}\) Id.

\(^{35}\) Mosier, 215 S.W.2d at 969 (citing Lawson v. Commonwealth, 164 S.W.2d 972, 976 (Ky. 1942)).

\(^{36}\) Gingerich, 382 S.W.3d at 841.

\(^{37}\) Id.

\(^{38}\) Id. at 844.

\(^{39}\) Id. at 837.

\(^{40}\) Id. at 844.

\(^{41}\) Id.

\(^{42}\) Id.
increases visibility over vehicles without the emblem. In applying the deferential rational basis review, the court set the stage for the Kentucky General Assembly’s enactment of the Kentucky RFRA.

B. Legislative Enactment

Kentucky’s RFRA began as H.B. 279, when it was introduced to the House on February 7, 2013. The language of the final version of the bill was as follows:

Government shall not substantially burden a person's freedom of religion. The right to act or refuse to act in a manner motivated by a sincerely held religious belief may not be substantially burdened unless the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest. A "burden" shall include indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities.

Few amendments were offered for the bill in committee; among them was one that deleted a reference to religious institutions. Thereafter, the first House Floor Amendment was proposed. House Floor Amendment 1 first offered that the burden be substantial and that language relating to indirect burdens be deleted. Also, the amendment proposed language “specifying that the section does not affect the grant or denial of an appropriation to a religious organization or a tax exemption for a religious organization.” Finally, the House Floor Amendment, likely in response to concerns of potential abuses of the prospective law, provided that “[t]his section does not establish or eliminate a defense to a civil action or criminal prosecution under a federal or state civil rights law or local civil rights ordinance.”

41 Id.
42 It is worth noting that on February 7, 2012, prior to H.B. 279’s introduction, the Kentucky General Assembly unanimously passed a bill that allowed the Amish to use reflective tape on their buggies instead of a reflective triangle, a compromise that alleviated the asserted religious burden. It is my contention that this type of fact specific legislative exemption is preferable to broad codification of religious liberty. For further discussion, see infra Part V.
44 Id.
45 Id.
46 Id.
47 Id.
48 Id.
49 Id.
50 Id.
51 Id.
Indeed, the opponents of the bill were concerned that the Act would allow an individual with sincerely held religious belief to discriminate against others, using the protections of the law as a defense for discrimination.\textsuperscript{52} Major cities of Kentucky including Louisville, Lexington, Covington, and Vicco all have local ordinances that ban discrimination based on sexual orientation and gender identity.\textsuperscript{53} Ultimately, however, House Floor Amendment 1 was rejected, with the only subsequent change to the bill coming in House Amendment 2, requiring that the burden be substantial.\textsuperscript{54} The bill received no further changes and proceeded to the House floor on March 1, 2013, where the bill passed the House by a margin of 82-7.\textsuperscript{55} No more than a week later the bill was received and passed without amendment by the Senate, 29-6.\textsuperscript{56}

On March 22, 2013, Governor Steve Beshear vetoed the bill.\textsuperscript{57} The Governor, in his veto message, acknowledged the good intentions behind the law but alluded to some of the concerns expressed by opponents of the legislation.\textsuperscript{58} In full, the Governor stated:

I am vetoing this bill because, as written, the measure is itself vague, and thereby creates impermissible uncertainty for business, individuals and governmental agencies as to the boundaries of existing laws. House Bill 279 attempts to strengthen existing constitutional protections for religious expression. However, the use of overly broad and vague terminology would render compliance with and enforcement of the law difficult, and would undoubtedly lead to considerable litigation. As written, the measure calls into question the scope and efficacy of many laws regarding public health and safety as well as individual civil rights. Citizens are constitutionally entitled to clarity in the law. Our business, our local governments, our citizens and our religious organizations should not be burdened with the potential consequences associated with this well intended but ultimately flawed legislation.\textsuperscript{59}

\textsuperscript{53} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{60} Id.
Ultimately, the Governor’s concerns were of no consequence, as the veto was overridden by the Legislature.\(^6^0\) The vote in the House was 79-15, with the Senate voting 32-6 in favor of overriding the veto.\(^6^1\) Almost all of the legislators siding with the governor were from urban areas of the state, likely due to the previously stated fears of discrimination.\(^6^2\) Despite concerns over the breadth and potential unintended consequences of the law, HB 279 was delivered to the Secretary of State and became the law of the Commonwealth on May 27, 2013.\(^5^3\)

While currently there are no published Kentucky cases that have been brought under the Kentucky RFRA, the statute has recently been cited by a company to support discrimination on the basis of religion. The Kentucky Tourism Development Finance Authority preliminarily approved $18.25 million in sales tax rebates over ten years for Ark Encounter, LLC, which plans to build a $73 million full-size replica of Noah’s Ark as described in the bible.\(^6^4\) The Tourism Development Finance Authority had initially approved Ark Encounter’s original application on May 19, 2011, but the application was later withdrawn due to delays in fundraising.\(^6^5\) Upon filing a new application, Ark Encounter reiterated to the Commonwealth that the project would simply be a theme park and tourist attraction depicting Noah’s Ark.\(^6^6\)

After the Commonwealth requested express written assurance that Ark Encounter would not discriminate on the basis of religion in the hiring for the project, Ark Encounter responded in a December 8, 2014 letter, in which it argued that any condition prohibiting religious preference in hiring

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\(^{61}\) Id.


