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Coda to William Penn's Overture: Safeguarding Non-mainstream Religious Liberty Under the Pennsylvania Constitution

Gary S. Gildin
gsg2@psu.edu

CODA TO WILLIAM PENN'S OVERTURE: SAFEGUARDING NON-MAINSTREAM RELIGIOUS LIBERTY UNDER THE PENNSYLVANIA CONSTITUTION

Gary S. Gildin[*]

INTRODUCTION

The United States Supreme Court's 1990 decision, *Employment Division v. Smith*,[1] spawned a renaissance in state law protection of religious liberty. In *Smith*, the Court held that laws of general applicability that had the effect of burdening an individual's religious faith no longer need be justified by a compelling governmental interest, but now would pass constitutional muster whenever there was a rational basis for the law. Strict scrutiny would continue to be applied to laws that contradicted an individual's religion only in three narrow circumstances: 1) the law purposefully interfered with free exercise of religion;[2] 2) governmental action offended hybrid rights—not only freedom of religion, but also a second fundamental right;[3] or 3) the government had a protocol for affording exceptions from the generally applicable rule, but denied religious exemptions from the law.[4]

As the majority in *Smith* conceded, applying the rational basis test to general laws that have the effect of burdening religion "will place at a relative disadvantage those religious practices that are not widely

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[*] G. Thomas and Anne G. Miller Chair in Advocacy, The Dickinson School of Law, Pennsylvania State University. B.A., 1973, University of Wisconsin; J.D., 1976, Stanford Law School. The author is indebted to Timothy Kepner, Heather Parsons, Michelle Ryan and Lisa Wampler for their invaluable assistance in the preparation of this article.

[1] 494 U.S. 872 (1990).

[2] *Smith*, 494 U.S. at 877; *see* Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993).

[3] *Smith*, 494 U.S. at 881-82; *see* City of Boerne v. Flores, 521 U.S. 507, 514 (1997). The lower courts have accorded varying interpretations to this exception. *Compare* EEOC v. Catholic Univ. of Am., 83 F.3d 455, 467 (D.C. Cir. 1996), *and* Brown v. Hot, Sexy & Safer Prods., 68 F.3d 525, 539 (1st Cir. 1995) (holding that strict scrutiny is applied only where there is an "independently viable" right beyond free exercise), *with* Swanson v. Guthrie Indep. Sch. Dist. No. 1-L, 135 F.3d 694, 700 (10th Cir. 1998) (holding that a "colorable" claim that another right is invaded triggers the compelling interest/narrowly tailored test), *and* Kissinger v. Bd. of Trustees of Ohio State Univ., 5 F.3d 177, 180 (6th Cir. 1993) (refusing to apply strict scrutiny to hybrid claims).

[4] *Smith*, 494 U.S. at 883-84; *see* Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999); Black Hawk v. Pennsylvania, 114 F. Supp. 2d 327 (M.D. Pa. 2000) (mem.) (granting motion for preliminary injunction because state failed to show least restrictive means). *See generally* Carol M. Kaplan, *The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions from* Smith, 75 N.Y.U. L. REV. 1045 (2000).

engaged in."[5] Members of non-mainstream faiths often lack the numbers to inform or politically derail majoritarian legislation that conflicts with their religious tenets.[6] Before *Smith*, the courts adequately protected minority religions by applying the compelling interest/least restrictive alternatives test under the Free Exercise Clause of the United States Constitution.[7] After *Smith*, however, courts employing the rational basis test will reflexively sustain generally applicable laws attacked under the federal Constitution.[8]

Congress has been unsuccessful in attempting to restore the compelling interest/less restrictive alternatives test as a matter of federal statutory law.[9] At the same time, steady progress in securing minority

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[5] *Smith*, 494 U.S. at 890.

[6] *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); Timothy L. Hall, *Omnibus Protections of Religious Liberty and the Establishment Clause*, 21 CARDOZO L. REV. 539, 553 (1999). *See also* Rosalie Berger Levinson, *First Monday—The Dark Side of Federalism in the Nineties: Restricting Rights of Religious Minorities*, 33 VAL. U. L. REV. 47, 51 (1998) ("The Rehnquist Court's approach to the First Amendment religion clauses clearly demonstrates both its willingness to protect majority interests and its unjustified use of federalism to invalidate laws that would protect the rights of those who lack political power."); Martin S. Sheffer, *God Versus Caesar: Free Exercise, the Religious Freedom Restoration Act, and Conscience*, 23 OKLA. CITY U.L. REV. 929, 969 (1998) ("The [Rehnquist] Court is simply insensitive towards the unfamiliar and the different.").

[7] *See* Hernandez v. Commissioner, 490 U.S. 680, 689 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987); Bowen v. Roy, 476 U.S. 693, 732 (1986) (O'Connor, J., concurring in part and dissenting in part); Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983); United States v. Lee, 455 U.S. 252, 257-58 (1982); Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981); Wisconsin v. Yoder, 406 U.S. 205, 213-14 (1972); Sherbert v. Verner, 374 U.S. 389, 406-07 (1963).

[8] Since the Supreme Court's holding in *Smith*, the federal courts have applied the rational basis standard to deny a variety of free exercise claims. *See* Miller v. Reed, 176 F.3d 1202 (9th Cir. 1999) (determining that a person's free exercise rights are not violated by a religiously neutral, generally applicable requirement to furnish a social security number); Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694 (10th Cir. 1998) (holding that school board policy prohibiting part time attendance by students does not invade the free exercise rights of parents who want to home school for religious reasons); Bronx Household of Faith v. Cmty. Sch. Dist. No. 10, 127 F.3d 207 (2d Cir. 1997) (stating that church members who are denied use of a school auditorium for religious use in conjunction with a religiously neutral law have no free exercise claim); Kissinger v. Bd. of Trustees, 5 F.3d 177 (6th Cir. 1993) (holding that a veterinary student's right to freely exercise her religious beliefs were not offended because Ohio State University's curriculum was generally applicable to all veterinary students and religiously neutral); Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991) (stating that there is no free exercise violation when the city's zoning law prevents a church from conducting services in area zoned commercial); Rector of St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990) (stating that the Free Exercise Clause is not contravened where a facially neutral landmark designation hinders a church's ability to raise funds for charities and ministerial programs); Hubbard v. Buffalo Indep. Sch. Dist., 20 F. Supp. 2d 1012 (W.D. Tex. 1998) (determining that a school board's policy requiring proficiency testing for students who attend non-accredited private schools or are home schooled is religiously neutral and generally applicable and does not trammel a person's free exercise rights); Yang v. Sturner, 750 F. Supp. 558 (D.R.I. 1990) (stating that Free Exercise Clause is not violated when an autopsy is performed pursuant to a generally applicable and religiously neutral state law, even if it violates a religious belief).

[9] In 1993, Congress passed the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1 et seq. (1994). As its title suggested, the statute set forth as its purpose "to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of

religious freedom has been achieved by returning to state constitutions—the original font of constitutional shelter for religious liberty[10]—for strict scrutiny of general laws that have the effect of burdening an individual's religious beliefs.[11] This Article argues that Article I, Section 3 of the Pennsylvania Constitution, rooted in William Penn's vision of religious tolerance, generously safeguards nonmainstream religions by demanding that government prove a compelling interest and no less restrictive alternatives to sustain a law of general applicability that has the effect of burdening the exercise of an individual's religion.

While presented with the narrow issue of whether government may invoke a good-faith exception to the exclusionary rule under Article I, Section 8 of the Pennsylvania Constitution, the Pennsylvania Supreme Court in *Commonwealth v. Edmunds* decreed the criteria that should be analyzed in assessing claims under any individual rights provision of the charter.[12] Although the federal Constitution imposes a floor for state protection of rights, United States Supreme Court decisions construing the Bill of Rights do not bar the Pennsylvania

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religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court struck down RFRA as beyond Congress' power under Section 5 of the Fourteenth Amendment.

On September 22, 2000, President Clinton signed the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (2000). Relying upon its spending and commerce powers, Congress instated the compelling interest/least restrictive alternative test for burdens on religion imposed by land use regulations in programs that receive federal financial assistance or that affect commerce, 42 U.S.C. § 2000cc-1(b), and burdens on religion imposed on persons confined in institutions governed by the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 (1994), 42 U.S.C § 2000cc-1(a).

[10] It was not until *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) that the Court held the rights guaranteed by the Free Exercise Clause to be fundamental, hence applicable to the States through the Fourteenth Amendment.

[11] For commentary on this trend see David H.E. Becker, *Free Exercise of Religion Under the New York Constitution*, 84 CORNELL L. REV. 1088 (1999); Linda S. Wendtland, Note, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 VA. L. REV. 625 (1985); Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-*Smith *Jurisprudence*, 1993 BYU L. REV. 275 (1993); Daniel A. Crane, *Beyond RFRA: Free Exercise of Religion Comes of Age in the State Courts*, 10 ST. THOMAS L. REV. 235 (1998); Aaron Gauthier, *Free Exercise Jurisprudence Under the Michigan Constitution: Will Michigan Courts Protect Religious Liberty?*, 3 T.M. COOLEY J. PRAC. & CLINICAL L. 55 (1999); 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 (1994); Stuart G. Parsell, *Revitalization of the Free Exercise of Religion Under State Constitutions: A Response to* Employment Division v. Smith, 68 NOTRE DAME L. REV. 747 (1993); Vikram D. Amar, *State Constitutions and the Workplace*, 32 U.C. DAVIS L. REV. 513 (1999); Glen V. Salyer, *Free Exercise in Illinois: Does the State Constitution Envision Constitutionally Compelled Religious Exemptions?*, 19 N. ILL. U. L. REV. 197 (1998).

[12] Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991) (holding that the state cannot assert a good faith exception under Article I, Section 8 of the Pennsylvania Constitution to admit evidence obtained by a search warrant that was issued without probable cause); *see* Commonwealth v. Swinehart, 664 A.2d. 957, 961 (Pa. 1995) (finding four-pronged analysis established in *Edmunds* the salient point of departure for construction of Article I, Section 9 of Pennsylvania Constitution). In *Commonwealth v. Shaw*, 770 A.2d 295, 298 n.2 (2001), however, the court observed that while the *Edmunds* analysis is required for the briefs of litigants, courts are not required to assess the four criteria in their opinions.

courts from interpreting analogous provisions of the state constitution to afford wider privileges to the citizenry.[13] Deeming it "important and necessary" to independently examine the Pennsylvania Constitution, the *Edmunds* court announced that litigants should brief and analyze four factors whenever presenting or defending a state constitutional claim: 1) the text of the Pennsylvania constitutional provision; 2) the history of the provision, including Pennsylvania case-law; 3) related case-law from other states; and 4) considerations of policy, including "unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence."[14] Each of these factors points unmistakably to the conclusion that Article I, Section 3 of the Pennsylvania Constitution insists that an individual must endure a burden on religion—whether a product of intent, ignorance or inadvertence—only where government proves a compelling interest and that no alternatives less restrictive of religion exist to achieve that interest.

I. TEXTUAL DIFFERENCES BETWEEN THE PENNSYLVANIA AND UNITED STATES CHARTERS COUNTENANCE INDEPENDENT AND BROADER PROTECTION OF RELIGIOUS LIBERTY UNDER THE PENNSYLVANIA CONSTITUTION

The *Edmunds* court held that construction of the civil liberties guarantees of the Pennsylvania Constitution should begin with the text of the document. Even where the language of the state constitution is similar or identical to the text of the federal Constitution, courts are not obliged to assign identical meaning to the provisions.[15] The presence of significant differences in language weighs even more forcefully in favor of independent interpretation of the two charters.[16]

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[13] *Edmunds*, 586 A.2d at 894.

[14] *Edmunds*, 586 A.2d at 895. *See* Ken Gormley, *The Pennsylvania Constitution After* Edmunds, 3 WIDENER J. PUB. L. 55 (1993). For a time, the superior court held that failure to brief the four *Edmunds* factors constituted waiver of the state constitutional claim. *See In re* F.B., 658 A.2d 1378, 1382-83 (Pa. Super. 1995); Commonwealth v. Brown, 654 A.2d 1096, 1099 (Pa. Super. 1995); Commonwealth v. Dorsey, 654 A.2d 1086, 1089 (Pa. Super. 1995). The Pennsylvania Supreme Court later ruled that while addressing these factors was important, helpful, and encouraged, a litigant does not waive the state constitutional claim by neglecting to brief the four criteria. *See* Commonwealth v. White, 669 A.2d 896, 899 (Pa. 1995); Commonwealth v. Swinehart, 664 A.2d 957 (Pa. 1995).

[15] *Edmunds*, 586 A.2d at 895-96. ROBERT E. WOODSIDE, PENNSYLVANIA CONSTITUTIONAL LAW 7 (1985) ("The present Constitutions of the United States and Pennsylvania have many of the same words as the eighteenth century documents, but not necessarily the same meaning attributable to those words by lawyers, officials and laymen of that era.").

[16] *See* Kroger Co. v. O'Hara Township, 392 A.2d 266, 274 (Pa. 1978) ("While there may be a correspondence in the meaning and purpose between the two, the language of the Pennsylvania Constitution is substantially different from the federal constitution. We are not free to treat that language as though it was not there. Because the Framers of the Pennsylvania Constitution employed these words, the specific language in our constitution cannot be readily dismissed as superfluous."); WOODSIDE, *supra* note 15, at 217-18 ("At times both state and federal courts seem to put the two constitutions, or specific portions of them, in a mixer and then examine

The distinct text of the religious liberty provisions of the Pennsylvania Constitution lends protection to religious freedom that is not only independent of, but also broader than, the Free Exercise Clause of the First Amendment.

A. The Fundamental Religious Liberty Clause of the Pennsylvania Constitution Is Textually More Spacious than the Free Exercise Clause of the First Amendment

The language of Article I, Section 3 of the Pennsylvania Constitution safeguards individual religious liberty more expansively than the Free Exercise Clause of the United States Constitution. The First Amendment expresses only the general proscription that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...."[17] By contrast, the Pennsylvania Constitution uses significantly different language to prescribe a positive civil liberty:

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship.[18]

The variance in text is more than semantic and stems from an understanding that federal and state constitutions were to perform different functions with regard to religion. Early state constitutions expressed a range of views as to the affirmative scope of freedom of religion. On the other hand, in ratifying the First Amendment, the States were unified behind a single proposition. "[B]ecause all believed that such matters [of religion] pertained to the states, and that they were making explicit the fact that the federal government had nothing to do with religion, no collision of their differing views as to what constituted a violation of 'rights of conscience' took place."[19]

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the resulting mixture. This ignores the fact that state and federal constitutions were adopted at different times by different people, under different circumstances to apply to different jurisdictions, and contain different language which suggests different interpretations."). *See also* State v. Hunt, 450 A.2d 952, 965 (N.J. 1982) (Handler, J., concurring) (holding that language "may be so significantly different from the language used to address the same subject in the federal Constitution that we can feel free to interpret our provision on an independent basis").

[17] U.S. CONST. amend. I.

[18] PA. CONST. art. I, § 3.

[19] THOMAS J. CURRY, THE FIRST FREEDOMS 202 (1986). *See also* Robert C. Palmer, *Liberties as Constitutional Provisions 1776-1791, in* LIBERTY AND COMMUNITY: CONSTITUTIONS AND RIGHTS IN THE EARLY AMERICAN REPUBLIC 55-56 (William E. Nelson & Robert C. Palmer II eds., 1987) ("The United States Constitution established a second-level and limited government that did not completely supercede the states. Because it was different in kind and purpose from the constitutions of the states, an evaluation of both powers and liberties within it must be altered. Liberties, in the United States Constitution, were exceptions to power, not principles; the Con-

Accordingly, the pronounced textual differences between the United States Constitution's general limit on the power of government to invade religious liberty and the Pennsylvania Constitution's positive ordination of the contours of freedom of conscience make plain that the state and federal charters should be interpreted independently.

The language of article I, section 3 dictates that just as government must show a compelling interest to sustain laws that purposefully restrict religion, government must prove a comparable interest to uphold rules of general applicability that have the effect of compromising religious exercise. A longstanding maxim of constitutional interpretation is that a court should look at the plain meaning of the provision in question.[20] The Pennsylvania Constitution prescribes that the citizen's "right to worship . . . according to the dictates of [his] own conscience" is "indefeasible"—that is, not capable of being annulled.[21] This is not true of most of the rights enshrined in the Declaration of Rights; the only other liberties deemed indefeasible are: a) "enjoying and defending life and liberty;"[22] b) "acquiring, possessing and protecting property and reputation;"[23] c) "pursuing . . . happiness;"[24] and d) the "right to alter, reform or abolish their government in such manner as they may think proper."[25] Religious liberty is one of the select rights termed "indefeasible" because it is not granted by the civil society, but rather, as a "natural" right, precedes the establishment of a government.[26] Therefore, to allow civil inter-

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stitution had markedly little to do with the protection of individuals."); Stephen Botein, *Religious Dimensions of the Early American State, in* BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY (Richard Beeman et al. eds., 1987) 315, 321-22 ("In the late 1780's, only the most pessimistic of Antifederalists understood the new federal government to be a true nation-state . . . . It was, instead, a government designed for certain general purposes. It did not police or educate; it did not embody the immediate will of the people. Compared with the governments of the several states, conceivably it was too distant from the citizenry and too restricted in the scope of its responsibility to require an official religious dimension.").

[20] *See* Collins v. Kephart, 117 A. 440 (Pa. 1921); THOMAS RAEBURN WHITE, COMMENTARIES ON THE CONSTITUTION OF PENNSYLVANIA 12 (1907) ("A constitution is made, not particularly for the inspection of lawyers, but for the inspection of the million, that they may read and discern in it their rights and their duties; and it is consequently expressed in the terms that are most familiar to them. Words, therefore, which do not of themselves denote that they are used in a technical sense, are to have their plain, popular, obvious and natural meaning.") (internal citations omitted). WOODSIDE, *supra* note 15, at 58 ("Constitutional provisions are not to be read in a strained or technical manner. Rather they must be given the ordinary, natural interpretation the ratifying voter would give them.") (citing Commonwealth v. Harmon, 366 A.2d 895, 897 (Pa. 1976)).

[21] Black's Law Dictionary defines "indefeasible" as a claim or right "that cannot be defeated, revoked or lost." BLACK'S LAW DICTIONARY 772 (7th ed. 1999).

[22] PA. CONST. art. I, § 1.

[23] *Id.*

[24] *Id.*

[25] PA. CONST. art. I, § 2.

[26] *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1456 (1990) (referring to religious freedom as an "unalienable right"). Black's Law Dictionary defines a "natural right" as "[a] right that is conceived as part of

ests to trump religious exercise whenever the state has a rational basis for a law would be entirely at odds with the words chosen to spell out religious freedom in article I, section 3.

The succeeding language of article I, section 3 reinforces that as a "natural and indefeasible" right, religious liberty is not to be readily invaded by government. The Pennsylvania Constitution safeguards the right against any "human authority," which certainly includes the legislature.[27] The constitution not only constrains the legislature from purposeful attempts to "control" the right of conscience; article I, section 3 also bars legislation whose effect is to "interfere" with religious freedom.[28] Contrary to the language of the Pennsylvania Constitution, adoption of a rational basis test would, in virtually every circumstance, permit the interest of the "human authority" to "interfere with" the individual's "indefeasible" right of religious conscience. Conversely, requiring government to prove the same compelling interest to sustain an "interference" with religious liberty caused by rules of general applicability—as is admittedly necessary to uphold legislation whose purpose is to "control" freedom of religion—is consonant with the plain meaning of article I, section 3.

B. Related Provisions of the Pennsylvania Constitution Secure More Generous Protection of Religious Liberty than the United States Constitution

While article I, section 3 most directly guarantees individual religious freedom, other provisions of the Pennsylvania Constitution intimate that the Framers intended to confer protection of individual religious liberty that was independent of—and ultimately more generous than—the guarantee of free exercise later afforded by the United States Constitution.[29] The singular importance of religion and religious liberty is acknowledged in the Preamble to the Pennsylvania Constitution. "We, the people of the Commonwealth of Penn-

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natural law and that is therefore thought to exist independently of rights created by government or society." BLACK'S LAW DICTIONARY 1323 (7th ed. 1999).

[27] *See also* PA. CONST. art. I, § 26 ("Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.").

[28] The Oxford English Dictionary defines "control" as "3.a. [A] means adopted, esp. by the government, for the regulation of prices, the consumption of goods, etc.; a restriction;" "4. To exercise restraint or direction upon the free action of; to hold sway over, exercise power or authority over; to dominate, command." 3 THE OXFORD ENGLISH DICTIONARY 852-53 (2d ed. 1989). The definition of "interfere" includes, "4.a. To come into collision or opposition, so as to *affect* the course of." 7 THE OXFORD ENGLISH DICTIONARY at 1102 (emphasis added).

[29] *See* WHITE, *supra* note 20, at 13 ("It is the duty of the courts to so interpret the constitution as to carry out the intention of the people who adopted it, and that intent must be gathered from the instrument itself. The whole instrument should be examined, for only by so doing can the courts gain a comprehensive idea of its purpose."); Seth F. Kreimer, *The Right to Privacy in the Pennsylvania Constitution*, 3 WIDENER J. PUB. L. 77, 83 (1993) ("Pennsylvania's courts have relied on the insights under one constitutional provision to give texture to cognate rights.").

sylvania, grateful to Almighty God for the blessings of civil and religious liberty, and humbly invoking His guidance, do ordain and establish this Constitution."[30] By contrast, the Preamble to the United States Constitution[31] makes no special mention of God or religious freedom. The homage to religion in the Pennsylvania Preamble was no accident; instead, "[i]t was the desire of the members of the convention to go on record as recognizing the omnipotence and watchful care of the Almighty and to express gratitude for the protection which he had given to them and to their forefathers."[32]

One of the most prominent differences in federal and state constitutional treatment of the clash between individual religious faith and the interests of government lies in provisions concerning the military. Both constitutions confer upon the legislature the power to maintain armed forces to assure the security of the body politic—a national guard in the case of Pennsylvania,[33] an army and navy at the federal level.[34] While it is difficult to imagine a stronger governmental interest than defense, the Pennsylvania charter, unlike the United States Constitution, expressly authorizes the exemption from military service of individuals who harbor religious objections. Article III, section 16 provides:

> The citizens of this Commonwealth shall be armed, organized and disciplined for its defense when and in such manner as may be directed by law. The General Assembly shall provide for maintaining the National Guard by appropriations from the Treasury of the Commonwealth, *and may exempt from State military service persons having conscientious scruples against bearing arms.*[35]

As will be discussed in the following analysis of the history of the Pennsylvania Constitution,[36] this Article codifies the Framers' allowance that the demands of conscience—even if not shared by the majority of the populace—supersede civil obligations.[37] The compelling interest/least restrictive alternative test is more compatible with the Framers' conception of religious liberty than permitting government

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[30] PA. CONST. pmbl.

