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Revitalization of the Free Exercise of Religion under State Constitutions: A Response to Employment Division v. Smith

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NOTES

Revitalization of the Free Exercise of Religion Under State Constitutions: A Response to *Employment Division v. Smith*

I. INTRODUCTION

Because the Supreme Court's holding in *Employment Division, Department of Human Resources v. Smith*[1] "dramatically departs from well-settled First Amendment jurisprudence"[2] with regard to the Free Exercise Clause,[3] some state courts view free exercise analysis under the First Amendment as unpredictable.[4] Instead of using the current First Amendment analysis articulated in *Smith* to review free exercise of religion cases, state courts have begun providing broader free exercise protection by relying solely or independently on state constitutional free exercise clauses.[5]

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1 494 U.S. 872 (1990).

2 *Id.* at 891 (O'Connor, J., concurring in the judgment). In his dissent in *Smith*, Justice Blackmun, with whom Justices Brennan and Marshall joined, characterized the holding in *Smith* as a "wholesale overturning of settled law concerning the Religion Clauses of our Constitution." *Id.* at 908 (Blackmun, J., dissenting); *see also* First Covenant Church v. City of Seattle, 840 P.2d 174, 187 (Wash. 1992) (stating that *Smith* "departs from a long history of established law and adopts a test that places free exercise in a subordinate, instead of preferred, position"); Rupert v. City of Portland, 605 A.2d 63, 65 n.3 (Me. 1992) (noting that *Smith* "abandoned the 'four-stage framework' previously developed by the United States Supreme Court for First Amendment claims"); Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr.2d 32, 39 (Cal. Ct. App. 1991) (quoting *Smith*, 494 U.S. at 891 (O'Connor, J., concurring)), *reh'g granted*, 825 P.2d 766 (Cal. 1992).

3 The First Amendment of the United States Constitution provides, "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof.*" U.S. CONST. amend. I (emphasis added). The First Amendment has been incorporated into the Fourteenth Amendment and therefore applies to the states. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

For a discussion of free exercise jurisprudence prior to *Smith*, see *infra* text accompanying notes 7-29. For a discussion of *Smith*, see *infra* text accompanying notes 30-39.

4 *See* State v. Hershberger, 462 N.W.2d 393, 396 (Minn. 1990) (declining to base its decision on "the uncertain meaning" of *Smith*); State v. French, 460 N.W.2d 2, 8 (Minn. 1990) (plurality opinion) (noting the "unforeseeable changes in established first amendment law set forth in recent decisions of the United States Supreme Court;" citing *Smith*); *First Covenant Church*, 840 P.2d at 185, 187 (citing *Hershberger*, 462 N.W.2d at 396) (eschewing the "uncertainty" of *Smith*).

5 *See, e.g., Donahue*, 2 Cal. Rptr.2d at 40; State v. Evans, 796 P.2d 178, 179 (Kan. Ct. App. 1990); *Rupert*, 605 A.2d at 66 n.3; Society of Jesus v. Boston Landmarks

Part II of this Note discusses the strict scrutiny analysis the Supreme Court had previously employed in free exercise of religion cases and *Smith*'s departure from that standard in favor of a more relaxed standard of review. Part III examines and categorizes the cases that have afforded greater protection for the free exercise of religion under state constitutions than that provided by the First Amendment since the *Smith* case.[6] Part IV concludes that the recent trend of state courts avoiding *Smith*'s narrow reading of the Free Exercise Clause will continue in light of the similarity among state free exercise clauses and the original understanding of those state provisions. Part IV also lists some states whose future decisions might provide greater free exercise protection under their state constitutions, based upon pre-*Smith* state precedents that already have established their respective state free exercise provisions' independence from the First Amendment.

II. FREE EXERCISE OF RELIGION UNDER THE FIRST AMENDMENT

The first Supreme Court decision to address squarely the Free Exercise Clause was *Reynolds v. United States*.[7] In *Reynolds*, the Court affirmed the conviction of a Mormon charged with bigamy.[8] The Court created a belief/action distinction by stating that while laws "cannot interfere with mere religious belief and opinions, they may with practices."[9] The Court explained that permitting exemptions from laws based on religious conduct such as engaging in plural marriages would enable a citizen "to become a law unto himself."[10]

Comm'n, 564 N.E.2d 571, 572 (Mass. 1990); *Hershberger*, 462 N.W.2d at 396-97; *French*, 460 N.W.2d at 8; *First Covenant Church*, 840 P.2d at 185-88.

6 *See supra* note 5.

7 98 U.S. 145 (1878).

8 *Id.* at 168. In *Reynolds*, George Reynolds, a member of the Mormon Church, sought a religious exemption from a federal statute prohibiting polygamy. *Id.* at 145. The Mormon Church believed that its male members had a duty to practice polygamy and that failure to do so would result in "damnation in the life to come." *Id.* at 161.

9 *Id.* at 166.

10 *Id.* at 166-67. The Department of Justice has stated that the belief/action distinction introduced in *Reynolds* is contrary to the intent of the Framers of the Constitution, is inconsistent with the text of the First Amendment, and renders the Free Exercise Clause as a mere redundancy: "If the free exercise of religion were only a right to express religious *beliefs*, then the Free Exercise Clause would add nothing to the First Amendment, since that right is fully protected by the right to assemble, speak, and publish." DEPARTMENT OF JUSTICE REPORT TO THE ATTORNEY GENERAL, RELIGIOUS LIBERTY UNDER THE FREE EXERCISE CLAUSE 19 (1986) [hereinafter JUSTICE DEPARTMENT REPORT].

Cantwell v. Connecticut[11] signalled the demise of *Reynolds*' strict application of the belief/action distinction. In *Cantwell*, the Court observed that although the freedom to act according to one's religion is not absolute, the government only has limited power to regulate conduct.[12]

Expressly rejecting the belief/action distinction and establishing the compelling interest test, *Sherbert v. Verner*[13] marks the beginning of modern free exercise analysis under the First Amendment.[14] The Court in *Sherbert* held that South Carolina's denial of unemployment benefits to a Seventh Day Adventist who was fired from her job for refusing to work on Saturdays, her sabbath, violated her free exercise of religion.[15] Despite the fact that the Court acknowledged that the state provision, which disqualified the Sabbatarian from receiving unemployment benefits, regulated conduct,[16] the Court applied a strict scrutiny analysis.[17] The Court held that any government regulation that substantially burdens a sincere religious practice violates the Free Exercise Clause, unless the government justifies the burden by a compelling state interest that is the least restrictive means of achieving that interest.[18]

Nine years later, the Court in *Wisconsin v. Yoder*[19] again applied strict scrutiny analysis to a substantial governmental interference with the free exercise of religion. In *Yoder*, the Court held

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11 310 U.S. 296 (1940).

12 *Id.* at 303-04.

13 374 U.S. 398 (1963).

14 *Sherbert* is the "first and leading case in the Supreme Court's modern free exercise jurisprudence." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise*, 103 HARV. L. REV. 1409, 1412 (1990).

15 *Sherbert*, 374 U.S. at 406-09.

16 *Id.* at 404.

17 For the purposes of this Note, "strict scrutiny analysis" and "compelling interest test" are used synonymously.

18 *Sherbert*, 374 U.S. at 403. Commentators have criticized the Supreme Court's modern free exercise jurisprudence for its lack of any attempt to determine the original meaning of the Free Exercise Clause. *See* Douglas W. Kmiec, *The Original Understanding of the Free Exercise Clause and Religious Diversity*, 59 U.M.K.C. L. REV. 591, 599, 604-05 (1991) (asserting that the Court, in *Sherbert* and subsequent cases, departed from the text of the Free Exercise Clause and any inquiry as to its original meaning; submitting that denial of public benefits as a result of religious beliefs or conduct does not "prohibit" religion); McConnell, *supra* note 14, at 1413 ("The Court made no effort in *Sherbert* or subsequent cases to support its holdings through evidence of the historical understanding of 'free exercise of religion' at the time of the framing and ratification of the first amendment.").

