

February 2017

Whither Free Exercise: Employment Division v. Smith and the Rebirth of State Constitutional Free Exercise Clause Jurisprudence

Piero A. Tozzi

Follow this and additional works at: <https://scholarship.law.stjohns.edu/jcls>



Part of the [Catholic Studies Commons](#)

Recommended Citation

Piero A. Tozzi (2009) "Whither Free Exercise: Employment Division v. Smith and the Rebirth of State Constitutional Free Exercise Clause Jurisprudence," *Journal of Catholic Legal Studies*: Vol. 48 : No. 2 , Article 5.

Available at: <https://scholarship.law.stjohns.edu/jcls/vol48/iss2/5>

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Catholic Legal Studies by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

WHITHER FREE EXERCISE: *EMPLOYMENT DIVISION V. SMITH* AND THE REBIRTH OF STATE CONSTITUTIONAL FREE EXERCISE CLAUSE JURISPRUDENCE?

PIERO A. TOZZI[†]

If court cases were movies, the United States Supreme Court's 1990 decision in *Employment Division v. Smith*¹ would be one where the director bucked central casting in choosing villains and heroes. For in *Smith*, Justice Antonin Scalia, ostensible champion to the so-called "religious right," morphs into Dick Dastardly, and Justice Harry Blackmun, joined by Justices William Brennan and Thurgood Marshall, wears the white hat.² Think of casting Willem Dafoe as the good sergeant and Tom Berenger as the bad sergeant in Oliver Stone's *Platoon*, if you will.

From the perspective of religious and social conservatives, the result of *Smith* was to severely constrict the ambit of religious liberty jurisprudence under the First Amendment of the United States Constitution. In *Smith*, the Supreme Court effectively overruled at least three decades of free exercise case law by holding that devotees of an American Indian peyote cult were subject to laws of general application, regardless of whether

[†] Piero A. Tozzi is the Executive Vice President and General Counsel of the Catholic Family and Human Rights Institute and Director of its International Organizations Law Group. This Article is adopted from presentations given to the Guild of Catholic Lawyers on April 4, 2008, and the Society of Catholic Social Scientists on October 24, 2008. The author would like to thank Stephen Braunlich, an Alliance Defense Fund Blackstone Legal Fellowship Intern, for his research and editorial assistance in the preparation of this Article.

¹ 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(b), *as recognized in* *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

² The artifice of a cinematic comparison does not originate with me; I heard Richard Duncan of the University of Nebraska use it in a talk he gave a couple of years ago and have (shamelessly) cribbed it.

the offending conduct was part of a bona fide religious ritual.³ Yet the demise of federal free exercise of religion protection in the wake of *Smith* has a silver lining: the revival of state constitutional free exercise jurisprudence as a (potential) vehicle for protecting religious freedom.

This Article examines the rediscovered protections afforded to those whose public lives are inspired by conscientious adherence to principles motivated by religion that *may* exist under state constitutions. The Article then asks whether such a rebirth is enough to protect religious free exercise from encroachment by an increasingly hostile secular culture unmoored from traditional notions of right and wrong.⁴

I. THE UPENDING OF TRADITIONAL FEDERAL FREE EXERCISE CLAUSE JURISPRUDENCE

A. *The Smith Decision and Laws of General Application*

In *Smith*, the Supreme Court took up the case of two drug counselors who were—ironically enough—fired from their work at a private rehabilitation center because they ingested peyote as part of a sacramental ceremony in the Native American Church.⁵ Consuming the sacramental hallucinogenic drug caused them to fail a drug test. As a result, they were discharged on the grounds of work-related misconduct, resulting in them being denied unemployment benefits by the state of Oregon.⁶ In upholding the denial, Justice Scalia's majority opinion for a divided court held that the Free Exercise Clause does not exempt religious practitioners from adhering to laws of general application.⁷

³ *Smith*, 494 U.S. at 872 (“[T]he [Free Exercise] Clause does not relieve an individual of the obligation to comply with a law that incidentally forbids (or requires) the performance of an act that his religious belief requires (or forbids) if the law is not specifically directed to religious practice and is otherwise constitutional as applied to those who engage in the specified act for nonreligious reasons.”).

⁴ There is, of course, no guarantee that protections will be stronger under a state constitutional analysis. See Tracey Levy, *Rediscovering Rights: State Courts Reconsider the Free Exercise Clauses of Their Own Constitutions in the Wake of Employment Division v. Smith*, 67 TEMP. L. REV. 1017, 1047–48 (1994).

⁵ *Smith*, 494 U.S. at 874.

⁶ *Id.*

⁷ *Id.* at 878–79.

Among the precedent that Justice Scalia relied upon was *Reynolds v. United States*,⁸ an 1878 case that rejected the claim that criminal laws against polygamy could not be constitutionally applied to Mormons, whose then-religious beliefs approved of polygamy.⁹ *Smith's* need to resurrect cases from the nineteenth

⁸ 98 U.S. 145, 166 (1878) (holding that laws prohibiting plural marriage apply to all Americans regardless of their religion, and therefore, do not target any specific religion).

⁹ In trying to fathom why Justice Scalia would appear to rule so contrary to type, it may very well be that circa 1990 he saw free exercise as a Trojan Horse, which polygamists might use to breach the citadel, followed in the wake by advocates of sodomy and a host of other causes espoused by post-modern individualists. This would be consistent with concerns expressed in dissent thirteen years later, in the Supreme Court case *Lawrence v. Texas*, striking down laws criminalizing sodomy as violative of the Constitution.

The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are “immoral and unacceptable,”—the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity . . . If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review.

Id. at 599 (Scalia, J., dissenting) (citations omitted) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986)). If this indeed was the fear that animated Justice Scalia in *Smith*, the legal firewall did not hold, and the breach occurred not at the Free Exercise Clause, but rather the Due Process Clause of the Fourteenth Amendment. See *id.* at 592–93; cf. Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise: Smith, Lukumi, and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 853–54 (2001) (“This free-exercise-phobia that animates Scalia’s opinion in *Smith* has been described eloquently by Ira Lupu: Behind every free exercise claim is a spectral march; grant this one . . . and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe.”). This line of argumentation by Justice Scalia in *Lawrence*, and similar comments by former U.S. Senator Rick Santorum, generated hostile commentary. See, e.g., Louis Michael Seidman, *Out of Bounds*, 65 OHIO ST. L.J. 1329, 1331 n.17, 1335 n.37 (2004) (criticizing Scalia and Santorum, respectively); Sean Loughlin, *Santorum Under Fire for Comments on Homosexuality*, CNN.COM, Apr. 22, 2003, <http://www.cnn.com/2003/ALLPOLITICS/04/22/santorum.gays/> (“If the Supreme Court says that you have the right to consensual (gay) sex within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything . . .”). Yet in the wake of *Lawrence*, restrictions on plural marriage and “same sex marriage” have been challenged; for tactical reasons, supporters of the latter have made a prudential judgment to “continue to distance same-sex marriage from plural marriage to avoid relinquishing the movement’s hard-earned cultural capital and societal support.” Jaime M. Gher, *Polygamy and Same-sex Marriage—Allies or Adversaries Within the Same-Sex Marriage Movement*, 14 WM. & MARY J. WOMEN & L. 559, 559 (2008); see also Joseph Bozzuti, *The Constitutionality of Polygamy Prohibitions after Lawrence v. Texas: Is Scalia a Punchline or a Prophet?*, 43 CATH. LAW. 409 (2004) (addressing polygamy); cf. Steve Weatherbe, *Marriage Redefined Again?*, NAT’L CATHOLIC REG., Feb. 15–21, 2009 (stating that “if same-sex ‘marriage’

century to reach this result was due to the radical shift in twentieth-century free exercise jurisprudence as existed prior to the *Smith* decision.¹⁰ Notwithstanding Justice Scalia's protests to the contrary,¹¹ *Smith* effectively overruled decades-old precedent as set forth in *Sherbert v. Verner*¹² and *Wisconsin v. Yoder*,¹³ cases which held that governmental action that substantially burdens a religious practice must be justified by a compelling governmental interest.

Although the Court attempted to distinguish *Yoder* as a "hybrid" case in which the Court protected free exercise because the facts also implicated another fundamental constitutional right—the right of parents to determine their children's education¹⁴—the distinction has been widely viewed with skepticism because *Smith* itself also implicated other fundamental rights, namely freedom of speech and association.¹⁵

is legal, then so is any conjugal relationship between consenting adults"). The taboo of incest has been challenged based on *Lawrence* as well. See Michael Lindenberger, *Should Incest be Legal?*, TIME, Apr. 5, 2007, <http://www.time.com/time/nation/article/0,8599,1607322,00.html>.

Plaintiffs have made the [*Lawrence*] decision the centerpiece of attempts to defeat state bans on the sale of sex toys in Alabama, polygamy in Utah and adoptions by gay couples in Florida. So far the challenges have been unsuccessful. But plaintiffs are . . . even using *Lawrence* to challenge laws against incest.

Id.

¹⁰ Giving Justice Scalia the benefit of the doubt, while *Smith* upheld laws of general application, the Court would apply strict scrutiny to laws that specifically target religious practices. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court, three years later, would find for the plaintiffs because the record in the case "compel[led] the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances." 508 U.S. 520, 534 (1993).

¹¹ See *Smith*, 494 U.S. at 881 ("The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections.").

¹² 374 U.S. 398, 410 (1963).

¹³ 406 U.S. 205, 235–36 (1972).

¹⁴ In *Yoder*, a Wisconsin law requiring all children up to the age of sixteen to attend public or private school was overturned when Amish parents successfully demonstrated that their children's attendance in high school was contrary to their religion and way of life, and so, the law violated their free exercise. *Id.* at 207–09.

¹⁵ As Justice Souter later wrote,

[I]f a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote ritual.

Church of the Lukumi Babalu Aye, 508 U.S. at 567 (Souter, J., concurring).