[31] The Preamble to the United States Constitution provides:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

U.S. CONST. pmbl.

[32] WHITE, *supra* note 20, at 29.

[33] PA. CONST. art. III, § 16.

[34] U.S. CONST. art. I, § 8, cls. 12-16.

[35] PA. CONST. art. III, § 16 (emphasis supplied).

[36] *See* Part II, *infra.*

[37] The Pennsylvania Constitution also arguably places a greater premium on religious belief in its term concerning qualifications for office. Article I, section 4 provides that "[n]o person who acknowledges the being of a God and future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office . . . ." PA. CONST. art. I, § 4. The federal Constitution, while prohibiting any religious test as a prerequisite to holding office, does not in turn mandate belief in God as a condition of service. U.S. CONST. art. VI.

to trammel religious practices whenever it has a rational basis for a law of general applicability.

II. THE HISTORY OF ARTICLE I, SECTION 3 OF THE PENNSYLVANIA CONSTITUTION CONFIRMS ITS INDEPENDENCE FROM THE UNITED STATES CONSTITUTION AS WELL AS ITS AMPLE GUARANTEE OF RELIGIOUS LIBERTY FOR ADHERENTS OF MINORITY FAITHS

Edmunds instructs that Pennsylvania courts and litigants also are to explore the history of the state constitutional provision at issue to determine its meaning. The history of Article I, Section 3 of the Pennsylvania Constitution reveals that the article was not modeled after the Free Exercise Clause of the First Amendment and for that reason alone merits independent construction. Furthermore, the Pennsylvania Framers considered religious obligations to be of higher order than demands of the civil law and placed a premium on religious liberty for majority and minority faiths alike.[38] These historic findings are consistent with interpreting article I, section 3 to insist that government prove a compelling interest rather than a mere rational basis to sustain interference with religious liberty effected by laws of general applicability.

The present constitution emanates from three sources: the life and philosophy of William Penn, colonial precursors to the Pennsylvania Constitution, and the constitutional predecessors to the current charter. Each of these sources manifests an overarching concern with religious liberty in general, and protection of minority faiths in particular.

A. The Life and Philosophy of William Penn

The guarantee of religious liberty conferred by the text of the Pennsylvania Constitution mirrors William Penn's original vision of religious tolerance.[39] As a matter of history, whether the present Pennsylvania Constitution requires a compelling interest or merely a rational basis to uphold burdens on religion caused by majoritarian laws of general applicability turns on the answer to a simple question: "What would William Penn have said?" A brief examination of his life and philosophy makes the answer obvious.

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[38] *See* John C. Eastman, *We Are a Religious People, Whose Institutions Presuppose a Supreme Being*, 5 NEXUS 13, 15 (2000) (recognizing that the drafters of the Pennsylvania Constitution believed that a republican government could not thrive if people were not allowed to develop their religious faith and virtue).

[39] *See* John K. Alexander, *Pennsylvania: Pioneer in Safeguarding Personal Rights*, *in* THE BILL OF RIGHTS AND STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES 309 (Patrick T. Conley & John P. Kaminsky eds., 1992) ("Pennsylvania's tradition of guaranteeing basic liberties in writing stemmed directly from William Penn's philosophy and experience.").

Penn was born on October 14, 1644,[40] the son of an English naval commander.[41] From early in his lifetime, Penn rebelled against majoritarian faith. Penn was expelled from Christ Church College at Oxford University for publicly criticizing the religious ceremonies of the Anglican Church, the established Church of England at that time.[42] His parents then sent Penn to France where he studied at a Protestant university with Moïse Amyraut, another supporter of religious toleration.[43]

Penn's repudiation of mainstream religion was solidified with his conversion to Quakerism and marriage to a Quaker woman.[44] Penn became well acquainted with George Fox,[45] the founder of the Quaker religion, and began attending Quaker meetings even though the government outlawed them.[46]

Penn was imprisoned six times for speaking out for religious liberty and, while in jail for these offenses, wrote many pamphlets attacking intolerance.[47] Penn was incarcerated in the Tower of London for attacking the Catholic/Anglican doctrine of the Trinity and was held for seven months because of his refusal to recant.[48] Unwilling to subjugate his religious views to the civil law, Penn stated "[m]y prison shall be my grave before I will budge a jot; for I owe my conscience to no mortal man."[49] During this time, he wrote *No Cross, No Crown*, a historical case for religious toleration.[50]

Penn was again jailed following the passage of the Conventicle Act, which suppressed religious dissent as sedition.[51] While Parlia-

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[40] *See* Jim Powell, *William Penn, America's First Great Champion for Liberty and Peace, at* http://www.quaker.org/wmpenn.html.

[41] *See* THE WORLD OF WILLIAM PENN 4 (Richard S. Dunn & Mary Maples Dunn eds., 1986) [hereinafter WORLD OF PENN].

[42] *See* WILLIAM PENN AND THE FOUNDING OF PENNSYLVANIA 1680-1684: A DOCUMENTARY HISTORY 3-4 (Jean R. Soderlund et al. eds., 1983) [hereinafter FOUNDING OF PENNSYLVANIA]. ("Thus in his late teens, William Penn was already questioning the authority of the church in which he grew up and in doing so was challenging the right of his government to tell him what to believe and how to worship.").

[43] Powell, *supra* note 40.

[44] FOUNDING OF PENNSYLVANIA, *supra* note 42, at 4. ("The early Quakers were extreme radicals, in a social as well as a religious sense . . . . The Quakers considered most aspects of Christian tradition irrelevant: they had no need for ritual, for the sacraments, for an ordained clergy."). WORLD OF PENN, *supra* note 41, at 6.

[45] A Pennsylvania judge recently noted of the Quaker leader:

> A central idea in Fox's ideology was the doctrine of the Inner Light. Under this doctrine, individuals were thought to have the innate spiritual capacity to communicate directly with God. This doctrine was in opposition to established ecclesiastical doctrine of the time and undermined the importance of religious ritual and clerics.

Chief Justice John P. Flaherty, *William Penn, Lawgiver*, THE PENNSYLVANIA LAWYER, Nov.-Dec. 2000, at 42.

[46] *See* WORLD OF PENN, *supra* note 41, at 9; Powell, *supra* note 40.

[47] Powell, *supra* note 40. For a summary of ways in which English law suppressed religious liberty, see McConnell, *supra* note 26, at 1421-22.

[48] Powell, *supra* note 40.

[49] *Id.*

[50] *Id.*

[51] *Id.*

ment passed this Act in order to curb the power of Catholics, the law was applied most frequently against Quakers.[52] Penn challenged the law, which forbade the assembly of more than five adults for religious worship except in Anglican churches,[53] by holding a public Quaker meeting.[54]

By this time, Penn was internationally recognized for his views on religious toleration.[55] He had long worked for liberty of conscience and freedom of worship, including exemption from legal oaths, as a way of guaranteeing the civil rights included in the Magna Carta.[56] Penn's writings reveal two important themes. First, religious obligations are precedent to, and beyond the control of, the state.[57] Second, the stability of the body politic does not depend upon unity of religious belief; rather, loyalty and prosperity will be increased by religious toleration and liberty of conscience.[58]

Penn then shifted his efforts away from England towards establishing a separate settlement in America where freedom of conscience would be promoted.[59] Penn fulfilled the Quaker dream of founding a colony in America when he received the charter to Pennsylvania from King Charles II in 1681 as repayment of a debt of 16,000 pounds the King owed to Penn's father.[60] Penn's goal was to establish a moral, yet tolerant, society in which people were granted freedom of con-

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[52] *Id.*

[53] *See* WILLIAM WISTAR COMFORT, WILLIAM PENN AND OUR LIBERTIES 62 (1947).

[54] After the jury acquitted the defendants, the Lord Mayor of London fined and imprisoned the jury. Still, they would not change their verdict. After two months, the court of common pleas set them free. This case was instrumental in protecting the right to trial by jury. *See* Powell, *supra* note 40.

[55] *See* EDWARD CORBYN OBERT BEATTY, WILLIAM PENN AS SOCIAL PHILOSOPHER 123 (1939).

[56] *See* COMFORT, *supra* note 53, at 73. Penn believed that the Magna Carta provided the most support for freedom of conscience and worship. *Id.* at 133.

[57] "Quakers denied the power of government over conscience, which led them to constant disavowals of the right of the civil arm to punish them for their religious beliefs and practices." CURRY, *supra* note 19, at 74.

[58] *See id.* at 74 (noting that a constant theme in Penn's writings was that "a ruler, rather than creating among his citizens a smouldering hostility by forcing uniformity of belief or impoverishing dissenters by fines, should bind those citizens to himself in a common interest by giving them liberty of conscience").

[59] *See* Powell, *supra* note 40. Even after Pennsylvania was established, Penn continued to work for religious toleration in England and used his political influence to aid imprisoned Quakers. Penn's influence with the King led to the passage of The Acts of Indulgence, releasing over one thousand Quakers from jail. *See* FOUNDING OF PENNSYLVANIA, *supra* note 42, at 53. Penn's influence lapsed for a time when King James II was overthrown and King William III took the throne in 1688. Penn's connections with King James resulted in his arrest for treason and the seizure of his property, including Pennsylvania. He was cleared, but subsequently marked as a traitor again. John Locke finally helped to restore his name in 1694. *See* Powell, *supra* note 40. Pennsylvania was again returned to Penn in 1694. *See* 1 PENNSYLVANIA: A HISTORY 255 (George P. Donehoo ed., 1926).

[60] The Charter granted Penn land in America between Lord Baltimore's colony in Maryland and the Duke of York's province in New York. In 1682, the area was increased when the Duke of York deeded three counties to Penn, in what is now Delaware. *See Pennsylvania State History: The Quaker Province: 1681-1776, at* http://www.phmc.state.pa.us/bah/pahist/quaker.asp?secid=31.

science without fear of persecution.[61] Pennsylvania became the site for Penn's "Holy Experiment," bestowing religious freedom upon all its colonists.[62]

Because his ambition was to allow people from all religious backgrounds to practice as they believed was right, Penn aggressively recruited outside the Quaker faith.[63] As proof of the success of his campaign, the first settlers came from all over Europe.[64] As a consequence, the colony was a bastion of religious pluralism:

> That extraordinary figure William Penn created the "holy experiment" of Pennsylvania as a sanctuary for the oppressed of Europe—the religiously oppressed in particular—with toleration for all who believed in God. Pennsylvania was a refuge for Quakers . . . . But Pennsylvania was also a haven for a wide variety of sectarian and pietist groups from the Continent: Mennonites, Moravians, Dunkers, Amish, and other German sects, for example. And it was important to many other groups as well: It welcomed Roman Catholics in a way that Puritan New England did not; Lutherans and Baptists would find welcome in Pennsylvania.[65]

It is patent that Penn would have rejected the notion that a law of general applicability be permitted to infringe religious liberty merely upon showing a rational basis for the law. First, the rational basis test leaves non-mainstream faiths at the mercy of majoritarian legislation, precisely what Penn sought to avoid in establishing the colony. "Toleration meant to Penn freedom from interference with religious worship and exercises *and exemption from civil disabilities on account of religion.*"[66] Penn advocated that the Quakers be exempted from laws of general applicability concerning oaths, education, the military and marriage.[67] Second, Penn advocated that religious obligations supersede, and are beyond the province of, government.[68] To authorize

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[61] FOUNDING OF PENNSYLVANIA, *supra* note 42, at 5. Penn had also hoped to profit from selling land in Pennsylvania; however, he lost money for a variety of reasons, including the expense of running the government. *See* FREDERIC A. GODCHARLES, PENNSYLVANIA: POLITICAL, GOVERNMENTAL, MILITARY AND CIVIL 61 (1933); Powell, *supra* note 40.

[62] *See* Powell, *supra* note 40. *See also* City of Boerne v. Flores, 521 U.S. 507, 551 (1997) (O'Connor, J., dissenting) ("These colonies [including Pennsylvania], though established as sanctuaries for particular groups of religious dissenters, extended freedom of religion to groups—although often limited to Christian groups—beyond their own.").

[63] FOUNDING OF PENNSYLVANIA, *supra* note 42, at 53; ALEXANDER, *supra* note 39, at 312-13. *See* Commonwealth v. Beiler, 79 A.2d 134, 135 (Pa. Super. Ct. 1951) ("Their [Amish] ancestors came to Pennsylvania in response to William Penn's personal invitation and his promise of religious liberty.").

[64] FOUNDING OF PENNSYLVANIA, *supra* note 42, at 72.

[65] WILLIAM LEE MILLER, THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC 205 (1987). *See also* Robert T. Handy, *The Contribution of Pennsylvania to the Rise of Religious Liberty in America, in* QUEST FOR FAITH, QUEST FOR FREEDOM: ASPECTS OF PENNSYLVANIA'S RELIGIOUS EXPERIENCE 19, 23-24 (Otto Reimherr ed., 1987) ("The liberal policy of toleration and the lack of establishment, combined with the desire of Pennsylvania's leaders to attract immigrants, led to an influx of persons from various religious backgrounds, many of them refugees from persecution in Europe.").

[66] BEATTY, *supra* note 55, at 127.

[67] *Id.* at 129, 144.

[68] In his *Good Advice to the Church of England*, Penn asserted that sovereignty over conscience

government to enact laws that have the effect of limiting religious practice simply by positing a rational civil goal turns Penn's hierarchy on its head.

Perhaps the most germane expression of Penn's views on the tension between religious and civil obligation is set forth in his 1670 work, *The Great Case of Liberty of Conscience.* Among other things, Penn responded to "objections" proffered by those opposing religious freedom, including the protest that "at this rate ye may pretend to Cut our Throats, and do all Manner of Savage Acts."[69] Penn answered, "We are pleading only for such a Liberty of Conscience, as preserves the Nation in Peace, Trade, and Commerce, and would not exempt any man, or Party of men, from not keeping those excellent Laws, that tend to Sober, Just and Industrious Living."[70] As Professor McConnell observes, a rational basis test would not restrict denial of conscience-based exemptions to "excellent Laws," but would permit governmental interests to take precedence over religious exercise in most every instance.[71] Consistent with his life's mission, Penn's *Liberty of Conscience* contemplated a regime much closer to the compelling interest standard—accepting that religious liberty would not be absolute so as to insulate conduct that threatened the state but otherwise demanding that civil obligations give way to an individual's religious duties.

B. Colonial Precursors to the Pennsylvania Constitution

Article I, section 3 of the present state charter traces its lineage to colonial times. The terms of the colonial precursors to the Pennsylvania Constitution make abundantly clear that, just as Penn envisioned,[72] absent compelling reasons individual religious conscience was to predominate over the will of the majority expressed in legislative acts.

1. *The West New Jersey Concessions*

The first relevant document that defined freedom of religion was, arguably, the West New Jersey Concessions ("Concessions"), written

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rested in God, not in any human or governmental authority. *See* BEATTY, *supra* note 55, at 143. *See also* Flaherty, *supra* note 45, at 47 ("Penn's religion emphasized the individual's power to receive insight directly from God, and this religious individualism influenced his political ideas of natural law and fundamental right.").

[69] WILLIAM PENN, THE GREAT CASE OF LIBERTY OF CONSCIENCE 33 (London, 1670).

[70] *Id.* at 34. *See also* WILLIAM PENN, PERSWASIVE TO MODERATION 1 (London, 1686) ("I alwayes premise this Conscience to keep within the bounds of Morality, and that it be neither Frantick nor Mischievous but a Good Subject, a Good Child, a Good Servant in all the affairs of Life: as exact to yield to Caesar the things that are Caesar's, as jealous of withholding from God the thing that is God's . . . .").

[71] *See* McConnell, *supra* note 26, at 1447-48.

[72] *See* WILLIAM PENN, THE GREAT CASE OF LIBERTY OF CONSCIENCE (London, 1670).

in March 1676 and adopted by the proprietors, freeholders and inhabitants of the province of West New Jersey. While there is debate over whether William Penn aided in drafting the Concessions, he signed the document and many of the principles of religious liberty found in the Concessions are incorporated in Pennsylvania's colonial charters.[73] The religious freedom provision of the Concessions states:

> That no Men nor number of Men upon Earth hath power or Authority to rule over mens consciences in religious matters therefore it is consented agreed and ordained that no person or persons whatsoever within the said Province at any time or times hereafter shall be any waies upon any pretence whatsoever called in question or in the least punished or hurt either in Person Estate or Priviledge for the sake of his opinion, Judgment faith or worship towards God in matters of Religion but that all and every such person and persons may from time to time and at all times freely and fully have and enjoy his and their Judgments and the exercise of their consciences in matters of religious worship throughout all the said Province.[74]

The Concessions codify two important features of religious liberty. First, freedom of conscience is not subject to qualification by government, the representative of the "number of Men upon Earth."[75] Second, the right is sheltered not only against intentional burdening; the Concessions ensure that no person is to be "in any waies upon any pretense whatsoever called into question or the least bit punished or hurt in Person Estate or Priviledge" based upon his religious belief or practice.[76]

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[73] Flaherty, *supra* note 45, at 43; BEATTY, *supra*, note 55, at 159 (noting that the Concessions are believed to have been written primarily, if not completely, by Penn); 1 THE PAPERS OF WILLIAM PENN 387-88 (Mary Maples Dunn & Richard S. Dunn eds., 1981) [hereinafter THE PAPERS OF PENN]. Penn had helped promote and found Quaker settlement of the West New Jersey colony. FOUNDING OF PENNSYLVANIA, *supra* note 42, at 96-97.

[74] WEST NEW JERSEY CONCESSIONS CH. 16, *reprinted in* THE PAPERS OF PENN, supra note 73, at 396-97.

[75] That this right was considered fundamental and not alterable by majoritarian legislation is further evidenced by its inclusion under the section of the Concessions entitled *The Charter, or fundamentall Laws of West Jersey agreed upon:*

> That these following concessions are the common Law or fundamentall Rights of the province of West New Jersey. That the common Law, or fundamentall Rights and priviledges of West New Jersey are Individually agreed upon by the Proprietors and freeholders thereof to be the foundation of the Government which is not to be altered by the Legislative Authority or free Assembly hereafter mentioned and constituted But that the said Legislative Authority is constituted according to these fundamentalls to make such Laws as agree with and maintaine the said fundamentalls and to make no Laws that in the least contradict differ or vary from the said fundamentalls under what pretence or allegation soever.

WEST NEW JERSEY CONCESSIONS CH. 13, *reprinted in* THE PAPERS OF PENN, *supra* note 73, at 396.

[76] Religious freedom was not confined to a liberty to believe. The Concessions guarantee not only the right to "freely and fully have and enjoy . . . Judgments," but further safeguard the "exercise of their consciences." WEST NEW JERSEY CONCESSIONS CH. 16, *reprinted in* THE PAPERS OF PENN, *supra* note 73, at 396-97.

2. *Fundamental Constitutions*

The first document governing the Pennsylvania colony was the Charter of Pennsylvania, by which King Charles II created Pennsylvania and granted the land to William Penn. Penn's initial draft of the Charter included a clause guaranteeing religious liberty; however William Blathwayt, secretary to the Lords of Trade, eliminated the provision.[77] Religious liberty was indirectly furthered, however, as the Charter did not require the colonists to attend Anglican services.[78] More significantly, Penn was given the power to make whatever laws he chose, with the consent of the freemen of the Province and provided that they were not contrary to the laws of England.[79]

Although the Charter granted Penn power to rule the colony, Penn wanted Pennsylvania to be governed by people of different languages and customs who worshiped as each chose.[80] His first attempt at drafting a document to accomplish this end was the Fundamental Constitutions, written between 1681 and 1682.[81] Possibly using the West New Jersey Concessions as a source,[82] the Fundamental Constitutions granted freedom of religion in its first clause:

> Considering that it is impossible that any people or government should ever prosper where men render not unto God that which is God's, as well as to Caesar that which is Caesar's; and also perceiving the disorders and mischiefs that attend those places where [there is] force in matters of faith and worship; and seriously reflecting upon the tenure of the new and spiritual government, and that both Christ did not use force and that He did expressly forbid it in His holy religion, as also that the testimony of His blessed messengers was that the weapons of the Christian warfare were not carnal but spiritual; and further weighing that this unpeopled country can never be planted if there be not due encouragement given to sober people of all sorts to plant, and that they will not esteem anything a sufficient encouragement where they are not assured, but that after all the hazards of the sea and the troubles of a wilderness, the labor of their hands and sweat of their brows may be made the forfeit of their conscience, and they and their wives and children ruined because they

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[77] FOUNDING OF PENNSYLVANIA, *supra* note 42, at 39.

[78] The only time religion was even mentioned in the Charter was in a provision allowing the bishop of London to appoint an Anglican preacher upon the request of twenty inhabitants. The provision states:

> And our further pleasure is, and we do hereby, for us, our heirs and successors, charge and require that if any of the inhabitants of the said province, to the number of twenty, shall at any time hereafter be desirous, and shall, by any writing or by any person deputed by them, signify such their desire to the Bishop of London, for the time being, that any preacher or preachers, to be approved of by the said bishop, may be sent unto them for their instruction, that then such preacher or preachers shall and may reside within the said province without any denial or molestation whatsoever.

THE FUNDAMENTAL CONSTITUTIONS OF PENNSYLVANIA PT. XXII (1681), *reprinted in* FOUNDING OF PENNSYLVANIA, *supra* note 42, at 49.

[79] *See* FOUNDING OF PENNSYLVANIA, *supra* note 42, at 49.

[80] *See id.* at 95.

[81] *See id.* at 96.