19 406 U.S. 205 (1972).

that Wisconsin violated the Free Exercise Clause by convicting members of the Amish religion for violating a generally applicable, neutral state statute which required children to attend school until age sixteen.[20] High school attendance was contrary to the Amish faith and their way of life.[21] Concluding that Wisconsin's interest in compulsory education did not outweigh the Amish believers' free exercise of religion, the Court stated that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[22]

The Supreme Court reaffirmed the applicability of the compelling interest test in free exercise cases in *Thomas v. Review Board of Indiana Employment Security Division*.[23] In *Thomas*, the Court held that Indiana's denial of unemployment benefits to a Jehovah's Witness who refused to transfer to his employer's munitions division on religious grounds violated the Free Exercise Clause.[24] The Court explained, "The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."[25] Although the Supreme Court created limited exceptions to the applicability of strict scrutiny in certain free exercise cases,[26] in *Hobbie v. Unemployment Appeals*

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20 *Id.* at 234.

21 *Id.* at 209.

22 *Id.* at 215.

23 450 U.S. 707 (1981).

24 *Id.* at 718.

25 *Id.*

26 In a military setting, the Court in Goldman v. Weinberger, 475 U.S. 503 (1986), denied a Jewish officer of the Air Force a religious exemption from a military regulation. *Id.* at 510. Prohibiting the wearing of headgear while indoors, the military regulation prevented the Jewish officer from wearing his yarmulke as required by his religion. *Id.* at 505-06. Refusing to apply the strict scrutiny standard, the Court stated, "Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society." *Id.* at 507.

The Court also has applied a more deferential standard of review to prison regulations. In O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987), the Court held that prison regulations that prevented Islamic prisoners from attending Muslim services did not violate the Free Exercise Clause. *Id.* at 353. The regulations "reasonably related to legitimate penological interests"—prison security. *Id.* at 348 (citation omitted).

The Supreme Court further limited the applicability of strict scrutiny analysis in free exercise cases by more narrowly interpreting the word "prohibiting" in the Free Exercise Clause. In Bowen v. Roy, 476 U.S. 693, 712 (1986), the Court held that the Free Exercise Clause did not require the government to provide a religious exemption from the government's use of social security numbers in administering the Aid to Families with Dependent Children program and the Food Stamp program. A member of the Native American religion asserted that the government's use of his daughter's social security number, as a condition for receiving benefits from these programs, robbed his daughter

Commission,[27] the Court continued to apply the compelling interest test in cases outside those exceptions. In *Hobbie*, the Court held that Florida's denial of unemployment benefits to an individual who refused to work on her sabbath day violated the Free Exercise Clause.[28] The Court stated that "[b]oth *Sherbert* and *Thomas* held that such infringements [of the free exercise of religion] must be subjected to strict scrutiny and [can] be justified only by proof by the State of a compelling interest."[29]

The *Smith*[30] case, however, departs from strict scrutiny analysis. In *Smith*, Oregon denied unemployment benefits to two mem-

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of her spirit. *Id.* at 696-97. The Court found that the use of the daughter's social security number did not "in any degree impair" the father's free exercise of religion, but merely involved the way in which the government conducted its internal affairs. *Id.* at 699-700. Emphasizing that denying government benefits is far less burdensome than prohibiting or compelling religious activity, the Court concluded that a condition for governmental benefits does not violate the Free Exercise Clause if it reasonably promotes a legitimate state interest. *Id.* at 703-04, 706-08.

In Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988), the Court examined the government's construction of a road through a portion of a national forest traditionally used for religious rituals by American Indian tribes. Relying on *Bowen*'s distinction between regulations involving the way in which the government conducts its own affairs that incidentally burden religious activity and regulations that prohibit or compel religious activity, the Court held that the government's construction did not violate the Free Exercise Clause. *Id.* at 458. It explained that the government's construction on its own land did not "prohibit" the Indians' free exercise of religion, because it did not directly or indirectly coerce the Indians to violate their religious beliefs. *Id.* at 448-51.

27 480 U.S. 136 (1987).

28 *Id.* at 146.

29 *Id.* at 141. As recently as 1989, the Supreme Court reiterated the validity of the compelling interest test in three cases. The Court stated, "The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." Hernandez v. Commissioner, 490 U.S. 680, 699 (1989) (citing *Hobbie*, 480 U.S. at 141-42; *Thomas*, 450 U.S. at 717-19; *Yoder*, 406 U.S. at 220-21); *see also* Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 384 (1990); Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989).

Although the Supreme Court's strict scrutiny review in free exercise cases appears to support religious liberty, the Court's decisions, by creating exceptions to the application of the compelling interest test and by broadly interpreting "compelling interest," have been unsympathetic to those seeking religious exemptions. *See supra* note 26; *see also* Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (denying tax exempt status to a religious school because of that school's policy against interracial dating and marriage); United States v. Lee, 455 U.S. 252 (1982) (finding the maintenance of the tax system compelling enough to require a member of the Old Amish Order, a self-supporting religious group, to pay social security taxes against his religious beliefs). In fact, since the Court first applied the compelling interest test in 1963, Wisconsin v. Yoder, 406 U.S. 205 (1972), is the only case where the Court has granted a religious exemption outside the context of unemployment compensation.

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

bers of the Native American Church who were fired from their jobs as drug rehabilitation counselors because they violated Oregon's criminal narcotics statute by ingesting peyote for sacramental purposes at a religious ceremony.[31] Refusing to grant a constitutionally based religious exemption, the Court held that Oregon had not violated the Free Exercise Clause.[32] The significance of *Smith* lies in its analysis and not its outcome, because religious exemption requests before the Supreme Court were not usually rewarding.[33]

The Court split five to four on the appropriate test for religion-based exemptions in free exercise cases. Although Justice Scalia, writing the majority opinion, agreed that a state would violate the Free Exercise Clause if it sought to prohibit acts only engaged in for religious purposes,[34] he stated that a generally applicable law whose effect incidentally prohibits religion does not violate the Free Exercise Clause if the law does not intend to prohibit the free exercise of religion.[35] A state must provide a religion-based exemption to a generally applicable law only in hybrid situations, where the law infringes another constitutional protection in conjunction with the free exercise of religion.[36] Scalia explained that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[37] The majority in *Smith* then concluded that the compelling interest test does not apply to free exercise challenges to generally applicable, religion-neutral laws that merely have the effect of prohibiting a particular religious practice;[38] otherwise an individual would be able "'to become a law unto himself.'"[39]

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31 *Id.* at 874.

32 *Id.* at 890.

33 *See supra* note 26.

34 *Smith*, 494 U.S. at 877.

35 *Id.* at 878.

36 *Id.* at 881.

37 *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

38 *Id.* at 884-85, 886 n.3.

39 *Id.* at 885 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1879)).

Scalia's interpretation of the Free Exercise Clause in *Smith* expressly contradicts an earlier interpretation found in Wisconsin v. Yoder, 406 U.S. 205 (1972), which states:

> [T]o agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the

Smith sparked much scholarly reaction, mostly critical of its rejection of a constitutionally compelled religious exemption and its abandonment of strict scrutiny analysis for a more deferential standard of review.[40] Perhaps because of this reaction, the Court recently has heard *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*,[41] a case that will allow the Court to reconsider or clarify its holding in *Smith*.[42]

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power of the State to control, even under regulations of general applicability . . . .

. . . A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.

Id. at 220 (citations omitted).

40 *See, e.g.*, James D. Gordon, III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91, 96-97 (1991) (arguing that *Smith* mistreated precedent, used unskillful reasoning, and deprived the Free Exercise Clause of any independent significance); Kmiec, *supra* note 18, at 592-93, 597, 599 (1991) (stating that the Court, in *Smith*, incorrectly presumed the validity of laws that have the effect of prohibiting religious action, because "some government actions which do not intentionally discriminate or are facially neutral can, indeed, prohibit the exercise of religion contrary to the text of the Constitution"); Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841, 848-49, 855 (1992) (maintaining that because *Smith* "repealed the substantive component of the Free Exercise Clause," there is no federal constitutional barrier to prevent states from persecuting religion); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1111, 1116, 1119, 1128, 1153 (1990) (asserting that the holding in *Smith* is contrary to history, text, and precedent, and that its theoretical rationale is merely the majority's normative judgments that are inconsistent with the "deep logic of the First Amendment"). *But cf.* Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 247-48, 263-64, 307 (1991) (agreeing that *Smith* misinterpreted the *Sherbert* line of precedents, but asserting that *Smith*'s rejection of conduct exemptions to neutral laws is consistent with the "plain meaning" of the Free Exercise Clause); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 309-10 (1991) (admitting that *Smith* is inconsistent with case precedent but defending *Smith*'s rejection of the Supreme Court's previous religious exemption analysis, which "undermines the constitutional values it purports to protect, is inherently arbitrary, forces courts to engage in a balancing process that systematically underestimates the state interest, and threatens other constitutional values").

