SMU | Dedman School of Law

SMU Law Review

Volume 52 | Issue 1 Article 23

1999

Why Free Exercise Jurisprudence in Relation to Zoning Restrictions Remains Unsettled after Boerne v. Flores

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WHY FREE EXERCISE JURISPRUDENCE IN RELATION TO ZONING RESTRICTIONS REMAINS UNSETTLED AFTER *BOERNE V. FLORES*

*Sarah J. Gralen Rous**

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* This Comment was selected as a finalist in the 1997-98 *SMU Law Review* Best Comment Competition, sponsored by Baker & McKenzie.

"After all, what is the First Amendment about if not about one's subjective beliefs? (This Court has yet to encounter any objective beliefs.)"[1]

I. INTRODUCTION

RECENT Supreme Court decisions interpreting the Free Exercise Clause have generated more heat than light and have led many of the religious faithful to claim that free exercise protections have been eviscerated. The most recent development featured a contest between Congress and the Supreme Court, with the Supreme Court reasserting its power of judicial interpretation in *City of Boerne v. Flores*,[2] by invalidating the Religious Freedom Restoration Act[3] (RFRA), a Congressional attempt to reverse the Supreme Court's earlier ruling in *Employment Division, Department of Human Resources of Oregon v. Smith*.[4]

Those in the land use and planning communities have watched these developments with interest. Although neither *Smith* nor RFRA expressly addresses zoning, they both focus on so-called neutral, generally applicable laws and have been applied by lower courts in free exercise challenges to zoning ordinances.[5] *Flores* presented both zoning and free

1. Keeler v. Mayor of Cumberland, 940 F. Supp. 879, 883 (D. Md. 1996).
2. 117 S. Ct. 2157 (1997).
3. 42 U.S.C. §§ 2000bb - 2000bb-4 (1994).
4. 494 U.S. 872 (1990).
5. *See, e.g.*, Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991) (applying *Smith*); Health Services Div., Health and Env't Dept. of New Mexico v.

exercise issues and leaves many with the impression that the minimal scrutiny articulated in *Smith* has been restored to analysis of free exercise challenges to zoning ordinances. On its face, *Flores* invalidates RFRA and restores the *Smith* rule[6] that where a law is neutral and generally applicable, any incidental burden on religious practices thereby does not offend free exercise.[7] However, this does not, as it may seem, signal the death knell for religious exemptions from zoning restrictions. Quite the contrary, post-*Smith* cases reveal at least four strategies by which religious challengers are avoiding the *Smith* rule in zoning cases and invoking a substantial burden/compelling interest analysis, under which they are far more likely to prevail. These strategies expose *Smith*'s weaknesses in the zoning context and demand that it be reconsidered.

This Comment reviews the historical development of both free exercise and zoning jurisprudence and argues that the most recent Supreme Court decision does not necessarily restore a deferential review to cases in which both zoning and free exercise of religion are implicated. Part II considers the historical underpinnings of zoning and free exercise principles. Part III examines the current state of the law in these areas, including the recent invalidation of RFRA by *Flores*. Finally, Part IV argues that *Flores* does not necessarily signal a return to *Smith*'s minimal scrutiny where both zoning and free exercise of religion are at issue.

II. THE HISTORICAL UNDERPINNINGS OF ZONING AND FREE EXERCISE

Religious institutions and zoning ordinances have long been uncomfortable bedfellows. Churches and synagogues have played prominent roles in cities and towns, and in the lives of their citizens, since the nation's founding. Zoning ordinances, while only a part of municipal life since the early decades of the twentieth century, have quickly gained prominence; they are now widely used and enjoy substantial judicial deference.[8] The two forces most often collide over the circumstances in which use districts, landmark designations, and historic districts may, consistent with the Constitution, impact religious practices. Accordingly, this part describes the historical jurisprudence relating to use district zoning and historic district zoning generally, free exercise of religion generally, and the intersection of zoning and free exercise concerns.

Temple Baptist Church, 814 P.2d 130 (N.M. Ct. App. 1991) (applying *Smith*); St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (applying *Smith*); Western Presbyterian Church v. Board of Zoning Adjustment of District of Columbia, 862 F. Supp. 538 (D.D.C. 1994) (applying RFRA).

6. *Flores*, 117 S. Ct. at 2171-72.

7. *Smith*, 494 U.S. at 878-79.

8. *See infra* notes 9-11 and accompanying text.

A. ZONING

1. *Use Districts Generally*

The landmark case of *Village of Euclid, Ohio v. Ambler Realty Company* established the constitutionality of modern zoning ordinances based on use distinctions, provided the ordinance is not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[9] This presumption of constitutionality remains the deferential standard by which modern courts evaluate zoning ordinances.[10]

While upholding zoning as presumptively constitutional, the *Euclid* Court noted that an otherwise constitutional ordinance may effect an unconstitutional result if it is arbitrary and unreasonable as applied to a particular tract.[11] Just two years later, the Court was presented with this exact issue in *Nectow v. City of Cambridge*, in which it held that an ordinance could not be upheld as applied to plaintiff's property because, as so applied, it did not promote the health, safety, and welfare of the city.[12] Developing jurisprudence drew a distinction between "facial" constitutionality and "as applied" constitutionality.[13] The courts have been particularly receptive to as-applied challenges because they provide an appealing middle ground between upholding legislative action and relieving hardship where legislation is unduly burdensome.[14]

2. *Historic District Zoning and Landmark Designations Generally*

As zoning has grown in popularity as a means to shape community growth, municipalities have moved beyond traditional use district zoning to embrace legislation that preserves areas and buildings of historic importance and regulates aesthetic changes in historic areas. Landmark designation and historic district zoning often restrict the ability of affected property owners to make physical changes to their property, and proposed changes must typically be approved by a planning commission or city council. Historic district zoning, as with any zoning scheme, can be imposed by the appropriate governing body without the consent of those affected; similarly, landmark designation ordinances seldom require that the property owner consent to the designation.[15]

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9. 272 U.S. 365, 395 (1926).

10. *See, e.g.*, Lafayette Park Baptist Church v. Board of Adjustment of City of St. Louis, 599 S.W.2d 61, 66 (Mo. Ct. App. 1980) ("[A] zoning ordinance . . . is subject to the same historic tests established by our courts . . . [w]hether the . . . ordinance is reasonable and constitutional or whether it is arbitrary and unreasonable and therefore unconstitutional . . . .").

11. *See Euclid*, 272 U.S. at 395.

12. 277 U.S. 183, 187-88 (1928).

13. *See* KENNETH H. YOUNG, ANDERSON'S AMERICAN LAW OF ZONING §§ 3.11-.12 (4th ed. 1996).

14. *See id.* § 3.13.

15. *See* Alan C. Weinstein, *The Myth of Ministry vs. Mortar: A Legal and Policy Analysis of Landmark Designation of Religious Institutions*, 65 TEMP. L. REV. 91, 102-03 (1992).