[82] *See id.*

> worship God in some different way from that which may be more generally owned. Therefore, in reverence to God the Father of lights and spirits, the author as well as object of all divine knowledge, faith, and worship, I do hereby declare for me and mine and establish it for the First Fundamental of the government of my country, that every person that does or shall reside therein shall have and enjoy the free possession of his or her faith and exercise of worship towards God, in such way and manner as every person shall in conscience believe is most acceptable to God, and so long as every such person uses not this Christian liberty to licentiousness (that is to say, to speak loosely and profanely of God, Christ, or religion, or to commit any evil in their conversation), he or she shall be protected in the enjoyment of the aforesaid Christian liberty by the civil magistrate. Very good.[83]

Although never enacted or signed by any settler,[84] as the first articulation of religious liberty in Pennsylvania the Fundamental Constitutions evidence the twin prongs of Penn's vision. First, religious faith must be protected not only for mainstream orders, but equally for persons who "worship God in some different way from that which may be more generally owned."[85] Second, religious obligation is not only preeminent to civic duty, but is a prerequisite to a successful civil order. Hence the "civil magistrate" is required to safeguard "free possession of his or her faith" as well as "exercise of worship towards God, in such way as every person shall in conscience believe is most acceptable."[86]

The only qualification on free exercise imposed by the Fundamental Constitutions is that the citizen "not use this Christian liberty to licentiousness."[87] This proviso is akin to Penn's *The Great Case of Liberty of Conscience*, where he answered the charge that religious freedom would justify "all Manner of Savage Acts" with the concession that such freedom "would not exempt any man . . . from not keeping those excellent Laws, that tend to Sober, Just and Industrious Living."[88] As was true of Penn's writing, the limit on freedom of religion espoused in the Fundamental Constitutions fits more comfortably with a modern compelling interest test than one permitting the populace to enact any general laws—whether or not "excellent"—that have the effect of invading religion merely upon proffering any rational basis.[89]

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[83] *See id.* at 98-99.

[84] *See id.* at 97.

[85] *Id.* at 98-99.

[86] *Id.*

[87] *Id.*

[88] *See* WILLIAM PENN, THE GREAT CASE OF LIBERTY OF CONSCIENCE 33-34 (London, 1670).

[89] *See* McConnell, *supra* note 26, at 1456-58, 1461-66. *See also* City of Boerne v. Flores, 521 U.S. 507, 554-55 (1997) (O'Connor, J., dissenting) (finding provisos in state constitutions that rights of conscience do not excuse acts of licentiousness "make sense only if the right to free exercise was viewed as generally superior to ordinary legislation, to be overridden only when necessary to secure important government purposes").

3. *The Laws Agreed Upon in England*

Penn's next effort to provide for religious liberty in the colony was The Laws Agreed Upon in England, which were to operate in conjunction with his proposed First Frame of Government.[90] The Laws Agreed upon in England expressly granted religious freedom:

> That all Persons living in this Province, who confess and acknowledge the One Almighty and Eternal God, to be the Creator, Upholder and Ruler of the World; and that hold themselves obliged in Conscience to live peaceably and justly in Civil Society, shall in no Ways be molested or prejudiced for their Religious Perswasion or Practice in matters of Faith and Worship, nor shall they be compelled at any Time to frequent or maintain any religious Worship, Place or Ministry whatever.[91]

The Laws Agreed Upon in England carry forth features of religious liberty that are consistent with applying the compelling interest test to all infringements, whether purposeful or inflicted by neutral laws of general applicability. The Laws safeguard the religious liberty of all persons who believe in God, even if that faith is professed differently than the religion of the majority. The civil government is debarred not only from purposefully "molesting" one on account of her religious views, but is prohibited from acting in a way that has the effect of "prejudic[ing]" one based upon religion.[92] The only limitation on the primacy of religious conscience is that one "live peaceably and justly" in the "Civil Society."

4. *The Great Law*

The Laws Agreed Upon in England were never approved by the settlers of the colony and were superseded by the Great Law, enacted by the Assembly convened in Chester in December 1682.[93] The first chapter of the Great Law guaranteed religious freedom in much the same way as Penn had proposed in the Fundamental Constitutions and Laws Agreed Upon in England:

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[90] The Laws Agreed Upon in England were part of Penn's effort to distinguish the colony based on its founding principles:

> Laws Agreed Upon in England were meant to take the place of the laws applicable to the area of Pennsylvania before Penn received his grant, the Duke of York's Laws, which had been written on Long Island in 1664 and been made applicable, in 1676, to what was later Pennsylvania.

UNITY FROM DIVERSITY: EXTRACTS FROM SELECTED PENNSYLVANIA COLONIAL DOCUMENTS, 1681 TO 1780, IN COMMEMORATION OF THE TERCENTENARY OF THE COMMONWEALTH 5 (Louis M. Waddell ed., 1980) [hereinafter UNITY FROM DIVERSITY].

[91] *The Laws Agreed Upon in England* pt. XXXV (1682), *reprinted in* A COLLECTION OF CHARTERS AND OTHER PUBLICK ACTS RELATING TO THE PROVINCE OF PENNSYLVANIA, at 21 (Philadelphia, Franklin 1740).

[92] *See id.* The definition of "molest" in 9 THE OXFORD ENGLISH DICTIONARY 973 (2d ed. 1989), includes "2.a. [t]o interfere or meddle with (a person) injuriously or *with hostile intent.*" The definition of "prejudice" includes "to *affect* injuriously or unfavourably by doing some act" 12 THE OXFORD ENGLISH DICTIONARY at 356 (emphasis added).

[93] *See* UNITY FROM DIVERSITY, *supra* note 90, at 7.

> Almighty God, being Only Lord of Conscience father of Lights and Spirits, and the author as well as object of all Divine knowledge, faith, and Worship, who only can enlighten the mind, and persuade and convince the understandings of people. In due reverence to his sovereignty over the Souls of Mankind.
>
> *Be it enacted by the Authority aforesaid,* That no person, now, or at any time hereafter, Living in this Province, who shall confess and acknowledge one Almighty God to be the Creator, Upholder and Ruler of the world, And who professes, him, or herself Obliged in conscience to Live peaceably and quietly under the civil government, shall in any case be molested or prejudiced for his, or her Conscientious persuasion or practice. Nor shall hee or shee at any time be compelled to frequent or Maintain anie religious worship, place or Ministry whatever, Contrary to his, or her mind, but shall freely and fully enjoy his, or her, Christian Liberty in that respect, without any Interruption or reflection. And if any person shall abuse or deride any other, for his, or her different persuasion and practice in matters of religion, such person shall be lookt upon as a Disturber of the peace, and be punished accordingly.
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> But to the end That Looseness, irreligion, and Atheism may not Creep in under pretense of Conscience in this Province, *Be It further Enacted by the Authority aforesaid,* That, according to the example of the primitive Christians, and for the ease of the Creation, Every first day of the week, called the Lord's day, People shall abstain from their usual and common toil and labour, That whether Master, Parents, Children, or Servants, they may the better dispose themselves to read the Scriptures of truth at home, or frequent such meetings of religious worship abroad, as may best suit their respective persuasions.[94]

Like its predecessors, the Great Law protected minority and majority faiths alike, provided they believed in God. The Great Law declared it to be a punishable breach of peace to "abuse or deride any other, for his, or her different persuasion and practice in matters of religion."[95] Even the mandate to abstain from working on the first day of the week acknowledged that one was free to pursue her faith as she best saw fit—"to read the Scriptures of truth at home, or frequent such meetings of religious worship abroad, as may best suit their respective persuasions."[96] Again, government was banned from both "molest[ing] or prejudic[ing]" on account of one's religion while the lone restraint on the right of religious liberty continued to be that the right holder "[l]ive peaceably and quietly under the civil government."[97]

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[94] GREAT LAW, CH. 1 (1682), *reprinted in* CHARTER TO WILLIAM PENN AND LAWS OF THE PROVINCE OF PENNSYLVANIA PASSED BETWEEN THE YEARS 1682 AND 1700, at 107-08 (Harrisburg, Hart 1879).

[95] *Id.*

[96] *Id.*

[97] *Id.*

5. *The Charter of Privileges*

In 1701, Penn promulgated the Charter of Liberties (or Privileges), which remained in effect until 1776 when the first Pennsylvania Constitution was written. The very first provision of the Charter of Privileges enshrined religious freedom:

> Because noe people can be truly happy, though under the Greatest Enjoyment of Civil Liberties, if Abridged of the Freedom of theire Consciences, as to their Religious Profession and Worship. And Almighty God being the only Lord of Conscience Father of Lights and Spirits and the Author as well as Object of all divine knowledge Faith and Worship who only [can] Enlighten the mind, and perswade and Convince the understandings of people I doe hereby Grant and Declare, that noe person or persons Inhabiting in this Province or Territories who shall Confesse and Acknowledge one Almighty God the Creator upholder and Ruler of the world and professe him or themselves Obliged to live quietly under the Civill Governement, shall be in any case molested or prejudiced in his or theire person or Estate because of his or theire Conscientious perswasion or practice nor be compelled to frequent or mentaine any Religious Worship place or Ministry contrary to his or theire mind or doe or Suffer any other act or thing, contrary to theire Religious perswasion.[98]

The Charter of Privileges embraced the dimensions of religious liberty first codified in the West New Jersey Concessions and which permeated the Fundamental Constitutions, the Laws Agreed Upon in England and the Great Law. Freedom of religion extends to all persons who believe in God, regardless of their particular religious tenets.[99] Government may neither purposefully "molest" nor act in a way that will "prejudice" one's "person or estate" because of her religion. The only circumstance under which government may place its interests above liberty of conscience is where exercise of religion would violate the obligation "to live quietly under the civil government."

The Charter of Privileges singled out religious liberty for special sanctuary. The Charter acknowledged that even if possessed of "the Greatest Enjoyment of Civil Liberties," "noe people can be truly happy . . . if abridged of the Freedom of theire Consciences as to

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[98] THE CHARTER OF PRIVILEGES (1701), *reprinted in* 4 THE PAPERS OF PENN, *supra* note 73, at 104-06.

[99] The assurance that no person be "compelled to . . . mentaine any Religious Worship Place" also served to protect minority faiths. In Pennsylvania, "[t]here was no established church to bend the conscience of men and to inflict pain and penalty for nonconformity to creed or dogma." WAYWOOD FULLER DUNAWAY, A HISTORY OF PENNSYLVANIA 35-36 (1948).

Religious equality, however, was not unbounded. The Charter of Privileges limited government office to Christians. THE CHARTER OF PRIVILEGES (1701), *reprinted in* 4 THE PAPERS OF PENN, *supra* note 73, at 104-06. ("[A]ll persons who also professe to believe in Jesus Christ the Saviour of the world shall be capable (notwithstanding theire other perswasions and practices in point of Conscience and Religion) to Serve this Governement in any capacity both Legislatively and Executively . . . ."). While discriminatory against non-Christians in this regard, the religious requirement was liberal for its time in that it enfranchised Roman Catholics, who were barred even from voting in most colonies. Alexander, *supra* note 39, at 309.

theire Religious Profession and Worship."[100] Accordingly, the Charter fully and forever insulated the right from governmental invasion:

> And noe Act Law or Ordinance whatsoever shall at any time hereafter be made or done to Alter Change or Diminish the forme or Effect of this Charter or of any part or Clause therein Contrary to the True intent and meaning thereof without the Consent of the Governour for the [time being and] six parts of Seven of the Assembly [mett] But because the happiness of Mankind Depends So much upon the Enjoying of Libertie of theire Consciences as aforesaid I Doe hereby Solemnly Declare Promise and Grant for me my heires and Assignes that the first Article of this Charter Relateing to Liberty of Conscience and every part and Clause therein according to the True Intent and meaneing thereof shall be kept and remaine without any Alteration Inviolably for ever.[101]

While no liberty in the Charters of Privileges could be altered absent approval of six-sevenths of the legislators, the religious freedom provision was placed entirely beyond the power of the legislature, to be "kept and remaine without any Alteration Inviolably forever."

The provisions of the Laws Agreed Upon in England, the Great Law and the Charter of Privileges afforded greater asylum to religious liberty in Pennsylvania than the laws of any colony.[102] "It was a declaration not of toleration but of religious equality, and brought within its protection all who confessed one Almighty God—Roman Catholics and Protestants, Unitarians and Trinitarians, Christians, Jews and Mohammedans, and excluded only Atheists and Polytheists."[103] This equality stemmed from Penn's belief that the duty to religion preceded and superceded obligations to secular society, and that the security of body politic is enhanced by promoting rather than quashing the diverse ways in which individuals choose to relate to the Creator. Accordingly, government was dis-empowered from either purposefully molesting or in effect prejudicing an individual because of his religious belief or practice, so long as the citizen lived peaceably in the community. Codifying William Penn's vision, the colonial precursors to the Pennsylvania Constitution are wholly incompatible with a rational basis test for neutral rules of general applicability that would permit the majority to routinely burden the religion of minority faiths.

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[100] CHARTER OF PRIVILEGES (1701), *reprinted in* 4 THE PAPERS OF PENN, *supra* note 73, at 106.

[101] *Id.* at 108.

[102] *See* CURRY, *supra* note 19, at 75 ("Pennsylvania from its beginnings, however, established perhaps the broadest religious liberty in colonial America, and its government provoked no serious charges of persecution."); Alexander, *supra* note 39, at 311 ("Pennsylvania, which never instituted an established religion and never faced a serious charge of religious persecution, joined Rhode Island in offering the inhabitants the greatest degree of religious liberty in colonial America.").

[103] HON. MICHAEL WILLIAM JACOBS, THE GUARANTIES OF LIBERTY IN THE EARLY LAW OF PENNSYLVANIA (1907).

C. Constitutional History of Article I, Section 3

Pennsylvania has held five constitutional conventions since the American Revolution, resulting in the Constitutions of 1776, 1790, 1838, 1874, and 1968.[104] Each of these constitutions perpetuated the broad ambit of religious liberty for minority and majority faiths alike that was envisioned by William Penn and captured in the colonial charters.[105]

1. *1776 Constitution*

The first Constitution for the Commonwealth of Pennsylvania, consisting of a Declaration of Rights and a Frame of Government, was adopted in 1776.[106] Section 46 of the Frame of Government pronounced the Declaration of Rights "to be a part of the constitution of this Commonwealth" which "ought never to be violated on any pretence whatever."[107] To fully appreciate the significance of the provisions of the Declaration of Rights protecting freedom of religion, it is first necessary to examine the religious composition of the Commonwealth as well as the political role of its sects.[108]

As of 1776, the diverse religions in Pennsylvania were divided among three geographic regions of the Commonwealth. The Philadelphia area—Chester, Bucks and Philadelphia counties—had been settled by English of Quaker, Episcopalian and Baptist faiths who occupied the wealthy and aristocratic stratum of society. Their financial status assured that members of these religions would wield the bulk of political power, for the requirement that one own property as a

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[104] For an overview of the process by which these constitutions were adopted, *see* WOODSIDE, *supra* note 15, at 9-10, 567-81; PREPARATORY COMMITTEE FOR THE PENNSYLVANIA CONSTITUTIONAL CONVENTION 1967-1968, A HISTORY OF PENNSYLVANIA CONSTITUTIONS, REFERENCE MANUAL NO. 3 (1968) [hereinafter HISTORY OF PENNSYLVANIA CONSTITUTIONS].

[105] *See* CURRY, *supra* note 19, at 160.

[106] For detailed analyses of the history and impact of the 1776 Constitution, see J. PAUL SELSAM, THE PENNSYLVANIA CONSTITUTION OF 1776: A STUDY IN REVOLUTIONARY DEMOCRACY (1936); ROSALIND L. BRANNING, PENNSYLVANIA CONSTITUTIONAL DEVELOPMENT (1960); WHITE, *supra* note 20; William Bentley Ball, *The Religion Clauses of the Pennsylvania Constitution*, 3 WIDENER J. PUB. L. 709, 713-16 (1994); Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 TEMP. L. REV. 541 (1989); and Stephen P. Halbrook, *The Right To Bear Arms in the First State Bills of Rights: Pennsylvania, North Carolina, Vermont and Massachusetts.* 10 VT. L. REV. 254, 266-75 (1985).

[107] PA. CONST. of 1776, FRAME OF GOVERNMENT § 46.

[108] For an analysis of the religious composition of early Pennsylvania and its impact on Pennsylvania politics, see E. Theodore Bachmann, *Penn's "Holy Experiment" in Context: Some Aspects of a Nascent Ecumenism as Seen in the Lutheran Involvement (1638-1762), in* QUEST FOR FAITH, QUEST FOR FREEDOM: ASPECTS OF PENNSYLVANIA'S RELIGIOUS EXPERIENCE 41 (Otto Reimherr ed., 1987); O.S. Ireland, *The Crux of Politics: Religion and Party in Pennsylvania, 1778-1789*, 42 WM. & MARY Q. 453 (1985); O.S. Ireland, *The Ethnic-Religious Dimension of Pennsylvania Politics, 1778-1779*, 30 WM. & MARY Q. 423 (1973).

qualification to vote sapped the influence of non-Quakers.[109] German farmers of Reformed or Lutheran religious conviction as well as pietistic sects of Moravians, Schwenkfelders, Mennonites and Dunkers dominated the middle of the state. Members of these faiths were primarily middle class and largely followed the political lead of the Quakers.[110] Finally, the western frontier was populated by Scotch-Irish Presbyterian small farmers, whose debt not only disadvantaged them economically, but deprived them of representation in the government.[111] One of the leading adverse consequences of the Presbyterians' lack of franchise was the inability to protect their frontier homes and land during the frequent periods of war. Because of their religious based conscientious objection, the Quakers, who controlled the government, refused to support the raising of arms.[112]

While the Quakers dominated the pre-revolutionary government, it was the Scotch-Irish Presbyterians who exerted primary sway over the 1776 Constitution. The Presbyterians were enfranchised by one of the first acts of the Provincial Conference that assembled in Philadelphia on June 18, 1776—the abrogation of the requirement that one own property amounting to fifty pounds in order to vote for delegates to the state constitutional convention.[113] Furthermore, "[s]ince the Quakers, the conservatives, and the German sectarians opposed to war had little or nothing to do with the movement for a constitution, and since the great leaders of Pennsylvania like Wilson, Dickson, Franklin, Morris and others were busily engaged in Congress or serving in the army, the Presbyterian influence was all powerful" at the convention called to draft the state constitution.[114] Despite the ascendancy of a religious sect that had been prejudiced by the lack of franchise and left vulnerable by the Quaker conscientious objection to war, the document that the constitutional convention produced codified Penn's ideal of religious freedom and tolerance. In

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[109] SELSAM, *supra*, note 106, at 2; BRANNING, *supra* note 106, at 9-10.

[110] SELSAM, *supra* note 106, at 6; BRANNING, *supra* note 106, at 9-10.

[111] SELSAM, *supra* note 106, at 6; BRANNING, *supra* note 106, at 9-10.

[112] The Quaker-dominated Assembly refused to lend support to the King William War in 1689; Queen Anne's War in 1701; the 1739 War of Jenkin's Ear, which merged into King George's War; and the French and Indian War, where fighting occurred within the boundaries of Pennsylvania. *See* SELSAM, *supra* note 106, at 18-25. When Governor Thomas sent a message to protest the Assembly's refusal to support King George's War, the Assembly charged him with "overthrowing the liberties of the people." *Id.* at 22.

[113] PROCEEDING OF THE PROVINCIAL CONFERENCE OF THE COMMITTEES OF THE PROVINCE OF PENNSYLVANIA, JUNE 20-21, 1776, *reprinted in* THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790, at 38 (Harrisburg, Wiestling 1825) [hereinafter PROCEEDINGS]; SELSAM, *supra* note 106, at 138; HISTORY OF PENNSYLVANIA CONSTITUTIONS, *supra* note 104, at 2.

[114] SELSAM, *supra* note 106, at 150. *See also* HISTORY OF PENNSYLVANIA CONSTITUTIONS, *supra* note 104, at 1. ("Pennsylvania's convention was called not by the colonial assembly, which was under the control of the eastern conservatives, but by a provincial conference of the committees of correspondence of all the counties convoked by the committee of the city of Philadelphia. These were wholly extralegal bodies in which persons disenfranchised under the existing property qualification and rigid naturalization procedures could and did participate.").

fact, the *Address to the People of Pennsylvania,* crafted by a committee of the Provincial Conference to announce the convention, urged that a change of government was "absolutely necessary, to secure property, liberty and the sacred rights of conscience, to every individual in the province."[115]

Although the Declaration of Rights is often touted as being modeled after the Virginia Declaration of Rights,[116] Pennsylvania's religion clause departed from the Virginia charter to cut a wider swath of religious liberty.[117] Section 2 of the Pennsylvania Declaration of Rights in the 1776 Constitution provided:

> That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: And that no man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent: Nor

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[115] PROCEEDINGS, *supra* note 113 at 41-42; WHITE, *supra* note 20, at xxii.

[116] The linkage may be attributable to the fact that Madison shared Penn's view that the duty to religion superseded civil obligations:

> It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society . . . . [I]n matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.

JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, *reprinted in* Everson v. Bd. of Educ., 330 U.S. 1, 64 (1947) (Appendix to Rutledge, J., dissenting).

[117] *See* BERNARD SCHWARTZ, 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 262 (1971). In a letter to William Bradford, Jr. of Pennsylvania written on April 1, 1774, James Madison acknowledged that colonial Pennsylvania was far more munificent in its treatment of minority faiths than Virginia:

> Our Assembly [of Virginia] is to meet on the first of May When It is expected something will be done in behalf of the Dissenters: Petitions I hear are already forming among the Persecuted Baptists and I fancy it is in the thoughts of the Presbyterians also to intercede for greater liberty in matters of Religion. For my part, I cannot help being very doubtful of their succeeding in the Attempt . . . . The Sentiments of our people of Fortune & fashion on this subject are vastly different from what you have been used to. That liberal catholic and equitable way of thinking as to the rights of Conscience, which is one of the Characteristics of a free people and so strongly marks the People of your province is but little known among the Zealous adherents to our Hierarchy . . . .
>
> You are happy dwelling in a Land where those inestimable privileges are fully enjoyed and public has long felt the good effects of their religious as well as Civil Liberty.

JAMES MADISON, WRITINGS 7-9 (Library of America 1999). *See also* MILLER, *supra* note 65, at 37-38 ("The middle colonies did not offer a striking defense of religious liberty for the opposite reasons: They had already attained it, or something close to it. Pennsylvania, the weightiest of them, had been from the beginning not far from the ideal that Madison wanted, through the courtesy of its Quaker founder William Penn."); Alexander, *supra* note 39, at 327 ("American revolutionaries in other states, including James Madison, often cited Pennsylvania's development to support the case for embracing religious toleration or to attack the practice of creating an established church.").

The fact that the Pennsylvania Constitution was more expansive in its treatment of religious freedom than the Virginia Declaration of Rights further supports interpreting the state constitution independent of and more broadly than the Free Exercise Clause of the United States Constitution. For the United States Supreme Court has viewed the Virginia Declaration of Rights "as particularly relevant in the search for the First Amendment's meaning." McGowan v. Maryland, 366 U.S. 420, 437 (1961).