41 723 F. Supp. 1467 (S.D. Fla. 1989), *aff'd*, 936 F.2d 586 (11th Cir. 1991), *cert. granted*, 112 S. Ct. 1472 (1992).

42 In *Hialeah*, the Church of the Lukumi Babalu Aye claimed that ordinances passed by the city of Hialeah, Florida, violated its religious freedom under the First Amendment. *Id.* at 1469. The church follows the Lukumi religion, commonly know as Santeria, which sacrifices animals as an integral part of its religious ceremonies. *Id.* at 1469, 1471. The city passed ordinances that prevented the practice of animal sacrifice by, among other things, prohibiting animal slaughter on any premises not zoned for that purpose. *Id.* at 1476.

The district court held that the ordinances did not impermissibly infringe the church's religious freedom under the Free Exercise Clause. *Id.* at 1487-88. Finding that the ordinances were facially neutral regulations that incidentally prohibited the church's religious conduct, the court determined that the ordinances were justified by compelling

III. FREE EXERCISE PROTECTION UNDER STATE CONSTITUTIONS

United States citizens' constitutional rights derive from, and are dually protected by, both the United States Constitution and each citizen's state constitution. The United States Constitution provides minimum guarantees of individual rights by limiting the powers of the federal and state governments.[43] State constitutions may supplement the individual rights derived from the federal constitution by affording their citizens greater protection than the federal constitution requires.[44] If a ruling by the highest court in a state squarely and independently relies on its own state constitution to provide greater protection than the federal constitution, that decision is final and is immune from review by federal courts.[45] Despite the ruling in *Smith*, therefore, state courts remain free to grant state citizens greater free exercise liberties than those guaranteed in the First Amendment by basing decisions solely or independently on state constitutions.

In *Smith*, the majority recognized a state's ability to afford its citizens broader free exercise protections than those guaranteed under the federal constitution by acknowledging that three states

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secular interests. *Id.* at 1484, 1487. The district court reasoned that the ordinances protected the public health by preventing the increased risk of disease that would arise from the attraction of flies and rats to dead animal carcasses left in public places. *Id.* at 1474, 1485. The court also explained that the ordinances protected animals from cruelty and protected children involved in Santeria from emotional injury. *Id.* at 1485-86.

In an unpublished opinion, the Eleventh Circuit Court of Appeals affirmed the district court's ruling. 936 F.2d 586 (11th Cir. 1991).

43 *See* Michigan v. Mosely, 423 U.S. 96, 120 (1975). The federal constitution is considered the "lowest common denominator" of individual rights. Williams v. Florida, 399 U.S. 78, 136 (1970) (Harlan, J., dissenting).

44 *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (stating that each state has the "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution"); Ross v. Moffitt, 417 U.S. 600, 618-19 (1974); Cooper v. California, 386 U.S. 58, 62 (1967); *see also* Yvonne Kauger, *Reflections on Federalism: Protections Afforded by State Constitutions*, 27 GONZ. L. REV. 1, 1-2 (1991-92) (characterizing this two-tiered source of protections as "the true hallmark of federalism"); Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure; State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 430 (1974).

45 *See* Michigan v. Long, 463 U.S. 1032, 1041 (1983); Herb v. Pitcairn, 324 U.S. 117, 126 (1945); Powell v. Alabama, 287 U.S. 45, 60 (1932); *see also* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 501 (1977) (remarking that "the state decisions not only cannot be overturned by, they indeed are not even reviewable by, the Supreme Court of the United States" and that the Supreme Court is "utterly without jurisdiction to review such state decisions"); Peter J. Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 SYRACUSE L. REV. 731, 732 (1982).

exempted religious peyote use from their drug laws.[46] Justice O'Connor more clearly accepted a state's ability to afford its citizens greater free exercise protection under state law in the first part of her concurring opinion, which Justices Brennan, Marshall, and Blackmun joined. These Justices recognized that the Oregon Supreme Court still could determine that its state constitution requires Oregon to provide a religious exemption from its generally applicable criminal prohibition of narcotics for the sacramental use of peyote.[47] Therefore, individuals seeking religiously based exemptions from generally applicable laws should argue under both federal and state constitutions in order to obtain their fullest free exercise protection.[48]

The ruling in *Smith* narrowed free exercise protection under the First Amendment by abandoning the compelling interest test where individuals seek religiously based exemptions from generally applicable laws.[49] Prior to *Smith*, most state courts had treated the federal and state free exercise provisions as identical protections, or had found it unnecessary to involve the state constitution at all.[50] Subsequent to *Smith*, courts in at least five states, by retaining the compelling interest test under their respective state constitutions, have begun providing greater free exercise protections than those guaranteed in the First Amendment as interpreted by *Smith*.[51] These state courts seem to focus on free exercise protec-

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46 *Smith*, 494 U.S. at 890; *see* Kauger, *supra* note 44, at 3 n.10 (listing the statutes of 10 states which exempt religious peyote use from criminal prosecution).

47 *Smith*, 494 U.S. at 892 (O'Connor, J., concurring). In his dissent, Justice Blackmun noted that 23 states exempt religious peyote use from their drug laws. *Id.* at 912 n.5 (Blackmun, J., dissenting). In fact, Blackmun felt that it would not be wise for the Court to decide the constitutionality of Oregon's criminal prohibition of sacramental peyote use precisely because the Oregon Supreme Court could, on remand, invalidate the prohibition under its state constitution. *Id.* at 909 n.2.

The counterpart to the Free Exercise Clause in the Oregon Constitution states, "All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences." OR. CONST. art. I, § 2. Oregon's constitution also reads, "No law shall in any case whatever control the free exercise, and enjoyment of religeous [sic] opinions, or interfere with the rights of conscience." OR. CONST. art. I, § 3.

48 In fact, one scholar has asserted that after *Smith*, an attorney, filing a free exercise claim, commits malpractice if he fails to plead the applicable state constitution as well as the federal constitution. *See* Laycock, *supra* note 40, at 854.

49 *See supra* text accompanying notes 30-39.

50 *See* Nicholas P. Miller & Nathan Sheers, Note, *Religious Free Exercise under State Constitutions*, 34 J. CHURCH & ST. 303, 307, 320-21 (1992) (revealing that at least 40 states prior to *Smith* never independently addressed their state free exercise provisions).

51 These state cases are Donahue v. Fair Employment & Hous. Comm'n, 2 Cal.

Rptr.2d 32 (Cal. Ct. App. 1991), *reh'g granted*, 825 P.2d 766 (Cal. 1992); Rupert v. City of Portland, 605 A.2d 63 (Me. 1992); Society of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571 (Mass. 1990); State v. Hershberger, 462 N.W.2d 393 (Minn. 1990); First Covenant Church v. City of Seattle, 840 P.2d 174 (Wash. 1992). *See infra* text accompanying notes 55-135.

Although courts in two other states retained strict scrutiny analysis in free exercise cases subsequent to *Smith*, it is unclear whether these courts intended to construe their respective state free exercise clauses more broadly than the First Amendment. Just one month after the Supreme Court decided *Smith*, a Pennsylvania appeals court, in Zummo v. Zummo, 574 A.2d 1130 (Pa. Super. Ct. 1990), applied the compelling interest test and held that a lower court's order prohibiting a divorced father from taking his children to Catholic services during visitation periods, contrary to the Jewish mother's faith, violated the father's free exercise rights. *Id.* at 1157. While specifically citing *Smith*, the court stated that state action interfering with religious beliefs "may only be taken in support of countervailing interests of the highest order, and then only in the least intrusive manner adequate to safeguard the specific interests identified." *Id.* at 1135. The court either misapplied *Smith*, distinguished it, or applied strict scrutiny analysis based on Pennsylvania's constitution.