It is worth noting that this “hybrid” claim has never been central to another Supreme Court decision.¹⁶ Likewise, *Sherbert*, per Justice Scalia, no longer stood for the proposition that the “state is ‘constitutionally compelled to *carve out an exception*—and to provide benefits—for those whose unavailability is due to their religious convictions.’”¹⁷ Absent a compelling justification, however, governments must give religious reasons for exemptions the same deference they give secular reasons.¹⁸

But what is the practical effect of the *Smith* doctrine vis-à-vis religious liberty? Although it is beyond the scope of this Article to explore the distinction between the old and new doctrines in depth, applying three different Prohibition-type laws to the two approaches demonstrates how the *Smith* free exercise doctrine is substantially weaker than its predecessor. *Law One* is a generally applicable ban upon all consumption of alcohol without exception; *Law Two* is a ban upon all public consumption of alcohol but providing exemptions for restaurants and bars; *Law Three* is a ban upon all consumption of alcohol for religious worship.¹⁹ Under the pre-*Smith* doctrine, all three laws—lacking an exemption for those who use alcohol in religious worship—would be unconstitutional unless the state could meet strict scrutiny. The most notable case where this would apply is a Catholic Mass (or Orthodox Divine Liturgy), where the initiated drink sacramental “wine” at communion—the substance of which is the Blood of Christ, though its “accidental” properties are those of wine.²⁰ However, applying *Smith*’s free exercise doctrine (as

¹⁶ This may be due in part to the passage of the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb(b), and Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1(a), which restored the pre-*Smith* free exercise test as applied to the federal government and in land use and prison contexts. As discussed below, the Religious Freedom Restoration Act was struck down in part by *City of Boerne v. Flores*, 521 U.S. 507 (1997).

¹⁷ Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1412 (1990) (quoting *Sherbert*, 374 U.S. at 420 (Harlan, J., dissenting)).

¹⁸ See *Duncan*, *supra* note 9, at 862.

¹⁹ These three examples borrow from those provided by Professor Richard Duncan. See *id.* at 860.

²⁰ See CATECHISM OF THE CATHOLIC CHURCH ¶ 1374 (2d ed. 1997). Catholic teaching is that although the physical properties (or “accident”) of the bread and wine remain, their substance has been changed (or transubstantiated) into the actual body, blood, soul, and divinity of Jesus Christ. *Id.* St. Thomas Aquinas explains that the retention of the physical properties is

clarified in *Lukumi*) to the same law would permit *Law One* to stand as it is—generally applicable and without exceptions. *Law Three* would remain unconstitutional as it directly targets religious worship. However, *Law Two* would only be struck if it could be shown that the religious reasons for seeking an exemption were treated with less respect than the secular reasons for which restaurants and bars were given an exemption.

B. *Reacting to Smith: Congress and Boerne v. Flores*

Reacting to *Smith* and its implications for free exercise, Congress, in 1993, passed the Religious Freedom Restoration Act (RFRA), which restored the pre-*Smith* test, but it was partially struck down in *City of Boerne v. Flores*²¹ four years later. In *Boerne*, the Court held that those portions of RFRA that applied to the states were “beyond congressional authority” to legislate,²² though it left RFRA intact as it applied to the federal government.²³

In her dissent, Justice Sandra Day O’Connor called the Court to remember that free exercise of religion is not just a question of what beliefs you hold in your heart, but also requires the performance of certain acts central to worship, like partaking of the Eucharist or ingesting peyote.²⁴ Her dissent in *Boerne* persuasively argues that “the Clause is best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible governmental interference” and that “where a law substantially burdened

done by Divine providence. First of all, because it is not customary, but horrible, for men to eat human flesh, and to drink blood. And therefore Christ’s flesh and blood are set before us to be partaken of under the species of those things which are the more commonly used by men, namely, bread and wine. Secondly, lest this sacrament might be derided by unbelievers, if we were to eat our Lord under His own species. Thirdly, that while we receive our Lord’s body and blood invisibly, this may redound to the merit of faith.

ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE*, pt. III, Q. 75, art. 5 (1st ed., Benziger Bros. 1947) (1266–73).

²¹ 521 U.S. 507 (1997).

²² *Id.* at 536.

²³ See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 n.1 (2006). Here, an Amazonian tea drinking cult’s worship was enhanced with the aid of hallucinogenic tea. *Id.* at 423. The drugs in the tea were regulated by the Controlled Substances Act, and the cult successfully sought a preliminary injunction preventing the Act’s application. *Id.*

²⁴ See *Boerne*, 521 U.S. at 544–45 (O’Connor, J., dissenting).

religiously motivated conduct—regardless whether it was specifically targeted at religion or applied generally”—the government must meet the highest standard to justify the law.²⁵ Under this old regime, religious liberty occupied a preferred constitutional position of a higher level of respect,²⁶ just as the Constitution unequivocally makes free speech and freedom from race discrimination rights of a higher order than “ordinary rights” that could be circumscribed by legislative action. While this did not mean that a believer had an absolute right to engage in religiously-motivated conduct, even liturgical conduct—one can envision a devout, practicing Aztec’s religious worship needing to be circumscribed²⁷—the government nevertheless had to show a compelling interest in limiting it.²⁸ Moreover, it took a broad view of religious exercise that included belief and practice. This has implications far beyond religious worship as religion can spill into life in many ways: motivating the pharmacist to not dispense birth control, the doctor to not perform abortions, or the campground administrator to not rent out a pavilion for “same sex marriages” (“SSM”) when their beliefs inform them that such acts are wrong.²⁹

²⁵ *Id.* at 546.

²⁶ *Id.* at 564–65.

²⁷ On the summit he was received by six priests, whose long and matted locks flowed disorderly over their sable robes, covered with hieroglyphic scrolls of mystic import. They led him to the sacrificial stone, a huge block of jasper, with its upper surface somewhat convex. On this the prisoner was stretched. Five priests secured his head and his limbs; while the sixth, clad in a scarlet mantle, emblematic of his bloody office, dexterously opened the breast of the wretched victim with a sharp razor of itztli, a volcanic substance hard as flint, and, inserting his hand in the wound, tore out the palpitating heart. The minister of death, first holding this up towards the sun, an object of worship throughout Anahuac, cast it at the feet of the deity to whom the temple was devoted, while the multitudes below prostrated themselves in humble adoration. The tragic story of this prisoner was expounded by the priests as the type of human destiny, which, brilliant in its commencement, too often closes in sorrow and disaster.

See William H. Prescott, *History of the Conquest of Mexico* (C. Harvey Gardiner ed., Univ. Chi. Press 1966).

²⁸ See *infra* notes 46–51 (discussing broad state constitutional religious liberty provisions balanced against the need to protect public safety).

²⁹ See discussion *infra*. Of course, a secular atheist may also conclude that facilitating contraception, abortion, and homosexual unions violates an ethical code. For example, the founder of the Ethical Culture movement, Felix Adler, found abortion highly unethical. See SIDNEY HOOK, *OUT OF STEP: AN UNQUIET LIFE IN THE 20TH CENTURY* 347 (Harper & Row 1987); see also Nat Hentoff, *Pro-Choice Bigots: A View From the Pro-Life Left*, Nov. 30, 1992, <http://groups.csail.mit.edu/>

II. THE REBIRTH OF STATE CONSTITUTIONAL FREE EXERCISE ANALYSIS

Smith forced a useful reexamination by states and state courts of their own constitutions and forced states to ask: if what the Federal Constitution requires is a minimum, what liberties and values do our own state constitutions—which are organic, constitutive documents—protect? As New York’s recently retired, former Chief Judge Judith Kaye has noted, “where there are material textual differences between the state constitution and a corresponding provision of the Federal Constitution, there is little difficulty concluding that something different may have been intended.”³⁰ *Smith* has forced state courts to turn to their own constitutions and examine those differences in order to protect free exercise. This is something to be welcomed, for taking state constitutions seriously was a skill that had atrophied. Previously, when state courts addressed free exercise issues, they tended to view state constitutional provisions as an afterthought, content just to ape the federal standard.³¹

mac/users/rauch/nvp/consistent/hentoff_pro-life_left.html (proclaiming himself a “Jewish, atheist, civil libertarian, left-wing pro-lifer”).

³⁰ Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, The Forty-First Benjamin N. Cardozo Lecture Delivered Before the Association of the Bar of the City of New York (Feb. 26, 1987), reprinted in 61 ST. JOHN’S L. REV. 399, 412 (1987). Former Chief Judge Kaye of the New York Court of Appeals has been an influential proponent of interpreting state constitutions independently from that of the federal and according them their proper due within our federalist system of government. See Vincent Martin Bonventre, *New York’s Chief Judge Kaye: Her Separate Opinions Bode Well for Renewed State Constitutionalism at the Court of Appeals*, 67 TEMP. L. REV. 1163, 1166 (1994); see also Piero A. Tozzi & Lisa M. Tankoos, *New York: Steering a Course Between the Scylla of Judicial Activism and the Charybdis of Wayward Legislating—But for How Long?* 31–32 (Ams. United for Life State Supreme Court Project, White Paper Series, 2007), available at http://www.aul.org/xm_client/client_documents/sscp/NY.pdf (citing theme of the “stand-alone authority of the New York state constitution” as a lodestar of the Chief Judge’s jurisprudence, but also discerning “a hierarchy of state constitutional liberty principles” in her jurisprudence, with free exercise perhaps less cherished than others).

A recent book that gives a thorough review of how the abortion issue plays out under state constitutions—which will certainly increase in significance if *Roe* were ever overturned—is PAUL BENJAMIN LINTON, *ABORTION UNDER STATE CONSTITUTIONS* (2008).

³¹ See, e.g., *Blount v. Dep’t of Educ. & Cultural Servs.*, 551 A.2d 1377, 1385 (Me. 1988) (holding that “the full range of protection afforded . . . by the Maine Constitution is also available under the United States Constitution”). Additionally, the state free exercise claim is “premised on a contention that the Maine Constitution, by the language of the text and the record of the framers’ debates,

To simplify matters, the texts of state constitution free exercise clauses can be classified into two categories: those whose free exercise clauses mimic, in substance, that of the Federal Constitution and those that diverge. Among the latter, there exists a distinction among those that follow the “New York model,” as amplified below, and those that follow other models, which this Article shall not dwell on.³²

A. *Free Exercise Clauses Echoing the U.S. Constitution—The Massachusetts Example*

The Commonwealth of Massachusetts Constitution is a typical example of those that, in substance, follow the U.S. Constitution’s Free Exercise Clause: It states that “[n]o law shall be passed prohibiting the free exercise of religion.”³³ Though states may, like Massachusetts, follow the general text of the Federal Constitution,³⁴ they are free to interpret their clauses to different results. Not long after the *Smith* decision, in the 1994 case *Attorney General v. Desilets*,³⁵ the Massachusetts Supreme

provides more protection for religious practice and less protection for countervailing public interests than does the United States Constitution. [This] cannot survive a comparison of the two texts.” *Id.*; see also *Donahue v. Fair Emp. & Hous. Comm’n*, 2 Cal. Rptr. 2d 32, 39 (Ct. App. 1991) (“In analyzing a claim of the constitutional right to the free exercise of religion, the analysis is generally similar under both federal and state constitutional law.”); *Snyder v. Holy Cross Hosp.*, 352 A.2d 334, 341–42 (Md. Ct. Spec. App. 1976) (applying a compelling interest test to both state and federal free exercise provisions).