> can any man, who acknowledges the being of God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship: And that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner control, the right of conscience in the free exercise of religious worship.[118]

This provision embraces many features of the rights that derive from the colonial precursors and persist in the present constitution. The right to worship God is "natural and unalienable." "No authority"—including government—is empowered to "in any manner control" or "in any case interfere" with the free exercise of worship.[119] The 1776 Constitution acknowledges the equivalent protection to be accorded non-majoritarian faiths, enjoining dispossession of any civil right due to "the citizen's religious sentiments or *peculiar* mode of worship."[120]

The preamble to the 1776 Constitution confirms the commitment to the liberty of adherents of all persuasions. The preamble documents the Framers' belief that

> [I]t is our indispensable duty to establish such original principles of government, as will best promote the general happiness of the people of this State, and their posterity, and provide for future improvements, *without partiality, for, or prejudice against any particular class, sect or denomination of men whatever*. . . .[121]

There is perhaps no better example of the Framers' endorsement that individual faith occupies a higher plane than the civil needs of the collective than the provision of the Declaration of Rights concerning the common defense. It must be recalled that the Scotch-Irish Presbyterian farmers who controlled the convention had been victimized by the pacifist religious beliefs of the Quaker-dominated colonial Assembly, which had rendered the farmers impotent to defend their property in times of war. Nonetheless, the 1776 Constitution continued to respect the religious liberty of the Quakers, exempting "any man who is conscientiously scrupulous of bearing arms" from being compelled to do so, "if he will pay such equivalent."[122]

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[118] PA. CONST. of 1776, DECLARATION OF RIGHTS, cl. 2. By comparison, the 1776 Virginia Declaration of Rights stated: "That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forebearance, love and charity, towards each other." VA. DECLARATION OF RIGHTS § 16 (1776), *reprinted in* SCHWARTZ, *supra* note 117, at 236. In departing from the language of the Virginia Declaration of Rights, the Pennsylvania Constitution "granted practically the same protection as that of Penn's *Charter of Privileges*." SELSAM, *supra* note 106, at 180.

[119] The dictionaries of the time defined "exercise" to include not only belief but conduct. McConnell, *supra* note 26, at 1489.

[120] PA. CONST. of 1776, DECLARATION OF RIGHTS, cl. 2 (emphasis supplied).

[121] PA. CONST. of 1776 pmbl. (emphasis supplied).

[122] PA. CONST. of 1776, DECLARATION OF RIGHTS, cl. 8. The New Hampshire and Vermont constitutions were the only other state constitutions to similarly provide this protection.

While not apparent on its face, the provision of the 1776 Constitution concerning the oath of office also operated to broaden religious tolerance. Section 10 of the Frame of Government required all members of the legislature to take the following oath: "I do believe in one God, the creator and governor of the universe, the rewarder of the good and the punisher of the wicked. And I do acknowledge the Scriptures of the Old and New Testament to be given by Divine inspiration."[123] While obviously barring disciples of certain faiths, this oath served to end the exclusion of Roman Catholics from office that the oath had exacted in colonial times.[124] The residual impact of the oath was further ameliorated by the immediately succeeding provision that "no further or other religious test shall hereafter be required of any civil officer or magistrate of this State."[125] This clause was inserted at the behest of Benjamin Franklin. While preferring that the mandate to acknowledge the divine inspiration of the Scriptures be omitted, Franklin concluded that the added clause limited to legislators the class of persons required to make the affirmation.[126]

Finally, section 45 of the Frame of Government offered additional security to religious faith, providing:

> [A]ll religious societies or bodies of men heretofore united or incorporated for the advancement of religion or learning, or for other pious and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities and estates which they were accustomed to enjoy, or could of right have enjoyed, under the laws and former constitution of this state.[127]

References to religion in this proviso were added to assuage concerns of Christian ministers that their followers' ability to pursue their faith could be compromised by a ruling class of "Jews, Turks, Spinozists, Deists, perverted naturalists."[128] Like other portions of the new con-

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SELSAM, *supra* note 106, at 179 n.33.

[125] PA. CONST. of 1776, FRAME OF GOVERNMENT, § 10.

[124] Updegraph v. Commonwealth, 11 Serg. & Rawle 394, 403 (Pa. 1824). "[F]rom 1693 to 1776 . . . every candidate for office had to swear that he did not believe in the doctrine of transubstantiation, that he regarded the invocation of the Virgin Mary and the saints as superstitious and the Popish Mass as idolatrous." SELSAM, *supra* note 106, at 179. "At a later date every prospective office-holder was compelled to declare his belief in the Athanasian definition of the Holy Trinity. Penn undoubtedly opposed these tests but he was powerless to act. They imposed civil disabilities on Catholics, Socinians or Unitarians, Jews and Infidels." *Id.* at 179 n.35; UNITY FROM DIVERSITY, *supra* note 90, at 79; Alexander, *supra* note 39, at 323.

The new oath may have originated in the oath that the Provincial Conference required of delegates to the Constitutional Convention, which was "a return to the original idea of liberty of conscience held by William Penn." SELSAM, *supra* note 106, at 140 n.12; WHITE, *supra* note 20, at xxiii.

[125] PA. CONST. of 1776, FRAME OF GOVERNMENT, § 10.

[126] SELSAM, *supra* note 106, at 180; WHITE, *supra* note 20, at xxiv, 45; MORTON BORDEN, JEWS, TURKS AND INFIDELS 11 (1984).

[127] PA. CONST. of 1776, FRAME OF GOVERNMENT, § 45.

[128] SELSAM, *supra* note 106, at 217. *See also* BORDEN, *supra* note 126, at 11. While still biased in favor of Christian faith in general, "[c]onsidering the times, the framers of the constitution were very liberal in regard to religion. Besides Pennsylvania only Delaware and Rhode Island

stitution, pains were taken to guarantee that those who ran the new civil order would not trammel the religious liberty of members of other sects in the Commonwealth.

2. *1790 Constitution*

Primarily because of dissatisfaction with the structure of government fixed by the 1776 Constitution,[129] another constitutional con-

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acknowledged the equality of all Protestant sects, and only Pennsylvania extended equality to Catholics." SELSAM, *supra* note 106, at 180-81. The apparent dichotomy in the 1776 Constitution between promoting Christianity in general while guaranteeing religious liberty of dissenters was not unique to Pennsylvania but rather typified state constitutional efforts to promote the personal and societal virtues offered by religion in a pluralistic body politic. As Professor Onuf explains:

> Most of the founders agreed that Protestant Christianity provided the best support for republican virtue. Because, in the words of Benjamin Rush, "a Christian cannot fail of being a republican," it was obviously advisable for American republics to support Christianity. But what sort of state support would be broadly acceptable in a pluralistic religious environment? Experience in the colonies and new states showed that religious establishments generated sectarian divisions and offended many devout Christians.
>
> Efforts to establish Christianity, even where sectarian diversity precluded actual state support, show how concerned constitution writers were with fostering popular piety and virtue. But most of the new charters also incorporated provisions that acknowledged individual rights of conscience and, south of New England, disavowed any preference for a particular sect . . . . Republicanism may have depended on Christianity, but respect for religious freedom and the threat of sectarian hostility precluded the new state governments from cultivating the popular piety and virtue which alone could sustain them.

Peter S. Onuf, *State Politics and Republican Virtue*, in TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS 94-95 (Paul Finkelman & Stephen E. Gottlieb eds., 1991).

Professor Onuf further observes that at the time of the American Revolution, most clergy accepted the necessity of religious freedom for those who did not accept mainstream religious dogma. "By the time of the Revolution, most established clergymen in New England . . . were increasingly wary about invoking state power to uphold their prerogatives or curb dissent . . . . The moral authority of the clergy was not based on unthinking popular deference to the ministerial office but instead depended on their enthusiastic advocacy of civil and religious liberties . . . ." *Id.* at 99. *See also* McConnell, *supra* note 26, at 1465-66.

[129] *See* BRANNING, *supra* note 106, at 17-20; HISTORY OF PENNSYLVANIA CONSTITUTIONS, *supra* note 104, at 4-5. The delegates approved the following resolutions as to the objects of the convention:

> I. That the legislative department of the constitution of this commonwealth requires alterations and amendments, so as to consist of more than one branch, and in such of the arrangements that may be necessary for the complete organization thereof.
>
> II. That the executive department of the constitution of this commonwealth should be altered and amended, so that the supreme executive power be vested in a single person, subject however to proper exceptions.
>
> III. That the judicial department of the constitution of this commonwealth should be altered and amended, so that the judges of the supreme court should hold their commissions during good behavior, and be independent as to their salaries, subject however to such restrictions as may hereafter be thought proper.
>
> IV. That the constitution of this commonwealth should be so amended as that the supreme executive department should have a qualified negative upon the legislature.
>
> V. That the part of the constitution of the commonwealth, called "A declaration of the rights of the inhabitants of the commonwealth or state of Pennsylvania," requires alterations and amendments, in such manner as that the rights of the people, reserved and excepted out of the general powers of government, may be more accurately defined and

vention was called in 1789. There was very little debate over or change to the religious liberty provisions of the constitution of 1776.[130] Former section 2 of the Declaration of Rights of 1776 was reenacted as section 3 of article IX:

> That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry, against his consent; that no human authority can, in any case whatever, controul or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishments or modes of worship.[131]

If anything, the modest deviations from section 2 of the 1776 Declaration of Rights strengthened the protection of non-mainstream faiths and expanded the contours of religious freedom. Where the 1776 Constitution precluded any authority from controlling or interfering with "the rights of conscience *in the free exercise of religious worship*," the 1790 Constitution omitted the italicized language, no longer limiting to religious worship the activities safeguarded.[132] The clause from the constitution of 1776 stating "*Nor can any man, who acknowledges the being of God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship*" was removed from the general guarantee of religious liberty embodied in article IX, section 3.[133] Because the earlier clause shielded only persons "who acknowledge the being of God," the 1790 Constitution arguably brought non-believers within the right of conscience. A memorial from the members of the Quaker faith presented to the convention applauded the general religious liberty

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secured, and the same and such other alterations and amendments in the said constitution as may be agreed upon, be made to correspond with each other.

PROCEEDINGS, *supra* note 113, at 149-53 (Dec. 9, 1789).

[130] *See* HISTORY OF PENNSYLVANIA CONSTITUTIONS, *supra* note 104, at 5 ("The rights of the people under the bill of rights remained unchanged, for these were issues on which liberals and conservatives were agreed.").

[131] PA. CONST. of 1790, art. IX, § 3.

[132] McConnell, *supra* note 26, at 1461 (emphasis supplied).

[133] *See* Ball, *supra* note 106, at 716. In the constitution of 1790, the "acknowledgment of God" clause was moved to article IX, section 4, which stated "[t]hat no person, who acknowledges the being of a God and a future state of rewards and punishments, shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this commonwealth." Hence the mandate that one acknowledge the being of God no longer was a pre-condition to the general protection of religious liberty, but served the more limited aim of acting as a prerequisite to assuming public office. *See id.*

The convention rejected a proposed amendment to eliminate the requirement that one holding public office "acknowledge[ ] the being of a God and a future state of rewards and punishments," as well as an offer to substitute the provision that "[n]o religious test shall ever be required as a qualification to any office or public trust under this constitution." PROCEEDINGS, *supra* note 113, at 218-19 (Feb. 19, 1790); *id.* at 377 (Feb. 3, 1790). The delegates also rejected a proposal to omit the words "and a future state of rewards and punishments" and to insert instead after the word "God" the phrase "the rewarder of the good and punisher of wicked." *Id.* at 218 (Feb. 19, 1790); *id.* at 376 (Feb. 3, 1790).

clause as coinciding with the expansive protection of religious belief and practice recorded in Penn's Charter of Privileges.[134]

The 1790 Constitution also eliminated the requirement that legislators taking office swear an oath acknowledging "the Scriptures of the Old and New Testaments to be given by Divine inspiration."[135] Instead, the 1790 Constitution required judicial, executive and legislative officers to "be bound, by oath or affirmation, to support the Constitution of this commonwealth, and to perform the duties of their respective offices with fidelity."[136] This change further sheltered minority faiths by extending the right to hold office to Jews and other non-Christians.[137]

The rights engraved in the 1790 Constitution were not to be readily trammeled by competing governmental interests. The delegates were presented with a proposal specifying that the individual rights set forth in the constitution are "excepted out of the general powers of legislation, and shall for ever remain inviolate." The delegates approved and adopted an amendment that more stringently placed the rights beyond the power not only of the legislative branch, but of any arm of government.[138]

3. *1838 and 1874 Constitutions*

No alterations to the religious liberty provisions were made in the 1838 Constitution.[139] The next constitutional convention was held in 1872. The Act of Assembly calling this meeting stated specifically that

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[134] *See* PROCEEDINGS, *supra* note 113, at 270-71 (Aug. 21, 1790). The memorial, however, was critical of the separate constitutional provision maintaining the requirement of the 1776 Constitution that those exempted from military service based upon conscientious objection pay the equivalent for personal services. While rejecting a proposal that would have eliminated all reference to exemption of those holding a conscientious objection to bearing arms, *see id.* at 225 (Feb. 23, 1790), the delegates refused to consider removal of the condition that persons so exempted pay an equivalent for personal service, *id.* at 274 (Aug. 23, 1790). The constitution as adopted preserved both the conscientious objection as well as the condition that persons exempted offer payment as a substitute for military service. PA. CONST. of 1790, art. VI, § 2.

[135] PA. CONST. of 1776, FRAME OF GOVERNMENT, § 10; Alexander, *supra* note 39, at 323.

[136] PA. CONST. of 1790, art. VIII.

[137] CURRY, *supra* note 19, at 161. The 1790 Constitution omitted the preamble that opened the 1776 Constitution. The substance of section 45 of the 1776 Constitution was re-codified as article VII, section 3, and provided: "The rights, privileges, immunities and estates of religious societies and corporate bodies shall remain as if the constitution of this state had not been altered or amended." PA. CONST. of 1790, art. VII, § 3.

[138] *See* PROCEEDINGS, *supra* note 113, at 226 (Feb. 23, 1790); PA. CONST. of 1790, art. IX, § 26 ("To guard against the transgressions of the high powers which we have delegated, we declare, that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate.").

[139] "The chief issues debated were the governor's power of appointment, tenure of office, method of choice of judges, the voting franchise, public education, and banking and corporate charters." BRANNING, *supra* note 106, at 23. That constitution was amended four times, with none of the amendments related to religion. *See* HISTORY OF PENNSYLVANIA CONSTITUTIONS, *supra* note 104, at 9-10.

> [N]othing herein contained shall authorize the said Convention to change the language or to alter in any manner the several provisions of the ninth article of the present Constitution, commonly known as the Declaration of Rights, but the same shall be excepted from the powers given to said Convention, and shall be and remain inviolate forever.[140]

While the Convention did not consider this language to bind them, a proposal to change the Declaration of Rights was strongly opposed.

> The Bill of Rights, as we have it, was framed in 1790. It passed through the Convention of 1837-38 without the alteration of a single word, without the crossing of a *t* or the dotting of an *i*. We have had it as it came from the hands of the Convention in this city, signed as it was, and proclaimed here on the second day of September, 1790. It is our *magna charter* and every principle in it that is worth a farthing is taken from *Magna Charter* itself, as was the Declaration of Rights appended to the Constitution of 1776, and that Declaration of Rights of this Commonwealth, as proclaimed in this city in 1790, has been the model upon that subject for every State government in the United States.
>
> There is not a Constitution in the Union that has a Declaration of Rights appended thereto, perhaps with the exception of Massachusetts, that has not some article or some principle in it, taken from that Declaration of Rights of the State of Pennsylvania. It is one of the most perfect articles in any Constitution in the Union. It cannot be bettered; and therefore, upon principle, I am opposed to changing it.
>
> I am opposed to changing it in the first place, because I think this Convention has no power to alter or change or modify it; and I am opposed in the second place to changing it because I think it ought not to be altered, changed or amended. It is better than anything we can make now, No alteration that this Convention can make, nothing that we can insert in that article of the Constitution, can improve it in a solitary particular.[141]

The Committee on the Declaration of Rights "made but very few changes, and those of a rather unimportant character."[142] The Committee returned the Declaration of Rights to the first article of the constitution, having found that thirty-two other state constitutions so situated their Bill of Rights.[143] While renumbered as article I, section 3, no changes were made to the core religious freedom term.[144] De-

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[140] ACT OF ASSEMBLY OF 1873, SECTION 4, *reported in* 4 DEBATES OF THE CONVENTION OF 1873, at 649 (May 21, 1873) (Harrisburg, Singerly 1873) [hereinafter DEBATES OF THE CONVENTION]. "The Pennsylvania constitution of 1874 . . . was crafted in an atmosphere of extreme distrust of the legislative body and of fear of the growing power of corporations, especially of the great railroad corporations . . . . Legislative reform was truly the dominant motive of the convention . . . ." BRANNING, *supra* note 104, at 37. *See also* HISTORY OF PENNSYLVANIA CONSTITUTIONS, *supra* note 104, at 10-22.

[141] 4 DEBATES OF THE CONVENTION, *supra* note 140, at 659 (Remarks of Mr. Kaine, May 21, 1873).

[142] *Id.* at 646 (Remarks of Mr. MacConnell, May 21, 1873); *see also* HISTORY OF PENNSYLVANIA CONSTITUTIONS, *supra* note 104, at 21 ("[M]ost of the Bill of Rights was carried over verbatim from the 1838 statement of fundamental rights.")

[143] 4 DEBATES OF THE CONVENTION, *supra* note 140, at 647 (May 21, 1873).

[144] *Id.* at 669 (May 21, 1873).

bates over related provisions, however, reaffirmed the Framers' commitment to the widest religious liberty for members of minority and majority faiths alike.

Perhaps the clearest endorsement of copious religious liberty for followers of non-mainstream faiths arose out of the seemingly modest proposal to amend Article IX, Section 4 of the 1838 Constitution. That article provided: "No person who acknowledges the being of a God and a future state of rewards and punishments, shall, on account of his religion, be disqualified to hold any office or place of profit or trust under this Commonwealth." The Declaration of Rights Committee moved that this provision, now numbered as article I, section 4 be amended to delete the word "a" before the word "God."[145] The change was tendered because, "taken as it was in the old Constitution, it might refer to Juggernaut just as well as to almighty God."[146] Speaking in opposition to the amendment, Mr. Broomall argued[147] that the Founders intended to afford unsparing rights of religious liberty to unpopular faiths:

> The object of our forefathers was not to require any man to adopt any particular creed; but they did require that he should, to be qualified for places of trust, so far acknowledge as the binding force of a higher law upon him as to believe in an overruling Providence. That I may believe in the particular God of the majority of the people here is no reason why I should impose upon those who do not believe in Him any necessity to adopt my creed. We have just passed a section in which it is said that no human authority can, in any case whatever, control or interfere with the rights of conscience. Now, if it is meant by this to put any disability upon those whose consciences do not shape their themselves exactly with ours, if it is proposed by this to offer any inducement to men to shape their consciences just like our own and so make hypocrites of them, then the amendment I have offered [to restore the word a] should not be adopted; but I think our forefathers were right in so guarding this section as not to contradict the one immediately preceding it.
>
> . . . I want conscience to be as free as the air. I want nobody to say to me: "You do not believe in my God; therefore you are not to be entrusted with the right of talking before a jury or holding any office of trust or profit."[148]

Following Mr. Broomall's speech, the Convention then approved his amendment to return the word "a" before the word "God" in the article.[149]

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[145] *Id.*

[146] *Id.* at 669 (Remarks of Mr. MacConnell, May 21, 1873).

[147] While the Pennsylvania Supreme Court generally has found the statements of individual convention delegates not relevant in interpreting the constitution, it has at times used the remarks of delegates to support its construction. *See* cases collected in WOODSIDE, *supra* note 15, at 63-66.

[148] 4 DEBATES OF THE CONVENTION, *supra* note 140, at 669-70 (Remarks of Mr. Broomall, May 21, 1873).

[149] *Id.* at 670 (May 21, 1873). The Convention, however, later rejected proposed amendments to delete the words "and a future state of rewards and punishments" from the article and

Respect for minority creeds and the primacy of religion over the civil order also is manifested in debates on the preamble to the 1874 Constitution. As adopted, the preamble reads: "WE, the People of the Commonwealth of Pennsylvania, grateful to Almighty God for the blessings of civil and religious liberty, and humbly invoking His guidance, do ordain and establish this Constitution."[150] Rising in opposition to the preamble, Mr. Broomall, echoing Penn's original vision, proffered that religious obligations may compel individuals not to accede to a civil law and that a vote of a majority could not hinder this pre-eminent duty:

> Let us bear in mind that we are proposing not to change the Constitution ourselves, but to submit certain propositions to the people for their adoption or rejection. Are gentlemen willing to submit to a majority of ballots the question of the existence and attributes of the Deity? I am not. What a question it is! The being and attributes of the Creator; the existence of a law-giver above all legislators, of a law above all human laws, a law that sets aside all human laws when they conflict with it; a law that binds the individual, not as a member of society, but as a man, and that commands him not to obey the civil law when it conflicts with this higher law. We propose to submit to a majority of ballots these great questions, whether there is a Ruler of the Universe, and whether we are responsible for our conduct to that Ruler of the Universe![151]

Mr. Patterson agreed that religious obligation occupied a higher order than civil law, but argued that the preamble was not an effort to elevate the status of any single belief system:

> [T]he recognition of God as contained in . . . the preamble as reported by the committee, is not a recognition of any religion under heaven specifically. It is simply an acknowledgment on the part of the people of Pennsylvania of the existence of God Almighty. It is not a question as to whether God shall be voted up or voted down by the people of Pennsylvania. It is simply a question of the welfare of our State, as to whether, as a conservative measure, in order to check, in some degree, the tendency to corruption and the prevalent irreligion of the day, the substantial portion of the people of Pennsylvania shall acknowledge this as a bulwark to which they shall cling, whether they shall put into their Constitution this tribute to the

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to eliminate "and who acknowledges the being of a God and a future state of rewards and punishments" from the section. 5 DEBATES OF THE CONVENTION, *supra* note 140, at 561-65 (June 16, 1873); 7 DEBATES OF THE CONVENTION, *supra* note 140, at 253-55 (Sept. 25, 1873). The motion to delete this language was made in order to ensure that certain religious sects—principally Universalists—would not be precluded from holding office. 5 DEBATES OF THE CONVENTION, *supra* note 140, at 561-62 (Remarks of Mr. Broomall, June 16, 1873). In response, Mr. Black offered that "a construction has been given to this language by the Supreme Court which does not exclude the Universalists nor any other class of men who profess to believe in the existence of a Supreme Divine Governor of the Universe, and believe in any kind of punishment for doing wrong, either in this world or in the next." *Id.* at 562 (Remarks of Mr. J.S. Black). Supporters of the amendment then conceded that the legislature had never denied anyone the right to take office on account of religious belief. *Id.* at 564 (Remarks of Mr. Broomall).