Judicial challenges to historic district ordinances have been largely unsuccessful. The challenged ordinance was upheld in one of the leading cases, *City of New Orleans v. Pergament*.[16] A comprehensive city ordinance enacted controls throughout the famed French Quarter of New Orleans, with the intent of preserving not only specific historic buildings, but also the overall historic and sentimental character of the area. The owner of a commercial service station, housed in a modern building, failed in challenging the application of the ordinance to his property, which was admitted to have no historic or sentimental value. The court concluded protective measures that preserve the historic, sentimental, and commercial value of the area as a whole fall within the municipality's police power.[17] Similarly, legislation to preserve and protect the historic whaling town of Nantucket, Massachusetts, was upheld as being sufficiently related to the promotion of the public welfare to be constitutional.[18] More recently, the U.S. Supreme Court weighed in on the issue of historic, landmark legislation, decisively upholding it.[19] In explaining its holding, the Court stated that "this Court has recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city."[20] The Court acknowledged that landmark legislation typically burdens some property owners more severely than others but dismissed this as a reason to hold the ordinance invalid, saying "[l]egislation designed to promote the general welfare commonly burdens some more than others."[21]

B. Free Exercise of Religion

The free exercise of religion is a fundamental constitutional guarantee secured by the words of the First Amendment: "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ."[22] This guarantee has been held applicable to the states via the Fourteenth Amendment.[23]

Free exercise jurisprudence in this century has been confusing at best. One line of cases employed a compelling interest test to free exercise challenges if the challengers first demonstrated that governmental action had substantially burdened their religious practices; under this rigorous test, some courts found free exercise violated,[24] while others did not.[25] In

16. 5 So. 2d 129 (La. 1941).
17. *See id.* at 131.
18. *See In re* Opinion of Justices to the Senate, 128 N.E.2d 557, 562 (Mass. 1955).
19. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).
20. *Id.* at 129.
21. *Id.* at 133.
22. U.S. Const. amend. I.
23. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).
24. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 146 (1987); Thomas v. Review Bd., Indiana Employment Sec. Div., 450 U.S. 707, 718-20 (1981); Wisconsin v. Yoder, 406 U.S. 205, 234 (1972); Sherbert v. Verner, 374 U.S. 398, 410 (1963).
25. *See, e.g.*, Hernandez v. Commissioner, 490 U.S. 680, 700 (1989); Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983); United States v. Lee, 455 U.S. 252, 259-61 (1982); Gillette v. United States, 401 U.S. 437, 462 (1971).

sharp contrast, other cases employed a far more deferential review that resulted in sustaining governmental action regardless of the burden on the challenger's religious practices.[26] This subsection examines this jarring split.

1. *The Development of the Compelling Interest Test in Free Exercise Challenges*

The assertion that the Court's modern approach to free exercise challenges employs a compelling interest test is often based on two leading cases: *Sherbert v. Verner*[27] and *Wisconsin v. Yoder*.[28] In *Sherbert*, the Court adopted a compelling interest test in evaluating the free exercise claim of a Seventh Day Adventist who was denied unemployment compensation after having been discharged from a job for refusing to work on Saturdays, which would have been contrary to her religious beliefs. The Court first found her religious practices had been burdened. In so finding, the Court made the careful distinction that free exercise may be violated even if the burden is not a direct prohibition of one's ability to engage in religious practices but has the effect of discouraging religious practice: "[T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively *penalizes* the free exercise of her constitutional liberties."[29] The Court then inquired whether the State had a compelling interest that would justify this infringement and found the State's interest lacking. The Court also suggested that had the State's interest been compelling, it also would have had to demonstrate that other means to achieve the same end were not feasible.[30] The Court's reading gave the Free Exercise Clause a wide berth, calling Sherbert's burden "substantial infringement" and suggesting free exercise rights may only be limited by "grave" circumstances and "paramount" State interests.[31]

Likewise in *Yoder*, the deference to religious practice is clear. Amish parents, on the basis of religious beliefs, objected to a Wisconsin statute that required them to send their children to either public or private school until age sixteen. The parents' preference was to send their children to school until completion of the eighth grade; they believed it essential to their religion that after eighth grade their children remain in the Amish community to learn practical skills and receive religious education. The Court found that application of the statute to the Amish would "gravely endanger if not destroy the free exercise of [their] religious be-

26. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 458 (1988); O'Lone v. Estate of Shabazz, 482 U.S. 342, 353 (1987); Bowen v. Roy, 476 U.S. 693, 712 (1986).

27. 374 U.S. 398 (1963).

28. 406 U.S. 205 (1972).

29. *Sherbert*, 374 U.S. at 406 (emphasis added).

30. *See id.* at 407.

31. *See id.* at 406.

liefs"[32] and that the State's interest was not compelling enough to justify such an intrusion.[33] In language substantially at odds with more recent decisions, discussed *infra*, Part III, the Court stated that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."[34]

Though the compelling interest test has recently been seriously limited,[35] historical adherence to it should not be minimized in hindsight. It has continually been followed in the context of denial of unemployment compensation benefits.[36] Outside of this context, it has also been applied by the courts in free exercise challenges to the payment of Social Security taxes[37] and military conscription[38] (in addition to application in *Yoder*, discussed *supra*, regarding compulsory school attendance).

2. *Deferential Review in Pre-1990 Free Exercise Challenges*

A distinctly different line of cases adopted a more deferential judicial review while distinguishing *Sherbert*, *Yoder*, and other cases that employed the compelling interest test. The free exercise challenge in *Lyng v. Northwest Indian Cemetery Protective Association*[39] came from Native Americans opposed to governmental plans to build roadways and harvest timber in forests central to their religious worship ceremonies. Despite the assertion, undisputed by the government, that the project would have a "devastating" impact on the Native Americans' religious practices, the Court found a compelling interest test inappropriate. The Court did not clearly articulate the standard ultimately used to evaluate the claim but did suggest that absent evidence that governmental action had the effect of coercing individuals into actions at odds with their religious beliefs, a compelling interest test would not apply. In fact, the Court seemed to suggest no balancing whatsoever of the government's actions and the religious burden would be required, stating that the line between permissible and impermissible government action "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development."[40] The Court concluded that the proposed project had neither penalizing nor coercive effects on the complainants' religious practice and that the free exercise challenge therefore failed.

The compelling interest test was also rejected in *Bowen v. Roy*, in which the Court ultimately denied the free exercise challenge, employing

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32. *Wisconsin*, 406 U.S. at 219.
33. *See id.* at 221-29.
34. *Id.* at 220.
35. *See infra* Part III.
36. In addition to *Sherbert*, see Hobbie v. Unemployment Appeals Commission, 480 U.S. 136 (1987) and Thomas v. Review Board, Indiana Employment Security Division, 450 U.S. 707 (1981).
37. *See* United States v. Lee, 455 U.S. 252 (1982).
38. *See* Gillette v. United States, 401 U.S. 437 (1971).
39. 485 U.S. 439 (1988).
40. *Id.* at 451.

the familiar rational basis test.[41] Native American parents objected to the use of a Social Security number to identify their daughter for purposes of obtaining welfare benefits. Their objection was based on a religious belief that to assign a number to their daughter would rob her of her spirit and inhibit her spiritual growth. Unlike the analysis in *Lyng*, the *Roy* Court emphasized that, given a religion-neutral requirement, an intent to discriminate against religious beliefs or practices must be demonstrated to avoid a rational basis review and invoke stricter scrutiny.[42] Distinguishing *Sherbert*, which also involved a religion-neutral law, the Court pointed out that the unemployment compensation scheme at issue in *Sherbert* allowed for individual exemptions and that the failure to extend an exemption to a situation of religious hardship suggested discriminatory intent.[43] Finding no such intent in the uniform requirement of a Social Security number, the Court did not find a free exercise violation.

Seen as a whole, free exercise decisions prior to 1990 ultimately failed to yield a consistent evaluative standard. Myriad distinctions—such as whether the challenged ruling permitted individual exemptions,[44] whether the conduct at issue posed a threat to the public interest,[45] or whether the challenged action related to administrative governmental procedures—confused the issue.[46] This lack of consistency led one commentator to decry the "slogans and multipart tests that could be manipulated to reach almost any result."[47]

C. The Historical Intersection of Free Exercise and Zoning

This judicial ambivalence about free exercise protections is particularly apparent in cases involving both free exercise and zoning issues.