³² Some courts and commentators conflate the free exercise provisions of New York and Pennsylvania. Compare *Vermont State v. DeLaBruere*, 577 A.2d 254, 266 (Vt. 1990) (classifying Minnesota as having a “Pennsylvania” model free exercise clause), with *State v. Hershberger*, 462 N.W.2d 393, 399 (Minn. 1990) (Simonett, J., concurring) (tracing the provenance of Minnesota’s free exercise clause back to New York’s). See also *Levy*, *supra* note 4, at 1036 & n.146 (listing “Pennsylvania model” states). This Article is not meant to be an exhaustive taxonomic survey of states whose constitutions’ free exercise clauses differ from the federal; what is important to note is that states differ in the level of protection afforded by their respective constitutions post-*Smith*.

Interestingly, the Republic of the Philippines, whose Constitution was shaped by its American colonial history, adopted a hybrid federal-New York model. SALINGANG BATAS NG PILIPINAS [Constitution] art. III, § 5 (Phil.) (“No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed.”).

³³ MASS. CONST. art. XVIII, § 1.

³⁴ See ALA. CONST. art. I, § 4; HAW. CONST. art. I, § 4; IOWA CONST. art. I, § 3; LA. CONST. art. I, § 8; S.C. CONST. art. I, § 2; UTAH CONST. art. I, § 4.

³⁵ 636 N.E.2d 233 (Mass. 1994).

Court was forced to determine whether the free exercise right under the state constitution was broader than under the federal.³⁶

In *Desilets*, two devout Catholic landlord brothers refused to rent an apartment to unmarried cohabitants on the ground that they could not, in good conscience, facilitate conduct that their faith taught was immoral.³⁷ The rejected cohabitants filed a complaint with the Massachusetts Commission Against Discrimination, alleging that the brothers' conduct violated a Massachusetts statute that prohibited a landlord from refusing "to rent or lease . . . accommodations because of race, religious creed, color, national origin, sex, . . . age, . . . ancestry, or *marital status* of such person or persons"³⁸

The Attorney General prosecuted a case against the brothers, alleging that the Commonwealth's interest in eliminating all kinds of discrimination contained in the statute overrode any purported religious justification.³⁹ The court held that the brothers' conduct was motivated by sincerely held religious conviction, and thus, amounted to an exercise of religion.⁴⁰ Applying a *Sherbertesque* balancing test, the court looked at whether the Commonwealth had asserted a "sufficiently compelling" governmental interest to overcome the believers' free exercise rights and stated that the "general objective of eliminating discrimination of all kinds referred to in the [statute] . . . cannot alone provide a compelling State interest that justifies the application of that section in disregard of the defendants' right to free exercise of their religion."⁴¹ Noting that marital status, unlike "sex, race, color, creed or national origin," is not a category enumerated under the Massachusetts Constitution's equal protection clause, the court was "unwilling to conclude that simple enactment of the prohibition against discrimination based on marital status establishes that the State has such a substantial interest in eliminating that form of

³⁶ See *id.* at 235.

³⁷ *Id.* at 234.

³⁸ MASS. GEN. LAWS ch. 151B, § 4(6) (2006) (emphasis added); see *Desilets*, 636 N.E.2d at 235.

³⁹ See *Desilets*, 636 N.E.2d at 235.

⁴⁰ *Id.* at 237.

⁴¹ *Id.* at 238.

housing discrimination that” it outweighed defendants’ free exercise rights.⁴²

For proponents of the free exercise of religion, *Desilets* gives comfort that courts in states whose constitutional free exercise language tracks that of the Federal Constitution will readily interpret the same language in line with the traditional understanding of free exercise.⁴³ By retaining the applicability of the old doctrine, albeit as applied to the state constitution, advocates in states whose free exercise clause copies the federal government *may* have a powerful tool to protect religious liberty.

But, as explained below, strict scrutiny is not what it used to be. It remains to be seen how strong solicitude for religious liberty in the Commonwealth of Massachusetts will remain in light of the Massachusetts Supreme Court’s decision in *Goodridge v. Department of Public Health*,⁴⁴ which brought SSM to the state and fabricated a novel, “fundamental” right that may indeed conflict with guarantees of religious exercise, which predate the founding of the Republic.⁴⁵

B. *Free Exercise Clauses More Robust than the U.S. Constitution—The New York Model*

In contrast to Massachusetts’ plain vanilla free exercise clause, some states provide stronger free exercise protection in the actual text of their constitutions. New York’s Constitution, as originally adopted in 1777, contained the essential elements of its present-day free exercise clause: protection of profession and worship limited only by the need to prevent acts of licentiousness

⁴² *Id.* at 239–40.

⁴³ It is important to note, however, that the court did not find the state’s interest in preventing housing discrimination could *never* be sufficient to justify an infringement on the free exercise of religion. *See id.* at 240–41 (“On the other hand, we cannot say that it is certain that the Commonwealth could not prove in this case that it has some specific compelling interest that justifies overriding the defendants’ interests There are factual circumstances that bear on the question”). Needless to say, other states may interpret similar provisions differently or adopt a “lockstep” approach that disregards the importance of prior state constitutional precedent, abdicating the duty to interpret the organic, constituting document of their sovereign state to Justice Scalia and the Supreme Court majority circa 1990. *See Levy, supra* note 4, at 1035 (discussing “lockstep” analysis in Tennessee, whose state constitution’s free exercise clause mirrors the federal).

⁴⁴ 798 N.E.2d 941 (Mass. 2003).

⁴⁵ *See id.* at 948–49; Roger Severino, *Or for Poorer? How Same-Sex Marriage Threatens Religious Liberty*, 30 HARV. J.L. & PUB. POL’Y 939, 942 (2007) (“The movement for gay marriage is on a collision course with religious liberty.”).

or practices inconsistent with the peace and safety of the state.⁴⁶ It has been incorporated in whole⁴⁷ or in part⁴⁸ in seventeen states.

The modern New York Constitution, in language more robust and sweeping than that of the First Amendment, broadly proclaims that religious liberty is of paramount importance:

The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind . . . but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.⁴⁹

The very structure of this language directs that the free exercise of religion—to be “forever” allowed—is superior to ordinary legislation. This fundamental right may be overridden only in those limited circumstances where “peace or safety” is implicated, or where a licentious practice is garbed with religious justification. Rather than restricting religious liberty, the latter “peace or safety” clause implies that religious exercise is exempt from all laws of general application, save those within

⁴⁶ N.Y. CONST., art. XXXVIII (1777).

⁴⁷ ARIZ. CONST. art. II, § 12; CAL. CONST. art. I, § 4; COLO. CONST. art. II, § 4; CONN. CONST. art. I, § 3; GA. CONST. art. I, § 1; IDAHO CONST. art. I, § 4; ILL. CONST. art. I, § 3; MINN. CONST. art. I, § 16; MISS. CONST. art. III, § 18; NEV. CONST. art. I, § 4; N.D. CONST. art. I, § 3; S.D. CONST. art. VI, § 3; WASH. CONST. art. I, § 11; WYO. CONST. art. I § 18.

⁴⁸ FLA. CONST. art. I, § 3 (incorporating the limits of public morality, safety, and peace); see also MD. CONST., Decl. of Rights, art. XXXVI; MO. CONST. art. III, § 5.

⁴⁹ N.Y. CONST. art. I, § 3. New York, whose four metropolitan counties had established Anglican churches until the 1777 constitution, had a strong and early tradition of sectarian tolerance. See McConnell, *supra* note 17, at 1424; see also Edward Hart, Clericus, Remonstrance of the Inhabitants of the Town of Flushing to Governor Stuyvesant (Dec. 27, 1657), <http://www.nym.org/flushing/remons.html>.

You have been pleased to send unto us a certain prohibition or command that we should not receive or entertain any of those people called Quakers because they are supposed to be, by some, seducers of the people . . . [I]f any of these said persons come in love unto us, we cannot in conscience lay violent hands upon them, but give them free egress and regress unto our Town, and houses, as God shall persuade our consciences, for we are bounde by the law of God and man to doe good unto all men and evil to noe man. And this is according to the patent and charter of our Towne, given unto us in the name of the States General, which we are not willing to infringe, and violate, but shall houlde to our patent and shall remaine, your humble subjects, the inhabitants of Vlissing.

this narrow enumerated category.⁵⁰ Courts must thus give “religiously motivated conduct” an exemption from otherwise generally applicable laws “up to the point such conduct breache[s] pubic peace or safety.”⁵¹ To hold otherwise reduces the constitutional language to mere precatory wallpaper, gutted of any substantive meaning.⁵²

Minnesota, like New York, has a strongly worded free exercise clause that would seem to offer, on its face, broader protection of religious liberty than exists in the Federal Constitution:

The right of every man to worship God according to the dictates of his own conscience shall never be infringed . . . nor shall any control of or interference with the rights of conscience be permitted . . . but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state⁵³

Like Massachusetts, Minnesota was confronted with a free exercise case very soon after *Smith*. In 1990, the Minnesota

⁵⁰ See McConnell, *supra* note 17, at 1464.

⁵¹ See *id.* at 1462.

⁵² Justice O'Connor made this point in criticizing the *Smith* decision by construing New York's free exercise clause and sister provisions from other states:

The language used in these state constitutional provisions and the Northwest Ordinance strongly suggests that, around the time of the drafting of the Bill of Rights, it was generally accepted that *the right to “free exercise” required, where possible, accommodation of religious practice.* If not—and if the Court was correct in *Smith* that generally applicable laws are enforceable regardless of religious conscience—there would have been no need for these documents to specify, *as the New York Constitution did*, that the rights of conscience should not be “construed to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of [the] State.” Such a proviso *would have been superfluous.* Instead, these documents make sense only if *the right to free exercise was generally viewed as generally superior to ordinary legislation*, to be overridden *only* when necessary to secure important government purposes.