[150] PA. CONST. of 1874, pmbl.

[151] 4 DEBATES OF THE CONVENTION, *supra* note 140, at 760 (Remarks of Mr. Broomall, May 23, 1873).

> power which is behind the State and above the State and which all the States in this country, so far, have recognized their faith . . . .
>
> I ask delegates sincerely and honestly to look at this question and vote conscientiously, as they ought, on the question of the recognition of God, without regard to any particular religion, and remembering that such a recognition is not a step towards the recognition of any State religion. . . .[152]

Approval of the preamble thus represented reaffirmation of the importance of religion and religious liberty in general, but without any preference for, or discrimination against, particular sects.

Perhaps the strongest evidence of the delegates' respect for minority faiths is evidenced by the treatment of religious exemptions from military service. Like its 1776 and 1790 predecessors, the 1838 Constitution provided that "[t]hose who conscientiously scruple to bear arms shall not be compelled to do so, but shall pay an equivalent for personal service."[153] Followers of the Quaker faith petitioned the 1873 convention to eliminate the "military tax" that the constitution imposed as a condition to exemption. While the Quakers did not object to general taxation, even though portions would be used to support the military, the payment of a fine as a *quid pro quo* for being granted a religious exemption from military service was offensive to their conscience.[154]

The Committee on the Militia proposed a new article that eliminated both reference to conscientious objection as well as payment of an equivalent amount for personal service.[155] In the Committee's view, abrogating the earlier provisions afforded the legislature the power to excuse objectors from military service without conditioning exemption on payment of a fine or tax. Mr. Carter proposed an amendment that added the following language to the Committee's proposal: "But the Legislature may exempt from military service members of religious societies who have conscientious scruples against bearing arms."[156] Unlike the Committee proposal, Carter's amendment explicitly empowered the legislature to release conscientious objectors from military obligations; unlike the prior constitutions, it did not mandate payment of the monetary equivalent of personal service by those exempted.

The fate of proposed adjustments to Mr. Carter's amendment illuminates the delegates' regard for minority religious liberty. The delegates rejected amendments that would have restored the re-

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[152] *Id.* at 767 (Remarks of Mr. T.H.B. Patterson, May 23, 1873).

[153] PA. CONST. of 1838, art. VI, § 2.

[154] 3 DEBATES OF THE CONVENTION, *supra* note 140, at 160, 170 (Mar. 26, 1873).

[155] The proposal read: "The freemen of this Commonwealth shall be armed, organized and disciplined for its defence, when and in such manner as may be directed by law; the Legislature shall provide for maintaining the militia by direct appropriation from the State Treasury." 3 DEBATES OF THE CONVENTION, *supra* note 140, at 159 (Mar. 26, 1873).

[156] 3 DEBATES OF THE CONVENTION, *supra* note 140, at 161 (Mar. 26, 1873); PA. CONST. of 1874, art. IX.

quirement that one exempted must pay an equivalent for personal services[157] as well as an amendment that would have denied the right to vote in any state or municipal election to anyone claiming a religious objection to military service.[158] Equally importantly, the delegates accepted an amendment to extend the exemption beyond members of religious societies to any person—whether or not part of an organized religion—who has conscientious scruples against bearing arms.[159]

The statements of supporters of the religious exemption from service make clear that not only in this constitution, but from Penn's founding of the colony, the utmost protection was to extend to religious belief, including sentiments not shared by the majority. Mr. Carter, who proposed the original amendment restoring reference to exemption from military service, offered:

> I do not consider it at all necessary for the consideration of my amendment, nor to commend its adoption . . . that we shall enter into any discussion as to whether those religious sects, holding the opinions that I refer to, are right or wrong in that matter . . . [W]e cannot refuse to recognize honest conscientious scruples. They are something that no man can fail to respect . . . .
>
> [I]f it be not essential to the guaranteeing of the rights of conscience to those few religionists who hold this view, we owe it to ourselves, meeting here under the shadow of that August presence [pointing to the portrait of William Penn over the President's desk,] and within the limits of this city of brotherly love, founded by him and that very sect, which sect has even yet a moral influence in this State far superior to its relative numbers . . . .
>
> When William Penn founded the Commonwealth of Pennsylvania he said: "I am founding a colony for all mankind." This great principle of perfect religious toleration, which he always observed, constituted one of the main elements of his greatness, and the society which he founded, and of which he was a most eminent teacher, has always observed with scrupulous care this right . . . .
>
> A man has to rise to a high pitch of enlightenment, and to attain to a sublime Christian elevation of thought, before he will acknowledge that others shall have all the rights to which their conscientious beliefs entitle them, and before he will admit, fully and without reserve, the right of others to conscientiously differ from him. This principle has in all times, since the inauguration of christianity, been settled, and the conviction

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[157] 3 DEBATES OF THE CONVENTION, *supra* note 140, at 175-76 (Mar. 26, 1873). The delegates rejected a second proposal to restore the "military tax" offered on behalf of German Baptists who felt that they owed government something in return for the protection provided by government. 7 DEBATES OF THE CONVENTION, *supra* note 140, at 575-95 (Oct. 7-8, 1873). Mr. M'Clean argued unsuccessfully that the payment requirement should not be eliminated at the behest of the Quakers. *Id.* at 575 (Remarks of Mr. M'Clean, Oct. 7, 1873).

[158] 3 DEBATES OF THE CONVENTION, *supra* note 140, at 177 (Mar. 26, 1873).

[159] *Id.* at 176-77.

> has grown with the growth of civilization that concessions should be made to the right of conscience.[160]

Mr. Darlington, speaking generally about the tension between the state's interest in security and individual religious belief, articulated a standard that foreshadows the compelling interest test:

> I suppose that we all would agree that our conscientious scruples upon matters of religion and faith are sacred, and must never be touched by the government. In other words, that no number of men can or ought to interfere with my conscientious convictions, unless it becomes a matter of State necessity that those convictions should be disregarded . . . .
>
> The conscientious scruples of every individual should be observed unless the public safety requires that they should be disregarded. And that the public safety does not require that they should be disregarded has been shown by the past history of the State.[161]

The 1873 Convention was the last one in which the entire Pennsylvania Constitution was examined and readopted. The 1967 Convention, limited to considering specific articles of the constitution, made no substantive changes to the religious freedom provision of the constitution. Thus the religious liberty provisions of the present constitution may be plainly traced to the text of the 1776 Constitution, with the modest changes in the 1790 and 1874 Constitutions serving to strengthen its guarantees of religious liberty.

Several conclusions may be gleaned from the constitutional history. At the most elementary level, the fact that the religious liberty protection of article I, section 3 has its genesis in the Constitution of 1776 bolsters the position that this provision is to be interpreted independent of the Free Exercise Clause of the United States Constitution. Obviously the Framers of the 1776 Constitution could not and did not clone the religion clause from the text of the First Amendment of the federal Bill of Rights, which was not adopted until fifteen years later.[162] Second, the fact that the terms of the present article I, section 3 have remained relatively unchanged since 1776 manifests the importance of religious liberty in the Commonwealth. As the

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[160] *Id.* at 161-62 (Remarks of Mr. Carter, Mar. 26, 1873).

[161] *Id.* at 166-67 (Remarks of Mr. Darlington). To the same effect are the supporting remarks of Mr. Curtin: "[I]f there be a body of men in Pennsylvania who have conscientious scruples and the State will not suffer, then this Convention should not impose duties upon them which they cannot perform without a violation of religious belief, of Christian duty and obligation." *Id.* at 171 (Remarks of Mr. Curtin).

[162] Thus, contrary to the popular misconception that state constitutions are somehow patterned after the United States Constitution, the reverse is true." *Edmunds*, 586 A.2d at 896. *See also* Robert F. Williams, *A "Row of Shadows": Pennsylvania's Misguided Lockstep Approach to Its State Constitutional Equality Doctrine*, 3 WIDENER J. PUB. L. 343, 346 (1993) (Arguing that because equality clauses of the Pennsylvania Constitution are precedent to, and not modeled after Equal Protection Clause of the Fourteenth Amendment, state constitution should not be interpreted in "lockstep" with federal Equal Protection Clause); Donald Marritz, *Making Equality Matter (Again): The Prohibition Against Special Laws in the Pennsylvania Constitution*, 3 WIDENER J. PUB. L. 161, 195 (1993) ("This history and purpose of the special laws provision [of the Pennsylvania Constitution] have little in common with those of the Fourteenth Amendment . . . .").

Pennsylvania Supreme Court stated in construing the search and seizure provisions of the state constitution more broadly than the Fourth Amendment, "the survival of the language now employed in article I, section 8 through over 200 years of profound change in other areas demonstrates that the paramount concern for privacy first adopted as part of our organic law in 1776 continues to enjoy the mandate of the people of this Commonwealth."[163] Perhaps no provision of the state or constitution has proven more durable than the sanctity of religious liberty of minority faiths—a veneration that would be significantly undermined were the majority permitted to burden religious liberty on a bare showing of rational basis. Third, the constitutional history of the religious liberty clauses of the current constitution echoes William Penn's conception of religious liberty perpetuated in the colonial charters. The individual's obligation to his creator—whether or not shared by the majority—is precedent and superior to his duties to the civil society. Hence, no human authority is empowered to purposefully control or in effect interfere with the right of conscience, even—as the conscientious objector exemption makes clear—where the security of the state is at stake. History confirms the interpretation afforded by the plain meaning of the text of article I, section 3—that rules of general applicability may constitutionally interfere with one's religious exercise only where government proves it has a compelling interest not attainable by means less restrictive of that religious practice.

III. PENNSYLVANIA CASE-LAW SUPPORTS THE HISTORIC EVIDENCE THAT THE PENNSYLVANIA CONSTITUTION PROTECTS RELIGIOUS LIBERTY INDEPENDENT OF, AND MORE WIDELY THAN, THE CURRENT INTERPRETATION OF THE FREE EXERCISE CLAUSE

The *Edmunds* Court required consideration of Pennsylvania case-law as part of the assessment of the history of the constitutional provision in issue. Court decisions interpreting Article I, Section 3 of the Pennsylvania Constitution are entirely consistent with its colonial and constitutional history. Long before the First Amendment was applied to the states, the Pennsylvania courts applied independent constitutional scrutiny under article I, section 3 that presaged the compelling interest test.

A. *Debunking the Myths of* Wiest *and* Springfield School District

Before analyzing the true historic jurisprudence of article I, section 3, it is necessary to dissect two cases, *Wiest v. Mt. Lebanon School District*[164] and *Springfield School District v. Department of Educa-*

[163] Commonwealth v. Sell, 470 A.2d 457, 467 (Pa. 1983).
[164] 320 A.2d 362 (Pa. 1974).

tion,[165] which suggest that the Article I, Section 3 of the Pennsylvania Constitution is to be interpreted in lockstep with the Free Exercise Clause of the First Amendment. *Wiest* arose out of a fact situation that smacks principally of Establishment Clause jurisprudence—a suit to restrain the School District from including an invocation and benediction at high school graduation ceremonies. In addition to challenging the invocation and benediction as offensive to the Establishment Clause of the United States Constitution, however, plaintiffs founded their claim for relief on the Free Exercise Clause of the United States Constitution as well as upon Article I, Section 3 of the Pennsylvania Constitution.

The Pennsylvania Supreme Court first held that the School District did not contravene the Free Exercise Clause of the United States Constitution. The court properly observed that the guarantees of the Free Exercise Clause are triggered only where the plaintiff initially proves that the government has somehow restrained his religious liberty. Because attendance at commencement activities was voluntary and those who did not attend could gather their diplomas at the principal's office, the invocation and benediction did not exert any coercive effect on the practice of the plaintiffs' religion.[166]

The fact that participation in graduation ceremonies was voluntary did not similarly settle the federal Establishment Clause issue. The court concluded, however, that plaintiffs had not presented sufficient facts to satisfy their burden of persuasion that the purpose or principal effect of the District's resolution endorsing an invocation and benediction was to promote religion.[167]

Having found no invasion of either religion clause of the federal Constitution, the court turned to plaintiffs' averment that the invocation and benediction violated Article I, Section 3 of the Pennsylvania Constitution. In order to comprehend the *Wiest* court's disposition of this issue, it is essential to set forth the text of the court's analysis in full:

> The principles enunciated in [article I, section 3] of our Constitution reflected a concern for the protection of the religious freedoms of Pennsylvanians long before the First Amendment to the United States Constitution was made applicable to the states through the Fourteenth Amendment. Provisions identical to the above section [of the Pennsylvania Constitution of 1874] were contained in the constitutions of 1790 and 1838 and a similar provision was contained in the constitution of 1776. On the authority of this provision, this Court has prohibited the use of a public schoolroom for Catholic religious instruction after hours and the use of public school property for sectarian religious purposes when school was not in session. *The protection of rights and freedoms secured by this section of our Constitution, however, does not transcend the protection of*

[165] 397 A.2d 1154 (Pa. 1979).
[166] *Wiest*, 320 A.2d at 364-65.
[167] *Id.* at 365-66.

> *the First Amendment of the United States Constitution.* Our prior discussion is, therefore, equally apposite to this issue. Furthermore, we do not feel that an invocation and benediction are the type of activity at which this section of our Constitution was aimed. This claim, therefore, was also properly dismissed by the court below.[168]

There are several reasons why the court's one paragraph analysis in *Wiest* does not resolve whether like the First Amendment, the Pennsylvania Constitution requires the government to demonstrate only a rational basis, rather than a compelling interest and no less restrictive alternative, to sustain rules of general applicability that burden religion. First, although not entirely free from doubt, the court's state constitutional analysis appears to address the Establishment rather than the Free Exercise component of article I, section 3. The only cases the court cited in its assessment of the Pennsylvania Constitution—*Hysong* and *Bender*—concern use of school property for religious purposes.[169] Nowhere did the court analogize, cite, or otherwise allude to any freedom of conscience cases decided by the Pennsylvania courts. Any holding that the state constitution does not impose stricter limits on the establishment of religion than does the United States Constitution would not in turn mandate that the free exercise dimensions of the two constitutions are to be interpreted in lockstep.

Second, even if the court's opinion can somehow be contorted to address the Free Exercise protections of article I, section 3, the *Wiest* court did not have occasion to determine the appropriate level of scrutiny of laws of general applicability that interfere with the free exercise of religion. The only "prior discussion"[170] of the federal Free Exercise Clause that the court could deem "equally apposite"[171] to its analysis of the Pennsylvania Constitution is the court's earlier reasoning that because attendance at commencement was voluntary, the School District did not exert any coercive effect on the plaintiff's religious liberty. As the government had placed no burden on the plaintiff's faith, the court was not confronted with assessing whether the interest proffered by the School District rose to a level sufficient to justify the incursion. The *Wiest* court was neither presented with nor decided the question of whether under the Pennsylvania Constitution, government must prove a compelling interest, or merely a rational basis, to sustain rules of general applicability that burden the free exercise of an individual's religion.[172]

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[168] Wiest v. Mt. Lebanon Sch. Dist., 320 A.2d 362, 366-67 (Pa. 1974) (emphasis added).

[169] Hysong v. Gallitzin Borough Sch. Dist., 30 A. 482, 482-84 (Pa. 1894); Bender v. Streabich, 37 A. 853 (1897). *Hysong* also addressed the separate issue of whether members of the Order of St. Joseph, a religious society of the Roman Catholic Church, could be employed to teach in the public schools.

[170] *Wiest*, 320 A.2d at 367.

[171] *Id.*

[172] Had the *Wiest* Court reached out in dictum to comment on the appropriate level of scrutiny, it necessarily would have endorsed strict scrutiny for all burdens on religion whether intended or inadvertent. At the time of the *Wiest* opinion, the United States Supreme Court was

Five years later, the Supreme Court in *Springfield School District v. Department of Education*[173] again declined to find greater protection under article I, section 3 than under the First Amendment to the United States Constitution. The case arose out of a challenge to the constitutionality of the portion of the Public School Code that forced local school districts to provide free transportation to students of non-public schools. Three school districts argued that supplying free transportation to parochial students violated the Establishment Clause of the First Amendment. The Pennsylvania Supreme Court held that the Act did not transgress the federal Establishment Clause. The court then observed that article I, section 3 of the state constitution does not impose stricter limits on the separation of church and state than the Establishment Clause limits of the United States Constitution. The Court's reasoning in *Springfield* essentially is comprised of quoting the Court's one paragraph analysis in *Wiest.*

Like *Wiest,* the Pennsylvania Supreme Court's decision in *Springfield School District* does not answer whether Article I, Section 3 of the Pennsylvania Constitution affords broader guarantees of religious freedom than the proscriptions of the Free Exercise Clause of the United States Constitution. Plaintiffs in *Springfield* lodged no claim whatsoever under the Free Exercise Clause of the United States Constitution. Accordingly, the court was not faced with the issue of the appropriate standard that government must meet under article I, section 3 to justify incursions on free exercise of religion.

In short, rudimentary case analysis betrays that neither *Wiest* nor *Springfield School District* holds that the Pennsylvania Constitution must be interpreted to mirror the United States Constitution in repudiating the compelling interest test for burdens on religious liberty visited by across the board laws.[174] Notably, neither case assessed the four factors later prescribed by *Edmunds.* Indeed, the Superior Court in *Wikoski v. Wikoski* dismissed as "only dicta" the *Wiest* court's state-

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applying the compelling interest/least restrictive alternative test set forth in *Wisconsin v. Yoder,* 406 U.S. 205 (1972), to all burdens on free exercise—both those intended and those imposed by rules of general applicability. Sherbert v. Verner, 374 U.S. 398 (1963). Thus, unless the Pennsylvania Supreme Court was to take the unprecedented step of declaring religious liberty an absolute right, *see* Andress v. Zoning Bd. of Adjustment of Philadelphia, 188 A.2d 709, 712 (Pa. 1963) ("The Constitutionally ordained right of . . . freedom of religion . . . [is] not absolute."), there was no reason to find that the Pennsylvania Constitution demanded a higher degree of governmental justification to sustain burdens on religious liberty than the extant strict scrutiny exacted by the United States Constitution. The *Wiest* Court certainly would not and could not have held that unintended burdens on religious liberty were justifiable under the Pennsylvania Constitution whenever the government has a rational basis. Given that strict scrutiny was demanded by the federal Constitution, to have endorsed rational basis review under that state constitution would have contravened the Supremacy Clause of the United States Constitution. Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).

[173] 397 A.2d 1154 (Pa. 1979).

[174] *See also* Bruce Ledewitz, *Could the Death Penalty Be a Cruel Punishment,* 3 WIDENER J. PUB. L. 121, 138-39 (1993) ("As part of the new federalism, the legal community is coming to appreciate the valid, independent role of state judges in interpreting state constitutions . . . [A] coextensive approach to a state constitution is a poor method of constitutional interpretation.").

ment that the protections of article I, section 3 do not exceed the guarantees of the Free Exercise Clause.[175]

Any intimation that article I, section 3 must be interpreted in lockstep with the federal Constitution is refuted by a line of cases, decided long before the First Amendment was held applicable to the states, in which the Pennsylvania courts evaluated under the state constitution challenges to general laws invading an individual's religious liberty. The scrutiny applied by the Pennsylvania courts conforms more to the demanding compelling interest test than the entirely deferential rational basis standard.

B. The Pennsylvania Courts Scrutinized Laws Invading Religious Liberty Before the First Amendment Was Made Applicable to the States

The constitutional history of article I, section 3 unequivocally demonstrates that the precursors to the article were precedent in time to, and not modeled after, the Free Exercise Clause of the federal Constitution. Similarly, the Pennsylvania courts had evaluated challenges to laws of general applicability under article I, section 3 long before 1940, when the Free Exercise Clause was first held applicable to the States.[176] This settled independent jurisprudence repudiates any suggestion that the Pennsylvania courts have interpreted article I, section 3 merely to duplicate protection afforded by the

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[175] 513 A.2d 986, 988 n.5 (Pa. Super. Ct. 1986) (noting that state constitutional provisions may expand upon federal protections).

[176] *See* City of Pittsburgh v. Ruffner, 4 A.2d 224 (Pa. 1939); Commonwealth v. Herr, 78 A. 68 (Pa. 1910); Hysong v. Sch. Dist. of Gallitzin Borough, 30 A. 482 (1894); Philips v. Gratz, 2 Pen. & W. 410 (Pa. 1831); Commonwealth v. Lesher, 17 Serg. & Rawle 155 (Pa. 1828); Updegraph v. Commonwealth, 11 Serg. & Rawle 394 (Pa. 1824); Commonwealth v. Wolf, 3 Serg. & Rawle 48 (Pa. 1817); Halperin v. Public Serv. Comm'n, 81 Pa. Super. 591 (1923); City of Wilkes-Barre v. Garabed, 11 Pa. Super. 355 (1899).

There have been other Pennsylvania cases concerned with religion and religious freedom that are not of importance in analysis of article I, section 3. Some cases mentioned Article I, Section 3 of the Pennsylvania Constitution, but based their holdings solely on the First Amendment of the United States Constitution. *See In re* Cabrera, 552 A.2d 1114, 1118 (Pa. Super. Ct. 1989); Commonwealth v. Barnhart, 497 A.2d 616 (Pa. Super. Ct. 1985). Other cases were based solely on the First Amendment without even a passing reference to article I, section 3. *See In re* Green, 292 A.2d 387 (Pa. 1972); Fitzgerald v. City of Philadelphia, 102 A.2d 887 (Pa. 1954); Fink v. Bd. of Educ., 442 A.2d 837 (Pa. Commw. Ct. 1982); Appeal of the Open Door Baptist Church, 437 A.2d 1291 (Pa. Commw. Ct. 1981); Christian Sch. Ass'n of Greater Harrisburg v. Dep't of Labor & Indus., 423 A.2d 1340 (Pa. Commw. Ct. 1980). Several other cases raising religious arguments are not applicable because they were decided on other grounds. *See In re* First Church of Christ Scientist, 55 A. 536 (Pa. 1903) (holding based on Pennsylvania's incorporation laws and whether the incorporation of the organization would endanger the public). Also, the case of *Zook v. State Board of Dentistry*, 683 A.2d 713 (Pa. Commw. Ct. 1996), is not helpful in determining whether article I, section 3 requires the use of the compelling interest test or rational basis test. In *Zook*, a post-*Smith* case, the defendant argued that the First Amendment still required a generally applicable law to be analyzed using the compelling interest test. However, the Commonwealth Court never had to decide the case on the merits because the court determined that there had been no burden on the defendant's religious exercises.

federal Constitution. Indeed, even after the religion clauses of the First Amendment were held to govern the states, the Pennsylvania Superior Court acknowledged that "this amendment is not nearly as stringent as the corresponding provision in the Pennsylvania Constitution."[177]

C. The Pennsylvania Courts Have Evaluated General Laws that Burden Religion Under Standards More Akin to the Compelling Interest Test than to the Rational Basis Test

The United States Supreme Court first specifically articulated the compelling interest test for Free Exercise cases in *Sherbert v. Verner*.[178] It is not surprising that the pre-1963 Pennsylvania cases under article I, section 3 do not employ either the phrase "compelling interest" or "rational basis" in their assessing the constitutionality of laws of general applicability that burden religion. Rather than reflexively upholding all general laws that conflict with an individual's faith, however, the Pennsylvania courts invariably insisted upon proof of a substantial overriding governmental interest before subordinating religion to the demands of the civil order. Thus Pennsylvania jurisprudence is commensurate with the history of article I, section 3 in demanding a compelling interest, rather than a rational basis, before government may constrain an individual's religious exercise through neutral laws.