1. Use Districts and Houses of Worship

Historically, the judiciary tended to give religious uses substantial deference, reasoning that religious activities promote the morals and welfare of the community.[48] For example, in *Holy Spirit Association for Unification of World Christianity v. Rosenfeld*, the court stated that New York adheres to the "majority view" that religious institutions are inherently beneficial to the public welfare and should be accommodated where possible, even if inconvenience to the community results.[49]

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41. 476 U.S. 693 (1986).
42. *Id.* at 707-08.
43. *See id.* at 708.
44. *See, e.g.*, Bowen v. Roy, 476 U.S. 693, 708 (1986) (interpreting Sherbert v. Verner, 374 U.S. 398 (1963)).
45. *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599, 603-05 (1961).
46. *See* Bowen v. Roy, 476 U.S. at 699-700.
47. Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 685 (1992).
48. *See, e.g.*, YOUNG, *supra* note 13, § 12.21 (discussing judicial deference to religious uses).
49. 91 A.D.2d 190, 197 (N.Y. App. Div. 1983)

Some courts, however, draw a line when the presence of a church threatens to subvert the overall goals of the zoning districts. The court in *Grace Community Church v. Town of Bethel* upheld the town's ordinance, to the exclusion of the church, citing the adverse traffic and parking impact the church would likely bring to a single family residence zone.[50] The ordinance was found to be reasonable because it did not exclude churches outright but required them to establish their use as compatible with residential uses permitted in the zone.[51]

A common problem for religious organizations in relation to use district zoning stems from the use of property for purposes other than worship services, such as religious schools, fund-raising events, and services for the homeless and the poor. While use zoning often permits reasonable "accessory" or "incidental" uses,[52] such uses are problematic with respect to houses of worship, which are often located in, yet somewhat at odds with, residential zones. For example, using a rational basis test, the court in *City of Las Cruces v. Huerta* found that the city requirement of a special use permit for the operation of a parochial school was a reasonable requirement that did not infringe on free exercise of religion.[53] The court concluded that a full-time parochial school was outside the scope of a church's reasonable accessory uses.[54]

Other cases, such as *Alpine Christian Fellowship v. County Commissioners of Pitkin County*,[55] take a different approach. In *Alpine Christian Fellowship*, a church was permitted in the zone at issue, but a school was not; the court determined the operation of a school was "integrally related to the religious belief of the church membership" and that denial of the permit needed to operate the school would substantially burden the church's religious practices.[56] Deciding the county failed to assert a compelling interest to justify this burden, the court enjoined the county from enforcing the special use requirement as applied to the church.[57] The courts are similarly split as to whether religious activity to help the homeless is a reasonable accessory use.[58] It is in the refusal to allow religious uses in certain districts and the denial of accessory uses where zoning ordinances are commonly challenged on free exercise grounds, and courts

50. 622 A.2d 591 (Conn. App. Ct.), *cert. denied*, 510 U.S. 944 (1993).

51. *See id.* at 596.

52. *See* Robert Roy, Annotation, *Zoning: What Constitutes "Incidental" or "Accessory" Use of Property Zoned, and Primarily Used, For Residential Purposes*, 54 A.L.R. 4th 1034, § 2[a] (1988) ("An accessory use is one which is customarily incidental and subordinate to, and dependent upon, the principal use of a building or property.").

53. 692 P.2d 1331, 1335 (N.M. Ct. App. 1984).

54. *See id.* at 1333.

55. 870 F. Supp. 991 (D. Colo. 1994).

56. *Id.* at 994-95.

57. *See id.* at 995.

58. *Compare* First Assembly of God of Naples, Fla., Inc. v. Collier County, 20 F.3d 419, 422-24 (11th Cir. 1994) (finding no free exercise violation where a church had been forced to close a homeless shelter on the grounds it was not a customary accessory use) *with* Western Presbyterian Church v. Board of Zoning Adjustment, 862 F. Supp. 538, 544-47 (D.D.C. 1994) (finding free exercise protection for a church program to feed the hungry that zoning authorities had determined not to be an accessory use).

struggle with balancing deference to free exercise with deference to the will of the city's governing body.

2. *Historic District and Landmark Zoning and Houses of Worship*

Houses of worship often have historical, cultural, and architectural significance and thus run headlong into conflicts with municipal landmark designations and historic district ordinances. When landmark or historic designations act to restrict the use of property belonging to a house of worship, free exercise challenges often follow, again with the attendant judicial attempts to balance the city's interests against the constitutional guarantee.

Prior to 1990, free exercise challenges to historic district or landmark legislation were marked by inconsistency. Similar to free exercise challenges to use districts, courts have struggled with whether deference to the legislative zoning scheme or deference to religious purposes should prevail. In *Lafayette Park Baptist Church v. Board of Adjustment of St. Louis*,[59] a church's constitutional challenge to a historic district ordinance was evaluated under the deferential standards accorded zoning ordinances. Disregarding the religious status of the objector, the court upheld the zoning.[60] In contrast, the religious nature of the challenger was key to invoking a compelling interest test in *Society of Jesus of New England v. Boston Landmarks Commission*,[61] which resulted in invalidation of a landmark designation as applied to plaintiff's church.[62]

D. SUMMARY

Against this backdrop, the high Court attempted to clarify free exercise jurisprudence in the 1990s. The following part analyzes the impact of recent developments in free exercise and zoning jurisprudence.

III. RECENT DEVELOPMENTS IN FREE EXERCISE AND ZONING JURISPRUDENCE

In 1990, the Court's decision in *Smith* shifted the focus of a free exercise analysis to the nature of the law at issue rather than the nature of the right threatened.[63] Congress's 1993 attempt to shift attention back to the threat to free exercise by enacting RFRA was rejected by the Court's decision in *Flores* in 1997.[64] This part examines these developments.

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59. 599 S.W. 2d 61 (Mo. Ct. App. 1980).

60. *See id.* at 66 ("An historic district ordinance is essentially a zoning ordinance. As a zoning ordinance it is subject to the same historic tests established by our courts.") (citation omitted).

61. 564 N.E. 2d 571 (Mass. 1990).

62. *See id.* at 574 ("The government interest in historic preservation, though worthy, is not sufficiently compelling to justify restraints on the free exercise of religion, a right of primary importance.").

63. Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).

64. City of Boerne v. Flores, 117 S. Ct. 2157 (1997).

While the developments focus somewhat abstractly on neutral laws of general applicability, they have significant implications for zoning concerns, as discussed in Part IV.

A. The Court Shifts the Focus of Free Exercise: The *Smith* Rule

1. Smith's *Minimal Scrutiny*

In *Smith*, two Native Americans who used peyote (an illegal drug under the laws of the state) for sacramental purposes were denied unemployment compensation on the ground that their work discharge was justified due to their use of the illegal substance. They challenged the denial as an infringement on their right to free exercise of religion. By a narrow margin, the Court rejected the claim,[65] grounding its decision on the fact that the law at issue—a criminal drug statute—was religion-neutral and generally applicable to all citizens. Given this, the Court found any incidental burden on religion insignificant, emphasizing that to depart from the proposition that all citizens must conform their actions to the laws of the state would permit citizens to exempt themselves from the law.[66] The Court articulated its concern as follows: "To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[67] In effect, the Court concluded that only when a law has the *intent* of burdening religious exercise will a free exercise concern arise: "[I]f prohibiting the exercise of religion . . . is not the *object* of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[68]

In so holding, the Court soundly rejected the *Sherbert* compelling interest test.[69] Prior to *Smith*, the Court had struggled with whether, and how, to ascertain the impact of a law on an objector's faith, an inquiry necessary for application of the compelling interest test, which requires a finding that the objector's faith has been substantially burdened.[70] In *Smith*, the Court concluded that any inquiry into the degree of burden is inappropriate: "[C]ourts must not presume to determine the place of a particular belief in a religion . . . . If the 'compelling interest' test is to be applied at all, then, it must be applied across the board, to all actions

65. The majority garnered five Justices, three dissented, and one concurred in the judgment only.

66. *See Smith*, 494 U.S. at 888.

67. *Id.* at 879 (quoting Reynolds v. United States, 98 U.S. 145, 166-67 (1879)).

68. *Id.* at 878 (emphasis added).

69. *See id.* at 883-86.