City of Boerne v. Flores, 521 U.S. 507, 554–55 (1997) (O'Connor, J., dissenting) (emphasis added).

For a recent law review article that seriously considers state constitutional guarantees as a means for better understanding the federal, see George A. Mocsary, *Explaining Away the Obvious: The Infeasibility of Characterizing the Second Amendment as a Non-Individual Right*, 76 *FORDHAM L. REV.* 2113, 2123–25, 2157 (2008).

⁵³ MINN. CONST. art. I, § 16. This provision appears traceable to the New York Constitution of 1777. See *State v. Hershberger*, 462 N.W.2d 393, 399 (Minn. 1990) (Simonett, J., concurring); see also David H.E. Becker, Note, *Free Exercise of Religion Under the New York Constitution*, 84 *CORNELL L. REV.* 1088, 1118–19 (1999).

Supreme Court reconsidered its previous findings from the pre-*Smith* case, *State v. Hershberger*⁵⁴ (hereinafter *Hershberger I*) in *State v. Hershberger*⁵⁵ (hereinafter *Hershberger II*). In *Hershberger I*, the court had taken up the case of members of the Old Order Amish religion who challenged a state law requiring all “slow-moving vehicles”—including their horse drawn buggies—to display a fluorescent orange triangle while on state highways.⁵⁶ The Amish plaintiffs contested that “the ‘loud’ colors required and the ‘worldly symbols’ the triangular shape represents” were in conflict with their religious faith.⁵⁷ Notably, not all members of the Old Order Amish took this position; some accommodated the legal requirements.⁵⁸ Because *Hershberger I* was pre-*Smith*, upon finding that the statute violated existing federal free exercise doctrine, the court never reached a determination as to the applicability of Minnesota’s free exercise doctrine.⁵⁹ After *Smith* removed the federal protection which had been applied, the court took the case back up in *Hershberger II*.

There, the court interpreted its free exercise clause—analagous in substance to New York’s—as “expressly limit[ing] the governmental interests that may outweigh religious liberty.”⁶⁰ Basing its decision solely upon the Minnesota Constitution, which “provides an independent and adequate state constitutional basis on which to decide,” the Minnesota Supreme Court held that because a less restrictive alternative (a different color of reflective tape) that would not burden the Amish religious beliefs existed, the statute must give way to religious belief.⁶¹ Thus, even though the government could show that its interest in traffic safety was “compelling,” it nevertheless had to show more before it could “infringe upon religious freedoms which this state has traditionally revered”—namely, that “public safety cannot be achieved through reasonable alternative means.”⁶²

⁵⁴ 444 N.W.2d 282 (Minn. 1989), *vacated by* 495 U.S. 901 (1990).

⁵⁵ 462 N.W.2d at 395.

⁵⁶ 444 N.W.2d at 284.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 289.

⁶⁰ *Hershberger II*, 462 N.W.2d at 397.

⁶¹ *Id.* at 396–99 (commenting that Minnesota’s free exercise clause was “distinctively stronger [in] character than [its] federal counterpart”).

⁶² *Id.* at 398–99.

Minnesota is not alone in its interpretation. Like the “Land of 10,000 Lakes”—home to the original basketball Lakers⁶³—Washington’s free exercise clause echoes New York’s in that it limits the privilege “as to [not] excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.”⁶⁴ In *First Covenant Church of Seattle v. City of Seattle*, the Supreme Court of Washington considered a challenge to Seattle’s designation of a church as a historic landmark, which would require pre-approval of any external changes.⁶⁵ Finding for the plaintiffs, the state held that “the Washington State Constitution extends broader rights to citizens than the federal constitution” based on six grounds, including the text of the state constitution, differences between that and the Federal Constitution, state constitutional and common law history, and differences in structure between the state and Federal Constitution.⁶⁶ Concluding that the Washington Constitution’s free exercise provision was stronger, the court held that a compelling interest test was appropriate and that the city had failed to meet this test.⁶⁷

Though New York’s Constitution (obviously) follows the New York model, the Court of Appeals—the State’s highest court—would not avail itself of the opportunity to expound on its scope post-*Smith* until 2006, as discussed in greater detail below.⁶⁸

⁶³ Why a Los Angeles-based team would keep the name “Lakers” is perplexing, though the result may perhaps be no more incongruous than the name “Jazz” being retained by a team following its move from New Orleans to Utah. Such mental peregrinations, alas, wander beyond the scope of this Article.

⁶⁴ WASH. CONST. art. I, § 11.

⁶⁵ See *First Covenant Church v. City of Seattle*, 840 P.2d 174, 177–78 (Wash. 1992).

⁶⁶ *Id.* at 185–86. The remaining grounds included pre-existing state law and matters of particular state or local concern. *Id.*

⁶⁷ *Id.* at 188–89.

⁶⁸ The state constitution’s free exercise provision was not before the court in *New York State Employment Relations Board v. Christ the King Regional High School*, 90 N.Y.2d 244, 247, 682 N.E.2d 960, 962, 660 N.Y.S.2d 359 (1997), where on “First Amendment grounds, under the Free Exercise and Establishment Clauses of the United States Constitution, appellant [sought] an absolute, threshold exemption from the operation of the New York State Labor Relations Act.” *Id.* at 361 (emphasis omitted).

III. THE NEW YORK STATE OF MIND: A MUSHY MIDDLE GROUND IN RELIGIOUS LIBERTY PROTECTION

Although the above may suggest that states will find in their free exercise clauses protection for religious liberty, in a post-*Smith* world, even strongly worded clauses may not be interpreted to the fullest breadth suggested by their textual language. New York is one such example, but to appreciate the current state of free exercise jurisprudence, a historical glance backward is helpful.

New York State constitutional free exercise jurisprudence dates back (at least) to the early nineteenth century, though it went into desuetude during much of the twentieth century while the Federal Free Exercise Clause dominated the analysis.⁶⁹ In the 1813 case *People v. Philips*,⁷⁰ a Roman Catholic priest arranged for a repentant burglar to return stolen goods to their rightful owner, one James Keating, who proceeded to inform the authorities of what had transpired.⁷¹ Subpoenaed to appear before a grand jury, the priest refused to disclose the identity of the thief because the seal of confessional prevented him from so doing.⁷² Unmoved, the district attorney pointed directly to the text of the state constitution, which, he intoned:

has granted "profession and worship" to all denomination 'without discrimination or preference': but it has not granted exemption from previous legal duties. It has expelled the demon of persecution from our land: but it has not weakened the arm of public justice. Its equal and steady impartiality has soothed all the contending sects into the most harmonious equality, but to none of them has it yielded any of the rights of a well organized government.⁷³

Not so, said the *Philips* court, in an opinion drafted by DeWitt Clinton, a virtuous man of broad cast of mind who variously

⁶⁹ Incorporation of the bill of rights as binding upon states was a gradual process. Certainly the federal Free Exercise Clause was deemed binding upon the states by 1940, when the Supreme Court decided *Cantwell v. State of Connecticut*, 310 U.S. 296, 303-04 (1940).

⁷⁰ N.Y.C. Gen. Sess. N.Y. County 1813, available at <http://www.churchstatelaw.com/cases/peoplevphillips.asp>. This case was not officially reported but was abstracted in 1 W.L.J. 109 (1843).

⁷¹ See *id.*

⁷² See *id.*

⁷³ Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1411 (1990); see also N.Y. CONST. art. I, § 3.

served as both mayor of New York City and governor of New York State, in addition to his duties on the bench.⁷⁴ The Court ruled that the New York State Constitution—written in gratitude “to Almighty God for our Freedom”⁷⁵—required deference to the principle of free exercise:

It is essential to the free exercise of religion, that its ordinances should be administered—that its ceremonies as well as its essentials should be protected To decide that the minister shall promulgate what he receives in confession, is to declare that there shall be no penance; and this very important branch of the Roman catholic religion would thus be annihilated Although we differ from the witness and his brethren, in our religious creed, yet we have no reason to question the purity of their motives, or to impeach their good conduct as citizens. They are protected by the laws and constitution of this country, in the full and free exercise of their religion, and this court can never countenance or authorize the application of insult to their faith, or of torture to their consciences.⁷⁶

Though the state free exercise clause did not receive much attention while expansive federal free exercise analysis was ascendant, this deference did continue post-*Sherbert*. In *Rivera v. Smith*,⁷⁷ the New York Court of Appeals ruled on a case involving a Muslim inmate claiming his free exercise rights were violated when, contrary to his earnestly held beliefs that he would sin if a member of the opposite sex touched him, a woman officer pat frisked him.⁷⁸ Although finding that the “nature of a correctional facility . . . is such that inmates cannot be afforded free exercise rights as broad as those enjoyed outside the prison setting,”⁷⁹ the court nevertheless applied a compelling interest test in applying the state constitution.⁸⁰ Neither did the Court of

⁷⁴ THE ENCYCLOPEDIA AMERICANA 83 (Grolier 1989).

⁷⁵ N.Y. CONST. pmb1.

⁷⁶ N.Y.C. Gen. Sess. N.Y. County 1813, available at <http://www.churchstatelaw.com/cases/peoplevphillips.asp>. Despite the reference to the “laws and constitution of this country,” what was at issue was the New York Constitution’s free exercise clause. *Id.*

⁷⁷ 63 N.Y.2d 501, 506, 472 N.E. 2d 1015, 1017, 483 N.Y.S.2d 187, 189 (1984).

⁷⁸ *Id.* at 506, 472 N.E. 2d at 1017, 483 N.Y.S.2d at 189.

⁷⁹ *Id.* at 511, 472 N.E.2d at 1020, 483 N.Y.S.2d at 192.