Most of the Pennsylvania cases sustaining general laws challenged under the religious freedom provisions of the state constitution invoke the one overriding interest that William Penn accepted must qualify religious liberty—the rights holder must live "peaceably" in civil society.[179] In *Updegraph v. Commonwealth*,[180] the court affirmed the blasphemy conviction of a member of a debating society who argued that the Holy Scriptures were a fable; the court reasoned that defendant's words were not part of a serious intellectual debate but instead were an insult that tended to "disturb the public peace."[181] While undoubtedly violative of modern day Establishment Clause[182] and free

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[177] Commonwealth v. Bauder, 145 A.2d 915, 917 (Pa. Super. Ct. 1958).

[178] 374 U.S. 398 (1963).

[179] *See The Laws Agreed Upon in England* pt. XXXV (1682), *reprinted in* A COLLECTION OF CHARTERS AND OTHER PUBLICK ACTS RELATING TO THE PROVINCE OF PENNSYLVANIA, *supra* note 91, at 17 (Philadelphia, Franklin 1740) ("obliged in Conscience to live peaceably and justly in civil Society"); *The Great Law*, ch. 1 (1682), *reprinted in* CHARTER TO WILLIAM PENN AND LAWS OF THE PROVINCE OF PENNSYLVANIA PASSED BETWEEN THE YEARS 1682 AND 1700, *supra* note 94, at 108 ("Obliged in Conscience to Live peaceably and quietly under civill government"); *Charter of Privileges* (1701), *reprinted in* 4 THE PAPERS OF PENN, *supra* note 73, at 106 ("Obliged to live quietly under the Civill Governement").

[180] 11 Serg. & Rawle 394 (Pa. 1824).

[181] *Id.* at 399.

[182] The Court's analysis was premised upon the supposition that Christianity was part of the common law of Pennsylvania. *Id.* at 399-404.

speech jurisprudence, the court in 1824 deemed the blasphemy law to serve a vital state interest in preserving public order:

> It is open, public vilification of the religion of the country that is punished, not to force conscience by punishment, but to preserve the peace of the country by an outward respect to the religion of the country, and not as a restraint upon the liberty of conscience; but licentiousness, endangering the public peace, when tending to corrupt society, is considered a breach of the peace . . . .[183]

The court did not consider the state interest in quelling breaches of the peace to be minimal; to the contrary, in the court's mind "[t]o prohibit the open, public and explicit denial of the popular religion of a country, is a necessary measure to preserve the tranquility of a government."[184] Subsequent cases upheld laws designed to prevent disturbances caused by the playing of musical instruments on the street,[185] hawking merchandise to houses and businesses,[186] and attempting to force entry into private homes, against religious challenge.[187] Conversely, the Commonwealth's supreme court held the Pennsylvania Constitution safeguarded the right to attempt to convert members of the Roman Catholic faith where there was no evidence that those engaged in efforts to convert had caused any "unrest" in the past or would "breach the peace" or offend "good order."[188]

Cases upholding the constitutionality of Sunday Closing Laws also employed a standard of scrutiny comparable to the compelling interest/least restrictive alternative test. In *Commonwealth v. Wolf*,[189] the Pennsylvania Supreme Court reasoned that it was "of the utmost moment" that members of the community abide by a day of rest "to invigorate their bodies for fresh exertions of activity." The court in

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[183] *Id.* at 408.

[184] *Id.* at 405.

[185] *See* City of Wilkes-Barre v. Garabed, 11 Pa. Super. 355, 366 (1899) (holding nuisance law that made the playing of a musical instrument on the streets illegal without a permit did not violate religious freedom of Salvation Army members under Pennsylvania Constitution: "no one can lawfully stretch his own liberty of action so as to interfere with that of his neighbors or violate the peace and good order").

[186] *See* City of Pittsburgh v. Ruffner, 4 A.2d 224, 227 (Pa. 1939) (holding ordinance requiring permit to peddle merchandise did not violate rights of Jehovah's Witnesses under state constitution where ordinance was "designed to protect people in their homes and offices from being victimized by unscrupulous and unauthorized agents"). The United States Supreme Court later held such permit requirements violate the United States Constitution. *See* Follett v. McCormick, 321 U.S. 573 (1944); Murdock v. Pennsylvania, 319 U.S. 105 (1943).

[187] *See* Commonwealth v. Palms, 15 A.2d 481, 484 (Pa. Super. Ct. 1940) (holding disorderly conduct prosecution of Jehovah's Witnesses who made incessant noise and persistent attempts to enter homes did not violate religious freedom under Pennsylvania Constitution; the mode of expressing religious belief may not be "inimical to the peace, good order and morals of society"). The court further reasoned that defendant violated a constitutional right older than the right of religious freedom—the right to be secure in one's home from unwanted invasion. *Id.* at 485.

[188] Application for Charter of Conversion Center, Inc., 130 A.2d 107, 111 (Pa. 1957).

[189] 3 Serg. & Rawle 48, 51 (Pa. 1817).

Specht v. Commonwealth[190] similarly found that "[a]ll agree that to the well-being of society, periods of rest are *absolutely necessary*." The Superior Court further recognized that there are no less restrictive alternatives to fixing a single day on which no work is to be done:

> To permit a person to rest on his own day of choice would compel the Commonwealth to prove which was the day of his choice and that he had not rested on that day or if he had no day of his own choice that he had worked on each of the other six days of the week. Any such requirement would practically nullify the law. [191]

While the Pennsylvania courts did not use the compelling interest terminology, they repeatedly stated that only those governmental interests that are "paramount" may constitutionally burden religious exercise.[192] This term was first expressed in Justice Gibson's dissenting opinion in *Commonwealth v. Lesher*:

> It is declared in the constitution [of 1790] that "no human authority can, in any case, control or interfere with the *rights of* conscience." But what are those rights? Simply a right to worship the Supreme Being according to the dictates of the heart; to adopt any creed or hold any opinion whatever on the subject of religion; and to do, or forebear to do, any act, for conscience sake, the doing or forebearing of which *is not prejudicial to the public weal.* But *salus populi suprema lex*, is a maxim of universal application; and where liberty of conscience would impinge upon the paramount right of the public, it ought to be restrained.[193]

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[190] 8 Pa. 312, 323 (Pa. 1848) (emphasis supplied).

[191] Commonwealth v. Bauder, 145 A.2d 915, 919 (Pa. Super. Ct. 1958). The United States Supreme Court similarly applied the least restrictive alternative test to Sunday Closing Laws, challenged under the Free Exercise Clause of the First Amendment. Braunfeld v. Brown, 366 U.S. 599, 607-08 (1961). For a discussion concerning the Supreme Court's interpretation of Sunday Closing Laws in conjunction with the Free Exercise Clause of the First Amendment, see Martin S. Sheffer, *God Versus Caesar: Free Exercise, the Religious Freedom Restoration Act, and Conscience*, 23 OKLA. CITY U. L. REV. 929, 934-39 (1998).

The Pennsylvania cases upholding Sunday Closing Laws held that the prohibition of work on Sunday did not violate any tenet of the faith of the person challenging the law. *See* Specht v. Commonwealth, 8 Pa. 312, 324-26 (1848); Commonwealth v. Wolf, 3 Serg. & Rawle 48, 49-50 (Pa. 1817); Commonwealth v. Bauder, 145 A.2d 915, 918 (Pa. Super. Ct. 1958). *See also* Halperin v. Public Serv. Comm., 81 Pa. Super. 591 (1923) (finding denial of certificate to be common carrier did not interfere with religious worship of Jewish faith or affect how Jewish funeral ceremonies are conducted).

[192] In *Commonwealth v. Herr*, 78 A. 68 (Pa. 1910), the court held that a law forbidding teachers in public schools to wear religious garb did not violate the religious freedom clause of the Pennsylvania Constitution. In the course of its opinion, the court did state that the legislature has the power to make "reasonable regulations" that may affect teachers. *Id.* at 73. Nowhere in its reasoning, however, did the *Herr* court elect between the "paramount" or "reasonableness" test for purposes of Article I, Section 3 of the Pennsylvania Constitution. Interestingly, the court in *Wikoski v. Wikoski*, 513 A.2d 986, 988 (Pa. Super. Ct. 1986), while formally adopting the "paramount" test, cites *Herr* approvingly for the proposition that the right of conscience is not absolute.

[193] 17 Serg. & Rawle 155, 160 (Pa. 1828) (Gibson, J., dissenting). In *Lesher*, the Pennsylvania Supreme Court held that removing a juror who had a religious objection to imposing the death penalty did not violate the juror's liberty of conscience under the Pennsylvania Constitution. The court reasoned that the government had an overriding interest in the integrity of the criminal justice system, which would be compromised by including jurors who had precon-

The requirement that a government interest be "paramount" in order to trump religious liberty under the state constitution was reiterated in *Commonwealth v. Beiler*[194] and in *Wikoski v. Wikoski*.[195] The *Wikoski* court construed the condition that the government interest be "paramount" to be a "most substantial test," finding the standard equivalent to the compelling interest test eventually adopted by the United States Supreme Court in evaluating claimed invasions under the Free Exercise Clause.[196]

Two conclusions follow from examination of Pennsylvania caselaw. First, the religious liberty provision of the state constitution is to be interpreted independent of the Free Exercise Clause of the United States Constitution. As the courts properly found the state constitution to shelter religious freedom for more than 120 years before the First Amendment was incorporated against the states, article I, section 3 should not suddenly cease to merit an autonomous construction once the Free Exercise Clause became a meaningful source of religious liberty.[197] Second, the Pennsylvania courts consistently

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ceived notions or who would ignore the evidence and facts. *Id.* at 156, 159. *See also* Philips v. Gratz, 2 Pen. & W. 412, 416 (Pa. 1831) (compelling person to testify on Saturday Sabbath did not violate state constitution "else a denial of the lawfulness of capital punishment would exempt a witness from testifying to facts that serve to convict a prisoner of murder"); Stansbury v. Marks, 2 Dall. 213 (Pa. 1793) (holding that court properly fined Jewish witness who refused to testify on his Sabbath).

[194] 79 A.2d 134 (Pa. Super. Ct. 1951). The *Beiler* court held that the Pennsylvania law mandating public school attendance until the age of sixteen did not violate the religious freedom of the Amish. The court found the state had a "paramount" interest in the education of children to accomplish the "fundamental objectives" of safety, integrity, independence and progress of the Commonwealth as well as the preservation and enrichment of democracy. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the United States Supreme Court found these interests insufficient to justify infringing the sincerely held religious beliefs of the Amish.

[195] 513 A.2d 986 (Pa. Super. Ct. 1986).

[196] *Id.* at 989. In *Commonwealth v. Eubanks*, 512 A.2d 619, 621-23 (Pa. 1986), the court held that a prosecutor violated article I, section 3 by making "sarcastic commentary" concerning the defendant's religious beliefs. The court reasoned that religious freedom is a "fundamental" right, a designation that customarily demands the highest governmental justification when trammeled. *Id.* at 622. The *Eubanks* court also directed the reader to view THE PAPERS OF WILLIAM PENN, *supra* note 73.

[197] Even if the Pennsylvania courts had relied upon the United States Supreme Court's interpretation of the First Amendment when construing article I, section 3, one commentator has suggested that the rejection of the compelling interest test in *Smith* should not necessarily affect the prior Pennsylvania constitutional precedent. *See* Bruce Ledewitz, *When Federal Law Is Also State Law: The Implications for State Constitutional Law Methodology of Footnote Seven in* Commonwealth v. Matos, 72 TEMP. L. REV. 561 (1999). According to Professor Ledewitz, if the earlier state constitutional precedent had reflected dissatisfaction with the compelling interest test, then a presumption should arise that the Pennsylvania courts would adopt the new federal standard—the rational basis test—under the Pennsylvania Constitution. *See id.* at 578. However, if the prior state constitutional precedent reflected satisfaction and approval of the compelling interest test, a presumption should arise that the Pennsylvania courts would reject the use of the rational basis test under the Pennsylvania Constitution. *See id.* Even if the Pennsylvania courts had relied upon the precedent of the United States Supreme Court in interpreting article I, section 3, the Pennsylvania courts' support of the compelling interest test for decades before and after *Sherbert* reflects that the courts should continue to apply the compelling interest test post-*Smith* under the Pennsylvania Constitution.

mandated proof of more than a rational basis before upholding laws of general applicability that conflicted with an individual's religious convictions. Accordingly, requiring government to prove a compelling interest and no less restrictive alternatives before refusing to exempt a religious objector from an across the board law comports with the constitutional and jurisprudential history, as well as the text, of Article I, Section 3 of the Pennsylvania Constitution.

IV. RELATED CASE-LAW FROM OTHER STATES SUPPORTS APPLICATION OF THE COMPELLING INTEREST TEST UNDER ARTICLE I, SECTION 3 OF THE PENNSYLVANIA CONSTITUTION

The *Edmunds* court urged that litigants also should seek guidance on interpretation of the Pennsylvania Constitution from related precedent from other states. The Pennsylvania courts have used this factor in two different manners. At times, the courts have limited their discussion of kindred case-law to a mere "scorecard,"[198] tallying the number of state courts favoring competing constructions of the constitution. More often, the courts have been faithful to the Pennsylvania Supreme Court's admonition to go beyond a head count and examine the reasoning used by other state courts.[199] Both approaches support interpreting Article I, Section 3 of the Pennsylvania Constitution to require strict scrutiny of laws of general applicability that burden the free exercise of religion.

A. The "Scorecard" of Other States Heavily Favors the Compelling Interest Test

The overwhelming state law response to the United States Supreme Court's diminution of religious freedom under the First Amendment in *Smith* has been to demand that government prove a compelling interest to justify any incursion on religious liberty.

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[198] *See* Commonwealth v. Cleckley, 738 A.2d 427, 432 (Pa. 1999); Stenger v. Lehigh Valley Hosp. Ctr., 609 A.2d 796, 803 (Pa. 1992); Commonwealth v. Lewis, 598 A.2d 975, 980 n.10 (Pa. 1991); Commonwealth v. Carroll, 628 A.2d 398, 402-03 nn.3-4 (Pa. Super. Ct. 1993).

[199] *See* Commonwealth v. Zhahir, 751 A.2d 1153, 1160-61 (Pa. 2000); Commonwealth v. Arroyo, 723 A.2d 162, 169 (Pa. 1999); Commonwealth v. Waltson, 724 A.2d 289, 292 (Pa. 1998); Commonwealth v. Cass, 709 A.2d 350, 362-64 (Pa. 1998); Commonwealth v. Williams, 692 A.2d 1031, 1038 (Pa. 1997); Commonwealth v. Hayes, 674 A.2d 677, 681 (Pa. 1996); Commonwealth v. Matos, 672 A.2d 769, 775 (Pa. 1996); Commonwealth v. Swinehart, 664 A.2d 957, 965-67 (Pa. 1995); UA Theater Circuit, Inc. v. City of Philadelphia, 635 A.2d 612, 619 (Pa. 1993); Blum v. Merrell Dow Pharms., Inc. 626 A.2d 537, 547-48 (Pa. 1993); Commonwealth v. Edmunds, 586 A.2d 887, 900-01 (Pa. 1991); Commonwealth v. Crouse, 729 A.2d 588, 597 (Pa. Super. Ct. 1999); Commonwealth v. J.B., 719 A.2d 1058, 1064-66 (Pa. Super. Ct. 1998); Commonwealth v. Glass, 718 A.2d 804, 809-10 (Pa. Super. Ct. 1998), *aff'd by* Commonwealth v. Glass, 754 A.2d 655 (Pa. 2000); *In re* B.C., 683 A.2d 919, 928 (Pa. Super. Ct. 1996); Commonwealth v. Craft, 669 A.2d 394, 395-96 (Pa. Super. Ct. 1995); Commonwealth v. Rosenfelt, 662 A.2d 1131, 1142-44 (Pa. Super. Ct. 1995).

Eleven states—Massachusetts,[200] New York,[201] Minnesota,[202] Alaska,[203] Montana,[204] Wisconsin,[205] Washington,[206] Ohio,[207] Maine,[208] North Carolina,[209] and Kansas[210]—have determined that their state constitutions furnish more protection than the federal Constitution and employ the compelling interest test to evaluate the constitutionality of religiously neutral laws that burden a person's free exercise of faith.[211] The legislatures of eight additional states—Rhode Island,[212] Connecticut,[213] Illinois,[214] Florida,[215] South Carolina,[216] Arizona,[217] Texas,[218]

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[200] *See* Soc'y of Jesus of New England v. Boston Landmarks Comm'n, 564 N.E.2d 571 (Mass. 1990); Attorney Gen. v. Desilets, 636 N.E.2d 233 (Mass. 1994).

[201] *See* Rourke v. N.Y. State Dep't of Corr. Servs., 603 N.Y.S.2d 647 (N.Y. Sup. Ct. 1993), *aff'd by* 615 N.Y.S.2d 470 (N.Y. App. Div. 1994).

[202] *See* State v. Hershberger, 462 N.W.2d 393 (Minn. 1990).

[203] *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994).

[204] *See* Davis v. Church of Jesus Christ of Latter Day Saints, 852 P.2d 640 (Mont. 1993); St. John's Lutheran Church v. State Comp. Ins. Fund, 830 P.2d 1271 (Mont. 1992).

[205] *See* State v. Miller, 549 N.W.2d 235 (Wis. 1996).

[206] *See* First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174 (Wash. 1992).

[207] *See* Humphrey v. Lane, 728 N.E.2d 1039 (Ohio 2000); State v. Bontranger, 683 N.E.2d 126 (Ohio App. Ct. 1996).

[208] *See* Rupert v. City of Portland, 605 A.2d 63 (Me. 1992).

[209] *See In re* Browning, 476 S.E.2d 465 (N.C. Ct. App. 1996).

[210] *See* State v. Evans, 796 P.2d 178 (Kan. Ct. App. 1990).

[211] Confusion exists as to what column of the "scorecard" Vermont should be placed in because of *State v. DeLaBruere*, 577 A.2d 254 (Vt. 1990). Some commentators believe that *DeLaBruere* holds that Chapter I, Article 3 of the Vermont Constitution requires the use of the rational basis test. *See* Robert F. Drinan, *Reflections on the Demise of the Religious Freedom Restoration Act*, 86 GEO. L.J. 101, 117 (1997) ("Only Vermont has accepted *Smith's* more narrow interpretation of religious freedom."); David H.E. Becker, Note, *Free Exercise of Religion Under the New York Constitution*, 84 CORNELL L. REV. 1088, 1120 n.243 (1999) (stating that the Vermont Supreme Court adopted a standard similar to *Smith* under its state constitution in *State v. DeLaBruere*); Yehuda M. Braunstein, Note, *Will Jewish Prisoners Be* Boerne *Again? Legislative Responses to* City of Boerne v. Flores, 66 FORDHAM L. REV. 2333, 2372-73 n.361 (1998) (stating that, after *State v. DeLaBruere*, Vermont follows *Smith* level of scrutiny), while others believe that the Vermont Constitution requires the compelling interest test after *DeLaBruere*. *See* Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 155 n.11 (1997) (stating *DeLaBruere* holds that the Vermont Constitution rejects the reasoning of *Smith* and requires the use of the compelling interest test); Seymour Moskowitz & Michael J. DeBoer, *When Silence Resounds: Clergy and the Requirement to Report Elder Abuse and Neglect*, 49 DEPAUL L. REV. 1, 79 n.500 (1999) (citing to *DeLaBruere* for the proposition that Vermont Constitution requires strict scrutiny); Lauren D. Freeman, *The Child's Best Interests vs. The Parent's Free Exercise of Religion*, 32 COLUM. J.L. & SOC. PROBS. 73, 84 n.62 (1998) (stating that *State v. DeLaBruere* stands for the proposition that the Vermont Constitution requires strict scrutiny). Still other commentators believe that the question as to the proper level of scrutiny afforded under the free exercise clause of the Vermont Constitution has not yet been answered. *See* Jon J. Aho, *A Case of Good Intentions: The Vermont Supreme Court and State Constitutional Protection of Civil Rights and Liberties*, 60 ALB. L. REV. 1845, 1857-58 (1997) ("If, as interpreted by the *DeLaBruere* Court, Article 3 of the Vermont Constitution must be read as providing only the same level of protection available under the federal Constitution, since the Religious Freedom Restoration Act of 1993 was eventually held to be unconstitutional, does the Vermont Constitution automatically incorporate the *Smith* "rational basis" test for free exercise claims; or does it continue to provide for a strict scrutiny test, and thereby provide for greater protection than the federal Constitution? This question has yet to be answered.") (internal citations omitted).

[212] R.I. GEN. LAWS § 42-80.1-3 (1998).

[213] CONN. GEN. STAT. § 52-571(b) (1997).

[214] 775 ILL. COMP. STAT. 35 (1998).

and Idaho[219]—have enacted laws requiring the state to prove a compelling interest that cannot be satisfied by any less restrictive alternative means whenever a neutral and generally applicable law infringes a person's faith.[220] Furthermore, in November 1998, the people of Alabama amended their state constitution to mandate evaluation of across-the-board laws under the compelling interest test.[221]

In contrast to the twenty states that have instated strict scrutiny of neutral laws of general applicability after *Smith*, only two states—Tennessee[222] and Oregon[223]—have concluded that their state constitutions confer the same level of protection as the federal Constitution and follow the rational basis test established by *Smith*.[224] The "scorecard"

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[215] FLA. STAT. ANN. § 761.01 (West 1998).