\(^{65}\) After the first draft of this article was written, a circuit court in Fayette County Kentucky held that application of an antidiscrimination law to a print shop refusing to provide shirts for a gay rights organization violated the Kentucky RFRA. Hands on Originals, Inc. v. Lexington-Fayette Urban Cty. Human Rights Comm’n, Civ. No. 14-CI-04474, slip op. at 15 (Fayette Cir. Ct. Apr. 27, 2015). At the time this article was published, the case was pending before the Kentucky Court of Appeals.

\(^{66}\) Letter from Bob Stewart, Secretary, Tourism, Arts and Heritage Cabinet, to James E. Parsons, Esq., Taft, Stetinius & Hollister, LLC (December 10, 2014) (on file with the University of Louisville Law Review).

\(^{67}\) Id.
would violate the Kentucky RFRA. Given Ark Encounter’s stated intention to discriminate based upon religion, the Commonwealth declined to grant tax incentives for the project. The Secretary of the Tourism, Arts and Heritage Cabinet provided two reasons for this decision: First, the Commonwealth will not grant incentives to a company that intends to discriminate in hiring its employees based on religion; and second, it is a violation of the Constitution for the Commonwealth’s incentives to be used to advance religion.

The Ark Encounter project provides a current illustration of how the Kentucky RFRA is inconsistent with the guarantees of the Kentucky Constitution. Irrespective of whether Ark Encounter can prevail, the Kentucky RFRA affords Ark Encounter with a statutory right that a secular citizen or entity cannot obtain. The propensity of the Kentucky RFRA to independently and repeatedly give rise to Establishment Clause violations and the law’s failure to provide similar protections to secular beliefs are indicative of the inherent conflict between the law and the Kentucky Constitution.

The following sections will provide a backdrop of free exercise jurisprudence and the critical constitutional conflicts caused by the Kentucky RFRA.

III. ANALYSIS

A. Free Exercise Jurisprudence: From Sherbert to Hobby Lobby

1. Pre-Smith Decisions

In 1963, the Supreme Court decided Sherbert v. Verner, holding that laws that burden the free exercise of religion were subject to strict judicial scrutiny, requiring a showing of a compelling state interest. Applying this standard of review, the Court held that the government violated the Free Exercise Clause by denying unemployment benefits to a member of the Seventh Day Adventist Church who quit her job rather than work on Saturday, which she observed as the Sabbath. The Court noted that the appellant’s choice between following the tenants of her religion and

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67 Letter from James E. Parsons, Esq., Taft, Stettinius & Hollister, LLC, to Robert H. Stewart, Secretary, Tourism, Arts and Heritage Cabinet (December 8, 2014) (on file with University of Louisville Law Review).

68 See supra note 65.


70 Id. at 409–10.
forfeiting her unemployment benefits amounted to a significant burden on her exercise of religion.\textsuperscript{71} The Court applied \textit{Sherbert} in subsequent cases finding that the Free Exercise Clause was violated when individuals were denied unemployment benefits after quitting their jobs for religious reasons.\textsuperscript{72}

In \textit{Wisconsin v. Yoder}, the Court extended \textit{Sherbert}, finding a Free Exercise Clause violation where a compulsory school attendance law conflicted with the beliefs of Amish children.\textsuperscript{73} Of particular significance to the Court’s holding in \textit{Yoder} is that the compulsory school attendance law was one of uniform application. However, it was not dispositive to the Court’s inquiry that the law applied to all children and did not facially “discriminate against religions or a particular religion, or that it was motivated by legitimate secular concerns.”\textsuperscript{74} “A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion.”\textsuperscript{75} Thus, \textit{Yoder} held that as applied, even laws of general application may violate the Free Exercise Clause.\textsuperscript{76}