⁸⁰ *Id.* at 512, 472 N.E.2d at 1020–21, 483 N.Y.S.2d at 193 (The court tested to see “whether the impingement on . . . [plaintiff’s] religious convictions caused by a routine pat frisk conducted by a woman officer is outweighed by a legitimate

Appeals take a narrow view of what constituted a religious exercise. In *Rochester Christian Church, Inc. v. New York Public Service Commission*, the court overturned a Public Service Commission denial of statutory benefits to religious schools because they taught secular subjects, and thus, did not operate “‘exclusively’ for religious purposes within the meaning of the statute.”⁸¹ Reinstating the benefit, the court held that a school can be exclusively religious even when it teaches secular subjects because “the teaching of religious beliefs is the paramount objective and . . . it pervades all subjects whether secular or religious.”⁸²

This brief review of New York’s free exercise jurisprudence from *Philips* to *Rivera* would seem to suggest that New York’s free exercise clause encompasses a liberal-minded view of religious profession and worship and would protect it up to the point of the infringing upon peace and safety. Unfortunately, in *Catholic Charities of the Diocese of Albany v. Serio*,⁸³ such was not the case. Although its dictum provides a firmer foundation for free exercise than is offered by *Smith*, *Serio* fails to credit sufficiently the burden placed on religious believers and institutions by next-wave coercive legislation and lacks the measured deference afforded religious beliefs in *Philips*, *Rivera*, and *Rochester Christian Church*.

Serio was the first time the New York Court of Appeals interpreted the state’s free exercise clause after *Smith*. There, the Woman’s Health and Wellness Act of 2002 mandated that any prescription drug coverage offered by employers include contraceptive drugs or devices.⁸⁴ Despite the Act’s benign sounding name, this contraception mandate violated the religious tenets of certain religious organizations, most notably the Catholic Church.⁸⁵ Though the statute conferred an exemption

institutional need or objective of the correctional facility,” then found for the plaintiff as there were less discriminatory alternatives available.)

⁸¹ *Rochester Christian Church, Inc. v. N.Y. Pub. Serv. Comm’n*, 55 N.Y.2d 196, 199, 433 N.E.2d 132, 133, 448 N.Y.S.2d 149, 150 (1982). Although the court did not consider the state free exercise clause in its opinion, the definition of religion is applicable to the state as a New York statute was being considered. See generally *id.*

⁸² *Id.* at 204, 433 N.E.2d at 135, 448 N.Y.S.2d at 152.

⁸³ 7 N.Y.3d 510, 859 N.E.2d 459, 825 N.Y.S.2d 653 (2006), cert. denied sub nom. *Catholic Charities of the Diocese of Albany v. Dinallo*, 128 S. Ct. 97 (2007).

⁸⁴ N.Y. INS. LAW §§ 3221(l)(16), 4303(cc) (McKinney 2009).

⁸⁵ The Catechism of the Catholic Church states, “every action which, whether in anticipation of the conjugal act, or in its accomplishment, or in the development of

upon "religious employers," it defined the class so narrowly as to apply to almost no bona fide church social arm.⁸⁶ This was not by accident.⁸⁷

Advocates for religious liberty could initially take heart that the court would not blindly follow *Smith* because under Chief Judge Judith Kaye, the court has been cognizant that where "the Supreme Court has changed course and diluted constitutional principles," the Court of Appeals has the "responsibility to support the State Constitution when [it] examine[s] whether [it] should follow along as a matter of State law."⁸⁸ This augured well for advocates of religious liberty, as the New York Constitution seemed to limit free exercise only by a governmental interest universally acknowledged as compelling since the founding of the constitution: maintaining public peace or safety and preventing licentiousness. Access to contraceptives is a relatively new societal "good," acceptance of which is not universal. Indeed, well into the 1960s and 1970s, a number of states had laws restricting the distribution of contraceptives.⁸⁹ In New York specifically, contraception was once recognized as promoting licentiousness, and thus, endangering the public safety.⁹⁰ Today, mores (apparently) have changed, but a mere moral change did not necessarily alter the public peace and safety or allow one side in the culture wars to point to a new-found interest, label it compelling, and thus, coerce a dissenting minority into violating conscience or creed despite a strongly worded free exercise clause.

The New York contraception mandate legislation was modeled after a California statute that required certain group

its natural consequences, proposes, whether as an end or as means, to render procreation impossible' is intrinsically evil." CATECHISM OF THE CATHOLIC CHURCH, *supra* note 20, ¶ 2370.

⁸⁶ The most substantial narrowing factor in the "religious employer" definition was the prong that required a "religious employer" to serve primarily followers of the same faith—in other words, a Catholic social service agency that served the poor regardless of their faith background would not be deemed "Catholic" under this definition. N.Y. INS. LAW §§ 3221(l)(16)(A)(1)(c), 4303(cc)(1)(A)(iii).

⁸⁷ See *infra* notes 91–92 and accompanying text.

⁸⁸ *People v. Scott*, 79 N.Y.2d 474, 504, 593 N.E.2d 1328, 1347, 583 N.Y.S.2d 920, 939 (1992) (Kaye, J., concurring).

⁸⁹ See *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965); see also *Eisenstadt v. Baird*, 405 U.S. 438, 440 (1972) (Massachusetts).

⁹⁰ See *Foy Prods., Ltd. v. Graves*, 253 A.D. 475, 480, 3 N.Y.S.2d 573, 577 (3d Dep't 1938) (an "immoral and reprehensible" practice), *aff'd*, 278 N.Y. 498, 15 N.E.2d 435 (1938).

policies offering prescription coverage to include contraceptives. Though the New York legislative history is fairly plain vanilla,⁹¹ a reading of the California legislative history indicates that it was designed to target Catholic institutions through an inordinately narrow definition of “religious employer” as one who, inter alia, primarily serves people of the same religious beliefs.⁹² Thus, employers such as Catholic Charities or the Carmelite Sisters of the Aged and Infirm, which serve the needy *regardless* of their religious affiliation,⁹³ are not to be considered “religious,” and must provide contraceptives to their employees despite the consistent teaching of the Catholic Church that the use

⁹¹ In New York, the legislation had previously been blocked by the state senate, then controlled by Republicans. However, the party’s Senate leader changed direction in an attempt to win a special election and retain a liberal Manhattan seat whose voters supported the contraception mandate. The tactic failed. Tom Robbins, *East Side Attack*, THE VILLAGE VOICE, Oct. 29, 2002, <http://www.villagevoice.com/2002-10-29/news/east-side-attack/>.

⁹² The legislative record in California showed that ninety percent of Californians already had contraceptive coverage and that the remaining deficit was a “Catholic gap.” Piero A. Tozzi, *When Conscience Clashes with State Law & Policy: Catholic Institutions: A Response to Susan Stabile*, 46 J. CATHOLIC LEGAL STUD. 161, 164 (2007) (internal quotation marks omitted). Furthermore, Kathy Kneer, CEO of the Planned Parenthood Federation of California, testified that the bill intended to close the gap by leaving out a broad religious exemption and the chief Senate sponsor admitted that a narrow exemption was needed “so as *not* to exempt various religious institutions.” *Id.* at 165 (internal quotation marks omitted). Finally, background information submitted to the State Insurance Committee in support of the bill referenced Catholic employers, hospitals, and social service agencies, and the legislation was built on model legislation that was crafted to protect as few Catholic institutions as possible. *See id.* at 164–65.

The California Supreme Court upheld the constitutionality of the California contraception mandate, despite an impassioned dissent from former Justice Janet Robert Brown. *See Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 73–74, 98 (Cal. 2004) (Brown, J., dissenting). The U.S. Supreme Court denied certiorari. *Catholic Charities of Sacramento, Inc. v. California*, 543 U.S. 816 (2004). Query, whether in its denial of certiorari, the Supreme Court gave due consideration to the grounds outlined in *Lukumi* for reviewing legislation that might be targeting an unpopular religion under the guise of a statute of general application.

⁹³ *See Susan J. Stabile, State Attempts To Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 HARV. J.L. & PUB. POL’Y 741, 757 (2005).

Jesus did not teach his followers to provide care only for those who have accepted his teachings. The mission of Christ’s followers is to feed all who are hungry and care for all those who are in need. Thus, the fact that Catholic organizations serve members of other faiths as well as their own is part of their calling.

Id.

of contraceptives is intrinsically evil.⁹⁴ Indeed, more morally problematic than contraceptives qua contraceptives, certain contraceptives like the intrauterine device or “the pill” may function as abortifacients.⁹⁵

Recognizing the state constitutional free exercise argument to be the plaintiffs’ strongest⁹⁶ and holding New York’s free exercise protections to be broader than the federal protection, the court nevertheless declined to apply strict scrutiny, opting for a lower “substantial deference” standard that required religious adherents claiming an exemption from a statute to show that the legislation creates an “unreasonable interference” with religious freedom.⁹⁷ In so doing, the court credited the sincerity of the plaintiffs’ religious-based belief that contraception was immoral but noted that the conscience-crisis claim was overstated: As the legislation affected only employers who provided prescription drug coverage, a conscientious objector could sidestep the issue by simply not providing prescription drugs to its employees.⁹⁸ Even accepting the argument that religious-affiliated employers were morally obligated to provide employees with prescription drug coverage as part of a system of just wages and benefits, the court did not see the contraception mandate as an unreasonable interference as “it is surely not impossible, though it may be expensive or difficult, to compensate employees adequately

⁹⁴ See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 20, ¶ 2370; see also JOHN PAUL II, ENCYCLICAL LETTER *FAMILIARIS CONSORTIO* ¶ 32 (1981) (noting that when couples use contraception they separate the unitive and procreative meanings of sexuality and their sexual communion; they “degrade human sexuality—and with it themselves and their married partner—by altering its value of ‘total’ self-giving”). “Thus, the innate language that expresses the total reciprocal self-giving of husband and wife is overlaid, through contraception, by an objectively contradictory language, namely, that of not giving oneself totally to the other.” *Id.*; PAUL VI, ENCYCLICAL LETTER *HUMANAE VITAE* ¶ 14 (1968) (“[The Church is obliged to condemn] direct sterilization, whether of the man or of the woman, whether permanent or temporary. Similarly excluded is any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation”) (footnote call number omitted); PIUS XI, ENCYCLICAL LETTER *CASTI CONNUBII* ¶ 56 (1930) (“[A]ny use whatsoever of matrimony exercised in such a way that the act is deliberately frustrated in its natural power to generate life is an offense against the law of God and of nature”).

⁹⁵ *Stabile*, *supra* note 93, at 752–53.

⁹⁶ *Catholic Charities of the Diocese of Albany v. Serio*, 7 N.Y.3d 510, 521, 859 N.E.2d 459, 463, 825 N.Y.S.2d 653, 657 (2006), *cert. denied sub nom.* *Catholic Charities of the Diocese of Albany v. Dinallo*, 128 S. Ct. 97 (2007).