[216] S.C. CODE ANN. § 1-32-30 (Law. Co-op. 1999).

[217] ARIZ. REV. STAT. § 41-1493 (1999).

[218] TEX. CIV. PRAC. & REM. CODE ANN. § 110 (West 1999).

[219] IDAHO CODE § 73-402 (Michie 2000).

[220] For discussions of state RFRAs and reactions to them, see Christopher E. Anders & Rose A. Saxe, *Effect of a Statutory Religious Freedom Strict Scrutiny Standard on the Enforcement of State and Local Civil Rights Laws*, 21 CARDOZO L. REV. 663 (1999); Thomas C. Berg, *The New Attacks on Religious Freedom Legislation and Why They Are Wrong*, 21 CARDOZO L. REV. 415 (1999); Lee Boothby & Nicholas P. Miller, *Prisoner Claims for Religious Freedom and State RFRAs*, 32 U.C. DAVIS L. REV. 573 (1999); Erwin Chemerinsky, *Do State Religious Freedom Restoration Acts Violate the Establishment Clause or Separation of Powers?*, 32 U.C. DAVIS L. REV. 645 (1999); Mary Jean Dolan, *The Constitutional Flaws in the New Illinois Religious Freedom Act: Why RFRAs Don't Work*, 31 LOYOLA U. CHIC. L.J. 153 (2000); Gary S. Gildin, *A Blessing in Disguise: Protecting Minority Faiths Through State Religious Freedom Non-Restoration Acts*, 23 HARV. J.L. & PUB. POL'Y 411 (2000); Issac M. Jaroslawicz, *How the Grinch Stole Chanukah*, 21 CARDOZO L. REV. 707 (1999); Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565 (1999); Robert M. O'Neil, *Religious Freedom and Nondiscrimination: State RFRA Laws Versus Civil Rights*, 32 U.C. DAVIS L. REV. 785 (1999); Cheryl Rubenstein, *Legislating Religious Liberty Locally: The Possibility of Compelling Conflicts*, 19 REV. LITIG. 289 (2000); Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465 (1999); Eugene Volokh, *Intermediate Questions of Religious Exemptions—A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595 (1999).

[221] *See* ALA. CONST., amend. No. 622 (ratified Jan. 6, 1999).

[222] *See* Wolf v. Sundquist, 955 S.W.2d 626 (Tenn. Ct. App. 1997); State v. Loudon, 857 S.W.2d 878 (Tenn. Crim. App. 1993).

[223] *See* Meltebeke v. Bureau of Labor & Indus., 903 P.2d 351 (Or. 1995).

[224] Courts in three other states had the opportunity to determine the proper level of judicial scrutiny afforded by their state constitutions after *Smith*, but neglected to do so. Both Utah and New Jersey failed to do a separate state constitutional evaluation in conjunction with their First Amendment analysis. *See* Jeffs v. Stubbs, 970 P.2d 1234, 1249 (Utah 1998) (stating that the court will not determine whether the Utah Constitution provides protection over and above that provided by the First Amendment of the federal Constitution); S. Jersey Catholic Sch. Teachers Org. v. St. Teresa, 696 A.2d 709, 715 (N.J. 1997) ("As the federal jurisprudence concerning the Religion Clauses now stands, there is no need to consider whether our State Constitution affords greater religious protection than that afforded by the First Amendment."). The third state, California, has an interesting history of this issue. In 1996, the Supreme Court of California had the opportunity to decide the proper level of analysis afforded by its constitution's Free Exercise Clause in *Smith v. Fair Employment & Housing Commission*, 913 P.2d 909 (Cal. 1996), but declined to use this case to determine the issue. *Id.* at 931. ("Because Smith's claim fails even under that [compelling interest] test . . . we need not address the scope and proper interpretation of California Constitution Article I, Section 4."). Yet, the Governor of California mistakenly believed that the California Supreme Court had decided the issue of judicial scrutiny and gave this as one of his reasons for vetoing legislation that would have required strict scrutiny to be used when analyzing free exercise claims under the state constitutions. *See* Veto Mes-

approach to the third *Edmunds* factor, then, recommends adoption of the compelling interest test under article I, section 3 to assess all impositions on religious liberty—whether intended or created inadvertently by neutral laws of general applicability.

B. The Reasoning of Related Case-Law from Other States Further Endorses Adoption of the Compelling Interest Test Under Article I, Section 3 of the Pennsylvania Constitution

The Pennsylvania courts have not been particularly consistent in their reasoning for citing cases from other jurisdictions. At times, the mere fact that a case was decided on state constitutional grounds and not solely under federal precedents is the lone explanation provided for discussing a case from another jurisdiction.[225] On other occasions, the Pennsylvania courts have explored cases from other states solely to argue why the reasoning employed in those decisions was flawed and should not be accepted.[226] The soundest approach, however, has been to examine decisions from states that have either a constitutional text or relevant history similar to that of Pennsylvania.[227]

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sage of Governor Pete Wilson, California Dep't of Consumer Affairs Legislative Digest—Religious Freedom Protection Act, A.B. No. 1617 (Sept. 28, 1998), *at* http://www.dca.ca.gov/legis/ab1617.htm. Also, shortly after *Smith*, the California's Second District Court of Appeal held that the California Constitution required strict scrutiny, Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32 (Cal. Ct. App. 1991), *rev. granted*, 825 P.2d 766 (Cal. 1992), *rev. dismissed*, 859 P.2d 671 (Cal. 1993), but this opinion was later de-published by the California Supreme Court. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 281 n.10 (Alaska 1994). California's Court of Appeal, however, held in *Brunson v. Department of Motor Vehicles*, 85 Cal. Rptr. 2d 710, 713 (Cal. Ct. App. 1999), that the rational basis test discussed in *Smith* is applicable to free exercise claims under the California Constitution.

[225] *See* Commonwealth v. White, 669 A.2d 896, 905-06 (Pa. 1995) (Montemuro, J., concurring) (citing with approval decisions from states that decided only under their state constitutions whether a warrantless search of an automobile is justified after its occupants had been arrested); Commonwealth v. Glass, 718 A.2d 804, 809-10 (Pa. Super. Ct. 1998) (discussing cases from states that had determined whether anticipatory warrants violated their state constitutions), *aff'd by* 754 A.2d 655 (Pa. 2000); Commonwealth v. Rosenfelt, 662 A.2d 1131, 1142-44 (Pa. Super. Ct. 1995) (discussing with approval cases from states that determined whether warrantless searches of a parolee's car trunk violated their state constitutions instead of relying solely on federal precedent).

[226] *See* Commonwealth v. Arroyo, 723 A.2d 162, 169 (Pa. 1999) (declining to accept the reasoning of cases from Indiana and Mississippi when determining that the Pennsylvania Constitution's right to counsel attached the same time as the Sixth Amendment right); Commonwealth v. Hayes, 674 A.2d 677, 681 (Pa. 1996) (declining to accept the reasoning of the Oregon and Colorado courts when determining that Article I, Section 9 of the Pennsylvania Constitution does not provide a right to refuse a sobriety test); Commonwealth v. Craft, 669 A.2d 394, 395-96 (Pa. Super. Ct. 1995) (declining to accept the reasoning of the Alaska and Minnesota courts when determining that the Pennsylvania Constitution does not require contemporaneous recording of defendant's statements).

[227] *See* Commonwealth v. Crouse, 729 A.2d 588, 597 (Pa. 1999) (discussing case from New Jersey, a state that protects privacy rights similarly as Pennsylvania, to determine that a protective sweep of a residence does not violated Article I, Section 8 of the Pennsylvania Constitution); Commonwealth v. Waltson, 724 A.2d 289, 292 (Pa. 1998) (citing cases from states that are consistent with Pennsylvania jurisprudence on the issue of individual privacy rights); Commonwealth v. Williams, 692 A.2d 1031, 1038 (Pa. 1997) (citing with approval decisions from states

The principal reason that courts from other states have endorsed application of the compelling interest test to encumbrances on religion wrought by neutral laws of general applicability has been the text[228] and history of the state constitutional provision. Significantly, the text and history of the constitutions in those states employing strict scrutiny are identical in significant particulars to the text of article I, section 3, its colonial precursors, or the history of religious liberty in the Commonwealth.

Several states have reasoned that the fact that the state constitution—like article I, section 3—constrains not only control of, but also "interference" with, religious liberty mandates strict scrutiny of unintended burdens imposed by neutral laws of general applicability. In *Humphrey v. Lane*,[229] the Ohio Supreme Court concluded that because the Ohio Constitution's religious freedom clause,[230] provides "nor

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that had previously found greater protections under their state constitutions as compared to the federal Constitution when determining that parolees and probationers have a diminished expectation of privacy); Commonwealth v. Matos, 672 A.2d 769, 775 (Pa. 1996) (citing with approval state decisions that rejected the reasoning of *Hodari D.* because, like Pennsylvania, these states had a history of providing greater protection to the privacy of individuals); Commonwealth v. Edmunds, 586 A.2d 887, 900-01 (Pa. 1991) (agreeing with the reasoning employed by the courts in New Jersey, Connecticut, and North Carolina, all states that have similar jurisprudence to Pennsylvania, in their rejection of the "good faith" exception to the exclusionary rule); *In re* B.C., 683 A.2d 919, 928 (Pa. Super. Ct. 1996) (agreeing with the analysis of court decisions from states that have a history of providing greater protection of privacy under their state constitutions to determine that the "plain feel" doctrine did not violate the Pennsylvania Constitution).

In other cases, there is no definable pattern explaining why the court chose to look at the particular cases it analyzed. *See* Commonwealth v. Zhahir, 751 A.2d 1153, 1160-61 (Pa. 2000) (discussing reasoning of New York case that rejects the "plain feel" doctrine and a Connecticut case that accepts the "plain feel" doctrine under its state constitution); Commonwealth v. Cass, 709 A.2d 350, 362-64 (Pa. 1998) (citing cases from states that afford higher and lower protections of privacy under their state constitutions in determining whether the level of protection afforded to public school students under article I, section 8); Commonwealth v. Swinehart, 664 A.2d 957, 965-67 (Pa. 1995) (analyzing cases from states that followed and did not follow the United States Supreme Court reasoning in Kastigar v. United States, 406 U.S. 441 (1972), in determining the type of immunity that properly preserved the privilege against self-incrimination under their state constitutions); UA Theater Circuit, Inc. v. City of Philadelphia, 635 A.2d 612, 619 (Pa. 1993) (stating only that no other state court had determined that a historic designation is a taking under its state constitution); Blum v. Merrell Dow Pharms., Inc., 626 A.2d 537, 547-48 (Pa. 1993) (discussing cases only from Alabama and Rhode Island that stated that juries consisted of twelve persons under their state constitutions); Commonwealth v. J.B., 719 A.2d 1058, 1064-66 (Pa. Super. Ct. 1998) (discussing why cases cited by the appellant do not determine whether individualized searches of public school students require probable cause under the Pennsylvania Constitution); Commonwealth v. Carroll, 628 A.2d 398, 414-17 (Pa. Super. Ct. 1993) (Johnson, J., dissenting) (discussing rationale of states that both accepted and rejected the reasoning of *Hodari D.*).

[228] Even where the text of the state constitution is identical to the First Amendment to the United States Constitution, courts have felt free to apply strict scrutiny to laws of general applicability that burden a religious practice. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994); St. John's Lutheran Church v. State Comp. Ins. Fund, 830 P.2d 1271 (Mont. 1992); Davis v. Church of Jesus Christ of Latter Day Saints, 852 P.2d 640 (Mont. 1993).

[229] 728 N.E.2d 1039 (Ohio 2000).

[230] The Ohio Constitution provides:

All men have a natural and indefeasible right to worship Almighty God according to the

shall any interference with the rights of conscience be permitted,"[231] it affords broader protection than the First Amendment proscription of any law "prohibiting the free exercise [of religion]."[232] In *Humphrey*, a male correctional officer claimed that the prison's grooming policy violated his right to freely exercise his religious beliefs.[233] The officer, who wore his hair as part of his practice of Native American Spirituality, believed that a man's hair is part of his spiritual essence and should only be cut on certain occasions.[234] The court held that the Ohio Constitution's ban on any "interference" makes even indirect effects on religious practices unconstitutional absent a compelling state interest that cannot be satisfied by means less restrictive of the plaintiff's religion.[235] Applying this level of scrutiny, the court found that the prison's grooming policy could be served by the less restrictive manner of allowing the correctional officer to pin his hair under his uniform cap.[236]

The Minnesota Supreme Court held that the language of Article I, Section 16 of the Minnesota Constitution[237]—which is similar to both Article I, Section 7 of the Ohio Constitution and Article I, Section 3 of the Pennsylvania Constitution—is "distinctively stronger" than its federal counterpart.[238] The court noted that Article I, Section 16 of

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dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any place of worship, against his consent; and no preference shall be given by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.

OHIO CONST. art. I, § 7.

[231] Humphrey v. Lane, 728 N.E.2d 1039, 1044 (Ohio 2000).

[232] *Id.*

[233] *Humphrey*, 728 N.E.2d at 1041.

[234] *Id.*

[235] *Id.*

[236] *Id.* at 1047.

[237] The Minnesota Constitution states:

The enumeration of rights in this constitution shall not deny or impair others retained by and inherent to the people. The right of every man to worship God according to the dictates of 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 or interference with the rights of conscience be permitted or any preference be given by law to any religious establishment or mode of worship; 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, nor shall any money be draw from the treasury for the benefit of any religious societies or religious or theological seminaries.

MINN. CONST. art. I, § 16.

[238] State v. Hershberger, 462 N.W.2d 393 (Minn. 1990). In *Hershberger*, the Minnesota Supreme Court addressed whether a generally applicable law requiring the attachment of an orange triangle to slow moving vehicles violated the rights of the Amish faith to freely exercise their religion under the Minnesota Constitution after the United States Supreme Court re-

the Minnesota Constitution expressly grants affirmative rights in the area of religion whereas the First Amendment is written to restrain governmental action.[239] The court reasoned that while the First Amendment constrains only governmental prohibition of the exercise of religion, Section 16 forbids "even an *infringement* on or an *interference* with religious freedom."[240]

Like the Ohio and Minnesota courts, the Wisconsin Supreme Court relied upon the textual injunction against interference with religious liberty[241] in holding that the Wisconsin Constitution affords more liberal protection of religious freedom than the First Amendment of the federal Constitution.[242] The court reasoned that the language of the Wisconsin Constitution

> operate[s] as a perpetual bar to the state . . . from the *infringement, control or interference* with the individual rights of every person . . . . They presuppose the voluntary exercise of such rights by any person or body of persons who may desire, and by implication guaranty [sic] protection in the freedom of such exercise.[243]

Accordingly, the court concluded that it would apply the compelling interest test to all claims of religious infringement under the Wisconsin Constitution.[244]

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manded the case for further consideration in light of *Employment Division v. Smith*. *See Hershberger*, 462 N.W.2d at 395.

[239] *Id.*

[240] *Id.* The court also cited to the preamble as supporting strict scrutiny under the Minnesota Constitution. Similar to the Preamble of the Pennsylvania Constitution, the Preamble to the Minnesota Constitution 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 (quoting MINN. CONST. pmbl.).

[241] The Wisconsin Constitution provides:

> The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

WIS. CONST. art. I, § 18.

[242] State v. Miller, 549 N.W.2d 235, 239 (Wis. 1996).

[243] *Miller*, 549 N.W.2d at 239 (quoting State *ex rel.* Weiss v. Dist. Bd., 76 Wis. 177, 210-11, 44 N.W. 967 (1890)) (emphasis added).

[244] *Id.* at 239. In two other states—North Carolina and Kansas—whose constitutions guard against "interference with the right of conscience," the courts likewise have held that all burdens on religion will be scrutinized under the compelling interest test, although these courts have not expressly relied upon textual analysis to reach this conclusion. *See In re* Browning, 476 S.E.2d 465 (N.C. Ct. App. 1996); State v. Evans, 796 P.2d 178 (Kan. Ct. App. 1990); Rupert v. City of Portland, 605 A.2d 63 (Me. 1992). As mentioned earlier, *see supra* note 211, there is confusion about the level of scrutiny afforded by the Vermont Constitution after *State v. DeLaBruere*, 577 A.2d 254 (Vt. 1990). However, it should be noted that the Free Exercise Clause of the Vermont Constitution is worded similarly to Article I, Section 3 of the Pennsylvania Constitution. The Vermont Constitution states:

> That all men have a natural and unalienable right, to worship Almighty God, according to the dictates of their own consciences and understandings, as in their opinion shall be

Several other state courts applying strict scrutiny to neutral laws have pointed to language in their constitutions that mirrors the colonial precursors to the Pennsylvania Constitution[245] in assuring that the right of conscience may not be "molested or prejudiced," provided that the exercise of religion does not violate the "peace or safety" of the civil order. In *Society of Jesus of New England v. Boston Landmarks Commission*,[246] the Supreme Judicial Court of Massachusetts considered whether a landmark preservation ordinance violated the relig-

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regulated by the word of God; and that no man ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of his conscience, nor can any man be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments, or peculia[r] mode of religious worship; and that no authority can, or ought to be vested in, or assumed by, any power whatever, that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship. Nevertheless, every sect or denomination of christians ought to observe the Sabbath or Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God.

VT. CONST. ch. I, art 3.

When the Vermont Supreme Court analyzed chapter I, article 3 in *State v. DeLaBruere*, its analysis and conclusions were similar to those of courts in Ohio, Minnesota, and Wisconsin. In *DeLaBruere*, church doctrine enjoined its members from sending their children to public schools. *DeLaBruere*, 577 A.2d at 259. The parents of the children were charged with violating Vermont's Compulsory Education Statute for failing to send their children to an approved public or private school. *Id.* The parents claimed that the statute violated their freedom of religion under both the United States and Vermont Constitutions. *Id.* Before the court decided the state constitutional issue, it first analyzed the federal free exercise claim using the compelling interest test. *Id.* at 261. The court noted that the United States Supreme Court had recently decided *Employment Division v. Smith*. Because the State had shown a compelling interest, the court determined that the State also would meet the rational basis required by *Smith*. *See DeLaBruere*, 577 A.2d at 263 n.10.

After determining that Vermont's Compulsory Education Statute did not violate the parent's free exercise of religion under the First Amendment using the compelling interest test, the Vermont Supreme Court turned to the state constitutional issue. The court first analyzed the text of chapter I, article 3 and concluded that article 3 "prohibits '*mere interference*' in the rights of conscience in the free exercise of religious worship." *DeLaBruere*, 577 A.2d at 269 (quoting Beauregard v. City of Saint Albans, 450 A.2d 1148, 1152 (Vt. 1982)) (emphasis added). The court then discussed the history of chapter I, article 3 and the State of Vermont. The court noted that the original version of article 3 in the 1777 Constitution adopted language from the Pennsylvania Constitution. However, the Framers added language to limit the protection of the anti-discrimination portion of article 3 to only those citizens who practiced Protestant religions because the Framers "were fearful that the religious liberty allowed by the Pennsylvania version would be somewhat larger than the people of New England had been accustomed." *DeLaBruere*, 577 A.2d at 269. In the 1786 version of the Vermont Constitution, the language protecting only Protestants was deleted. *Id.* The court then considered the history of Vermont, but concluded that religion in the State of Vermont was not deemed any more important than that of the nation as a whole. *Id.* at 272. Finally, the Vermont Supreme Court chose not to accept the defendants' proposition that the Vermont Constitution afforded greater protection than the First Amendment analysis that the court developed earlier in its opinion. *Id.* Ultimately, the Vermont Supreme Court concluded that its historical and textual analysis of article 3 did not compel a different result than the federal Constitutional analysis. *Id.* The court then held that the compulsory education statute did not violate Chapter I, Article 3 of the Vermont Constitution because the State's compelling interest could not be achieved by a less restrictive alternative. *Id.*

[245] *See supra* Part III(B).

[246] 564 N.E.2d 571 (Mass. 1990).

ious rights of a Jesuit group.[247] The Free Exercise Clause of the Massachusetts Constitution provides:

> [N]o subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.[248]

The court reasoned that this "provision contemplates broad protection for religious worship" and guarantees religious liberty subject only to the condition that a person's free exercise of religion not disturb the public peace or religious worship of others.[249] Based on the text, as well as the history and intent of the drafters,[250] the court determined that the government needed a compelling reason to justify the restraints on the free exercise of religion under the Massachusetts Constitution, and that historic landmark preservation is not a sufficiently compelling interest to merit infringement of the Jesuit's religious exercise.[251]

The Washington Supreme Court held a similar text of the state constitution calls for application of the compelling interest test to a city landmark preservation ordinance that inhibited a church's ability to use the exterior of the church building as it desired.[252] Article I, Section 11 of the Washington Constitution states:

> 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.[253]

The court reasoned that the inclusion of the verb "disturbed" in the state constitution bespeaks a much more expansive protection than the First Amendment, which only limits governmental acts that "prohibit" free exercise.[254] Furthermore, unlike the First Amendment,

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[247] *Id.* at 572.

[248] *Id.* at 572 (quoting MASS CONST. art. 2).

[249] *Soc'y of Jesus*, 564 N.E.2d at 573.

[250] The court stated that one of the main objectives of the Massachusetts Constitution Declaration of Rights was "to secure and establish the most perfect and entire freedom of opinion, as to tenets of religion, and as to the choice of the mode of worship." *See id.* (quoting Adams v. Howe, 14 Mass. 340, 346 (1817)). The court made note of the definition of "free exercise" given by one county's delegates at the Massachusetts Constitutional Convention as indicative of the drafters' intent as to how broadly the right should be interpreted. That definition was: "[E]very man has an unalienable right to enjoy his opinion in matters of religion, and to worship God in that manner that is agreeable to his own sentiments *without any control whatsoever.*" *Id.* at 573 (quoting *The Instructions of Pittsfield (1779), reprinted in* MASSACHUSETTS, COLONY TO COMMONWEALTH, at 118 (Robert J. Taylor ed. 1972)) (emphasis added by the court).

[251] Soc'y of Jesus of New England v. Boston Landmarks Comm'n, 564 N.E.2d 571, 574 (Mass. 1990).

[252] First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174, 177 (Wash. 1992).

[253] *Id.* at 186 (quoting WASH. CONST. art. I, § 11).