However, the decision in \textit{Yoder} and the unemployment cases resulting from \textit{Sherbert} represent the only instances, from 1960 through 1990, that the Court has ever upheld a free exercise claim where the law at issue was one of general applicability.\textsuperscript{77} Opponents of the \textit{Sherbert} free exercise doctrine note the potential inequality created by its application. For example, an exemption from unemployment insurance requirements would be available to persons whose religious beliefs prevent them from working in an armaments factory, but would not be available to persons whose claim was based upon “personal philosophical choice.”\textsuperscript{78} This directly advances another problem: how can a fact finder distinguish between beliefs derived from religion from those derived from moral, philosophical, or social constructs?\textsuperscript{79}

\begin{thebibliography}{99}
\bibitem{71} \textit{Id.}
\bibitem{73} \textit{Wisconsin v. Yoder}, 406 U.S. 205 (1972).
\bibitem{74} \textit{Id. at 220.}
\bibitem{75} \textit{Id.}
\bibitem{76} \textit{Id.}
\bibitem{77} Erwin Chemerinsky, \textit{CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES} 1169, 1254 (3d ed. 2006); See also Michael W. McConnell, \textit{Free Exercise Revisionism and the Smith Decision}, 57 U. Chi. L. Rev. 1109, 1109 (1990) (commentating that the Sherbert free exercise doctrine was “more talk than substance”).
\bibitem{78} \textit{Thomas v. Review Bd. of Ind, Emp't Sec. Div.}, 450 U.S. 707, 713 (1981).
\bibitem{79} See \textit{id. at 714–15} (holding that Thomas’s belief was religious in direct contrast to the Indiana Supreme Court holding that found Thomas’s belief to be philosophical).
\end{thebibliography}
The pre-*Smith* free exercise cases are integral to current state RFRA. As will be discussed in the next sections, the primary purpose of the Federal RFRA was to restore the pre-*Smith* standard: the strict scrutiny test found in *Sherbert* and *Yoder*. Thus, the depth and breadth of pre-*Smith* jurisprudence provides a tool for analysis in understanding the potential implications of the Kentucky RFRA. Implicit in both the *Sherbert* free exercise doctrine and the Kentucky RFRA are concerns over a constitutional preference for religious over non-religious belief systems and the resulting inequality of respective beliefs.


Free exercise jurisprudence underwent a monumental change in 1990 when the Supreme Court decided *Employment Division, Department of Human Resources v. Smith*. In *Smith*, two Native Americans were fired from their jobs at a drug rehabilitation clinic for ingesting peyote, a schedule I hallucinogenic substance prohibited by Oregon law, for sacramental purposes at a ceremony of the Native American Church. Because of the determination that the use of peyote was considered “misconduct,” the Employment Division of the Oregon Department of Human Resources denied the Native Americans unemployment benefits. The Native Americans filed suit, claiming that the denial of unemployment benefits resulting from the use of peyote violated their right to the free exercise of religion.

Ultimately, the Supreme Court rejected the claims, ruling that there was no violation of the Free Exercise Clause. In reaching its decision the Court articulated a new test for free exercise claims, holding that the right of free exercise does not relieve an individual of the obligation to comply with a “valid and neutral law of general applicability on the ground [of religious belief].” In rejecting the free exercise claims, the Court abandoned the

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84 *Smith*, 494 U.S. at 882–83.
85 Id. at 874.
86 Id.
87 Id. at 890.
88 Id. at 879 (Stevens, J., concurring) (citing United States v. Lee, 455 U.S. 252, 236 (1982)).
compelling state interest test of Sherbert.\textsuperscript{89} The primary distinction articulated by the Court was that the Sherbert decision did not involve conduct that was prohibited by law.\textsuperscript{90} Indeed, the majority stated that “[w]e have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”\textsuperscript{91}

The Smith decision highlights a primary concern with legislation such as the Kentucky RFRA. Namely, the apparent inequality that ensues when some citizens are granted insulation from laws of general applicability solely based on adherence to a particular religion, while other modes of moral, philosophical, or social beliefs are excluded from receiving such privilege.

Given the disposition of Smith, subsequent free exercise cases focused on delineating the boundaries of neutrality and general applicability.\textsuperscript{92} The Court took up this task in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah.\textsuperscript{93} In the majority opinion, written by Justice Kennedy, the Court found unconstitutional several local ordinances prohibiting the sacrifice of animals.\textsuperscript{94} In so deciding, the Court treated neutrality and general applicability as separate and distinct inquiries.\textsuperscript{95} Despite the use of words “sacrifice” and “ritual” in the ordinances, such language was not conclusive in determining whether the ordinances were facially neutral.\textsuperscript{96} Indeed, the Court found that the only conduct prohibited by the ordinances was the religious exercise of Santeria church members.\textsuperscript{97} Since no other types of animal killing were prohibited by the ordinances, such as hunting, slaughtering of animals for food, and euthanasia, the Court concluded that the Santeria religion was the exclusive target of the laws.\textsuperscript{98} Since the killing

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\textsuperscript{89} Id. at 884 (“Even if we were inclined to breathe into Sherbert some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law.”).
\textsuperscript{90} Id. at 876.
\textsuperscript{91} Id. at 878–79.
\textsuperscript{93} Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).
\textsuperscript{94} Id. at 524–25.
\textsuperscript{95} Id. 522–46.
\textsuperscript{96} Id. at 534.
\textsuperscript{97} Id. at 535.
\textsuperscript{98} Id.
\end{flushleft}
of animals for religious purposes was considered less important than non-religious purposes, the ordinances singled out religion for discriminatory treatment. The legislative history, utilized by some Justices, provided further evidence that the legislature intended to target the Santeria religion through the ordinances. The record indicated that members of the council described the Santeria religion as “abhorrent” and “in violation of everything this country stands for.” Moreover, the President of the City Council at one point asked the members what could be done to prevent the church from opening. With a clear record of discriminatory intent, the Court determined that the ordinances were designed to target a specific religion and ban the religious, but not secular, killing of animals.