70. *Compare* Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 699 (1989) (deciding which beliefs are and are not central to a faith is "not within the judicial ken") *with* Quaring v. Peterson, 728 F.2d 1121, 1123-25 (8th Cir. 1984), *aff'd by an equally divided court sub nom.*, Jensen v. Quaring, 472 U.S. 478 (1985) (deciding whether religious belief is sincerely held is ascertained by referring to scriptures, the belief's role in the believer's daily life, and by evaluating the believer's sincerity).

thought to be religiously commanded."[71]

The prospect that all laws would be subject to a compelling interest test when challenged on religious grounds was unacceptable to the Court because it feared "religious exemptions" from a wide range of societal obligations.[72] In removing any balancing from an inquiry in which the challenged law is neutral and generally applicable, the Court established a standard of review, without expressly articulating it as such, that readily defers to the State's interest over the religious believer's, in the vast majority of challenges.

2. *Exceptions to the* Smith *Rule*

a. Non-Neutrality

The *Smith* Court recognized three exceptions to the rule of minimal scrutiny it espoused. The first, and most obvious, is the rule's inapplicability where the challenged law directly impacts religious beliefs or practices; such a law is in direct conflict with the First Amendment and would be subject to the strictest scrutiny.[73] Moreover, such a law is not religion-neutral, and thus the *Smith* rule would not apply.

Similarly, a law that is facially neutral may be subject to heightened scrutiny if it is determined that it is not, in fact, neutral but rather has the surreptitious purpose of impacting religious practices. The Court was presented with this situation just three years after *Smith* in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah.*[74]

In *Lukumi*, believers in the Santeria faith leased land in the City of Hialeah and announced plans to found a place of worship there. A regular component of their faith was to kill animals as an element of worship and subsequently, to cook and eat the animals. Shortly after the congregation's announcement, the city adopted several ordinances aimed at prohibiting the slaughter of animals within city limits, ostensibly due to public health concerns. However, legislative history and strained definitions in the ordinances themselves tended to show that the ordinances were a veiled attempt to prohibit the ritual killings practiced by Santeria adherents.[75] The Court stated that "the neutrality inquiry leads to one conclusion: The ordinances had as their object the suppression of religion. The pattern we have recited discloses animosity to Santeria adherents and their religious practices."[76] Because the ordinances lacked substantive neutrality, despite facial neutrality, the Court employed a compelling interest test rather than the *Smith* rule of deference, saying that "[a] law burdening religious practice that is not neutral or not of general applica-

71. *Smith*, 494 U.S. at 887-88.
72. *See id.* at 888-89.
73. *See id.* at 877-78.
74. 508 U.S. 520 (1993).
75. *See id.* at 534-42.
76. *Id.* at 542.

tion must undergo the most rigorous of scrutiny."[77]

b. Availability of Individualized Exemptions

The second exception to the *Smith* rule applies in contexts in which individualized exemptions from the provisions of a generally applicable law are available. *Smith* distinguished three prior Supreme Court cases in which a compelling interest test was applied[78] on the basis that, in each case, individualized governmental assessment of the religious objector's challenge was permitted and therefore the government could not "refuse to extend that system to cases of 'religious hardship' without compelling reason."[79] All three cases involved the denial of unemployment compensation, in which the appropriate governmental agency typically considers the personal circumstances that gave rise to an applicant's unemployment and makes discretionary exceptions to a bar on unemployment compensation. The Court seemed of two minds about this line of cases, however, attempting, at one point, to confine them to the unique context of unemployment compensation and, at another point, to establish a principle that situations in which individualized assessments are permitted may be subject to the *Sherbert* test.[80]

c. Hybrid Claims

The third exception outlined in *Smith* focuses on so-called hybrid claims. *Smith* distinguished prior cases outside the unemployment compensation field that had employed a compelling interest test on the basis that they had not involved only a free exercise claim but rather a free exercise claim coupled with another fundamental right, such as freedom of speech, freedom of press, or the fundamental right of parents to control their children's education.[81] Noticeably, the Court's only discussion of why a hybrid claim warrants heightened scrutiny while a free exercise claim, standing on its own, does not is that cases involving a hybrid claim "advert[ ] to the non-free-exercise principle involved."[82] This purported explanation, buried in a footnote, amounts to no explanation at all.

3. Objections to the Adoption of the Smith *Rule*

a. The Dissent and Concurrence in the Judgment

Three Justices in dissent, and Justice O'Connor concurring in the judgment, strongly disagreed with the *Smith* majority's abandonment of the

77. *Id.* at 546.
78. *Smith*, 494 U.S. at 883 (discussing *Sherbert*, *Thomas*, and *Hobbie*).
79. *Smith*, 494 U.S. at 884.
80. *Compare id.* at 884 ("Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field . . .") *with id.* at 884 ("[O]ur decisions in the unemployment cases stand *for the proposition* that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason.") (emphasis added).
81. *See id.* at 881-82 (citations omitted).
82. *Id.* at 882 n.1.

compelling interest test. Justice O'Connor charged the majority with reducing First Amendment protections to only those "extreme and hypothetical situation[s] in which a State directly targets a religious practice."[83] Justice O'Connor also rejected the Court's attempt to distinguish prior cases on the basis of hybrid status[84] and asserted the compelling interest test is both necessary and judicially manageable for protecting religious liberties.[85] Under Justice O'Connor's analysis, a compelling interest test would apply, but, despite the rigor of the test, the State's interest in upholding its criminal prohibitions would be paramount and would permit a burden on the challengers' religious practices.[86]

The dissent joined Justice O'Connor's embrace of the compelling interest test and decried the majority's "distorted view" of precedent.[87] Under the dissent's analysis, the State's interest was the narrow one of refusing to make an exception for the religious use of peyote, which some states apparently permit,[88] an interest not sufficiently compelling to justify the burden it placed on the challengers' religious practices.[89]

b. Public Reaction

Public and academic reaction to *Smith* was emphatically negative. Commentator Stephen Carter, claiming a majority view among constitutional scholars, declared:

> Smith is a much criticized—and justly criticized—decision, and it shows . . . where the current Court's free exercise jurisprudence is heading: toward . . . a world in which citizens who adopt religious practices at variance with official state policy are properly made subject to the coercive authority of the state, which can pressure them to change those practices.[90]

Carter goes on to claim that the Free Exercise Clause has been effectively reduced to a point at which it "lacks independent content," only giving rise to judicial protection when it intersects with free speech concerns.[91] Others agree.[92]

B. CONGRESS STEPS IN BY ENACTING THE RELIGIOUS FREEDOM RESTORATION ACT

In 1993, Congress joined the fray by enacting the Religious Freedom

83. *Smith*, 494 U.S. at 894 (O'Connor, J., concurring in the judgment).
84. *See id.* at 896.
85. *See id.* at 900-02.
86. *See id.* at 907.
87. *See id.* at 908-09 (Blackmun, J., dissenting).
88. *See id.* at 890.
89. *See id.*, 494 U.S. at 910, 921 (Blackmun, J., dissenting).
90. Stephen L. Carter, *The Separation of Church and Self*, 46 SMU L. REV. 585, 597 (1992).
91. *Id.* at 598.
92. *See, e.g.*, James D. Gordon, III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91, 91 (1991) ("the *Smith* Court mistreated precedent [and] used shoddy reasoning"); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990) ("There are many ways in which to criticize the *Smith* decision.").