⁹⁷ *Id.* at 525, 859 N.E.2d at 466, 825 N.Y.S.2d at 660.

⁹⁸ *Id.* at 527, 859 N.E.2d at 468, 825 N.Y.S.2d at 662.

without including prescription drugs in their group health care policies.”⁹⁹ This reasoning, however, marginalizes the religious believer, preventing full participation in the activities of the public square.

Despite the above, the Court of Appeals in *Serio* is more solicitous of religious liberty than the U.S. Supreme Court. In dicta, the Court of Appeals indicated that certain potential legislation, such as one which would threaten the seal of the confessional (considered recently by the New Hampshire,¹⁰⁰ Kentucky,¹⁰¹ Nevada,¹⁰² and Maryland¹⁰³ legislatures), would be unreasonable and violate religious adherents’ free exercise rights.¹⁰⁴ This is heartening and provides a theoretical firewall, a point at which the court would step in to protect religious freedom. Yet for the various groups opposed to the Women’s Health and Wellness Act, it falls short of the ideal.

Not all states opt to protect free exercise of religion to this extent. Approaches taken in other states have included applying the *Smith* test to state free exercise clauses or treating “the Federal Constitution as the primary protector of rights and the state constitution as the secondary protector.”¹⁰⁵ Indeed, even if New York had adopted the *Sherbert* test, *Catholic Charities of Sacramento, Inc. v. Superior Court*¹⁰⁶ suggests that the result could have been the same, for there, the Supreme Court of California considered the same legislative exemption that served as a model for New York’s contraception mandate.¹⁰⁷ Applying (ostensibly) the *Sherbert* test to the California constitution,¹⁰⁸ with its New York-type free exercise clause,¹⁰⁹ the court found against the various petitioners for religious freedom.¹¹⁰ The court reached this conclusion by discounting Catholic Charities’ assertion that Catholicism’s teaching on just wages required

⁹⁹ *Id.*

¹⁰⁰ H.B. 1127, 159th Gen. Court, 2006 Sess. (N.H. 2006).

¹⁰¹ H.B. 58, 2003 Gen. Assem., Reg. Sess. (Ky. 2003).

¹⁰² S.B. 223, 2003 Leg., 72nd Reg. Sess. (Nev. 2003).

¹⁰³ H.B. 823, 2003 Gen. Assem., 417th Reg. Sess. (Md. 2003); see also S.B. 412, 2003 Gen. Assem., 417th Reg. Sess. (Md. 2003).

¹⁰⁴ *Serio*, 7 N.Y.3d at 527, 859 N.E.2d at 467, 825 N.Y.S.2d at 661.

¹⁰⁵ Becker, *supra* note 53, at 1115.

¹⁰⁶ 85 P.3d 67 (Cal. 2004).

¹⁰⁷ *Id.* at 74 n.3.

¹⁰⁸ *Id.* at 91.

¹⁰⁹ CAL. GEN. LAWS ch. 151(B), § 4 (2006).

¹¹⁰ *Superior Court*, 85 P.3d at 94.

prescription drug coverage,¹¹¹ elevating contraceptive coverage to a compelling state interest¹¹² and finding that there was no less restrictive alternative.¹¹³ Thus, while reaching the same end result as *Serio*, California's means of getting there was worse, as it continued the pre-*Smith* strict scrutiny that was neither strict nor scrutinizing.

IV. GOD'S SERVANT FIRST: FREE EXERCISE IN AN AGE OF (IL)LIBERAL INTOLERANCE

Though some may consider it unduly alarmist, it seems that we are living in a time when the right of conscience, including that of conscientious Catholics, and the autonomy of religious institutions, is under siege. Just as in the days of DeWitt Clinton, a type of anti-Catholicism roams the land—but it is not one emerging from the fever swamps of fundamentalism. Rather, contemporary hostility toward the Church—and any other institution that upholds traditional mores and standards—springs from the bosom of progressive, secular liberalism.

Liberal theory views all preferences and the satisfaction of such preferences, as equally “good,” as all “standards” are relative and personal. Therefore, non-liberal institutions and standards, with their adherence to notions of objective right and wrong, are oppressive, as they conflict with and restrain the autonomous individual's choices.¹¹⁴ Hence, such opposition must be suppressed, and the liberal state so enlisted becomes intolerant, seeking to force mediating institutions, like churches

¹¹¹ *Id.* at 92 n.19 (stating that the petitioner could simply “avoid all conflict with its beliefs by declining coverage for prescription drugs . . . while offering its employees a raise to offset the reduced benefits” and dismissing that such a plan may be so expensive as to be a burden).

¹¹² *Id.* at 92. Disingenuously, the California court stated that employers are engaged in gender discrimination when they deny contraceptive drug coverage to *both* men and women because women purchase more prescription contraceptives. *Id.* at 74. Non-discrimination is no longer an issue of equal treatment, but equal results—in this case health care costs.

¹¹³ *Id.* at 93–94. This point implies that the legislation's narrow definition of religious employer was meant to target those whose religious objections prevented the gap from closing. Therefore, because the legislation targeted some religious believers and institutions but not others, it ought to have been held unconstitutional as burdening free exercise.

¹¹⁴ See generally JAMES KALB, *THE TYRANNY OF LIBERALISM: UNDERSTANDING AND OVERCOMING ADMINISTERED FREEDOM, INQUISITORIAL TOLERANCE, AND EQUALITY BY COMMAND* (2008).

and even families,¹¹⁵ out of the public square.¹¹⁶ Of course, as the public square becomes denuded, nothing stands between the individual and the state, and the state, which grants positive rights, can also take away rights, all in the name of its logic of “tolerance” and equality.¹¹⁷ Modern liberalism becomes totalitarian in its conceits.¹¹⁸

¹¹⁵ Consider, for example, opposition to laws requiring parental consent before minors may obtain an abortion. See *Ayotte v. Planned Parenthood*, 546 U.S. 320 (2006).

¹¹⁶ Liberals view themselves as idealistic and progressive, but such a self-image conceals dangers even if it is not wholly illusory. It leads liberals to ignore considerations like human nature and fundamental social and religious traditions, which have normally been treated as limits on reform. Freedom and equality are abstract, open-ended, and ever-ramifying goals that can be taken to extremes. Liberals tend to view these goals as a simple matter of justice and rationality that prudential considerations may sometimes delay but no principle can legitimately override. In the absence of definite limiting principles, liberal demands become more and more far-reaching and the means used to advance them ever more comprehensive, detailed, and intrusive.

KALB, *supra* note 114. While an extended discourse on liberal theory is beyond the scope of this inquiry, its general contours can be discerned in works like JOHN RAWLS, *POLITICAL LIBERALISM* (2d ed. 2005) and JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* (2d. ed. 2001).

¹¹⁷ See generally RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* (2d ed. 1986) and WILLIAM A. DONOHUE, *TWILIGHT OF LIBERTY: THE LEGACY OF THE ACLU* (1994) for an explication of this theme.

Those who lack utility, such as the inconvenient unborn child and the burdensome infirm and elderly, are excluded from liberal society, and their rights and those of their defenders—most emphatically, the (Catholic) Church—are “legitimately” subject to reduction and even elimination. Perhaps the most encapsulated exchange by the American judiciary on the issue of where rights derive—whether they are objective, inherent and grounded in nature, or granted at the relativistic whim of the liberal state—is found in the dueling majority and dissenting opinions in *Byrn v. New York City Health & Hospitals Corp.*, a pre-*Roe* New York Court of Appeals abortion decision. 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972). There, Judge Charles D. Breitell held for the majority that “[w]ether the law should accord legal personality is a policy question which in most instances devolves on the Legislature,” and Judge Adrian P. Burke defended the notion that “human beings are not merely creatures of the State, and by reason of that fact, our laws should protect the unborn from those who would take his life for purposes of comfort, convenience, property or peace of mind rather than sanction his demise.” *Id.* at 205, 286 N.E.2d at 892, 335 N.Y.S.2d at 397.

¹¹⁸ See Robert John Araujo, *Conscience, Totalitarianism, and the Positivist Mind*, 77 MISS. L.J. 571, 617 (2007); Jakob Cornides, *Human Rights Pitted Against Man*, 12 INT’L J. HUM. RTS. 107 (2008). For a philosophical inquiry into whether a purely secular-based notion of human rights can survive without a theistic underpinning for the concept of human dignity, see NICHOLAS WOLTERSTORFF,

This conflict is most pronounced in the area of sexual mores and reproduction, and it is here where threats to free exercise and conscience are already upon us. Contraception mandate legislation—the model for which was clearly designed to target the Catholic Church—is certainly one threat. Future dangers posed to free exercise loom particularly large in two areas: that related to healthcare and “reproductive rights” (including contraception) and that related to traditional marriage, pitted against an expanding notion of homosexual rights.

A. *Free Exercise and Health Care*

The first threat to the free exercise of religion has an eerie echo of *Serio* in its ring; it mandates that hospitals provide “morning after” pills like Barr Pharmaceutical’s Plan B that can act as abortifacients to rape victims upon request without first administering an ovulation test.¹¹⁹ For Catholics, the most direct

JUSTICE: RIGHTS AND WRONGS (2008) (the human rights project likely unsustainable without notion of a transcendent Deity in whose image man is created).