The *Lukumi* Court then turned to the issue of general applicability, ultimately concluding that the ordinances were not generally applicable. The Court concluded so by examining the asserted purposes put forth by the city. The City maintained that the ordinances advanced the purposes of protecting the public health and preventing cruelty to animals. However, the Court noted that the ordinances “fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does,” thus leaving the ordinances underinclusive with respect to the asserted purposes. While the City claimed it sought to prevent animal cruelty, various other types of animal killing were expressly allowed or not prohibited by the ordinances. The City ordinances were equally underinclusive with respect to the second purpose of protecting health. The City claimed that health was “threatened by the disposal of animal carcasses in open public places and the consumption of uninspected meat.” However, the Court noted that the health risks of disposing animal carcasses are the same whether the carcasses are a product of religious sacrifice or some nonreligious killing, while only the former type of conduct was prohibited. Thus, the ordinances “ha[ve] every appearance

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99 *Id.* at 537–38.
100 *Id.* at 540.
101 *Id.* at 541–42.
102 *Id.* at 541.
103 *Id.* at 542.
104 *Id.* at 545–46.
105 *Id.* at 542–46.
106 *Id.* at 543.
107 *Id.*
108 *Id.* at 543–44.
109 *Id.* at 544.
110 *Id.*
111 *Id.*
of a prohibition that society is prepared to impose upon [Santeria worshipers] but not upon itself.”112 This is precisely the type of discrimination that the requirement of general applicability is designed to prevent. Since “[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny[,]” the Court went on to apply strict scrutiny, finding the ordinances unconstitutional.113

By requiring neutrality and general applicability, the test in Lukumi provides a reasonable alternative to codified religious freedom protections such as the Kentucky RFRA. Several important policy and legal considerations can be taken from the Lukumi decision. First, the Court illustrates the close relationship between general applicability and neutrality on the one hand, and the requirement of equal protection on the other. To be sure, Justice Kennedy notes that “[n]eutrality in its application requires an equal protection mode of analysis.”114 This is evident from the Court’s opinion, as various approaches to equal protection analysis were utilized such as underinclusiveness and the finding of a non-legitimate interest motivated by animosity or ill will.115 An equal protection mode of analysis ensures that religious freedoms are protected. Any denial of equal protection results in finding that the law is not neutral or generally applicable, which in turn triggers the most rigorous level of judicial scrutiny available. This scheme effectuates the protection of religious liberty and does so without favoring or advancing religious over irreligious belief systems.

3. The Federal RFRA

In response to the decision rendered in Smith, the United States Congress passed the Religious Freedom Restoration Act.116 The purposes of the Act are:

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is

112 Id. at 545 (citing Florida Star v. B.J.F., 491 U.S. 524, 542 (1989) (Scalia, J., concurring in part and concurring in judgment)).
113 Id. at 546.
114 Id. at 540.
115 See supra notes 101–105 and accompanying text.
substantially burdened; and (2) to provide a claim or defense to persons
whose religious exercise is substantially burdened by government.117

Similar to the Kentucky RFRA, the Act requires that government shall not
substantially burden a person’s exercise of religion even if the burden
results from a rule of general applicability, unless the government
demonstrates that application of the burden is in furtherance of a
compelling governmental interest and is the least restrictive means of
furthering that interest.118

The rigorous strict scrutiny standard set forth in the federal RFRA had a
clear and immediate effect in several cases. For instance, the Ninth Circuit
upheld the right of Sikh Khalsa children to wear daggers to school,119 a
Native American was shielded from conviction under the endangered
species law for killing a bald eagle,120 the Vermont Supreme Court held that
a father was protected from a contempt citation for refusing to make child
support payments on religious grounds,121 and The Act was also cited in
claims against fair housing ordinances.122

In *City of Boerne v. Flores*, the Supreme Court reviewed the issue of
whether the federal RFRA was within Congress’s power under the
Enforcement Clause of the Fourteenth Amendment.123 The Court, citing
federalism concerns, found that the RFRA exceeded Congress’s authority
under the Fourteenth Amendment.124 Noting that Congress’s Section 5
authority “to enforce” is only preventative or “remedial,”125 “[l]egislation
which alters the meaning of the Free Exercise Clause cannot be said to be
enforcing the Clause,”126 In so ruling, the Court made clear that Congress’s
power to enforce under Section 5 of the Fourteenth Amendment is distinct
from a power to change the substantive nature of a constitutional right.127
Additionally, the Court noted that Congress had violated separation of
power principles by encroaching upon the duty of the judiciary to “say what

117 Id.
119 Cheema v. Thompson, 67 F.3d 883, 886 (9th Cir. 1995).
122 Smith v. Fair Emp’t & Hous. Comm’n, 913 P.2d 909, 925 (Cal. 1996); Jasniowski v. Rushing,
124 Id.
125 Id. at 508 (quoting South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966)).
126 Id.
127 Id.
Indeed, the RFRA “contradicts vital principles necessary to maintain separation of powers and the federal balance.”