Restoration Act (RFRA).[93] The Congressional findings and declaration of purposes that preface RFRA are somewhat unique in their express rejection of the *Smith* decision and approval of the decisions *Smith* limited —*Sherbert* and *Yoder*: "The Congress finds that . . . Smith . . . virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion . . . The purposes of this chapter are . . . to restore the compelling interest test as set forth in Sherbert . . . and Yoder . . . ."[94] The Act provides that a substantial burden on religious exercise will only be permissible if the government shows that its interest is compelling and that its means to achieve that interest are the least restrictive to further that interest.[95] Its applicability extends to all federal and state law and any branch, agency, or official of the United States or a state, as well as any person acting under color of law.[96]

Congress denied its effort was for the purpose of "reversing" the *Smith* decision, but rather claimed the purpose was to "creat[e] a new statutory right of free exercise in light of [the Supreme Court's] delineation of the First Amendment's scope."[97] In enacting RFRA, Congress relied on its authority under section five of the Fourteenth Amendment,[98] which provides "the power to enforce, by appropriate legislation" the due process and equal protection principles of the Fourteenth Amendment.[99] These principles include, by way of incorporation, the First Amendment guarantee of free exercise of religion.[100] In defending RFRA, counsel for the United States has argued that RFRA is simply a Congressional effort to guarantee equal protection of the laws to religious adherents and thus not substantively different than myriad other civil rights laws enacted by Congress.[101] Moreover, the argument continues to deny Congress the authority to act in this manner would be to "relegate [Congress] to the constitutional sidelines."[102]

C. The Supreme Court Responds: *Boerne v. Flores*

The Supreme Court disagreed and invalidated RFRA in *Boerne v. Flores*.[103]

1. *Facts of* Flores

The first and last challenge to reach the Supreme Court under RFRA started in the town of Boerne in the Hill Country of Texas. The regional

93. 42 U.S.C. §§ 2000bb – 2000bb-(a)4 (1994).
94. *Id.* §§ 2000bb-(a)(4), (b)(1).
95. *See id.* §§ 2000bb-(a)(1) to (b)(1)-(2).
96. *See id.* §§ 2000bb-(a)(2), 2000bb-(a)(3).
97. Brief for the United States, *Boerne v. Flores*, 117 S. Ct. 2157 (1997), *available in* 1997 WL 13201 at *4 [hereinafter Brief for the United States].
98. See id.
99. U.S. Const. amend. XIV, § 5.
100. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).
101. *See* Brief for the United States, *supra* note 97, at *7.
102. *Id.*
103. 117 S. Ct. 2157 (1997).

Catholic Archbishop, P.F. Flores, gave permission to the Boerne congregation of St. Peter Catholic Church to expand so as to accommodate a growing membership. Built in 1923, the church exemplified the Spanish mission style of architecture of the region's early history and was located in a city-designated historic preservation district. The church's application for a building permit was denied by city authorities on the basis that the city had an overriding interest in protecting historic landmarks, including St. Peter, to preserve the city's cultural heritage.[104] This is exactly the type of historic district zoning that has enjoyed substantial deference in recent years.[105]

The Archbishop brought suit in federal court on several claims, including the claim that the city violated its free exercise of religion under the Constitution and under RFRA. The district court found RFRA to be an unconstitutional exercise of Congressional authority.[106] On appeal, the Fifth Circuit reversed, finding the Act constitutional.[107]

2. *Invalidation of RFRA*

In the Supreme Court, *Flores* was argued and decided solely on the issue of whether RFRA exceeded Congressional power under the Fourteenth Amendment.[108] The Court struck down RFRA, concluding that Congress had overstepped its authority by effecting a substantive change in constitutional interpretation annunciated by the Court.[109] More importantly for those following these developments with zoning concerns in mind, the Court discussed RFRA's impermissible violation of federalism. Echoing the concern it articulated in *Smith*, the Court asserted that widespread application of a compelling interest test to neutral laws of general applicability would result in the potential for "religious exemptions" from myriad regulatory laws enacted for the general public health, safety, and welfare.[110] This would create a significant litigation burden in the states and threaten states' authority. The Court concluded: "This is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."[111]

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104. *See* Flores v. Boerne, 73 F.3d 1352, 1354 (5th Cir. 1996), *rev'd*, 117 S. Ct. 2157 (1997); Boerne v. Flores, 117 S. Ct. 2157, 2160 (1997).

105. *See supra* notes 19-21 and accompanying text.

106. *See* Flores v. Boerne, 877 F. Supp. 355 (W.D. Tex. 1995), *rev'd*, 73 F.3d 1352 (5th Cir. 1996), *rev'd*, 117 S. Ct. 2157 (1997).

107. *See* Flores v. Boerne, 73 F.3d 1352, 1354 (5th Cir. 1996), *rev'd*, 117 S. Ct. 2157 (1997).

108. *See Flores*, 117 S. Ct. at 2168. Consideration of other claims was stayed by the district court. *See* Brief for the United States, *supra* note 97, at *6 n.5.

109. The analysis in *Flores* centers on the separation of powers issue, which is outside the scope of this Comment. For purposes of this Comment, the significance of *Flores* is the fact that it reinstates the *Smith* rule of minimal scrutiny to religious challenges to zoning ordinances.

110. *See Flores*, 117 S. Ct. at 2171.

111. *Id.*

3. *Restoration of the* Smith *Rule*

Thus, the *Flores* decision returns the focus of free exercise analysis to the nature of the law at issue and restores the *Smith* rule of minimal scrutiny. Substantial burden, for whatever reason, is considered a permissible and inevitable impact of neutral, regulatory laws:

> It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens . . . .[112]

All three dissenters, two of whom were new to the Court since *Smith*, continued to question the wisdom of *Smith*. Justice O'Connor, joined by Justice Breyer, discussed at length the historical evidence supporting the view that the Free Exercise Clause protects religious believers from governmental interference even if due to generally applicable, neutral laws, concluding that "[t]he practice of the colonies and early States bears out the conclusion that, at the time the Bill of Rights was ratified, it was accepted that government should, when possible, accommodate religious practice."[113] According to this analysis, the *Smith* rule results in a refusal to inquire whether government might make reasonable efforts to accommodate religious practices.[114]

D. SUMMARY

Although *Flores* undoubtedly signals a return to *Smith*'s deferential review of most regulatory legislation, it does not necessarily establish this rule in relation to zoning challenges by religious institutions, despite the fact that *Flores* itself was such a dispute. Part IV explores this contention.

IV. THE RESTORATION OF THE *SMITH* RULE BY *FLORES* WILL NOT SETTLE FREE EXERCISE JURISPRUDENCE IN THE ZONING CONTEXT

Although *Flores* centers on both free exercise and zoning issues, its restoration of the *Smith* rule, despite decisive language, leaves unsettled the question of free exercise rights in the context of zoning disputes. This seeming *non sequitur* stems from the uncertainties inherent in *Smith* itself when applied in the zoning context and from apparent judicial dissatisfaction with *Smith*. This part explores four emerging analyses by which religious challengers and courts are avoiding application of the *Smith* rule in zoning disputes, leading to the conclusion that *Flores* does little to settle this area of free exercise jurisprudence.

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112. *Id.*
113. *Id.* at 2182 (O'Connor, J., dissenting).
114. *See id.* at 2183.

A. Hybrid Claims in the Zoning Context

The first analysis by which the *Smith* rule may be avoided in a zoning dispute is that of the hybrid claims exception.

1. Religious Architecture as Religious Expression

A particularly weak aspect of *Smith*, reinvigorated by *Flores*, is the so-called hybrid exception to the *Smith* rule. Under this exception, claims that represent a hybrid between free exercise rights and another fundamental right, such as freedom of expression or the right of parents to direct the education of their children, will typically call for strict scrutiny, while free exercise claims standing alone typically will not.[115] As noted earlier, the Court did little to explain the rationale behind this rule.[116] Equally confounding is the fact that in many free exercise claims, free expression rights are necessarily implicated. In fact, Justice Souter has asserted that the distinction between an exclusively free exercise claim and a free exercise claim that also involves free expression is "untenable" and concluded that most free exercise claims are in fact hybrid claims. Thus, the hybrid exception threatens to swallow the rule.[117] An earlier Court easily recognized this problem, not only chastising its dissenter for failing to recognize it but also suggesting that to draw such a distinction would impermissibly entangle the judiciary in inquiries about the significance of words and practices to different believers and to different faiths.[118] The undeniable overlap between free exercise and free expression has even led one scholar to call for analyzing all free exercise claims under the Free Expression Clause.[119]

When a house of worship is designated as a historic landmark, a free expression analysis asks whether religious architecture should be considered religious expression. If so, landmarks legislation is suspect because it is arguably content-specific regulation that substantially limits owners' ability to use their property for expressive purposes.[120] One commentator argues it is content-specific by evoking the following scenario:

> Suppose a congregation, in planning a new church, had to get permission from a state agency to have a Romanesque rather than a Gothic structure, or to put a rose window in the east end of the nave, or a baptistry at the west, or to have a parish house contiguous to,

115. *See* Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 881-82 (1990).