The most likely answer is that the Pennsylvania court exercised judicial restraint by implicitly distinguishing *Smith* to uphold the father's free exercise claim and avoid the issue as to whether its state constitution grants greater free exercise protection than the First Amendment. Although the court focused on the historical significance of religious freedom in Pennsylvania, *id.* at 1133-34, the court made no distinction between its state and the federal free exercise provisions. Without expressly distinguishing the facts in *Zummo* from *Smith*, the court characterized *Zummo* as a hybrid situation, involving the father's parental rights in raising his children as well as his free exercise rights. *Id.* at 1138. Because *Zummo*, therefore, qualified as an expressed exception to the holding in *Smith*, the court still could have applied the compelling interest test consistent with the current federal standard.

The second unclear case is State v. Evans, 796 P.2d 178 (Kan. Ct. App. 1990), in which a Kansas appellate court, after the ruling in *Smith*, applied the compelling interest test under the Kansas Constitution and found a free exercise violation. In *Evans*, after appellant pled guilty to charges of rape and unlawful restraint, a judge imposed conditions of probation requiring appellant to attend a specific church and to perform 1000 hours of maintenance work at that church. *Id.* Although the court agreed with appellant's argument that these probationary conditions violated his free exercise rights under both the United States Constitution and the Kansas Constitution, the syllabus provided by the court stated only that the conditions violated the Kansas Constitution. *Id.* Moreover, the court's analysis focused solely on the Kansas Constitution. *Id.* at 179-80.

With regard to the free exercise of religion, the Kansas Constitution provides: "The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship; nor shall any control of or interference with the rights of conscience be permitted." KAN. CONST. Bill of Rights, § 7. After quoting this provision, the court in *Evans* followed one of its previous cases and determined that "[o]nly those interests of the highest order" can outweigh legitimate free exercise of religion claims. *Evans*, 796 P.2d at 179 (quoting Wright v. Raines, 571 P.2d 26, 32 (Kan. Ct. App. 1977), *cert. denied*, 435 U.S. 933 (1978)). Further articulating the appropriate standard to apply, the court stated that a substantial restriction on the free exercise of religion must be justified by a compelling state interest with no less restrictive means of achieving that interest available. *Id.* The court in *Evans* explained that the Kansas Constitution strongly prohibits religious coercion. *Id.* at 180. Concluding that no compelling state interest supported the probationary conditions, the court ruled that the conditions violated the appellant's free exercise rights under the

tion under state constitutions, rather than the First Amendment for two reasons. First, the state courts view free exercise analysis under the First Amendment as too uncertain as a result of *Smith*,[52] and First Amendment analysis is unnecessary when free exercise protection may be granted under state constitutions. Second, state courts appear to agree that *Smith* is "incompatible with our Nation's [and their state's] fundamental commitment to individual religious liberty"[53] and, therefore, feel they must grant greater free exercise protection than *Smith* provides.

The different bases upon which these state courts relied in order to assert that their state free exercise clauses granted broader free exercise protections than the federal counterpart can be categorized as follows:[54] pre-*Smith* state case precedent; state con-

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Kansas Constitution. *Id.* The court in *Evans* never mentioned either the First Amendment or *Smith*, even though in state cases prior to *Smith*, the court had discussed the First Amendment and had made no distinction between the state and federal free exercise standards. *See Wright*, 571 P.2d at 31-32.

52 *See supra* text accompanying note 4.

53 *Smith*, 494 U.S. at 891 (O'Connor, J., concurring).

54 By distinguishing the facts of *Smith*, some of these state courts also teach that courts may avoid *Smith*'s relaxed standard of review without independently relying on state constitutions. In *First Covenant Church*, 840 P.2d at 180-85, the Supreme Court of Washington applied the compelling interest test under the First Amendment by distinguishing *Smith*. The court reasoned that a city ordinance which designated a church as a landmark was not neutral because it specifically referred to religious facilities. *Id.* at 180-81. The ordinance also was not generally applicable because it "invited individualized assessments of the subject property" and contained "mechanisms for individualized exceptions." *Id.* at 181 (citations omitted).

The court also determined that *First Covenant Church* involved a hybrid situation because the landmark designation violated the church's free speech rights, as well as its free exercise rights. *Id.* at 181-82. It agreed with the church's contention that the church's architectural design inherently conveys a Christian message. *Id.* at 182. The court stated that both the exterior and interior of churches are "'freighted with religious meaning.'" *Id.* (quoting Society of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571, 578 (Mass. 1990)). Finding that the landmark designation substantially burdened the church's free exercise of religion by requiring city approval of any structural alterations and by reducing the value of the church's property, the Supreme Court of Washington held that the city's interest in preserving the church's structure for cultural and aesthetic purposes was not compelling. *Id.* at 183, 185. Seattle, therefore, could not justify its landmark designation under the First Amendment. *Id.* at 185.

See also Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr.2d 32, 40 n.10 (Cal. Ct. App. 1991) (stating that it would not base its decision on federal constitutional grounds but noting that a hybrid situation arguably existed); State v. Hershberger, 462 N.W.2d 393, 396-97 (Minn. 1990) (resting its decision solely on state constitutional grounds but indicating that it could distinguish *Smith* because the case involved freedom of association as well as the free exercise of religion).

Finding hybrid situations in future free exercise decisions likely will be an easy task for state courts. In United States v. Eichman, 496 U.S. 310 (1990), the Supreme Court

stitutional text/"peace and safety" clauses; and historical analysis/original meaning. While most of the state cases made no attempt to ascertain the original meaning of their state free exercise clauses, they relied significantly on state case law and "plain meaning," *i.e.*, the text of their state free exercise provisions.

*A. Pre-*Smith *State Case Precedent*

In all five cases, the state courts significantly relied on state free exercise cases that applied the compelling interest test prior to *Smith*. Surprisingly, the pre-*Smith* case precedents upon which three of the state courts relied never addressed their state free exercise provisions independently from the federal standard and never contained any language that indicated that the state and federal standards could differ.

The Supreme Court of Washington is one of the three state courts that based its decision, in part, on pre-*Smith* case precedents that never indicated that the two standards could differ. In *First Covenant Church v. City of Seattle*,[55] the Supreme Court of Washington expressly ruled that its state constitution provided broader free exercise rights than *Smith*.[56]

In *First Covenant Church II*, Seattle designated the First Covenant Church as an historic landmark, limiting the church's ability to alter its exterior structure.[57] One month before the Supreme Court decided *Smith*, the Supreme Court of Washington, applying strict scrutiny analysis, had ruled that the designation violated the church's free exercise rights under both the United States Constitution and the Washington Constitution.[58] After granting certiorari, the Supreme Court, however, vacated the decision and remanded the case to the Supreme Court of Washington "for further consideration in light of" *Smith*.[59]

On remand, the Supreme Court of Washington reinstated its previous holding.[60] Recognizing that under its state constitution it

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confirmed that the Free Speech Clause of the First Amendment protects conduct that communicates a message. Religious activity, by its nature, almost always expresses a message filled with religious content.

55 840 P.2d 174 (Wash. 1992) [hereinafter *First Covenant Church II*].

56 *Id.* at 185-86.

57 *Id.* at 177-78.

58 First Covenant Church v. City of Seattle, 787 P.2d 1352, 1357-61 (Wash. 1990), *cert. granted and judgment vacated by* City of Seattle v. First Covenant Church, 111 S. Ct. 1097 (1991).

59 City of Seattle v. First Covenant Church, 111 S. Ct. 1097 (1991).

60 *First Covenant Church II*, 840 P.2d at 177, 189.

could provide "'individual liberties more expansive than those conferred by the Federal Constitution,'"[61] the court stated that it would base its decision independently on state constitutional grounds.[62] Contrary to *Smith*, the court ruled that a neutral, generally applicable statute that merely indirectly burdens the free exercise of religion violates Washington's constitutional counterpart to the Free Exercise Clause, unless the state justifies the statute with a compelling state interest that cannot be achieved by less restrictive means.[63] Concluding that Seattle's landmark designation did not meet these strict standards, the court held that the landmark ordinance violated the Washington Constitution.[64]

The Supreme Court of Washington asserted that state case law prior to *Smith* supported such a broad interpretation of Washington's free exercise provision.[65] The case precedents upon which the court relied state that religious liberty is of "vital importance" and that it is "the most important dut[y] of our courts to ever guard . . . religious liberty."[66] The aforementioned language, however, was consistent with the federal free exercise strict scrutiny standard that existed prior to *Smith*. Moreover, all the state case law that the court discussed or cited in *First Covenant Church II* applied the compelling interest test by relying on federal free exercise cases. None of the state cases were based solely or independently on Washington's constitution. Because Washington's case precedents prior to *Smith* never indicated that its state free exercise provision had an existence independent from the First

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61 *Id.* at 185 (quoting State v. Gunwall, 720 P.2d 808, 811 (Wash. 1986) (quoting Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980))). In *Gunwall*, 720 P.2d at 811-13, the Supreme Court of Washington announced its adoption of a "state law first" philosophy and developed a list of criteria in determining whether it should extend greater rights under its state constitution than the federal constitution: "(1) textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern." *Id.* at 811.