In a concurring opinion in *Boerne*, Justice Stevens offered an argument as to why the codification of religious liberty in RFRAs presents significant problems with the Establishment Clause:

If the historic landmark on the hill in Boerne happened to be a museum or an art gallery owned by an atheist, it would not be eligible for an exemption from the city ordinances that forbid an enlargement of the structure. Because the landmark is owned by the Catholic Church, it is claimed that RFRA gives its owner a federal statutory entitlement to an exemption from a generally applicable, neutral civil law. Whether the Church would actually prevail under the statute or not, the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment.

Justice Stevens profiles the key contention, applicable to State RFRAs, that such legislation is inherently preferential to religious belief. Justice Stevens’ museum hypothetical also implicates potential equal protection violations. Implicit in the concurring opinion is the resulting inequality that ensues when two individuals similarly situated are treated dissimilarly under the law based solely on whether their belief system is of religious, as opposed to irreligious, origin.

The final and most recent Supreme Court decision involving the federal RFRA was *Burwell v. Hobby Lobby Stores, Inc.* The question presented to the Court was whether the RFRA allows a for-profit company to deny its employees health coverage of contraception, to which the employees would otherwise be entitled, based on the religious objections of the company’s owners. After the Court’s decision in *Boerne*, but before *Hobby Lobby*, Congress amended the RFRA through the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).

Before the RLUIPA, the RFRA’s definition of “exercise of religion” was “the exercise of religion under the First Amendment.” In an evident attempt to separate

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128 Id. at 536 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).
129 Id.
130 Id. at 537 (citing Wallace v. Jaffree, 472 U.S. 38, 52–55 (1985)).
131 See id.
133 Id.
the RFRA from the First Amendment, the RLUIPA changed the definition of “exercise of religion” to “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” Ultimately, the Court held that Congress intended for the RFRA to be read as applying to corporations since they are composed of individuals who use them to achieve desired ends.

The ruling in *Hobby Lobby* does little to affect state RFRAs. Furthermore, the decision does not disrupt the Court’s holding in *Boerne* that the federal RFRA is not applicable to the states through the Fourteenth Amendment. Despite not being applicable to the states, the federal RFRA is relevant to state RFRAs for two primary reasons. First, the enactment of the federal RFRA and the subsequent decision in *Boerne* have prompted the states to adopt their own versions of the legislation. And second, the principles and issues that arise in the context of the federal RFRA are pertinent to the discussion of the codification of religious liberty in state governments. Keeping in mind the history of the federal RFRA and its legal and policy implications, we now turn back to the Kentucky RFRA. The next section will review the substantive provisions of the Kentucky Constitution against the Kentucky RFRA to determine the extent of constitutional conflicts.

**B. The Conflict Between the Kentucky RFRA and the Kentucky Constitution**

The Kentucky RFRA invites three primary constitutional objections. First, by treating similarly situated Kentucky citizens differently based solely on the presence or absence of religious belief, the Kentucky RFRA is susceptible to attack on equal protection grounds. Secondly, by enacting this law, the sole purpose of which is to advance religion, the Kentucky General Assembly runs afoul the Establishment Clause and it’s Kentucky counterpart, Section 5 of the Kentucky Constitution. Lastly, separation of powers is at issue where the General Assembly crafts a judicial standard of review and intrudes on the institutional integrity of the judiciary.

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136 42 U.S.C.A. § 2000cc–5(7)(A) (West 2015). This amended language is an effort to change the perceived nature of the RFRA, by framing it as a statutory right as opposed to a statute providing a substantive change to free exercise protections under the constitution.

137 *Hobby Lobby*, 134 S.Ct. at 2768.

138 *Id.*

139 See Lund, supra note 12, at 474–76.
1. The Equal Protection Fault of the Kentucky RFRA

The Kentucky RFRA faces several hurdles under an equal protection analysis. Citizens of Kentucky are entitled to equal protection of the law under the Fourteenth Amendment of the United States Constitution and Sections 1, 2, and 3 of the Kentucky Constitution. Indeed, the Kentucky Constitution provides that all citizens are equal, and no grant of exclusive privileges shall be made to any person or set of persons. The Equal Protection Clause applies to all government action, including legislative, executive, and judicial, and not only protects groups of persons, but those who have not alleged membership in a particular class. At bottom, the purpose of the Equal Protection Clause is to “keep[] governmental decision makers from treating differently persons who are in all relevant respects alike.” Not all equal protection challenges are reviewed with the same level of scrutiny, but the level of judicial scrutiny applied depends on the classification made in the statute and the interests affected by it.