116. *See supra* note 82 and accompanying text.

117. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring in part and concurring in the judgment).

118. *See* Widmar v. Vincent, 454 U.S. 263, 269-70 (1981).

119. *See* William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 Minn. L. Rev. 545 (1983).

120. *See* Thomas Pak, *Free Exercise, Free Expression, and Landmarks Preservation*, 91 Colum. L. Rev. 1813, 1825 (1991).

rather than detached from, the sanctuary, or to put a cross on top![121] Most likely, such prospective regulatory action would be unconstitutional, yet it is routinely permitted when done retrospectively by a landmark preservation commission.[122] In essence, then, landmark preservation legislation is content-specific because it attempts to promote the expression of certain architectural and aesthetic values and suppress others.[123] As another scholar has argued, "[a]lthough [a landmark ordinance] is content-neutral with respect to religion, it is a content-based regulation with respect to architectural expression."[124] A content-based regulation impacting religious speech demands application of the compelling interest test.[125]

The above rests, of course, on the premise that religious architecture should be construed as religious expression. Courts have been extremely reluctant to draw this conclusion. In fact, zoning controls over architectural design have traditionally been thought of as well within the municipal zoning power and have enjoyed substantial deference, even in some First Amendment challenges.[126] Prior to 1991, no case had held architecture—religious or not—to be protected by the Free Expression Clause.[127]

Interestingly, however, scholarly support for treating architecture as symbolic expression is nearly universal.[128] As Pak has noted, "art historians generally recognize architecture as art, and the Supreme Court has noted that artistic expression deserves some First Amendment protection. Architecture has also been considered deserving of protection as a form of symbolic expression, which, like other forms of art, demonstrates various political, social, or religious ideas."[129]

These arguments are even more persuasive in regards to religious architecture, which is arguably expressive of religious belief, and thus, under *Widmar*, should be protected as free expression.[130] Development of religious architecture for communicative purposes was inspired in the Middle Ages by the desire of clergy to communicate religious ideas to a populace that was illiterate.[131] Numerous architectural devices have been employed for centuries to express specific religious sentiments.[132] For example, spires have been used to represent aspiration to heaven; floor

121. Angela C. Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 VILL. L. REV. 401, 491 n.338 (1991).
122. *See id.*
123. *See id.* at 491.
124. Pak, *supra* note 120, at 1834.
125. *See* Widmar v. Vincent, 454 U.S. 263, 270 (1981).
126. *See* Pak, *supra* note 120, at 1824.
127. *See id.*
128. *See id.*
129. *Id.* (citations omitted).
130. *Widmar*, 454 U.S. at 269 ("[R]eligious *worship* and discussion . . . are forms of speech and association protected by the First Amendment.") (emphasis added); *see also infra* notes 152-53 and accompanying text.
131. *See* Pak, *supra* note 120, at 1840 n.160; Carmella, *supra* note 121, at 456.
132. *See* Pak, *supra* note 120, at 1840-41.

plans (e.g., circle or cross configurations) have been used to accentuate a particular theology about the distinction between laity and clergy; and certain design and placement of entrance doors have been used to symbolize the gates of heaven.[133]

Moreover, architectural styles evolve in response to shifts in religious beliefs. For instance, Protestants experimented with religious architecture during the Reformation in response to the revolutionary changes occurring in theology during that time.[134] Even today, debate in religious circles is intense regarding expression of religious belief through architecture. For example, noted theologian Paul Tillich has called for "sweeping renovations to de-Catholicize Protestant churches," a proposal that apparently embraces exterior as well as interior design.[135] In the end, this analysis would not only hold religious architecture as protected free expression, but a landmarks ordinance requiring a house of worship to "freeze" its architecture in a certain style could be thought of as compelled speech, which is impermissible under the First Amendment.[136]

Capitalizing on these very ideas, one state high court found church architecture protected as religious expression and, in a free exercise challenge to a landmark ordinance, applied the *Smith* hybrid exception on the basis that both free exercise and free expression rights were implicated.[137] In *First Covenant*, the City of Seattle designated First Covenant Church a historic landmark over the objections of the church. As a result of the designation, First Covenant would be required to apply to the city for a certificate of approval before making alterations to its exterior.[138] Earlier litigation in the case had been decided by the Washington Supreme Court in favor of the church. On appeal to the U.S. Supreme Court, the decision was vacated and remanded for reconsideration in light of *Smith*, then recently-decided.[139] Despite the obvious implication from the Supreme Court that *Smith* should compel a different result, the Washington Supreme Court found the *Smith* rule inapplicable and again found in favor of the church.

The court called First Covenant's claim a hybrid claim, implicating free expression as well as free exercise concerns:

> First Covenant claims, and no one disputes, that its church building itself "is an expression of Christian belief and message" and that conveying religious beliefs is part of the building's function. First Covenant reasons that when the State controls the architectural "proclamation" of religious belief inherent in its church's exterior it

133. *See* Carmella, *supra* note 121, at 452-460; Pak, *supra* note 120, at 1840-43.
134. *See* Pak, *supra* note 120, at 1841-42.
135. Carmella, *supra* note 121, at 473.
136. *See id.* at 491; Wooley v. Maynard, 430 U.S. 705, 711 (1977) (finding state requirement that state motto be displayed on automobile license plate was compelled speech that infringed on objector's right to refuse to display it on religious grounds).
137. *See* First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174 (Wash. 1992) (en banc).
138. *See id.* at 177-78.
139. *See id.* at 178.

> effectively burdens religious speech. We agree . . . . The relationship between theological doctrine and architectural design is well recognized . . . . When, as in this case, both are "freighted with religious meaning" that would be understood by those who view it, then the regulation of the church's exterior impermissibly infringes on the religious organization's right to free exercise and free speech.[140]

Because of the dual First Amendment concerns, the court employed the compelling interest test, not *Smith*'s minimal scrutiny.[141] Under a compelling interest analysis, the city's interest in historic preservation was not sufficiently compelling to warrant the infringement of First Covenant's rights to both free exercise and free expression.[142] Although it remains to be seen whether other courts will adopt similar reasoning, the Washington Supreme Court is emphatic, reaffirming the reasoning in *First Covenant* just four years later.[143]

2. *Religious Activities as Religious Expression*

In zoning disputes centered on the use of church or synagogue facilities, a parallel free expression question arises: should religious *activities* be protected as religious expression? In many non-zoning cases, courts have already answered this in the affirmative. The religious believer's right to engage or to refuse to engage in a wide variety of conduct regulated by neutral laws of general applicability for religious reasons has been upheld, in many cases at least in part, on free *expression* grounds.

Several cases have established free expression protection for certain religiously-motivated conduct. In *West Virginia State Board of Education v. Barnette*, parents sued the state claiming their children had the right to refuse to salute the American flag for religious reasons.[144] According to their beliefs, to salute the flag would impermissibly honor a secular symbol. The Court agreed that to salute the flag is a "form of utterance," and thus the requirement constituted an infringement of both free exercise and free speech.[145] In another case, a religious objection to mandatory display of the New Hampshire "Live Free or Die" motto on an automobile license plate was sustained as compelled speech, a violation of the First Amendment right not to speak, as well as a violation of free exercise.[146] In many other cases, the Court has found free speech an integral part of the analysis when violations of both free speech and free exercise are invoked.[147] In fact, this is exactly what the *Smith* Court recognized in

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140. *Id.* at 182.

141. *See id.*

142. *See id.* at 185.

143. First United Methodist Church of Seattle v. Seattle Landmarks Preservation Bd., 916 P.2d 374 (Wash. 1996) (en banc).