62 *Id.* The court also based its decision on the First Amendment by distinguishing *Smith*. *See supra* note 54.

63 *Id.* at 187.

64 *Id.* at 188. In a concurring opinion, Justice Utter would have gone a step further in establishing the independence of Washington's free exercise jurisprudence by adopting an original analysis instead of adopting the federally created compelling interest test. *Id.* at 191-92 (Utter, J., concurring).

65 *Id.* at 186 (briefly discussing State *ex rel.* Holcomb v. Armstrong, 239 P.2d 545 (Wash. 1952); Bolling v. Superior Ct., 133 P.2d 803 (Wash. 1943) (rejecting the view that a majority, through the political process, may control a minority's right to freely exercise religion)).

66 *Bolling*, 133 P.2d at 807, 809.

Amendment, the court in *First Covenant Church II* asserted the independence of its state free exercise clause for the first time by retaining the compelling interest test that once was used coextensively under both federal and state standards.

The second state case, in which a court applied strict scrutiny analysis under its state constitution subsequent to *Smith* by relying precedent that did not indicate any independence between the federal and state free exercise standards, is *Rupert v. City of Portland*.[67] The Supreme Judicial Court of Maine applied the compelling interest test in a free exercise case under its state constitution, while refusing to do so under the First Amendment in light of *Smith* because the claimant was seeking a religious exemption from a generally applicable law.[68] In *Rupert*, a clergyman of the Native American Church sought to force the city of Portland to return a marijuana pipe that police had seized as drug paraphernalia under Maine's Drug Paraphernalia Act.[69] The clergyman claimed that members of the Native American Church view marijuana as sacred and smoke it as part of their worship.[70]

Based on the standard of review used in one of its state cases decided prior to *Smith*,[71] the Supreme Judicial Court of Maine applied the compelling interest test under its state free exercise provision.[72] However, in that previous case, while referring to the free exercise of religion, the court stated that "the full range of protection afforded . . . by the Maine Constitution is also available under the United States Constitution."[73] It seems that the court in *Rupert* created this apparent inconsistency to establish the independence of its state free exercise provision from the First Amendment.

The court then expressly stated that it did not need to determine whether it would reject *Smith*'s ruling when applying Maine's Constitution in later free exercise cases.[74] It explained that its conclusion in *Rupert* would be the same under either standard because preventing the use and distribution of illegal drugs is a

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67 605 A.2d 63 (Me. 1992).

68 *Id.* at 63-68.

69 *Id.* at 64 (citing ME. REV. STAT. ANN. tit. 17-A, § 1111-A (West 1983 & Supp. 1991)).

70 *Id.* at 65.

71 *See* Blount v. Department of Educ. & Cultural Servs., 551 A.2d 1377, 1379 (Me. 1988).

72 *Rupert*, 605 A.2d at 66-67.

73 *Blount*, 551 A.2d at 1385.

74 *Rupert*, 605 A.2d at 65 n.3.

compelling state interest, and Maine's drug law as applied to the clergyman was the "least restrictive means" of achieving that interest.[75] The statute, therefore, violated neither the First Amendment nor the Maine Constitution.[76]

The other case in which a state court broadly interpreted its state free exercise provision, at least partially based on a pre-*Smith* state case that applied the compelling interest test jointly but not independently under both federal and state constitutions, is *State v. Hershberger*.[77] The Supreme Court of Minnesota expressly ruled that the Minnesota Constitution provides broader free exercise rights than the First Amendment as interpreted by *Smith*.[78] In *Hershberger*, fourteen members of the Amish religion were fined for not complying with a Minnesota statute requiring slow-moving vehicles on public highways to display a bright orange-red triangular emblem.[79] The Amish refused to comply with the statute on religious grounds.[80]

Prior to *Smith*, the Supreme Court of Minnesota had ruled that the state statute, as applied to the Amish, violated the Free Exercise Clause of the First Amendment of the United States Constitution. The court had expressly declined, therefore, to determine whether the statute also violated the Minnesota Constitution.[81] Although the court had found that Minnesota supported the statute with the compelling interest of providing safety on the public highways,[82] it had concluded that this interest could be achieved by less restrictive means.[83]

Just six days after the United States Supreme Court decided *Smith*, the Court vacated *Hershberger I* and remanded the case to

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75 *Id.* at 66-67.

76 *Id.* at 68.

77 462 N.W.2d 393 (Minn. 1990) [hereinafter *Hershberger II*].

78 *Id.* at 396-99.

79 State v. Hershberger, 444 N.W.2d 282, 284 (Minn. 1989) [hereinafter *HershbergerI*] (citing MINN. STAT. § 169.522 (1988)), *cert. granted and judgment vacated*, Minnesota v. Hershberger, 495 U.S. 901 (1990).

80 *Id.* The Amish believed that displaying a "loud" color, which they considered to be a "worldly symbol," on their horse-drawn buggies would contradict one of their principal religious tenets—that members of the Amish religion should remain separate from the modern world. *Id; see* 2 *Corinthians* 6:14 ("Be ye not unequally yoked together with unbelievers"); *Romans* 12:2 ("be not conformed to this world").

81 *Hershberger I*, 444 N.W.2d at 284, 289.

82 *Id.* at 288.

83 *Id.* at 289. The court noted that requiring the Amish to outline their buggies with reflective silver tape or to carry red lit lanterns in their buggies would be less restrictive alternatives. *Id.*

the Supreme Court of Minnesota in light of *Smith*'s holding.[84] On remand, the Supreme Court of Minnesota unanimously refused to apply the "uncertain meaning" of *Smith* to the facts of *Hershberger I*, determining that its decision could rest independently and adequately on the Minnesota Constitution.[85]

The Minnesota court retained the strict scrutiny analysis that it had applied in a free exercise case prior to *Smith*, even though the analysis of that previous case was not based on state constitutional grounds.[86] The Minnesota court ruled that the state statute, as applied to the Amish, impaired their free exercise of religion in violation of the Minnesota Constitution.[87] The court explained that although governmental attempts to preserve peace or safety are compelling state interests, the government must still use the least restrictive means to achieve those interests in order to justify an imposition on religious freedom under the Minnesota Constitution.[88] Following its factual finding in *Hershberger I*, the court concluded that the state could achieve safety on the public highways by means that were less restrictive with regard to Amish religious liberty.[89]

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84 Minnesota v. Hershberger, 495 U.S. 901 (1990).

85 State v. Hershberger, 462 N.W.2d 393, 396-97 (Minn. 1990). The court, however, indicated that, if necessary, it could distinguish this case from *Smith* on its facts because this case involved a hybrid situation. *Id.* at 396. Explaining that buggies are an important part of the Amish social life, the court determined that the statute requiring the flourescent triangular emblem impaired associational freedoms protected by the First Amendment as well as the free exercise of religion. *Id.*

86 *Id.* at 398 (discussing State v. Sports & Health Club, 370 N.W.2d 844 (Minn. 1985)).

87 *Id.* at 397, 399.

88 *Id.* at 398-99 (citing State v. French, 460 N.W.2d 2 (Minn. 1990) (plurality portion of opinion, also subsequent to *Smith*)). In *French*, a member of the Evangelical Free Church refused to rent his apartment to an unmarried couple allegedly in violation of a state statute which prohibited discrimination against individuals because of marital status. *French*, 460 N.W.2d at 3. The landlord believed that living together outside of marriage was sinful. *Id.* In a plurality portion of its opinion, the Supreme Court of Minnesota concluded that even if the landlord had violated the statute, the state must grant the landlord an exemption from the statute pursuant to article I, section 16 of the Minnesota Constitution. *Id.* at 9, 11. The court refused to deem the landlords actions as licentious and concluded that less restrictive means were available. *Id.* at 9-11.