The Kentucky RFRA divides citizens into two primary classes: those with sincerely held religious beliefs and those with sincerely held nonreligious beliefs. Non-religious belief has never been recognized as a fundamental right nor have those who hold non-religious beliefs been designated as a suspect class. Accordingly, it is likely that rational basis would be applied to any equal protection challenge to the Kentucky RFRA. Although sincerely or deeply held non-religious beliefs currently do not compel strict scrutiny analysis, it is possible that deeply-held beliefs could be construed as a fundamental right on grounds that it comprises a part of the individual's “basic autonomy of identity and self-creation.” What is more, nonbelievers have certainly been subjected to a clear history irrational discrimination, presenting the possibility of suspect class recognition. Indeed, discrimination against atheists was authorized in the United States well into the 20th century. Moreover, state governments...
continued to prohibit atheists from serving in public office or on a jury even after these prohibitions were lifted from other historically oppressed groups.147

While the level of scrutiny applied to a statute that seemingly discriminates against non-religion is not entirely clear, even rational basis poses a significant hurdle for the Kentucky RFRA and similar legislation. Namely, determining the legitimate basis for the classification between deeply held religious and nonreligious beliefs. If two similarly situated citizens, one religious and one secular, are both motivated by deeply held beliefs, why should one be entitled to an exemption from a law that equally burdens both respective beliefs? A sufficient answer to this question is difficult to pinpoint, particularly when the primary justifications for protecting religious beliefs are equally applicable to nonreligious beliefs.148

In choosing only to allow exemptions to generally applicable laws for religious beliefs, statutes such as the Kentucky RFRA explicitly deny equal protection to those who have chosen nonreligious, deeply held beliefs and suggest a statutory hierarchy of belief systems. Accordingly, the failure of the Kentucky RFRA to provide exemptions to those with deeply held nonreligious beliefs is in stark contradiction to the Kentucky Constitution’s guarantees of equal protection under the law.


148 See Steven D. Smith, The Rise and Fall of Religious Freedom in Constitutional Discourse, 140 U. Pa. L. Rev. 149, 197 (1991). In his article, Professor Smith notes the following nonreligious justifications for protecting religious beliefs, each of which I contend is equally applicable to protecting nonreligious beliefs:

[T]wenthieth century courts and commentators have offered a variety of potential nonreligious successors to the religious justification . . . [T]he civic virtue rationale argues that religion deserves special constitutional protection because it instills in citizens the moral values or traits of character necessary in a democratic social order; the personal autonomy rationale asserts that religious freedom is warranted because of the importance of religion to matters of personal choice and identity; the pluralism rationale emphasizes the importance of religious freedom in ensuring a diversity of faiths, thereby strengthening American pluralism; the civil strife rationale argues that religious freedom is valuable in helping to curb the dissension and social conflict that issues of religion have historically provoked; and the nonalienation rationale suggests that religious freedom helps to avoid offending citizens who adhere to minority religious faiths or to none at all, thus helping all citizens to feel like full members of the political community.
2. The Kentucky RFRA Violates Section 5 of the Kentucky Constitution

Perhaps the most apparent conflict with the Kentucky RFRA is the Establishment Clause of the U.S. Constitution and its state counterpart, Section 5 of the Kentucky Constitution. Section 5 of the Kentucky Constitution provides that “[n]o preference shall ever be given by law to any religious sect, society, or denomination . . . and the civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma, or teaching.”149

While being cognizant of the greater level of specificity in Section 5 of the Kentucky Constitution, Kentucky courts have noted that the test applied in federal Establishment Clause cases—despite its federal counterparts’ language hinging on the broad term “establishment”—is helpful in deciding how to apply Kentucky constitutional provisions.150 The test, set out in Lemon v. Kurtzman, requires that the challenged statute: (1) must have a secular purpose; (2) must have a primary effect that neither advances nor inhibits religion; and (3) must not foster impermissible state entanglement with religion.151 Principally, the Kentucky RFRA on its face violates both the secular purpose and primary effect prongs of the test.

The contention that the Kentucky RFRA violates the Establishment Clause is relatively direct. The unquestioned purpose of the law is to further the ability of people to practice religion. Indeed, nowhere on the face of the statute nor in the legislative history can a secular purpose be found. Additionally, the RFRA increases the likelihood that laws burdening religion practice will be invalidated, thereby advancing religion.152 Put differently, by requiring the government to withstand strict scrutiny—the most stringent level of judicial scrutiny—when the law burdens religious beliefs, the likelihood that religious believers will prevail substantially increases.153 The primary effect of such a statute is to advance religion.