¹¹⁹ Plan B is the trade name for Levonorgestrel, a high-hormone dose, progesterone-only birth control pill; another marketed “emergency contraception” is Preven, which uses a combination of the hormones progesterone and estrogen. According to the Food and Drug Administration (and Barr Pharmaceuticals) “emergency contraception” is believed to work by either (i) preventing ovulation, (ii) preventing fertilization (by inhibiting the sperm), or (iii) preventing the fertilized egg from attaching to the womb by altering the endometrium—in other words, preventing implantation and effectively expelling the fertilized ovum. See Food & Drug Administration, FDA’s Decision Regarding Plan B: Questions and Answers (May 7, 2004), <http://www.fda.gov/cder/drug/infopage/planB/planBQandA.htm> (“If fertilization does occur, Plan B may prevent a fertilized egg from attaching to the womb (implantation).”) (updated Aug. 24, 2006); Barr Pharmaceutical, How Plan B Works, <http://www.go2planb.com/plan-b-prescribers/how-plan-b-works.aspx> (last visited Aug. 3, 2009) (explaining that Plan B is believed to work by “[a]ltering the endometrium, which may inhibit implantation.”); see also Chris Kahlenborn et al., *Postfertilization Effects of Hormonal Emergency Contraception*, 36 ANNALS OF PHARMACOTHERAPY 465 (2002), available at http://www.polycarp.org/postfertilization_polycarp_1.htm. It is this latter function that is problematic. While there is some debate in the literature as to whether implantation is actually inhibited, the precautionary principle dictates that all doubts be resolved in protecting the right to life since the incontrovertible biological fact is that life begins at conception. See O’BRIAN & SADLER, LANGMAN’S MEDICAL EMBRYOLOGY 117 (2004) (defining pregnancy as beginning at fertilization of the egg by the sperm). The question of when rights attach to life is a separate question that is also the subject of (intense) debate, but it is the position of this author that drawing the line anywhere other than conception—when twenty-three chromosomes from the sperm and twenty-three chromosomes from the egg fuse—is arbitrary and leads to a devaluing of human dignity. Where on the slide down the slippery slope this devaluation ends is an open issue, but given present trends towards rationing health

doctrinal guidance on the illicitness of administering such “emergency contraception” comes from the Pontifical Academy for Life, which finds that “the proven ‘anti-implementation’ action of the *morning-after pill* is really nothing other than a chemically-induced abortion” and that “those who ask for or offer the pill are seeking the direct termination of a possible pregnancy already in progress, just as in the case of abortion.”¹²⁰ Likewise, the pertinent health care directive from the United States Conference of Catholic Bishops states that “[i]t is not permissible . . . to initiate or to recommend treatments that have as their purpose or direct effect the removal, destruction, or interference with the implantation of a fertilized ovum.”¹²¹ Laws in Connecticut,¹²² Massachusetts,¹²³ and California,¹²⁴ to cite three examples, override conscience rights and require Catholic hospitals to administer drugs that can cause the expulsion of a fertilized ovum, that is, a life already in being, upon request. While the response of the Bishops of Connecticut has been to capitulate to that state’s encroachment on religious liberty, other bishops have steadfastly maintained that they would shut down Catholic hospitals before cooperating materially with intrinsically evil acts.¹²⁵

care and a concomitant justification for ending “life not worth living” in the legal and other literature, things do seem dark. See generally RONALD DWORIN, *LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (Vintage Books 1994) (defending abortion and euthanasia on the ground of respect for individual autonomy); PETER SINGER, *PRACTICAL ETHICS* 175 (2d ed. 1993) (justifying infanticide); see also DAVID BENATAR, *BETTER NEVER TO HAVE BEEN: THE HARM OF COMING INTO EXISTENCE* 1 (2006) (“[C]oming into existence, far from ever constituting a net benefit, always constitutes a net harm. Most people, under the influence of powerful biological dispositions towards optimism, find this conclusion intolerable. They are still more indignant at the further implication that *we should not create new people.*” (emphasis added)).

¹²⁰ PONTIFICAL ACADEMY FOR LIFE, *Statement on the So-called “Morning-After Pill”*, VATICAN.VA, Oct. 13, 2000, para. 3, http://www.vatican.va/roman_curia/pontifical_academies/acdlife/documents/rc_pa_acdlife_doc_20001031_pillola-giorno-dopo_en.html (pointing out that pregnancy “begins with fertilization and not with the implantation of the blastocyst in the uterine wall”).

¹²¹ UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES* Directive no. 36 (4th ed. 2001), available at <http://www.usccb.org/bishops/directives.shtml>.

¹²² CONN. GEN. STAT. ANN. § 19a-112e(b)(3) (West 2008).

¹²³ MASS. GEN. LAWS ANN. ch. 111, § 70E (West 2009).

¹²⁴ CAL. PENAL CODE § 13823.11(e) (West 2009).

¹²⁵ See John-Henry Westen, *Wisconsin Bishop Breaks from Conference and Opposes Emergency Contraception in Catholic Hospitals*, LIFESITENEWS.COM, Dec. 19, 2007, <http://www.lifesite.com/ldn/2007/dec/07121906.html>; John-Henry Westen,

Another threat is the effort to enshrine a “fundamental” right to abortion in legislation. Most pronounced is the not-yet-crystallized Federal “Freedom of Choice Act” (“FOCA”), which then-candidate Barack Obama said he hoped to sign as his first act as president.¹²⁶

FOCA, however, also has state analogues—mini-FOCA bills pushed by state legislatures. State courts will need to weigh deference to legislative decisions against (one would think) a fundamental right to free exercise contained in respective state constitutions. In New York for example, the mini-FOCA bill under consideration has been known as the Reproductive Health and Privacy Protection Act (“RHAPP”)—proposed by former Governor Eliot Spitzer and seconded by his successor Governor David Paterson—which would establish a “fundamental right of privacy”¹²⁷ encompassing the right to “bear a child or to terminate a pregnancy.”¹²⁸ RHAPP could be interpreted to require state licensed or funded hospitals—including Catholic hospitals—to perform abortions because the state would not be permitted to provide conscientious protection against the exercise of abortion rights in the “provision of benefits, facilities, services or information.”¹²⁹

At oral argument in *Serio*—the New York Court of Appeal contraception mandate case discussed above—questions asked of the solicitor defending the contraception mandate inquired as to whether there was a distinction between abortion and contraception without resolving the issue.¹³⁰ It remains an open question: On the one hand, the court held that access to contraceptives—which can function as abortifacients, and

Colorado Springs Bishop Says He Does Not and Would Not Permit Plan B in Catholic Hospitals, LIFESITENEWS.COM, Oct. 10, 2007, <http://www.lifesite.com/ldn/2007/oct/07101001.html>.

¹²⁶ See Barack Obama, Speech to Planned Parenthood, July 17, 2007, available at <http://www.youtube.com/watch?v=pf0XIRZSTt8> (video) and <http://lauraetch.googlepages.com/barackobamabeforeplannedparenthoodaction> (full transcript).

¹²⁷ N.Y.S. 6045-A, 230th Sess. (2007). It will likely be reintroduced in this session under the name “Reproductive Health Act.”

¹²⁸ *Id.*

¹²⁹ *See id.*

¹³⁰ See Transcript of Oral Argument at 9–10, *Catholic Charities of the Diocese of Albany v. Serio*, 7 N.Y.3d 510, 859 N.E.2d 459, 825 N.Y.S.2d 653 (2006) *cert. denied sub nom.* *Catholic Charities of the Diocese of Albany v. Dinallo*, 128 S. Ct. 97 (2007) (No. 2006-0110) (noting the questions asked by Judge Graffeo and Judge Smith of Shaifali Puri).

therefore, burden religious believers and Catholic institutions—if mandated by the legislature, overrode free exercise rights.¹³¹ On the other hand, it also set up certain firewalls, as seen above in the context of the seal of the confessional.¹³² How far those walls will extend remains to be seen, and in the post-*Smith* world, would be determined by state court interpretations of state free exercise clauses and doctrines.¹³³

B. *Free Exercise and Traditional Marriage*

What is marriage? What is its purpose?

Marriage is a pre-political institution, by its nature premised “upon the biological complementarity of the sexes, ordered to natural birthing and raising of children, for the flourishing of individuals and society as a whole.”¹³⁴ John Locke described it as

a voluntary Compact between Man and Woman: and tho’ it consist chiefly in such a Communion and Right in one anothers Bodies, as is necessary to its chief End, Procreation; yet it draws

¹³¹ See *Serio*, 7 N.Y.3d at 525, 859 N.E.2d at 466, 825 N.Y.S.2d at 660.

¹³² *Id.* (adopting a test that is “more protective of religious exercise than the rule of *Smith*”).

¹³³ Beyond the constitutional arguments, if the New York legislature were to pass some form of the RHAPP legislation, statutory protection of the conscience rights of physicians and health care workers would also come to the fore, though these would not necessarily protect Catholic hospitals. Federal law provides that the receipt of certain federal funding “does not authorize any court or any public official or other public authority to require” an individual or entity to perform sterilization procedures or abortions if it would be against an individual’s “religious beliefs or moral convictions.” 42 U.S.C. § 300a-7(b) (2006). Certain covered employers are prohibited from discriminating against employees or applicants who conscientiously object to participation in abortions or sterilizations. See *id.* § 300a-7(c)(1); see also *id.* § 300a-7(e). Section 238 of the Federal Public Health Service Act provides,

[t]he Federal Government, and any State or local government that receives Federal financial assistance, may not subject any health care entity to discrimination on the—(1) basis that the entity refuses to undergo training in the performance of induced abortions, to require or provide such training, to perform such abortions, or to provide referrals for such training or such abortions.

Id. § 238n(a)(1). The statute defines “health care entity” as “an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions.” *Id.* § 238n(c)(2) (internal quotation marks omitted). Accordingly, Catholic physicians, but not necessarily hospitals, faced with adverse state administrative action may be able invoke section 238 of the Federal Public Health Service Act which, under the Supremacy Clause, should trump the application of RHAPP.

¹³⁴ See Piero A. Tozzi, *The Blessing or the Curse: Whose Values Will Guide Us? Where Will They Lead Us?*, 47 J. CATHOLIC LEGAL STUD. 167, 183 n.55 (2008).

with it mutual Support, and Assistance, and a Communion of Interest too, as necessary not only to unite their Care, and Affection, but also necessary to their common Off-spring, who have a Right to be nourished and maintained by them, till they are able to provide for themselves.¹³⁵

By its nature, marriage is a union between man and woman, which society sanctions for the benefit not as much for the man and woman, but (a) for the children that inevitably result when a man and a woman congress, and (b) for society as a whole, since such children must be cared for, reared, and essentially tamed¹³⁶—that is to say, integrated into society as well-adjusted individuals. What was once proclaimed by the Supreme Court as a truism—“[m]arriage and procreation are fundamental to the very existence and survival of the race”—now seems to be an observation that has escaped many.¹³⁷

As a common understanding of marriage and its purposes continues to erode, proponents of marriage as the union of one man and one woman—an understanding which may derive from religious conviction, though it is manifest universally across cultures and not a religious belief per se—comes under hostile assault from certain social segments. This was certainly evident in the debate in California over Proposition 8, where religious supporters of traditional marriage, in particular, Mormons, were subject to rank anti-religious bigotry.¹³⁸ Indeed, according to some homosexual activists, advocates for traditional marriage should be “fined, fired and even jailed until they relent”¹³⁹—that is to say, until they surrender their religious convictions.