144. 319 U.S. 624 (1943).

145. *See id.* at 632, 642.

146. *See* Wooley v. Maynard, 430 U.S. 705 (1977).

147. *See* Marshall, *supra* note 119, at 575-79 (citing cases).

devising its hybrid claims exception.[148]

These cases arguably culminated in *Widmar v. Vincent*.[149] In *Widmar*, non-religious student groups at a public university were provided with meeting space in university buildings while a religious student group was denied such access. Because the group's meetings consisted of Bible study, prayer, and discussion of religious experiences and beliefs, one might have expected the Court to rest its decision on free exercise grounds. Interestingly, in finding in favor of the students, the Court rested on free speech grounds exclusively, saying that "religious worship and discussion . . . are forms of speech and association protected by the First Amendment."[150]

That the religiously-motivated conduct in *Wooley*, *Widmar*, and *Barnette* is protected, in part, as *expression*, has implications for zoning disputes over religious facility use. Under these decisions, when a religious body operates a child care facility for the purpose of providing religious education or a soup kitchen on the grounds that feeding the poor is required by its beliefs, both free exercise and free expression are involved. In fact, the issue of where a house of worship is permitted to locate may implicate both free exercise and free expression concerns, rather than free exercise concerns alone.[151] Under *Flores* and *Smith*, the hybrid exception should apply to these situations, and a compelling interest test should be invoked.

In sum, the hybrid claims exception arguably applies in a great majority of religious zoning disputes, leaving us to wonder if the *Smith* rule has any applicability in this context.

B. Individualized Exemptions in the Zoning Context

Perhaps to an even greater extent than the hybrid claims exception, the individualized exemptions exception threatens to vitiate *Smith* in the zoning context. This is the second analysis by which religious challengers and courts are avoiding the *Smith* rule.

In describing earlier First Amendment cases that employed a compelling interest test in the context of unemployment compensation, the *Smith* Court said that where a system of individual exemptions is available, the government cannot "refuse to extend that system to cases of 'religious hardship' without compelling reason."[152] The Court suggested unemployment compensation legislation is unique in this regard (because it typically provides for individual review of the reasons for the applicant's unemployment and determination of eligibility for benefits based

148. Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 881 (1990).

149. 454 U.S. 263 (1981).

150. *Id.* at 269.

151. *See* Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 473 (8th Cir. 1991) (directing the trial court, on remand, to consider a hybrid rights claim where a church challenged an ordinance prohibiting it from locating in a central business district).

152. *Smith*, 494 U.S. at 884.

on that review) and distinguished areas such as criminal laws that are applied universally.[153]

Significantly, zoning ordinances are very similar to unemployment compensation in this regard because they are usually replete with provisions that allow for individual exceptions, typically in the form of nonconforming uses, special use permits, and variances. In fact, it is widely believed that if a zoning ordinance had no such provisions, it would be constitutionally suspect. It has been said that, "no matter how comprehensive a zoning plan may be, it regularly contains some mechanism for granting variances, amendments, or exemptions for specific uses of specific pieces of property. No responsibly prepared plan could wholly deny the need for presently unforeseeable future change."[154] In addition, landmark ordinances, perhaps more so than other zoning ordinances, involve extensive individualized assessment.[155] Thus, under the reasoning of *Smith*, most, if not all, zoning legislation must be exempted from the *Smith* rule and warrants application of the compelling interest test.

Two cases have pursued this line of reasoning, with *First Covenant*[156] again blazing the trail of *Smith* rule avoidance in the context of zoning disputes involving a house of worship. The *First Covenant* Court found that the individualized exemptions exception required application of the compelling interest test as much as the hybrid exception did by saying that "[t]he landmark ordinances at issue here . . . invite individualized assessments of the subject property and the owner's use of such property, and contain mechanisms for individualized exceptions. The City's Landmarks Preservation Ordinance is not generally applicable."[157]

Likewise, *Keeler v. City Council of Cumberland*[158] concluded a landmark ordinance could not be considered generally applicable because of its provisions for individual exceptions. In *Keeler*, the city refused to permit a church located in a historic district to demolish two facilities that were purportedly financially draining, so as to establish smaller, more modern facilities and a parking lot.[159] The court found *Smith*'s minimal scrutiny inappropriate because the ordinance permitted such extensive individual assessment. The court stated that "Cumberland's Historic Preservation Ordinance is significantly different from the 'across-the-board criminal prohibition on a particular form of conduct' sustained in *Smith II*. Rather, like the unemployment compensation programs at issue in *Sherbert*, *Thomas*, and *Hobbie*, the ordinance 'has in place a system of individual exemptions.'"[160] Finding the city's interest in

153. *See id.*
154. City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 681-82 (1976) (Stevens, J., dissenting) (citations omitted).
155. *See* Carmella, *supra* note 121, at 479-81.
156. First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174 (Wash. 1992) (en banc).
157. *Id.* at 181.
158. 940 F. Supp. 879 (D. Md. 1996).
159. *Id.* at 880.
160. *Id.* at 886.

historic preservation could not be considered compelling, the court sustained the free exercise challenge.[161]

In short, the individual exemptions exception to *Smith* presents another serious question as to whether *Smith* has any relevance in free exercise zoning challenges.

C. Zoning Legislation that is Not Neutral

The Supreme Court made it clear shortly after *Smith* that a law that specifically targets religion, even if facially neutral, would warrant a compelling interest test, not *Smith*'s minimal scrutiny.[162] Thus in *Lukumi*, the City of Hialeah's use of zoning ordinances to prohibit the practices of Santeria believers was evaluated using the compelling interest test and was held to violate Santerians' free exercise rights.[163]

A third situation in the zoning context in which the *Smith* rule is avoided is when zoning is used for discriminatory purposes. Though the discriminatory use of zoning ordinances is the exception rather than the rule, it happens enough to give life to this exception.[164] In *Islamic Center of Mississippi, Inc. v. City of Starkville*, a free exercise challenge was brought to challenge the city's denial of a zoning exception.[165] The challengers sought to establish an Islamic center for Muslim students in a residential district near the city's university. In the district at issue, religious uses were not permitted, save by exception. However, twenty-five houses of worship were operating in the district—sixteen as non-conforming uses and nine by exception after the ordinance was enacted.[166] The Islamic Center was the only applicant ever denied an exception.[167] Employing a compelling interest analysis, the court found the city could have no compelling interest in denying this exception while all others, all of Christian faith, had been granted.[168] Though *Islamic Center* was decided prior to *Smith*, it is the type of case to which a compelling interest test should apply even under *Smith*.

Similarly, *Cornerstone Bible Church v. City of Hastings* presented a situation in which the zoning power was allegedly used in non-neutral, discriminatory ways.[169] The zoning ordinance at issue permitted religious uses in residential areas, but not in the central business district. The city justified the exclusion with its concern for the effects of a non-commercial use on the vitality of the commercial district. However, many other non-

161. *See id.* at 886-87.
162. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).
163. *See supra* notes 74-77 and accompanying text.
164. Clearly, the use of zoning to discriminate against religious bodies invokes equal protection issues as well as free exercise issues. An analysis of equal protection in the context of zoning discrimination is outside the scope of this Comment.
165. 840 F.2d 293 (5th Cir. 1988).
166. *See id.* at 294.
167. *See id.*
168. *See id.* at 299.
169. 948 F.2d 464 (8th Cir. 1991).

commercial uses—such as a Masonic Lodge, Alcoholics Anonymous, and a pregnancy counseling center—were permitted in the district.[170] The court noted that "it is difficult to imagine how a church would displace commercial activity any more than a second story apartment, which is permitted."[171] Such a questionable exclusion of churches and only churches should, under *Smith*, be considered not neutral and thus subject to the compelling interest analysis, not deferential review.

In sum, *Smith* and *Lukumi* indicate that legislation that impacts religious exercise will require the most vigorous scrutiny if it is not neutral; thus, they provide yet another exception to the *Smith* rule in zoning disputes.