Despite the asserted concerns for free exercise rights underlying the Kentucky RFRA, the unqualified breadth of the Act signifies its unconstitutionality. As one commentator noted: “unbounded tolerance of governmental accommodation (of religion) in the name of free exercise

149 KY. CONST. § 5 (emphasis added).
153 Id. at 648.
neutrality could eviscerate the Establishment Clause.” 154 It is evident that this “unbounded tolerance” can result in apparent favoritism or endorsement of religion. By providing a statutory right to only religious believers, countless challenges could arise under criminal laws, housing ordinances, zoning codes, employment policies, and frankly any generally applicable civil law. When such challenges are presented to the courts, the Kentucky RFRA provides a statutory legal advantage that nonbelievers cannot obtain. This codified governmental preference for religion over irreligion is inapposite to the provisions of Section 5 of the Kentucky Constitution.


The Kentucky Constitution vests the power of the government of the Commonwealth of Kentucky into three distinct and separate departments: legislative, executive, and judicial. 155 Section 28 of the Kentucky Constitution provides that no person or collection of persons belonging to one of the three branches of government, shall exercise any power properly belonging to either of the others. 156 Focusing on these provisions, the Kentucky Supreme Court has often noted that “Kentucky is a strict adherent to the separation of powers doctrine.” 157 To be sure, “perhaps no state forming part of the . . . United States has a constitution whose language more emphatically separates and perpetuates what might be termed the American tripod form of government than does . . . [the Kentucky] Constitution.” 158

The Kentucky Supreme Court is the final arbitrator of Kentucky constitutional law. 159 Accordingly, the Kentucky RFRA violates separation

154 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1195 (2d ed. 1988).
155 KY. CONST. § 27.
156 Id. § 28.
157 Beshear v. Haydon Bridge Co., 416 S.W.3d 280, 295 (Ky. 2013) (citing Diemer v. Commonwealth of Ky., Transp. Cabinet, 786 S.W.2d 861, 864 (Ky. 1990)); See also Legislative Research Comm’n v. Brown, 664 S.W.2d 907, 912 (Ky. 1984) (“Our present constitution contains explicit provisions which, on the one hand, mandate separation among the three branches of government, and on the other hand, specifically prohibit incursion of one branch of government into the powers and functions of the others. Thus, our constitution has a double-barreled, positive-negative approach.”).
158 Sibert v. Garrett, 246 S.W. 455, 457 (Ky. 1922); See also Brown, 664 S.W.2d at 912 (“Moreover, it has been our view, in interpreting Section[s] 27 and 28, that the separation of powers is fundamental . . . and must be ‘strictly construed.’”) (quoting Arnett v. Meredith, 121 S.W.2d 36, 38 (1938)).
of powers in two primary ways. First, by forcing the Kentucky Supreme Court to apply a judicial standard of review, which it already rejected in *Gingerich*, the statute denies the court the ability to define the limitations of its own institutional competence.\(^{160}\) Second, the Kentucky RFRA fundamentally overrules a Kentucky Supreme Court decision, effectively making the General Assembly the ultimate interpreter of the Kentucky Constitution.

The *Smith* decision, upon which the *Gingerich* court relied, strongly suggests that courts are ill-suited to balance the importance of general laws against the burdens those laws place on religious beliefs.\(^{161}\) RFRA claims require courts to make difficult determinations regarding the sincerity of religious belief, the level of hardship, and the effects of granting an exemption on the government’s ability to effectively enforce the law.\(^{162}\) Such specific determinations are better suited to the legislature than the judiciary.\(^{163}\) By enacting a broad codification of religious liberty, as opposed to specific religious based exemptions, the General Assembly failed to take legislative responsibility and instead sought to leave such determinations with the judiciary. In doing so, the General Assembly denied the right of the Kentucky Supreme Court to define the limitations of its own institutional competence.

What is more disconcerting is that the General Assembly has superseded the Kentucky Supreme Court as it pertains to interpreting religious freedom provisions in the Kentucky Constitution. As the great constitutional scholar Judge Tomas Cooley noted, “the legislature cannot thus indirectly control the action of the courts, by requiring of them a construction of the law according to its own views . . . [and] it cannot do so directly, by . . . directing what particular steps shall be taken in the progress of a judicial inquiry.”\(^{164}\) Yet, this is precisely what the RFRA aims to accomplish. By creating a statutory right of religious liberty, the General Assembly endeavors to indirectly require the courts to apply a construction of the law according to its own views. Additionally, by expressly requiring the judiciary to implement strict scrutiny analysis, the legislature certainly “directs what particular steps shall be taken in the progress of judicial

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\(^{160}\) *Gingerich v. Commonwealth*, 382 S.W.3d 835, 844 (Ky. 2012).

\(^{161}\) *Smith*, 494 U.S. at 889 n.5 (1990) (“[It is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.”).


\(^{163}\) *Smith*, 494 U.S. at 890.