[254] *Id.*

section 11 decrees "absolute" protection for religious freedom absent a violation of "peace and safety."[255] The court concluded that the text and history[256] of the Washington Constitution require strict scrutiny and held that the preservation ordinance did not prevent a grave danger to the public health, peace, or welfare and thus did not serve a compelling state interest.[257]

While state courts generally have construed constitutional texts that are identical to the Pennsylvania Constitution or its colonial precursors to demand strict scrutiny of burdens on religion imposed by neutral laws, the Oregon and Tennessee courts have adopted the deferential rational basis test for their state constitutions.[258] Neither the Oregon nor Tennessee courts, however, reasoned that their constitutional language requires or implies use of the rational basis test.[259] To the contrary, the courts conceded that the text of the state constitution provided stronger protection of religious liberty than the First Amendment.[260] Nonetheless, the courts chose to follow precedents in which the language of the state charters was not analyzed.[261] Accordingly, the Oregon and Tennessee decisions offer no reasoned justification for interpreting the text of the Pennsylvania Constitution in lockstep with the First Amendment.

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[255] Justice Utter, in his concurrence, stated that, unlike the First Amendment, Article I, Section 11 expressly limits the governmental interests that may burden religious freedom and a court "should start with the assumption that government may not interfere with [a] sincerely held religious belief and religious practice." *First Covenant Church*, 840 P.2d at 192 (Utter, J., concurring).

[256] The court pointed out that Washington has a lengthy history of extending strong protection to the free exercise of religion and that the "active, broad language" of Article I, Section 11 of the Washington Constitution remained unchanged throughout the amendments of the provision. *Id.* at 186.

[257] First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174, 188 (Wash. 1992). The language of the New York and Maine Constitutions similarly guarantee religious liberty so long as the exercise of religion does not disturb the peace of the state. *See* N.Y. CONST. art. 1, § 3 ("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."); ME. CONST. art. 1, § 3 ("All individuals have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences . . . provided that that person does not disturb the public peace . . . . "). The courts of these two states have determined that their constitutions require the use of the compelling interest test, although they did no textual analysis. *See* Rourke v. N.Y. State Dep't of Corr. Servs., 603 N.Y.S.2d 647 (N.Y. Sup. Ct. 1993), *aff'd*, 615 N.Y.S.2d 470 (App. Div. 1994); Rupert v. City of Portland, 605 A.2d 63 (Me. 1992).

[258] Meltebeke v. Bureau of Labor & Indus., 903 P.2d 351 (Or. 1995); Wolf v. Sundquist, 955 S.W.2d 626 (Tenn. Ct. App. 1997); State v. Loudon, 857 S.W.2d 878 (Tenn. Crim. App. 1993).

[259] Article I, Section 2 of the Oregon Constitution provides: "All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences." Article I, section 3 provides: "No law shall in any case whatever control the free exercise, and enjoyment of religious opinions, or interfere with the rights of conscience."

[260] *Meltebeke*, 903 P.2d at 361; *Wolf*, 955 S.W.2d at 630.

[261] The Oregon court followed *Salem College & Academy, Inc. v. Employment Div.*, 695 P.2d 25 (Or. 1985) and *Smith v. Employment Div.*, 721 P.2d 445 (Or. 1986), *vacated and remanded on other, unrelated grounds*, 485 U.S. 660 (1988). The Tennessee Supreme Court followed *Harden v. State*, 216 S.W.2d 708 (Tenn. 1948) and *State ex rel. Swann v. Pack*, 527 S.W.2d 99 (Tenn. 1975).

Apart from the text of the state constitutions, courts have found support for the compelling interest test in state history of religious tolerance that is analogous to Penn's "Holy Experiment." The Minnesota Supreme Court noted that early settlers of the region had come from a variety of religious backgrounds and may have been victims of religious intolerance in their native countries.[262] The Wisconsin Supreme Court likewise relied on the genealogy of its citizenry in adopting the compelling interest test:

> Wisconsin, as one of the later states admitted into the Union, having before it the experience of others, and probably in view of its heterogeneous population . . . has, in her organic law, probably furnished a more-complete bar to any preference for, or discrimination against, any religious sect, organization or society than any other state in the Union.[263]

The court concluded that the drafters of the Wisconsin Constitution created a document that embodied the ideal that the religiously diverse citizenry of Wisconsin should be free to exercise the dictates of their religious beliefs. As has been previously analyzed,[264] Pennsylvania was founded upon the same profound respect for religious diversity and tolerance that can be ensured only by insisting upon proof of a compelling state interest no less restrictive alternatives before sacrificing individual faith to demands of the civic order.

In sum, interpreting Article I, Section 3 of the Pennsylvania Constitution to require proof of compelling interest for all invasions of religious exercise is in keeping with both the scorecard of other state constitutions, as well as with the textual and historic parallels between the Pennsylvania Constitution and the charters of those states that have been construed to apply strict scrutiny after the United States Supreme Court's decision in *Smith.*

V. POLICY CONSIDERATIONS FAVOR STRICT SCRUTINY UNDER ARTICLE I, SECTION 3 OF THE PENNSYLVANIA CONSTITUTION

The fourth and final factor the *Edmunds* court identified as necessary for a proper analysis of a Pennsylvania constitutional provision is "policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence."[265] While difficult to categorize with precision, the courts in Pennsylvania generally have applied this factor in two different manners. First, the courts have focused on Pennsylvania's unique history and laws in de-

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[262] State v. Hershberger, 462 N.W.2d 393, 398 (Minn. 1990) (citing State v. French, 460 N.W.2d 2 (Minn. 1990)).

[263] State v. Miller, 549 N.W.2d at 239 (quoting State *ex rel.* Reynolds v. Nusbaum, 17 Wis. 2d at 165, 115 N.W.2d 761 (Wis. 1962)).

[264] *See supra* Part III.

[265] *Edmunds*, 586 A.2d at 895.

termining how certain policy considerations should be addressed.[266] Second, the courts have simply tried to discern an interpretation of the constitution that is consistent with "good policy."[267] In divining

[266] *See* Commonwealth v. Zhahir, 751 A.2d 1153 (Pa. 2000) (stating that the Pennsylvania Superior Court's declaration that "guns follow drugs" in Commonwealth v. Patterson, 591 A.2d 1075 (Pa. Super. Ct. 1991) does not affect the validity of the frisk, but does clash with the totality of the circumstances standard employed by Pennsylvania when determining when a frisk is valid under the Pennsylvania Constitution); Wertz v. Chapman Township., 741 A.2d 1272, 1279 (Pa. 1999) (noting that the lack of a right to a trial by jury under the Pennsylvania Human Relations Act did not violate the underlying policy of the statute or the right to a trial by jury under the Pennsylvania Constitution); Commonwealth v. White, 669 A.2d 896, 908 (Pa. 1995) (Montemuro, J., concurring) (noting that the rule developed by the United States Supreme Court in New York v. Belton, 453 U.S. 454 (1981), allowing the police to search a vehicle after he made a lawful arrest of the occupant of the vehicle has no place in the jurisprudence and history of Pennsylvania); UA Theater Circuit, Inc. v. City of Philadelphia, 635 A.2d 612 (1993) (stating that a historic designation was not a governmental taking under the Pennsylvania Constitution because the citizens of Pennsylvania had passed the Environmental Rights Amendment to preserve the "natural, scenic, historic, and aesthetic values of the environment and the citizens of Philadelphia had passed ordinances to fulfill this state policy of preserving historic buildings"); Commonwealth v. Kohl, 615 A.2d 308, 315 (Pa. 1992) (stating that the implied consent provisions of the Motor Vehicle Code violated Pennsylvania's idea of probable cause under the Pennsylvania Constitution); Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991) (discussing why the "good faith" exception to the exclusionary rule under the Pennsylvania Constitution would undermine certain criminal procedure rules that had been adopted to protect the privacy rights of Pennsylvania's citizens); Commonwealth v. Glass, 718 A.2d 804, 812-13 (Pa. Super. Ct. 1998) (stating that anticipatory warrants are compatible with Pennsylvania's long history of protecting privacy rights under Article I, Section 8 of the Pennsylvania Constitution) *reaff'd by* Commonwealth v. Glass, 754 A.2d 655 (Pa. 2000); Commonwealth v. Rosenfelt, 662 A.2d 1131, 1144-46 (Pa. Super. Ct. 1995) (stating that because the Pennsylvania Constitution protects privacy greater than the Fourth Amendment and because of Pennsylvania's strong preference for warrants, a parole officer cannot search a parolee's trunk, minus exigent circumstances, after the vehicle is under the control of the officer).

[267] *See* Commonwealth v. Arroyo, 723 A.2d 162, 170 (Pa. 1999) (stating that allowing the right to counsel guaranteed under the Pennsylvania Constitution to attach during police interviewing before adversarial criminal proceedings were initiated would complicate the criminal investigative process); Commonwealth v. Waltson, 724 A.2d 289, 293 (Pa. 1998) (discussing that the specificity requirement for warrants does not limit a police officer's search of a residence to a single room when particular contraband could be located anywhere in the residence); Commonwealth v. Williams, 692 A.2d 1031, 1039 (Pa. 1997) (stating that parolees must expect a diminished right to privacy as a condition of being released from prison); Commonwealth v. Hayes, 674 A.2d 677, 683 (Pa. 1996) (discussing that because the intrusion of a field sobriety test is minimal in light of the state's interest in removing impaired drivers from the highway, article I, section 9 does not allow a person to refuse a field sobriety test); Commonwealth v. Rodriguez, 614 A.2d 1378, 1383 (Pa. 1992) (stating that allowing police to detain people without probable cause or reasonable suspicion would result in the abandonment of a person's constitutional right under Article I, Section 8 of the Pennsylvania Constitution to be free from intrusions upon her personal liberty); Commonwealth v. Lewis, 598 A.2d 975, 980 (Pa. 1991) (stating that judges have an obligation to give "no-adverse-inference" charge to a jury under Article I, Section 9 of the Pennsylvania Constitution in order to protect an individual's privilege against self-incrimination); Commonwealth v. Ludwig, 594 A.2d 281, 284-85 (Pa. 1991) (discussing that protecting victims of sexual abuse does not take precedence over an individual's constitutional right to confront his accusers); Commonwealth v. Crouse, 729 A.2d 588, 598 (Pa. Super. Ct. 1999) (stating that "protective sweeps" of a residence are a valid police practice as long as not a pretext for an evidentiary search); Commonwealth v. Glass, 718 A.2d 804, 812-13 (Pa. Super. Ct. 1998) (stating that anticipatory warrants are more protective of individual privacy rights because neutral magistrates will review the basis for the probable cause and will ensure that the warrant does not take effect until a specific event occurs or specific amount of time

which gloss furthers "good policy," the Pennsylvania courts have critically examined the policies adopted by other courts, including the United States Supreme Court.[268] Both approaches to the fourth *Edmunds* factor favor construing Article I, Section 3 of the Pennsylvania Constitution to require proof of a compelling state interest to sustain burdens on religious faith imposed by neutral laws of general applicability.

A. Pennsylvania Has a Unique History of Protection of Religious Liberty of Minority Faiths

Hopefully by the twenty-first century, officially endorsed religious discrimination in America has ceased to be a concern. As Justice O'Connor recognized in her concurring opinion in *Smith*, "[f]ew states would be so naive as to enact a law directly prohibiting or burdening religious practices as such."[269] On the other hand, "[e]specially when a religious belief is held by a small minority of individuals, legislators may simply be unaware of the crisis of religious conscience a neutral law may occasion."[270] Thus, it is members of minority faiths who have the greatest stake in the choice between application of the compelling interest and rational basis test to neutral laws of general applicability under the Pennsylvania Constitution.

Perhaps the most unique aspect of Pennsylvania history is its safeguarding of the religious liberty of adherents of non-mainstream

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elapsed) *reaff'd by* Commonwealth v. Glass, 754 A.2d 655 (Pa. 2000); Commonwealth v. J.B., 719 A.2d 1058, 1066 (Pa. Super. Ct. 1998) (reasoning that the adoption of the reasonable suspicion standard for student searches in schools will properly balance students' privacy interests with the school's need to maintain order and discipline); Commonwealth v. Rosenfelt, 662 A.2d 1131 (Pa. Super. Ct. 1995) (reasoning that once a vehicle is under police control, there is a greater need to protect the individual's expectation of privacy than the need to secure evidence or protect the police or public); Commonwealth v. Carroll, 628 A.2d 398 (Pa. Super. Ct. 1993) (Johnson, J., dissenting) (discussing that the standard to determine a "seizure" under *Hodari D.* makes it difficult for police officers to predict when their actions become a "seizure").

[268] *See* Commonwealth v. Zhahir, 751 A.2d 1153 (Pa. 2000) (reasoning that the "plain feel" doctrine, which has been rejected by some states, is not impractical, difficult to apply, or readily subject to police excess or abuse); Commonwealth v. Matos, 672 A.2d 769 (Pa. 1996) (stating that the seriousness of a crime can never be a justification for ignoring the constitutional rights of an individual in the context of deciding whether to continue to adhere to the United States Supreme Court's reasoning in California v. Hodari D., 499 U.S. 621 (1991) adopted in Commonwealth v. Carroll, 628 A.2d 398 (Pa. Super. Ct. 1993); Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991) (discussing that the underlying principle adopted by the United States Supreme Court in United States v. Leon, 468 U.S. 897 (1984), which states that the exclusionary rule allows some guilty defendants to go free, is questionable, and that if the reasoning of *Leon* were adopted it would promote the dangers of allowing magistrates to serve as "rubber stamps" and of fostering "magistrate-shopping" by the police).

[269] Employment Div. v. Smith, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring).

[270] Hall, *supra* note 6, at 553. *See also* S. REP. NO. 103-111, at 1 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1897 ("State and local legislative bodies cannot be relied upon to craft exceptions from laws of general applicability to protect the ability of religious minorities to practice their faiths . . . .").

faiths. As previously recounted,[271] Pennsylvania was founded on the principle of toleration, affording a sanctuary to those who had been oppressed by the dominant religion. Throughout Pennsylvania's colonial and constitutional history, freedom of conscience for majority and minority faiths was secured equally.[272] The Pennsylvania courts have consistently acknowledged Pennsylvania's singular respect for the sanctity of an individual's religious belief, however widely or narrowly shared. As the Pennsylvania Supreme Court stated in *Updegraph v. Commonwealth*:

> Christianity, general Christianity, is and always has been a part of the common law of *Pennsylvania*; Christianity without the spiritual artillery of *European* countries . . . not Christianity with an established church, and tithes and spiritual courts; but Christianity with liberty of conscience to all men. *William Penn* and Lord *Baltimore* were the first legislators who passed laws in favor of liberty of conscience . . . .
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> They [the first colonists] fled from religious intolerance, to a country where all were allowed to worship according to their own understanding . . . Every one had the right of adopting for himself whatever opinion appeared to be the most rational, concerning all matters of religious belief; thus securing by law this estimable freedom of conscience, one of the highest privileges, and greatest interests of the human race.[273]

The Pennsylvania Supreme Court reiterated the Commonwealth's longstanding policy of protecting all religions from government intrusion in *Commonwealth v. Palms*:[274]

> It seems clear to us that what the founders of the Republic—and also the framers of our State Constitution—had chiefly in mind, as respects freedom of religion, was the prohibition of a State or Established Church or Religion, and any interference with the right of freedom of conscience and religious belief—the right to attend or support or to refrain from supporting any church or ministry, and *to have all religious establishments or modes of worship treated on an equality and without any preference of one over another.*[275]

The Supreme Court in *Commonwealth v. Eubanks*,[276] citing to The Papers of William Penn, affirmed that Article I, Section 3 of the Pennsylvania Constitution secures the state's unrivaled guarantee of

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[271] *See supra* Part III(A).

[272] *See supra* Part III.

[273] Updegraph v. Commonwealth, 11 Serg. & Rawle 394, 401-02 (Pa. 1824).

[274] 15 A.2d 481 (Pa. 1940).

[275] *Id.* at 483 (emphasis added). In *Andress v. Zoning Board of Adjustment*, 188 A.2d 709, 713-14 (Pa. 1963), the court noted that the religious liberty preserved by article I, section 3 was one of the four basic and fundamental freedoms:

> The fundamental rights of ownership of private property, freedom of speech, freedom of religion, and freedom of the press, are the Hallmarks of Western Civilization. These four basic Freedoms constitute the fundamental differences which distinguish—and create the great impassable gulf which divides—Western Civilization from Communism and free peoples from peoples who are ruled by a despotic dictator or by an absolute or totalitarian form of Government.

[276] 512 A.2d 619 (Pa. 1986).

each individual's inviolable right to discern and practice his personal understanding of religion:

> Pennsylvania, *more than any other sovereignty in history*, traces its origins directly to the principle that the fundamental right of conscience is inviolate. See The Papers of William Penn . . . In general, thus, our Commonwealth is neutral regarding religion. It neither encourages nor discourages religious belief. It neither favors nor disfavors religious activity. A citizen of this Commonwealth is free, of longstanding right, to practice a religion or not, as he sees fit . . . .[277]

Assessment of burdens on religious liberty imposed by neutral laws of general applicability under a rational basis test would undermine Pennsylvania's unparalleled respect for minority faiths. Under the rational basis test, courts would automatically sustain legislation that was enacted in ignorance of or indifferent to the fact that the law infringes upon tenets of non-mainstream religions. On the other hand, by applying strict scrutiny, the courts would shield a sincerely held religious belief—even if not widely shared[278]—against unintended infringement unless the government can establish both a compelling interest and that the state interest cannot be secured in a manner less restrictive of the religious belief. Certainly the latter approach is more consonant with Pennsylvania's unique reverence for the right of each person, without interference, to hold true to his understanding of his relation to the Creator.

B. The Policy Considerations Underpinning the United States Supreme Court's Rejection of Strict Scrutiny in Smith *Are Wholly at Odds with the Twin Prongs of Penn's Vision of Religious Liberty*

The second manner in which the Pennsylvania courts have applied the final *Edmunds* factor is to examine the policy judgments that underlie the United States Supreme Court's interpretation of the related provision of the federal Bill of Rights. The policy assessment that animated the majority's repudiation of strict scrutiny under the First Amendment in *Smith* is diametrically opposed to Penn's vision of religious liberty embodied in Article I, Section 3 of the Pennsylvania Constitution.

Justice Scalia first rejected application of strict scrutiny to neutral laws of general applicability as incompatible with a body politic of variegated faiths:

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[277] *Id.* at 622. *See also* Stark et al. Appeal, 72 D. & C. 168, 173 (1950) ("The people of the Commonwealth of Pennsylvania did not wait for the fourteenth amendment to protect their religious freedom. Our Constitution contains as strong a guarantee of religious freedom as can be found anywhere.").

[278] Courts have generally found that an individual's religious belief merits constitutional protection even where the conviction is not accepted by all members of the persuasion or is "rank heresy to followers of the orthodox faiths." United States v. Ballard, 322 U.S. 78, 86 (1944).

> If the "compelling interest" test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously compelled . . . Any society courting such an action would be courting anarchy, but that danger increases in proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely "because we are a cosmopolitan nation made up of people of almost every religious preference" [citation omitted] and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open up the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind . . . .[279]

Contrary to Justice Scalia's view that respecting pluralism in belief through exemptions from general laws would imperil society, Penn believed that the civil order would flourish by tolerating and promoting liberty of conscience for adherents of all belief systems, including exemption from laws of general applicability that clashed with religious tenets.[280] Even if Justice Scalia was correct in believing that the Framers of the United States Constitution preferred the needs of the civil order to religious freedom except in cases of intentional discrimination, the founders of the Commonwealth of Pennsylvania plainly viewed the hierarchy in reverse.

The second policy basis of Justice Scalia's *Smith* opinion is the supposition that infringement of minority religious liberty is an inevitable cost of governance:

> [T]o say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that is an unavoidable consequence of democratic government and must be preferred to a system in which each conscience is a law unto itself . . . .[281]

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[279] Employment Div. v. Smith, 494 U.S. 872, 888 (1990).

[280] *See supra* Part III(A).

[281] *Smith*, 494 U.S. at 890. Justice O'Connor disagreed with the notion that burdening minority faiths was an inevitable cost of democratic government:

> In my view . . . the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish.

Smith, 494 U.S. at 902 (O'Connor, J., concurring).

Justice Blackmun, joined by Justices Brennan and Marshall, likewise rejected the notion that sacrifice of non-mainstream faiths was inescapable. *Id.* at 909 (Blackmun, J. dissenting) ("I do not believe the Founders thought their dearly bought freedom from religious persecution a 'luxury,' but an essential element of liberty—and they could not have thought religious intolerance 'unavoidable,' for they drafted the Religion Clauses precisely in order to avoid that intolerance."). These dissents may be properly considered by the courts in interpreting the state constitution. *See* Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of*

This rationale too inverts the Penn vision embodied in article I, section 3. Justice Scalia presumes that absent intentional discrimination, religious commitments must be subordinated to the demands of civil society. Penn presupposed that obligations imposed by religious faith take precedence over civic duties, with certain qualifiers that would be reflected in a compelling interest limitation. William Penn certainly did not found a "Holy Experiment" in a new colony simply so that non-mainstream faiths would be disadvantaged as an "unavoidable consequence" of a democracy rather than of a monarchy.

Penn's view of religious toleration has been codified in the colonial and constitutional precursors to Article I, Section 3 of the Pennsylvania Constitution and uniformly enforced through the decisions of the courts of Pennsylvania. The jurisprudence of other states whose constitutions resemble the text of Pennsylvania's charters, or whose history parallels the Commonwealth's abundant protection of minority faiths, have overwhelmingly supported strict scrutiny of neutral laws of general applicability that burden religion. Affording more generous protection to non-mainstream religions under the Pennsylvania Constitution than is granted under the Free Exercise Clause of the United States Constitution would show no disrespect to the United States Supreme Court. To the contrary, honoring Pennsylvania's unique history and status as a guarantor of religious liberty is wholly consonant not only with the intent of the drafters of the Pennsylvania Constitution, but also with the Framers of the United States Constitution's image of federalism. As Justice Brandeis wrote, "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel and economic experiments without risk to the rest of the country."[282] Applying strict scrutiny under Article I, Section 3 of the Pennsylvania Constitution would be the twenty-first century's tribute to the happy incident of William Penn's singular courage and novel "Holy Experiment."

Supreme Court Reasoning and Result, 35 S.C. L. REV. 353, 375-76 (1984).

[282] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting). In contrast, the United States Supreme Court has acknowledged that its construction of individual rights provisions of the federal Constitution always is constrained by considerations of federalism. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 44 (1973) ("It must be remembered that every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system. Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous constitutional scrutiny.").