D. Reliance on State Constitutional Free Exercise Guarantees

The fourth manner in which *Smith* is eluded in zoning disputes is found in a trend toward judicial reliance on state constitutional grounds to vindicate free exercise rights rather than reliance on the First Amendment. Many state constitutional provisions on free exercise of religion provide more extensive protection than the First Amendment.[172] Interestingly, many such provisions use expressly religious language and many are remarkably detailed and specific. In over forty of the state documents, invocations of a Supreme Being are followed by numerous terms describing religious liberty and protecting the rights of conscience, worship, and religious opinion and exercise from interference, infringement, control, discrimination, preference, persecution, or compulsion.[173]

For example, the Massachusetts provision provides:

> [N]o subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.[174]

Increasingly, state courts are relying on these provisions to invoke a compelling interest analysis and avoid resting on the *Smith* rule, which would otherwise be required in a free exercise challenge under the U.S. Constitution.[175] In fact, two of these decisions were decided on remand from the U.S. Supreme Court for reconsideration in light of the then-recent *Smith* decision.[176] In both instances, the state high court refused to find adherence to *Smith* required, relying instead on state constitutional

170. *See id.* at 468 n.3, 470.
171. *Id.* at 471 n.9.
172. *See* Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence*, 1993 BYU L. Rev. 275, 287-88 (1993).
173. *See id.* at 287.
174. Mass Const. Pt. 1, art. 2.
175. *See* Carmella, *supra* note 172, at 279-84.
176. *See* First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174 (Wash. 1992) (en banc); State v. Hershberger, 462 N.W.2d 393 (Minn. 1990) (en banc).

provisions.[177]

Minnesota started it. Just months after *Smith* was decided, the Minnesota high court reconsidered a challenge by Amish defendants who had been charged with violating a state statute that required them to display an emblem to identify their horse-drawn buggy as a slow moving vehicle.[178] The court expressly declined to rely on the First Amendment, choosing instead to rely on the state constitutional guarantee of free exercise, which is "distinctively stronger." The court noted:

> Whereas the first amendment establishes a limit on government action at the point of prohibiting the exercise of religion, section 16 precludes even an infringement on or an interference with religious freedom. Accordingly, government actions that may not constitute an outright prohibition on religious practices (thus not violating the first amendment) could nonetheless infringe on or interfere with those practices, violating the Minnesota Constitution.[179]

The court relied on a compelling state interest test to balance the state's interest in highway safety with the defendants' religious belief that prohibited them from displaying the symbol.[180] Under its balancing analysis, the court found religious liberty a "precious right" but also found the state's interest in public safety to be fundamental.[181] It resolved this dilemma by pointing to the fact that the state could have made a reasonable accommodation by permitting the use of reflective tape and a red lantern—an alternative that was acceptable to the Amish and sufficient to achieve the public safety interest.[182]

Even more to the point at hand, the *First Covenant* zoning case, discussed above for its avoidance of *Smith* under a First Amendment analysis, also relied on the state constitution to vindicate the church's rights. In Washington, as in Minnesota, state constitutional free exercise guarantees are significantly stronger and more elaborate than the First Amendment Free Exercise Clause.[183] The court concluded its state provision protects religious worship absolutely and prohibits any conduct that "disturbs" another on the basis of religion. Any religious conduct is protected unless it is licentious or inconsistent with public peace and safety.[184] Under state free exercise jurisprudence, a compelling interest analysis was required, and the city's interest in historic preservation was not compelling because it was not necessary to prevent a threat to public health or welfare.[185]

Another zoning and free exercise case, *Society of Jesus of New England*

177. This is an interesting twist of fate; the author of *Smith*, Justice Scalia, is an avid supporter of states' rights, and at least five states have asserted their right to rely on their state constitutions to avoid the *Smith* rule so vociferously advocated by Scalia.

178. *See Hershberger*, 462 N.W.2d at 395.

179. *Id.* at 397.

180. *See id.* at 398.

181. *Id.*

182. *See id.* at 399.

183. *See* First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174, 186 (Wash. 1992) (en banc).

184. *See id.*

185. *See id.* at 188.

v. Boston Landmarks Commission,[186] followed suit, this time resting on state free exercise grounds exclusively. Of the Massachusetts constitutional free exercise provision, the court stated that "[t]his provision plainly contemplates broad protection for religious worship. The specific language of art. 2 guarantees freedom of religious belief and religious practice subject only to the conditions that the public peace not be disturbed and the religious worship of others not be obstructed."[187] Also applying a compelling interest test, the court found the religious challengers prevailed over the city's interest in historic preservation.[188]

The trend continues. Two other high courts have analyzed recent free exercise claims under state constitutional provisions, employing a compelling interest analysis in so doing.[189] Some of these decisions make it clear, in language ranging from matter-of-fact to pointed, that their reliance on state constitutional grounds is motivated by disagreement with the *Smith* rule.[190] Even Alaska, which has a free exercise clause *identical* to that of the First Amendment, declined to apply the *Smith* rule and applied its own compelling interest analysis instead.[191]

This line of cases represents another method—one of four discussed in this part—by which *Smith*'s vitality is undermined in zoning disputes.

V. CONCLUSION

Ultimately, *Smith* is untenable in free exercise zoning challenges. Several exceptions to *Smith*—particularly the hybrid claims exception and the individualized exemptions exception—represent the rule in free exercise zoning disputes more often than the exception. Dissatisfaction with *Smith*'s jurisprudence is also evidenced by a growing trend in which state courts rely on state constitutional free exercise guarantees and a compelling interest analysis so as to avoid the *Smith* test under the First Amendment.

Furthermore, some members of the Supreme Court, albeit a minority, are highly critical of the *Smith* rule, issuing vigorous defenses of the compelling interest analysis.[192] In addition, three Justices have noted with displeasure that the question of what type of free exercise analysis to apply in *Smith*—the very issue on which *Smith* was decided and which resulted in a major shift in free exercise jurisprudence—was never briefed

186. 564 N.E.2d 571 (Mass. 1990).
187. *Society of Jesus*, 564 N.E.2d at 573.
188. *See id.* at 574.
189. *See* Rupert v. City of Portland, 605 A.2d 63, 66 (Me. 1992); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 281 (Ala. 1994).
190. *See State v. Hershberger*, 462 N.W.2d 393, 396-97 (Minn. 1990); *First Covenant*, 840 P.2d at 187.
191. *See Swanner*, 874 P.2d at 280-81.
192. *See, e.g.*, Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 891 (1990) (O'Connor, J., concurring in the judgment); *Smith*, 494 U.S. at 907 (Blackmun, J., dissenting); Church of the Lukumi, Babalu Aye, Inc., v. City of Hialeah, 508 U.S. 520, 559 (1993) (Souter, J., concurring in part and concurring in the judgment); City of Boerne v. Flores, 117 S. Ct. 2157, 2176 (1997) (O'Connor, J., dissenting).

by the parties, who had each briefed the case on the presumption that the compelling interest test applied.[193]

Smith has resulted in an "intolerable tension"[194] in free exercise jurisprudence, all the more so in zoning challenges, which demand special considerations due to free expression issues, the availability of individualized exemptions, and religious discrimination. Far from settling this issue, *Flores* has merely stoked the flames of the fire begun by *Smith*, flames that RFRA sought to quench.

193. *See Lukumi*, 508 U.S. at 571-74 (Souter, J., concurring in part and concurring in the judgment) ("[T]he Smith rule was not subject to 'full-dress argument' prior to its announcement."); *Flores*, 117 S. Ct. at 2176 (O'Connor, J., dissenting); *Flores*, 117 S. Ct. at 2186 (Souter, J., dissenting); *Flores*, 117 S. Ct. at 2186 (Breyer, J., dissenting).

194. *Lukumi*, 508 U.S. at 574 (Souter, J., concurring in part and concurring in the judgment).