\(^{164}\) THOMAS COOLEY, *CONSTITUTIONAL LIMITATIONS* 94–95 (1868).
inquiry."\textsuperscript{165} Despite claims that state RFRAs merely create a statutory right,\textsuperscript{166} the law’s implementation of an existing judicial standard of review illuminates that the statute is truly designed to perform a constitutional function.\textsuperscript{167} This usurpation of the judiciary’s duty to delineate the scope of constitutional rights is incompatible with Kentucky’s strict adherence to separation of powers.

\section*{IV. Resolution}

A review of the Kentucky RFRA reveals several constitutional conflicts. The statute advances religion in contradiction to Section 5 of the Kentucky Constitution, application of the law treats similarly situated individuals differently in contravention to Section 3 of the Kentucky Constitution, and the institutional integrity of the judiciary as a coequal branch is threatened where the General Assembly defines the scope of constitutional protections. Given the broad scope of constitutional implications triggered by the statute, the ideal solution is one that best limits the potential for constitutional violations.

\subsection*{A. Declare the Kentucky RFRA Unconstitutional as a Violation of Section 5 of the Kentucky Constitution}

Principally, I would urge the Kentucky Supreme Court to find the Kentucky RFRA unconstitutional, as it impermissibly advances religion over irreligion. This solution is ideal because it presents the path of least resistance for the court. To be sure, the plain text of the Kentucky Constitution is explicit: “the civil rights, privileges, or capacities of no person shall be in any way be . . . enlarged on account of any religious belief or disbelief.”\textsuperscript{168} Furthermore, the Kentucky Supreme Court’s prior utilization of the \textit{Lemon} test would provide an operative tool for finding the statute unconstitutional.\textsuperscript{169} In doing so, the court would also ensure that it is the ultimate interpreter of free exercise rights while simultaneously

\textsuperscript{165} Id.
\textsuperscript{166} Chemerinsky, \textit{supra} note 152, at 661.
\textsuperscript{167} For an analogous discussion of the federal RFRA, see Eugene Gressman & Angela C. Carmella, \textit{The RFRA Revision of the Free Exercise Clause}, 57 \textit{Ohio St. L.J.} 65, 124 (1996) (“. . . Congress, by enacting RFRA, believes that it can better and more properly interpret the Constitution than the Supreme Court. And Congress mandates this better interpretation by requiring the use of a judicial standard of review that has no independent statutory source.”).
\textsuperscript{168} KY. CONST. § 5.
\textsuperscript{169} \textit{Supra} notes 152–154 and accompanying text.
The Constitutional Deficiencies of the Kentucky RFRA

preventing the inherent inequality of treatment that results from the law’s application.

With the law struck down, the court could, in its institutional capacity, continue to develop and delineate the boundaries of free exercise claims. Additionally, the political process will still be available so that the General Assembly can create individualized religious exemptions. This approach is preferable to a broad codification of religious liberty that alters the fundamental nature of the separation of church and state.

As to the appropriate judicial standard to apply to free exercise claims under the Kentucky Constitution, I endorse the court’s decision in Gingerich and advocate a threshold determination of whether a challenged law is neutral and generally applicable. The court should utilize established equal protection principles in determining neutrality and general applicability. This approach strikes an appropriate balance. First, it ensures that citizens are not being treated differently under the law based solely on religious grounds and it comports with the duty of the State not to interfere with one’s right to religious belief. Secondly, it does so without granting unbounded tolerance to the government accommodation of religion, thereby avoiding government favoritism or endorsement of religion.

V. CONCLUSION

The Kentucky RFRA is a law fraught with good intentions. But the fault in the law stems not from its proponents’ intentions, but rather from the constitutional deficiencies in the law itself, which have to this point been amply discussed. The Kentucky RFRA cannot coexist with the proposition that all citizens of Kentucky are equal. The Kentucky RFRA sends a clear signal that nonadherents to religion are outsiders and are not afforded the same privileges as religious adherents. The suggested statutory hierarchy of belief systems inherent in the law is offensive to the notion of

170 See, e.g., Anna Bick, American Safety Laws Test Amish Tradition, PBS (Feb. 24, 2012), http://www.pbs.org/wgbh/amex/amish/ (“On February 7, 2012, the Kentucky Senate unanimously passed a bill that allowed the Amish to use reflective tape on their buggies instead of reflective triangles. The members of the Old Order Swartzentruber in Kentucky are happy with this compromise, as they believe that reflective tape is less flashy than the reflective triangles.”)
172 See supra, notes 110–11 and accompanying text.
173 See supra, notes 110–11 and accompanying text.
equality in freedom of conscious, a notion that encompasses and embraces all citizens of Kentucky. As citizens of the Commonwealth and as human beings generally, we all enjoy the right to basic autonomy of identity. Our rights under the Kentucky Constitution and the laws of the state should not be different based upon our notions of personal choice, identity, and self-creation. Striking down the Kentucky RFRA is a necessary course of action in order to safeguard equality in belief for all citizens of this great Commonwealth.