89 *Hershberger II*, 462 N.W.2d at 399. The Supreme Court of Minnesota reaffirmed the applicability of the strict scrutiny standard to free exercise cases under article I, section 16 of the Minnesota Constitution in Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857, 865 (Minn. 1992) (listing the four prongs to the compelling interest test still applicable under the Minnesota Constitution: "whether the objector's belief is sincerely held; whether the state regulation burdens the exercise of religious beliefs; whether the state interest in the regulation is overriding or compelling; and whether the state regulation uses the least restrictive means").

Another state court determined that its state free exercise provision provided greater protection than the First Amendment subsequent to *Smith* by relying on pre-*Smith* state cases that used the federal and state free exercise standards coextensively, but contained language establishing the independence of its state free exercise clause. The Supreme Judicial Court of Massachusetts, in *Society of Jesus v. Boston Landmarks Commission*,[90] based its decision solely on its state constitution, expressly providing greater protection than the Free Exercise Clause as interpreted by *Smith*. In *Society of Jesus*, after Jesuits began renovating the Church of the Immaculate Conception, the Boston Landmarks Commission designated elements of the church's interior as a landmark.[91]

The Supreme Judicial Court of Massachusetts held that the designation violated Massachusetts' free exercise provision.[92] The court reasoned that the landmark designation restrained the Jesuits from worshipping according to the dictates of their conscience because "[t]he configuration of the church interior is so freighted with religious meaning that it must be considered part and parcel of the Jesuits' religious worship."[93] The court simply stated that Boston's interest in preserving the church's interior for its historic significance was not compelling enough to justify the burden on the Jesuits' free exercise of religion under the Massachusetts Constitution.[94] Although the Supreme Judicial Court of Massachusetts never mentioned the United States Constitution or *Smith*, the court's interpretation of article II of its state constitution clearly provides greater free exercise protection than the First Amendment in light of *Smith*.

Language in at least one pre-*Smith* state case, upon which the court in *Society of Jesus* relied, supported interpreting Massachusetts' free exercise clause as requiring strict scrutiny analysis. In 1989, the Supreme Judicial Court of Massachusetts, although using federal cases to determine the scope of religious liberty under its state constitution, stated, "it is possible that, in the future, we may conclude that there are circumstances in which [our state free exercise provision] provides protection for religious practices not pro-

90 564 N.E.2d 571 (Mass. 1990).

91 *Id.* at 572. The designation required the commission's approval for permanent alterations to such things as the vestibule, window glazing, organ, organ loft, chancel, and nave in order to preserve the church's classic mid-nineteenth century design. *Id.*

92 *Id.* at 572-73.

93 *Id.* at 573.

94 *Id.*

tected by the First Amendment as construed and applied by Federal courts."[95]

The final case in which a state court ruled that its state constitution provides greater free exercise protection than *Smith* expressly relied on the fact that pre-*Smith* state free exercise cases applied the compelling interest test independently under both federal and state constitutions. The Second District Court of Appeal of California in *Donahue v. Fair Employment & Housing Commission*[96] expressly based a free exercise decision solely on its state constitution.[97] In *Donahue*, Mr. and Mrs. Donahue, who held the sincere religious belief that fornication or its facilitation is sinful, refused to rent their apartment to an unmarried couple.[98] The court of appeal found that the Donahues' refusal to rent to the unmarried couple constituted marital status discrimination in violation of California's Fair Employment and Housing Act ("Act").[99] The court, however, applied the compelling interest test under the California Constitution and concluded that the Donahues were entitled to a religious exemption from the Act.[100]

Noting that analysis of free exercise of religion cases is generally the same under both state and federal constitutional law, the court of appeal determined that the two standards differed as applied in *Donahue*.[101] The court explained that although the Supreme Court in *Smith* departed from the compelling interest test under First Amendment analysis, that standard still applied under its state constitution.[102] Stressing that two pre-*Smith* state free exercise cases made specific, independent references to the California Constitution as well as to the First Amendment, the court of appeal concluded that the California Supreme Court had adopted the federal compelling state interest test prior to *Smith* as part of its state constitutional analysis.[103] The court of appeal, therefore,

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95 Commonwealth v. Nissenbaum, 536 N.E.2d 592 (Mass. 1989).

96 2 Cal. Rptr.2d 32 (Cal. Ct. App. 1991), *reh'g granted*, 825 P.2d 766 (Cal. 1992).

97 *Id.* at 40 n.10.

98 *Id.* at 33. The Donahues are Roman Catholics and believe that sexual intercourse outside of marriage is sinful, and that they would commit a sin if they facilitated fornication by renting an apartment to an unmarried couple. *Id.* at 33 n.1.

99 *Id.* at 33, 38 n.5; *see* CAL. GOV'T CODE § 12955 (West 1992).

100 *Donahue*, 2 Cal. Rptr.2d at 33, 38, 40, 46.

101 *Id.* at 39. This determination was significant because California courts have established that they must independently determine claims asserted under California's Constitution. *Id.* at 39 n.7.

102 *Id.* at 39.

103 *Id.* at 40 (citing Molko v. Holy Spirit Ass'n, 762 P.2d 46 (Cal. 1988), *cert. denied*, 490 U.S. 1084 (1989); Walker v. Superior Ct., 763 P.2d 852 (Cal. 1988)).

decided that it would continue to apply the compelling interest test under its state constitution until the California Supreme Court ruled otherwise.[104]

The court of appeal ruled that no compelling state interest outweighed the Donahues' free exercise of religion as guaranteed under the California Constitution.[105] Finding that the Act, as applied to the Donahues, substantially burdened their sincere religious beliefs,[106] the court of appeal concluded that California's interest in protecting unmarried cohabiting couples from marital discrimination was not a compelling state interest.[107] The court also determined that even though the Act was supported by the compelling state interest in providing housing, the Act was not the "least restrictive means" of promoting that interest.[108]

B. State Constitutional Text/"Peace and Safety Clauses"

In determining the scope of state constitutional free exercise protections, state courts also can be guided by examining the text of state free exercise provisions and comparing it with the First Amendment and other state free exercise provisions. Textual analysis is especially helpful with regard to the free exercise of religion, because most states have no case law interpreting their own free exercise provisions.[109] "Peace and safety" clauses, which limit the scope of religious liberty by providing that the exercise of religion may not threaten the public "peace and safety," widely appear in state free exercise provisions.[110] Although "peace and

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104 *Id.* at 40. The court of appeal concluded that the California Supreme Court had adopted the compelling interest test as part of its state constitution by referencing two cases decided prior to *Smith.* The court viewed the California Supreme Court's two references to its state constitution in Molko v. Holy Spirit Ass'n, 762 P.2d 46 (Cal. 1988), where the California Supreme Court applied the compelling interest test in a free exercise case, "as an intention to decide the case not only on First Amendment grounds, but also on the basis of independent state constitutional grounds." *Donahue,* 2 Cal. Rptr.2d at 40. The court of appeal also noted that the California Supreme Court applied the compelling interest test under both federal and state constitutions in *Walker. Donahue,* 2 Cal. Rptr.2d at 40.

105 *Id.* at 46.

106 *Id.* at 42.

107 *Id.* at 44-45.

108 *Id.* at 45.

109 *See* Miller & Sheers, *supra* note 50, at 307, 320-21.

110 *See* JUSTICE DEPARTMENT REPORT, *supra* note 10, at 9, 30 (noting that "in a majority of the states that ratified the Bill of Rights, 'free exercise' meant that the government had no right to interfere with religious activities until those activities threatened public peace and safety or infringed the rights of others"); Miller & Sheers, *supra* note 50, at

safety" clauses merely seem to limit religious activity, they impliedly confirm that generally applicable laws cannot prevent or prohibit religious activities that do not threaten the public "peace and safety."[111] State courts also may construe "peace and safety" clauses as an exclusive limitation on religious liberty, thus limiting the possible overriding state interests that a court may find in applying strict scrutiny analysis.[112]

All five states, in which the aforementioned state cases held that their respective state constitutions provide broader free exercise protection than the First Amendment as construed by *Smith*, have free exercise provisions that contain "peace and safety" clauses. However, only three of those state courts based their ruling at least in part on the text of their state free exercise provisions.[113]

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322 (listing common clauses in state constitutional free exercise provisions); *see also* Kmiec, *supra* note 18, at 600; McConnell, *supra* note 14, at 1461-62.