One obvious area in which free exercise—individuals or religiously affiliated institutions acting in the public square in accordance with religious principles—has been threatened is adoption. When governments require adoption agencies to adhere to a policy of “non-discrimination” between same-sex and traditional households with respect to the placement of children,

¹³⁵ JOHN LOCKE, TWO TREATISES OF GOVERNMENT 319 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

¹³⁶ As the American novelist Hervey Allen wrote, “[e]ach new generation is a fresh invasion of savages.” HERVEY ALLEN, ANTHONY ADVERSE (1933).

¹³⁷ *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

¹³⁸ See Jessica Garrison & Joanna Lin, *Prop. 8 Protestors Target Mormon Temple in Westwood*, L.A. TIMES, Nov. 7, 2008, at B1.

¹³⁹ David Benkof, *Why California Gays Shouldn't Celebrate State Court Ruling*, SEATTLE POST-INTELLIGENCER, May 21, 2008, at B7.

as seen in Massachusetts in the wake of that state's "gay marriage" decision,¹⁴⁰ religious institutions are forced to either acquiesce or withdraw from the public square. There, rather than bowing to state dictates and violating Church teaching, Catholic Charities of Boston ceased participating in all adoptions.¹⁴¹ Less than a year after the charity's decision, the Archdiocese of San Francisco was forced to follow suit.¹⁴² In both cases, the Church agency could not violate Catholic teaching that, "[t]he bond between two men or two women cannot constitute a real family and much less can the right be attributed to that union to adopt children."¹⁴³ Adoption by same-sex couples is deemed to be "gravely damaging to the rights of children," as it involves "serious, negative and even irreparable consequences for the normal development of their personalities."¹⁴⁴ Catholic adoption agencies were thus forced to retreat from the public square. How exactly does this "victory"

¹⁴⁰ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

¹⁴¹ See Father Robert J. Carr, *Boston's Catholic Charities To Stop Adoption Service over Same-Sex Law*, Mar. 10, 2006, CATHOLIC ONLINE, http://www.catholic.org/national/national_story.php?id=19017.

¹⁴² Patricia Wen, *Calif. Charity Ends Full Adoptions*, BOSTON GLOBE, Aug. 3, 2006, at B2.

¹⁴³ PONTIFICAL COUNCIL FOR THE FAMILY, FAMILY, MARRIAGE AND "DE FACTO" UNIONS 29 (U.S. Catholic Conference 2001) (quoting John Paul II, *ANGELUS* (Feb. 20, 1994)).

¹⁴⁴ Final Declaration of the International Symposium on Adoption, "The Rights of Children," ¶¶ 13–14. In placing children with same-sex couples, one question that needs to be asked is which parent is deemed unnecessary for raising healthy children—the mother or the father? Advocates of same-sex adoption tend to focus on "rights" of the adults in question rather than the rights of the children. See David Quinn, *Daddy Must Go—He's Not Politically Correct*, IRISH INDEP. (Dublin), May 23, 2008 ("[W]e have convinced ourselves that recognising the right of single women or lesbian couples to fertility services has no consequences beyond the happiness of the adults involved. We have forgotten that a child has a right to a father and a father has a right to his child.").

For studies of the effects upon children of being reared in such same-sex households, see Paul Cameron & Kirk Cameron, *Homosexual Parents*, 31 *ADOLESCENCE* 757 (1996), available at http://findarticles.com/p/articles/mi_m2248/is_n124_v31/ai_19226135/?tag=content;coll1; George Reckers & Mark Kilgus, Review of Research on Homosexual Parenting, Adoption and Foster Parenting, <http://www.narth.com/docs/RationaleBasisFinal0405.pdf>; George Reckers & Mark Kilgus, *Studies of Homosexual Parenting: A Critical Review*, 14 *REGENT UNIV. L. REV.* 343 (2002) (analyzing the literature on adoption of children by same-sex couples and noting methodological shortcomings of certain studies); see also Don Browning & Elizabeth Marquardt, *What About the Children? Liberal Cautions on Same-Sex Marriage*, in *THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, AND MORALS* (Robert P. George & Jean Bethke Elshtain eds., 2006).

for liberal state aggrandizement and special interest activists benefit children in need of adoption services?

Another area in which declining free exercise protection, plus the rise of SSM, augurs trouble for religious believers, is the area of public accommodation laws. Examples abound. In New Jersey, the Ocean Grove Camp Meeting Association, a Methodist organization, is under investigation by the State Department of Law and Public Safety Division on Civil Rights because a group of lesbians filed a complaint after the organization refused to rent a boardwalk pavilion to them.¹⁴⁵ The investigation continues, in part, because “the transaction in question is governed by the [Law Against Discrimination]’s provisions for places of public accommodation.”¹⁴⁶ Although the government is continuing its investigation of the organization, the state has already revoked tax-exempt status on the pavilion.¹⁴⁷ According to Lisa Jackson—then the New Jersey Commissioner of Environmental Protection, now the Obama administration’s pick to head the Federal Environmental Protection Agency—the status was revoked because “the pavilion is not open to all persons on an equal basis.”¹⁴⁸ The fact that Ocean Grove was motivated by religious beliefs never factored into the revocation of the tax-exempt status and was rejected by the Division on Civil Rights.¹⁴⁹

In a similar case, Vermont innkeepers have been taken to their state’s human rights commission for being merely reticent about hosting a civil union reception.¹⁵⁰

In New Mexico, a photographer and her company have been taken before the state human rights commission for declining to

¹⁴⁵ Jill P. Capuzzo, *Group Loses Tax Break over Gay Union Issue*, N.Y. TIMES, Sept. 18, 2007, at B2.

¹⁴⁶ Letter from J. Frank Vespa-Papaleo, Esq., Dir., State of N.J., Office of the Attorney Gen., Dep’t of Law and Pub. Safety, Div. on Civil Rights to Counsel for Ocean Grove Camp Meeting Association (Jan. 7, 2008), available at <http://media.npr.org/documents/2008/jun/pavilion.pdf>.

¹⁴⁷ Capuzzo, *supra* note 145.

¹⁴⁸ *Id.* (internal quotation marks omitted). On her new federal position, see Lisa P. Jackson, *Times Topics*, N.Y. TIMES, Feb. 24, 2009, http://topics.nytimes.com/top/reference/timestopics/people/j/lisa_p_jackson/index.html?8qa&scp=1-spot&sq=Lisa+P.+Jackson&st=nyt.

¹⁴⁹ Vespa-Papaleo, *supra* note 146, at 3.

¹⁵⁰ See Lindsey Douthit, *Vermont Inn Sued for Resisting Same-Sex Civil Union Ceremony*, Concerned Women for America, July 24, 2005, <http://www.cwfa.org/articledisplay.asp?id=8607&department=CFI&categoryid=family>.

photograph a same-sex “commitment ceremony.”¹⁵¹ The case arose when two lesbians e-mailed Elane Photography, LLC about the project through the company’s website.¹⁵² They filed suit for discrimination¹⁵³ upon being refused services on the grounds that photographing such a project was against the company owners’ and employees’ Christian beliefs.¹⁵⁴ The case is pending appeal, but the Human Rights Commission administrative decision leveled a \$6,637.94 award¹⁵⁵ on the grounds that the company was a public accommodation¹⁵⁶ and must obey laws prohibiting public accommodations from refusing to serve people on the basis of sexual orientation.¹⁵⁷ In response to the free exercise claims, the Commission wrote that the facts of the case failed to support an exception to the non-discrimination law on those grounds,¹⁵⁸ but the Commission ultimately ducked the question by declaring that “questions as to an automatic preemption . . . by the United States Constitution, the New Mexico Constitution or the New Mexico Religious Freedom Restoration Act . . . are not before” the commission.¹⁵⁹

CONCLUSION

This is just a brief survey of some of the fronts where the rights to free exercise of religious belief and of conscience are under attack. Even if the sample is small and non-exhaustive, it suffices to show just how invidious a weak free exercise doctrine can be.¹⁶⁰ After the United States Supreme Court adopted the

¹⁵¹ Willock v. Elane Photography, LLC, HRD No. 06-12-20-0685 at 1 (Human Rights Comm’n of the State of N.M. Apr. 9, 2008), available at <http://volokh.com/files/willockopinion.pdf>.

¹⁵² *Id.*

¹⁵³ *Id.* at 8.

¹⁵⁴ *Id.* at 6.

¹⁵⁵ *Id.* at 19.

¹⁵⁶ *Id.* at 16.

¹⁵⁷ *Id.* at 18.

¹⁵⁸ *Id.* at 14.

¹⁵⁹ *Id.* at 18. I have written elsewhere about a case I litigated in which similar issues were raised in connection with a subpoena issued by then New York Attorney General Eliot Spitzer on a Long Island business. Following a motion to quash, the subpoena was withdrawn. See Tozzi, *supra* note 92, at 169–70.

¹⁶⁰ Other examples include a fertility clinic sued by lesbians for refusing to artificially inseminate them; the Supreme Court of California has not yet handed down a ruling in this case, but in oral arguments the court showed “little interest in [the] argument that freedom of religion as guaranteed by the state and Federal Constitutions should have been the focus.” Mike McKee, *Calif. Justices Appear To*

Smith test, state free exercise clauses have become increasingly important. With this increased importance comes the need to interpret them as providing broad protection, allowing religious citizens the ability to participate in the public square in a manner consistent with their beliefs.

Given the increasingly intolerant landscape, failure to reinvigorate free exercise jurisprudence and accommodate religiously motivated conduct and conscientious objection—or even non-religiously-motivated conscientious acts and omissions—will lead to more state coercion of those citizens who dissent because they labor to preserve what George Washington called “that little spark of celestial fire called conscience.”¹⁶¹

Favor Lesbian in Dispute over Artificial Insemination, LAW.COM, May 29, 2008, <http://www.law.com/jsp/article.jsp?id=1202421761840>.

¹⁶¹ GEORGE WASHINGTON, RULES OF CIVILITY & DECENT BEHAVIOUR IN COMPANY AND CONVERSATION: A BOOK OF ETIQUETTE 62 (AKASHIC BOOKS 2004) (1926).