111 *See* McConnell, *supra* note 40, at 1118 (asking, "If the [state] free exercise guarantees could not be read to exempt believers from 'otherwise valid' laws, what could have been the purpose of the 'peace and safety' proviso?"); McConnell, *supra* note 14, at 1462 (stating that "peace and safety" clauses "make sense only if free exercise envisions religiously compelled exemptions from at least some generally applicable laws" because they "would only have effect if religiously motivated conduct [were permitted to violate] the general laws in some way").

112 The Department of Justice asserts that limiting the compelling interests (which outweigh the free exercise of religion if they are the least restrictive means of achieving those interests) to protecting public safety, peace, and order was a principle adopted by a majority of the states at the time the First Amendment was ratified. JUSTICE DEPARTMENT REPORT, *supra* note 10, at 7-8, 61-62.

113 The *Donahue* court based its decision solely on article I, section 4 of the California Constitution, which contains a "peace and safety" clause. In part, it provides, "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. *This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State.*" CAL. CONST. art. I, § 4 (emphasis added). Although the court of appeal in *Donahue* ruled that this section provided greater free exercise protection than the current federal standard, the court did not reach this conclusion by examining how the language of article I, section 4 differs from the First Amendment. Like the free exercise clauses in many states, the California Constitution appears to merely limit the scope of an individual's religious freedom. Reviewing the *Donahue* case, the Supreme Court of California, however, easily could follow the reasoning used in *First Covenant Church II*, *Hershberger*, and *Society of Jesus* and rule that only governmental attempts to protect public peace or safety or to restrain licentious acts are sufficiently compelling state interests to justify a substantial burden on religious freedom. See *infra* notes 114-27 and accompanying text for the above-mentioned cases' treatment of their states' "peace and safety" clauses.

The Supreme Judicial Court of Maine, in Rupert v. City of Portland, 605 A.2d 63 (Me. 1992), based its decision independently on its state constitution. *Id.* at 63-68. The Maine Constitution in relevant part states:

> All individuals have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no person shall be hurt, molested or restrained in that person's liberty or estate for worshipping God in

In *First Covenant Church v. City of Seattle*,[114] the Supreme Court of Washington deemed the textual differences between its state and the federal free exercise provisions and the inclusion of a "peace and safety" clause in its state constituion as significant. Article I, section 11 of the Washington Constitution provides:

> Absolute freedom of conscience in all matters of religious sentiment, belief, and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; *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 and safety of the state.*[115]

Based on a number of factors, the Washington court concluded that this section conferred broader free exercise rights than the United States Constitution. First, the court emphasized that the language of article I, section 11 significantly differed from, and was stronger than the Free Exercise Clause of the First Amendment: "Our state provision 'absolutely' protects freedom of worship and bars conduct that merely 'disturbs' another on the basis of religion. Any action that is not licentious or inconsistent with the 'peace and safety' of the state is 'guaranteed' protection."[116] The court in *First Covenant Church II*, therefore, limited the compelling interests that could override religious activities to governmental attempts to prevent dangers to public peace, health, and welfare.[117]

The court also stressed the structural differences between the state and federal consitutions. Whereas the United States Constitu-

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> the manner and season most agreeable to the dictates of that person's own conscience, nor for that person's religious professions or sentiments, *provided that that person does not distrub the public peace, nor obstruct others in their religious worship;* —and all persons demeaning themselves peaceably, as good members of the State, shall be equally under the protection of the laws . . . .

ME. CONST. art. I, § 3 (emphasis added). This "peace and safety" clause, however, was not a factor in the court's decision to depart from the holding in *Smith* and apply the compelling interest under this state provision.

In fact, in 1988, the Supreme Judicial Court of Maine, specifically referring to this "peace and safety" clause, stated that the clause "cannot be read as giving *less* weight to 'compelling public interests' than does the unqualified language of the First Amendment." Blount v. Department of Educ. & Cultural Servs., 551 A.2d 1377, 1385 (Me. 1988) (emphasis in original).

114 840 P.2d 174 (Wash. 1992).

115 WASH. CONST. art. I, § 11 (emphasis added).

116 *First Covenant Church II*, 840 P.2d at 186.

117 *Id.*

tion grants limited power to the federal government, Washington's constitution allows the state government to do anything not explicitly forbidden by federal law or the state constitution.[118] The Supreme Court of Washington, therefore, had power to broadly construe article I, section 11.

The Supreme Judicial Court of Massachusetts' ruling in *Society of Jesus v. Boston Landmarks Commission*[119] also was based significantly on the existence of a "peace and safety" clause in its state free exercise provision. Article II of the Massachusetts Constitution in relevant part states:

> [N]o subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; *provided he doth not disturb the public peace, or obstruct others in their religious worship.*[120]

Noting that the language of this section expressly limits the state interests that are compelling enough to justify governmental imposition on religious liberty, the court determined that the landmark designation of the church's interior was not supported by any state interest that would immunize it from strict scrutiny under article II.[121] The court explained that renovating the church's interior neither obstructs religious worship nor disturbs the public peace.[122]

Determining that Minnesota's constitution provides greater free exercise protection than the First Amendment in *State v. Hershberger*,[123] the Supreme Court of Minnesota also heavily relied on the textual differences between its state and the federal free exercise provisions and the inclusion of a "peace and safety" clause. The relevant part of article I, section 16 of the Minnesota Constitution provides:

> The enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people. The right of every man to worship God according to the dictates of

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118. *Id.*

119 564 N.E.2d 571 (Mass. 1990).

120 MASS. CONST. pt. I, art. II, § 3 (emphasis added).

121 *Id.* Absent the limited exceptions under article II, the court characterized article II as a "categorical prohibition against government restraints on religious worship" and considered the landmark designation at issue a restraint on religious worship. *Id.* at 574.

122 *Id.* at 573-74.

123 462 N.W.2d 393 (Minn. 1990).

> his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; 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 state* . . . .[124]

Emphasizing the textual differences between this section and the First Amendment, the Supreme Court of Minnesota concluded that its state constitution provided its citizens with greater free exercise protections against the government than the United States Constitution.[125] The court reasoned that whereas the First Amendment merely precludes the government from prohibiting religion, the Minnesota Constitution prevents the government from interfering with religious freedom.[126] Also, unlike the First Amendment, the Minnesota Constitution exclusively lists and thereby limits the state interests that may outweigh religious freedom. Therefore, under the Minnesota Constitution, only attempts to prevent licentious acts or to preserve peace or safety are compelling enough to justify government actions which impair the free exercise of religion.[127]

C. Historical Analysis/Original Meaning

Regardless of one's position on the appropriateness of an inquiry into original meaning to determine the proper interpretation of a particular constitutional provision, as Professor McConnell has stated, "even those Justices and commentators who

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124 MINN. CONST. art. I, § 16 (emphasis added).

125 *Id.* at 397. The court further emphasized the importance of religious freedom in Minnesota by referencing the preamble to Minnesota's constitution, which states: "We, the people of the state of Minnesota, grateful to God for our civil and religious liberty, and desiring to perpetuate its blessings and secure the same to ourselves and our posterity, do ordain and establish this Constitution." *Id.* at 398.

A couple of months earlier, a plurality of the Supreme Court of Minnesota had concluded that the Minnesota Constitution "grants far more protection of religious freedom than the broad language of the United States Constitution." State v. French, 460 N.W.2d 2, 9 (Minn. 1990) (plurality portion of the opinion).

126 *Hershberger II*, 462 N.W.2d at 397. The court also noted that with regard to the free exercise of religion, the First Amendment merely restrains governmental action, whereas the Minnesota Constitution explicitly grants affirmative free exercise rights. *Id*; *see* Terrence J. Fleming & Jack Nordby, *The Minnesota Bill of Rights: "Wrapt in the Old Miasmal Mist,"* 7 HAMLINE L. REV. 51, 67 (1984).

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

believe that the historical meaning is not dispositive ordinarily agree that it is a relevant consideration."[128] All five of the state cases, asserting that their state free exercise provisions afford greater protection than the First Amendment subsequent to *Smith*, had almost no state constitutional free exercise analysis independent from the previous federal standard upon which to rely in order to determine the meaning of their respective state provisions. Despite this fact, four of the five state cases lack any significant attempt to consider historical sources as a means of determining the original meaning of their state free exercise provisions.[129] Instead, these state courts assert, rather than discover, the meaning of their state free exercise clauses based on the language of those provisions, on pre-*Smith* state case law that also lacked any real consideration of historical sources that might enlighten original meaning, or on both.[130]

Scholars and judges, who have focused on the recent movement of state courts increasing individual rights by relying independently on state constitutions, argue that an historical analysis is an essential element for an independent state constitutional interpretation.[131] The primary need for an adequate, systematic methodology of independent state constitutional interpretation is to legitimize a divergent interpretation from a previously employed

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128 McConnell, *supra* note 40, at 1117.

129 The only case that legitimately considered historical sources to ascertain the original meaning of its state free exercise clause was Society of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571, 573 (Mass. 1990). It cited at least three historical sources originating at the time of or prior to the adoption of Massachusetts' constitutional free exercise clause in 1780.

The Supreme Court of Minnesota at least has attempted to determine the original meaning of its state free exercise clause by considering some history surrounding that provision. In State v. French, 460 N.W.2d 2, 8-9 (Minn. 1990), the court stressed the importance of religious liberty based on the language of the preamble to its state constitution and the religious diversity of the early Minnesota settlers. In State v. Hershberger, 462 N.W.2d 393, 398 (Minn. 1990), the court again noted the significance of religious freedom in light of its constitutional preamble.

130 *See supra* text accompanying notes 55-127.

131 *See* Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 392 (1980) ("to make an independent argument under the state clause takes homework—in texts, in history, in alternative approaches to ananlysis"); G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841, 858 (1991) (noting that "if one is to remain faithful to the original understanding of state constitutions, one must look not only to textual differences between specific state and federal provisions but also to the broader political and theoretical context from which the state provisions came"); Robert F. Williams, *Methodology Problems in Enforcing State Constitutional Rights*, 3 GA. ST. U. L. REV. 143, 173 (1986).

federal analysis by avoiding the appearance of a mere result-oriented reaction to a recent federal case.[132]

Ironically, some commentators would say that the aforementioned state courts' assertions of the meaning of their respective state free exercise provisions are consistent with the Framers' original understanding of the Free Exercise Clause of the First Amendment.[133] This, however, is not surprising, because most current state free exercise provisions are similar to the majority of those that have existed since the First Amendment was ratified in 1791,[134] and scholars agree that the First Amendment was modeled after those early state free exercise clauses.[135] This historical similarity between the federal Free Exercise Clause and its state counterparts perhaps explains why at least some of the state courts

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132 *See* Stewart G. Pollock, *Address: State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707 (1983); David M. Skover, *Address: State Constitutional Law Interpretation: Out of "Lock-Step" and Beyond "Reactive" Decisionmaking* 51 MONT. L. REV. 243, 255-56 (1990) (stating that a true revitalization of state constitutions must move "beyond the reactive" and create "novel and innovative state law theories of . . . religious exercise"); Tarr, *supra* note 131, at 854 (stressing that state courts should avoid "ideological disagreements with the Supreme Court masquerading as independent interpretations of state constitutions"); Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353 (1984).

133 *See* JUSTICE DEPARTMENT REPORT, *supra* note 10, at 36, 52, 61-62; Kmiec, *supra* note 16, at 601-03 (suggesting that a "peace and safety" exception was not included in the federal Free Exercise Clause merely because the Framers feared such a clause would encroach on the police power of the states; stating that only the state's interest in preventing public dangers can override religious liberties under the historical understanding of the First Amendment); McConnell, *supra* note 40, at 1118, 1145, 1152 (indicating that the Free Exercise Clause, in light of its original meaning, requires religious conduct exemptions only subject to limited compelling state interests); McConnell, *supra* note 14, at 1415, 1453, 1511-12 (asserting that the application of the compelling interest test, even with regard to religious exemptions from generally applicable laws, is consistent with the original understanding of the Free Exercise Clause).

134 *See* McConnell, *supra* note 14, at 1427, 1455-56, 1458 (noting the similarity among the free exercise provisions of the early colonies); Miller & Sheers, *supra* note 50, at 311-12 (noting the similarities among current state free exercise provisions).

135 *See* JUSTICE DEPARTMENT REPORT, *supra* note 10, at 30, 61-62 (claiming that the federal Free Exercise Clause reflects the prevailing view of the state free exercise provisions that antedated the First Amendment); McConnell, *supra* note 14, at 1456, 1460-61, 1485 (stating that "state constitutions provide the most direct evidence of the original understanding [of the Free Exercise Clause], for it is reasonable to infer that those who drafted and adopted the first amendment assumed the term 'free exercise of religion' meant what it had meant in their states" and that "[t]he federal free exercise clause seems in every respect to have followed the most expansive models among the states"); McConnell, *supra* note 40, at 1118 (asserting that the state free exercise provisions "were the likely model for the federal free exercise guarantee, and their evident acknowledgment of free exercise exemptions is the strongest evidence that the framers expected the First Amendment to enjoy a similarly broad interpretation").

discussed in this Note emphasized textual differences instead of original intent to justify their divergent interpretations.

IV. CONCLUSION

Because the *Smith* case is so recent, it is unlikely that the Supreme Court in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*[136] will overturn *Smith* expressly or *sub silentio* by limiting *Smith* to its facts. Therefore, the recent trend of state courts that have avoided *Smith*'s narrow reading of the Free Exercise Clause in the First Amendment and have retained a more heightened level of scrutiny under their state constitutions will likely continue, using rationale similar to those state cases analyzed in this Note.

The reasons this trend will likely continue are numerous. Many other state constitutions have free exercise provisions containing, among other things, "peace and safety" clauses similar to those in the California, Maine, Massachusetts, Minnesota, and Washington constitutions. If these clauses are given any meaning, courts should construe them as allowing religious activities that conflict with generally applicable and neutral as well as invidious laws, unless the religious actions threaten public safety and peace. Furthermore, many state free exercise clauses are modeled after the free exercise provisions that existed in the majority of the original colonies at the time the First Amendment was ratified. The history and original meaning of most of these state free exercise provisions support a broader interpretation of those clauses than the Supreme Court in *Smith* gave to the First Amendment.[137] Finally, pre-*Smith* case precedents in a few states, whose courts have not addressed a free exercise case since *Smith*, already have established the independence of their state free exercise provisions and have held that their own state clauses require strict scrutiny analysis of challenges to the free exercise of religion.[138]

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136 723 F. Supp. 1467 (S.D. Fla. 1989), *aff'd*, 936 F.2d 586 (11th Cir. 1991), *cert. granted*, 112 S. Ct. 1472 (1992); *see supra* note 42.

137 *See supra* notes 133-35 and accompanying text.

138 *See* Kentucky State Bd. for Elementary and Secondary Educ. v. Rudasill, 589 S.W.2d 877, 879 n.3 (Ky. 1979) (stating that "it is obvious that [our state free exercise clause] is more restrictive of the power of the state . . . than is the first amendment to the federal constitution as it has been applied to the states"); *In re* Brown, 478 So.2d 1033, 1039, 1039 n.5 (Miss. 1985) (expressly basing its free exercise of religion decision independently on its state constitution and determining that only "compelling considerations of public safety and danger" can outweigh free exercise rights); State v. Pack, 527 S.W.2d 99, 111 (Tenn. 1975) (concluding that its state free exercise clause is "substantially stronger" than the federal Free Exercise Clause and that a "state's interest must be

Prior to *Smith*, the federal Free Exercise Clause and almost all state free exercise provisions granted synonymous religious protections, subjecting most challenges to the free exercise of religion to strict scrutiny analysis. Subsequent to *Smith*, however, differences between the religious protections under state constitutions and those afforded under the First Amendment are beginning to appear for the first time. Labeling these state decisions as a trend of state judicial activism in reaction to *Smith* is misleading. The state courts merely are retaining an established free exercise analysis that was discarded by the Supreme Court.

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compelling" to outweigh religious activities); Texas State Employees Union v. Texas Dep't of Mental Health and Mental Retardation, 746 S.W.2d 203, 205 (Tex. 1987) (noting that religious rights under the Texas Constitution create a "concomitant zone of privacy" that "should yield only when the government can demonstrate that an intrusion is reasonably warranted for the achievement of a compelling governmental objective that can be achieved by no less intrusive, more reasonable means").